



Nythamar de Oliveira, Marek Hrubec,  
Emil Sobottka (eds.)

# From Social to Cyber Justice

Critical Views on Justice, Law, and Ethics



PUCRS



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## Introduction: Critical Views on Justice, Law, and Ethics

Theories of justice have become an important research line for political, legal, social and moral philosophers and theorists all over the world. Justice, like its counterpart injustice, is a broad concept which is analyzed from many perspectives. In the book, we present our critical analyses of injustice in connection to law and ethics and develop normative alternatives linked to justice. We wish to contribute to discussions on in/justice mainly from the points of view that focus on important disturbing issues of contemporary society. Therefore, while some authors deal with issues of justice only in abstract terms while others focus only on narrow practical sub-problems, together we want to analyze relations between justice, law, and ethics specifically concerning critical research of the new key problems of the current society and human civilization. These problems are either new phenomena or new aspects of the relevant classical issues. In brief, the book covers the problems from social justice to cyber justice. The chapters address issues and concepts which guideline on social movements, transformations inherent in democratizing processes, global conflicts and other interactions, etc. For this reason, we approach these issues not only from the perspectives of political, legal, social and moral philosophy and theory but also of other disciplines and transdisciplinary standpoints.

The book concentrates on a critical examination of conflicts related to injustice, especially social injustice which is considered the underlying source of distortions of quality of living and even of the meaningful self-realization of human beings. The issue is closely dependent on the struggle against technocratic reification and poverty and is related to issues of unconditionality or conditionality of various ways of social provision. It requires analyses of normative preconditions and proposals of such social struggles concerning morality, law, and politics, as well as moral, legal, and political discourses, including moral, legal, and political philosophy and theory. One of the main issues is the position of human rights among morals, law, and politics, from the local to the cosmopolitan level. Such research necessarily touches on the issue of modernity or the plurality of modernities and the secularization of society or societies. Of course, these contemporary analyses also follow

research in the history of ideas, identifying the original inquiries of Kant, Hegel, Mill, and other authors, and the deficits in their theories. In the book, the deficits of the contemporary theories of justice are analyzed mainly in deontological theories, which requires recasting the phenomenological deficit and a new evaluation of the method of normative reconstruction. The ultimate deficit and danger of contemporary society is its escalation to war conflicts, be they conventional wars or new cyberwars. The current hegemonic and authoritarian tendencies can lead to a world war and to its possible resolution by a world state. All these dangers are challenges which authors of the book critically examine from political, legal, social, and moral points of view of justice.

The authors formulate their points of view mainly from the perspective of Critical Theory and critically examine and follow some of the key interpretations of this school of thought (Jürgen Habermas, Axel Honneth, et al.). Some authors deal also with other perspectives as well which allow for the analysis of pragmatic, utilitarian, consequentialist, and feminist approaches.

While the book contains also analyses of authors from Western Europe, namely from Germany and France, the specific contribution of the book is that it allows for the enrichment of global discussions from other perspectives, particularly from Latin America and Central Europe, specifically from Brazil and the Czech Republic. The volume includes chapters from renowned philosophers and social scientists with their extensive research work in their respective fields of knowledge, both in theory and applied ethics and law. The tradition of critical analyses of justice in the respective countries and regions has a longer history, but we would like to particularly emphasize two streams which play an important role with multiple effects in critical thinking.

The International Symposium on Justice, which usually takes place approximately every three years since 1997, has been organized by the interdisciplinary and interinstitutional Research Group Theories of Justice as well as by the Brazilian Center for Research in Democracy at the PUCRS University in Porto Alegre in Brazil. It has developed research in democracy, broadly construed both in theoretical and applied empirical terms, so as to foster social research in philosophy, sociology, legal studies, etc., relating to the vast field of interdisciplinary studies. The symposia have turned out to be the most important international event in theories of justice being held in Latin America. The activities

culminated in the creation of several research groups all over Brazil, contributing decisively to the theoretical discussions on justice and the democratization process in Brazil and other countries. It can be added that, in Latin America, where military coups took place in many countries since World War II, the topic of justice has been decisive for the transition to justice and the consolidation of state institutions and civil society in the 1980s and 1990s.

The colloquia Philosophy and Social Science, which take place in Prague, Czech Republic, have annually gathered together over 100 critical theorists from all over the world since 1993. Originally founded by Jürgen Habermas and Yugoslav colleagues, they pursue critical and explanatory approaches to injustice and creative normative theories and prospects to change the practice. Prague's geopolitical location and its understanding of both East and West have made it a favorite venue for various meetings. The 25<sup>th</sup> anniversary of the colloquia last year is a testimony to the long-term interest in critical thinking on injustice and other issues. Philosophers and social scientists from many countries, together with local colleagues mainly from the host institution the Centre of Global Studies in the Institute of Philosophy at the Czech Academy of Sciences in Prague, constitute a platform which makes possible such critical interdisciplinary and transdisciplinary research and its discussion. It is supported by the interdisciplinary Research Program "Global Conflicts and Local Interactions" which joins scholars from six institutes of the Czech Academy of Sciences in Prague and many foreign partner institutions, particularly philosophers, sociologists, political scientists, legal scholars, anthropologists, historians, and experts from various fields of study.

Latin American and Central European scholars have developed cooperation between East and West and between North and South. They have increased sensitivity concerning the regions beyond the West in order to also analyze the themes of poverty, armed conflict, global injustice, intercultural dialogue, and other issues in today's new period of global capitalism. It is now more evident than ever before that it is impossible to formulate a critical concept of global injustice without the participation of colleagues from all parts of the world.

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As mentioned above, the book offers critical views on the relationships between justice, law, and ethics, specifically concerning analyses of the new key problems of contemporary society. It focuses on six current thematic problematic complexes in six chapters of the book. First, it deals with social conflicts and injustice; second, disputes on legal and moral discourses; third, tense relations between moral and political justice; fourth, historical contentions on justice; fifth, phenomenological and deontological deficits of justice; and sixth, justice in world conflicts, particularly in cyberwar. The individual parts of the book include the following chapters.

The first part of the book on *social conflicts and injustice* begins with the text “A critical note on (un)conditionality” written by Josue Pereira da Silva (UNICAMP). The chapter deals with the relationship between unconditionality and conditionality of direct income transfer in the framework of the discussion about justice and recognition. The main idea behind the text is the possibility of a transition from the program of *bolsa família* (the Brazilian conditional social program) to an unconditional basic income program because unconditionality in a universal basic income program is more adequate. The chapter has three steps. First, it compares the problem of conditionality of the *bolsa família* with the problem of the unconditionality of a universal basic income. Second, it analyses the relationship between unconditionality and conditionality in relation to three theoretical models of justice: the theories of David Miller, Axel Honneth, and Alain Caillé. Third, it makes critical final commentaries about justice linked to both unconditionality and conditionality.

In their common chapter, Emil Sobottka (PUCRS/CNPq) and Danilo Streck (UNISINOS) focus their attention on the transition from local participatory budgeting to a participatory system. They analyze these participatory models as intensive kinds of the democratic experience which originally started in the city of Porto Alegre in 1989 and was then transferred to other places, including the level of the Brazilian state of Rio Grande do Sul in 1999. They highlight the various kinds of popular participation and consultation, with their most extensive version being a system of popular and citizen participation. They also bring out the tension between participation as a principle and a strategy, issues of organizational mediations, and the different regional cultures of participation.

The second part of the book is focused on *disputes on moral, legal and secular discourses*, containing chapters by Marco Antonio Azevedo, André L. S. Coelho, and Luiz Repa. Marco Antonio Azevedo (UNISINOS) researches the moral difference between morality and moralism. He understands “moralism” as a specific standpoint misleading people to falsely prefer their own set of duties connected to justice as legitimate. He argues for the moral epistemological standpoint that people can hold true moral beliefs, also on duties. He takes moralism as an interpretation that every action is either a fulfillment or violation of a duty. This leads to the conclusion that there is no modal difference between privileges and duties. One consequence is the full conflation between moralistic duties and other requirements to action which can be considered reasonable. He suggests that we should differentiate duties from so called “practical oughts”.

André Coelho (EURJ) concentrates his chapter on judicial procedure and argumentation, particularly on a scale of discursiveness of the legal discourse. It reformulates Habermas’ analysis of judicial procedure and offers a time diagnosis on current trends in judicial procedure. It applies an idea of facticity and validity both generally to law and also particularly to judicial procedure. It shows several objections to Habermas’ approach, including a deficit of choices for the facticity pole and the external tension with no confrontation of the idealization of judicial procedure with the empirical reality. It focuses on problems on both ends of the tension in judicial procedure.

Then, Luiz Bernardo L. Araujo (UERJ/CNPq) surveys the ongoing debate on democracy, secularism, and the role of religion in politics from the points of view of moral and political philosophy. He compares three concepts written by relevant contemporary political thinkers: Charles Taylor’s idea of secularist regimes related to securing the basic principles of the modern moral order; John Rawls’ idea of the relationship between democracy and religion within his inclusive view of public reason; and Jürgen Habermas’ distinction between knowledge and faith in the public sphere. It deals with an articulation of appropriate forum for the basic political discourse on the secular modern state.

The following, third part of the book looks into the *tense relationships between moral and political justice*. In the first chapter of this part, Christoph Horn (Universität Bonn) examines the concept of justice in relation to ethics and political philosophy. He challenges J.S. Mill’s



and J. Rawls' views on justice in order to raise objections against those contemporary ethical and political theories which follow these theories with their dominant role to justice. He shows that our idea of justice is a much more specific one. He provides a set of semantic arguments on the meaning of justice and injustice in everyday life because there are only a few analyses of these semantic issues in the philosophical texts on justice from the last four decades.

The second chapter is Fabricio Pontin's (PUCRS) text which analyses issues of shame, identity, and modernity, mainly with their links to the politicization of the subject. It explores two different views on emotional tonalities for the establishment of political identity. By exploring the idea of shame as politically constitutive in Michel Foucault's and Giorgio Agamben's theories, he differentiates a strong immanent perspective and a weaker regional perspective to identity constitution. He points at the necessity of reformulating Foucault's idea of biopolitics in relation to emotional tonalities. It makes possible to understand that it is not only a critique of modernity but also a narrative of the modern subject and state.

In his chapter, Petr Agha (Czech Academy of Sciences, Prague) focuses on self-authored human rights which he analyses as a claim to universality. He explains that human rights presuppose a shared position within a community with a link to shared universal values. They are embedded in nation states but at the same time transgress their borders. This is one of sources of their critical perspective. The basis of human rights is their dependence on recognition within institutional structure which is based on mutual recognition among people. The chapter especially emphasizes the political struggle for recognition and shows human rights as an important place in the political struggle.

Luiz Repa (USP/Cebrap/CNPq) investigates human rights on the boundary of morals and politics, with a special focus on Jürgen Habermas's cosmopolitanism. He shows that the cosmopolitan legal arrangement is not based on a moral concept but on the normative grammar of legal arrangement itself. He also seeks to explain that the need for a European identity, as formulated by Habermas, is on contrast with Habermas' other concepts related to overcoming the national identity. He demonstrates that Habermas' cosmopolitan project is considered a kind of "phasing in". It therefore sticks to the program of the

European Union program and does not analyze other possibilities for cosmopolitan arrangement.

The fourth part of the book concerns *historical contentions on justice*, especially focusing on Georg W. F. Hegel and John Stuart Mill. In the first chapter of this part, Thadeu Weber (PUCRS) inspects justice and liberty in Hegel's writings concerning law and ethics. He aims to explain the concept of justice in Hegel's *Philosophy of Right* and binds it to the concept of liberty in its various kinds of determination. He analyses the idea of "person of right", and identifies the fundamental rights that stem from the articulation of the legal capacity. He stresses that the right of necessity is a right to pursue an exception in favor of itself in order to realize justice. In doing so, he explains how it makes the administration of justice via the law.

Filipe Campello (PNPD-Capes, UFPE) raises the question of whether emotions matter for justice in order to examine an alternative proposal following Hegel. He suggests how Hegel can contribute to a formulation of the role of emotions for a social theory by pointing out the particular emotional component in civil society, specifically the relationship between interests and passions. He connects this phenomenon to Hegel's concept of solidarity as linked to the formation of will and stresses that the concept of social justice is based on both rational guided actions and also on the possibility of a volitional dimension given by an institutional framework which is justified by meeting individual needs and creating the sentiment of cooperation. It has its parallel in the contemporary critical social theory of recognition formulated by Axel Honneth.

In his chapter, Gustavo Hessmann Dalaqua (USP) deals with John Stuart Mill's texts on justice, law, morality and self-development. He investigates how John Stuart Mill understands law and morality and stresses that it be questioned and improved. A creative morality and justice require critical debate in the public sphere, including a possible breaking up with the law, i.e. civil disobedience. Justice needs critical thinking and self-development. In this sense, a person can only care for others if he or she cares for one's self.

The fifth part of the book concentrates on *phenomenological and deontological deficits of justice*. Nythamar de Oliveira (PUCRS/CNPq) focuses on reflective equilibrium and normative reconstruction as he

recasts the phenomenological deficit of Critical Theory. He reflects on the contemporary interdisciplinary analyses in the theories of justice and the cognitive and social sciences, and reformulates the normative requirements of a political constructivism and of a pragmatic reconstruction as examples of a weak constructionism. Within semantic and normative terms, he investigates how social transformations may be considered to pursue universalizable normative requirements justified from an externalist standpoint of reflective equilibrium.

Cinara Nahra (UFRGN/CNPq) then investigates deontological-utilitarian overlaps. She seeks to solve the problem of standard responses of the majority of people to moral dilemmas (which are linked to life and death) by the philosophical “utilitarian-deontological model”. When people make moral judgements, they combine deontological and utilitarian approaches. It is primarily deontological when they think that killing innocent people is not appropriate. Nevertheless, when faced with the problem of killing someone in order to save more people, they usually state that this is correct if death is necessary or in catastrophic moments. However, they often return to deontology if faced with blackmail.

Marina Velasco (PPGLM/UFRJ) examines the tensions between basic rights and balancing within the deontological reasoning of judges. She investigates balancing judgments which are often applied to judicial decisions, especially in supranational courts on human rights. In contrast to Robert Alexy, she shows that the need to balance is not dependent on the understanding of basic rights as principles but from the understanding that principles are optimization requirements. She defends that balancing in law is not the most adequate approach to deal with conflicts between principles. She recommends rather a deontological perspective which should be abandoned by judges in cases of conflicts of basic rights.

The sixth and last part of the book *focusing on justice in world conflicts in cyberwar* contains four chapters. In the first chapter, Marek Hrubec (Czech Academy of Sciences, Prague) offers moral, political, and legal analyses of justice in relation to conflicts and dangers of hegemony, authoritarianism, and possible world war. The main focus is on the negative and positive possibilities of the global arrangement. Since historical development does not unfold evenly, there is a need to deal with potential global reversals in the form of planetary hegemonization and

supranational authoritarian tendencies which can lead to a world war, and to formulate possible normative solutions of a just and peaceful arrangement to these. The chapter explains the bases for a critical theory of recognition of the global arrangement connected with the global state with the ambivalences of technological development.

In his chapter, Josef Velek (Czech Academy of Science, Prague) presents his chapter on a defensive just war and the supreme emergency. The text deals with the concept of supreme emergency which is one of the most interesting and provocative problems of the theory of just and unjust wars. In this context, the chapter analyses Walzer's understanding of the concept of "dirty hands". It shows that there exist three basic ways of evaluating the legitimacy of treating intentionally threatening behavior. This can be justified only in connection to a concept of the supreme emergency, a connection to the concept of civil obedience against the background of some conception of global justice, global constitutionalism, and global governance.

In the next chapter, Klaus-Gerd Giesen (Université d'Auvergne, Clermont-Ferrand) deals with justice in cyberwar. He explains that new technology has deeply transformed our reality: war drones, genetic cloning, and the enormous rise of the Internet all challenge our views on justice and its application to society. The sudden presence of new technologies has caused confusion among people as well as a moral crisis, also connected to the problem of still maintaining the war-peace dichotomy. He explores justice in a technological sphere of cyberwar. He applies the theory of justice in order to articulate a *regulation* of the developing cyber warfare.

The fourth chapter of this part of the book, written by Marcelo de Araujo (UFRJ/UERJ/CNPq), researches the important issue of cyberwar in relation to political realism and a global state. He investigates the question of whether cyberwar needs a new theory of just war or if traditional theories will be adequate. He shows that the unprecedented technological progress since the end of WWII has made classical theories useless, especially since the main problem is no longer an application of the principles of justice within the system of states. The main challenge is to develop an alternative to the system of states, i.e. a system which would be more appropriate to the reality we face. This is required for analyses of cyber-attack and nuclear conflict which must be solved in relation to the challenges of supranational institutions and the world state.

All the parts of this book contribute to the critical analyses of injustice in relation to law and ethics, as was indicated in the beginning of this introduction. It is our hope that these six disturbing topics of contemporary society and human civilization will have created, for its readers, highly relevant thematic complexes in six book chapters which address issues ranging from social justice to cyber justice.



In the end, we would like to thank all the contributors for their friendly and professional cooperation as well as our many other colleagues for their fruitful discussions which helped us analyze the issues in our book. Our thanks also go to our institutions, mainly the Brazilian Center for Research in Democracy (established in 2009) in the Catholic University in Porto Alegre, and the Centre of Global Studies (established in 2006) in the Institute of Philosophy at the Czech Academy of Sciences in Prague. We are grateful for the research support, particularly the decisive support for the Research Group “Theories of Justice” provided by the Brazilian federal research agencies Capes and CNPq, and the support for the Research Program “Global Conflicts and Local Interactions” by the Academy AV21 in the Czech Republic. Last but not least, we are obliged to the administrative staff of PUCRS and the Publishing House Filosofia. We hope that all the support and our work will contribute to developing analyses of the book’s themes, and, in doing so, to helping bring about justice in practice as well.

*Editors of the book*





A Critical Note on (Un)conditionality

Josué Pereira da Silva





This paper deals with the relationship between conditionality and unconditionality of direct income transfer in the context of the broader debate on justice and recognition. The idea of writing this paper emerged from a challenge put to me by Luiz Gustavo Souza to write about the issue of unconditionality. He was probably not convinced by my defense of an unconditional basic income as it appeared in an article I wrote on the possibility of a transition from Bolsa Família (family grant), the Brazilian income transfer program, to a universal and unconditional income transfer program in accordance with the Brazilian Basic Income Law sanctioned in January 2004 (Cunha, 2014).<sup>1</sup>

My starting point here will be the same as that of the article that motivated his challenge: to confront the basic ideas behind the two proposals of income transfer – Bolsa Família and unconditional basic income (Silva, 2011; 2014: 147–163). In the mentioned article, as in the present paper, I argue that an unconditional basic income as it appears in the 2004 Brazilian law is more appropriate to promote citizenship than the Bolsa Família Program. I also aim to advance here the thesis that the idea of unconditionality behind the proposal of a universal basic income and its relation to justice is more complex than it seems at first glance.

In the following, I will develop my argument in three steps. I start, first, by presenting the problem of conditionality as it appears in the Bolsa Família Program to the contrasted idea of unconditionality imbedded in the proposition of a universal basic income. In order to do that, I focus on the arguments of political agents as well as on the

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<sup>1</sup> See: Silva, 2011; 2014: 147–163. A first version of this paper, in Portuguese, has been prepared for the Round Table 33: Reconhecimento, justiça e desigualdade, coordinated by Cinara Lerner Rosenfield and Fabrício Maciel, at the 40 Encontro Anual da Anpocs, Caxambu, MG, Brazil. I would like to thank the participants of the round table for their questions and comments during the debates, Fabrício Maciel and Luiz Gustavo da Cunha de Souza for their later detailed comments, and also Celia M. M. Azevedo for the careful reading and suggestions to this manuscript.

work of some researchers (I). Then, to give support to my defense of unconditional basic income, I will deal with the relationship between conditionality and unconditionality in light of three theoretical models of justice: David Miller's theory of social justice, Axel Honneth's theory of recognition, and Alain Caillé's theory based on the paradigm of gift (II). Finally, on the basis of the analysis worked out in the two first sections and in order to better explain my thesis, I conclude with some critical comments on both conditionality and unconditionality in relation to justice (III).

## 1. Conditionality and unconditionality in social policies: Bolsa Família versus basic income

In this section, I do not intend to make an exhaustive discussion of either the Bolsa Família or basic income. My aim, instead, is to present the basic contours of these two propositions in a way that permits me to confront the principles that guide each of them respectively. Though keeping in mind David Miller's arguments on the need to maintain a close relationship between normative theory and empirical research (Miller, 1999: 42–60), I am assuming that due to lack of space my analysis here is more conceptual than empirical.

Created initially by a government provisional act in October 2003, and put into practice in Guariba, a small town in the state of Piauí in northeast Brazil, the Bolsa Família Program became law on 9 January 2004.<sup>2</sup> According to that law, the program is “destined to actions of income transfer with conditionalities”, and results from the unification of many other federal programs. Its third article, devoted to the conditionalities, says that “the concession of benefits will depend on the accomplishment, when in case, of conditionalities in relation to exams of pregnancy, nutritional and health accompanying, frequency to formal school of 85%, besides other conditionalities foreseen in the law regulation”.

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<sup>2</sup> Brazilian Law number 10.836, 9 January 2004. ([https://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2004/Lei/L10.836.htm](https://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L10.836.htm).)

Although the law that creates the Bolsa Família does not present the arguments to support the required conditionalities, these arguments can be found in the Brazilian debate on income transfer which anticipated the institutionalization of the Bolsa Família Program.<sup>3</sup>

A good example in this regard is the text by Cristovam Buarque, quoted below. Its subject is the logic of another income transfer program, the Bolsa Escola (school grant), which anticipated the Bolsa Família, having been implemented in Brasília in 1995 when Buarque was the governor of the Federal District. However, the argument Buarque uses to justify the conditionality of his Bolsa Escola can also be used to justify the conditionalities of the Bolsa Família. Buarque writes:

“It (bolsa escola) starts from an obvious idea: if children will be poor adults because they do not study in the present, and if they do not study because they are poor, the solution is to break the vicious circle of poverty by paying to families in order their children are put to study instead of working. We pay a monthly wage to each family, under the condition that all their children are in school and none of them miss the classes during the month. With these study grants for the poor children it is possible to bring them to and to maintain them in school. In a certain way, we use the poverty and the need for income to fight poverty, having the families responsible for controlling the frequency of their children in classes. With this, we prevent future poverty at the same time, for the children will be educated adults, and we reduce the present poverty by means of a minimal income for their family. All at a low cost” (Buarque, 2003: 59).<sup>4</sup>

In his formulation, Cristovam Buarque uses the conditionality as a means to improve the attendance of the beneficiary children at school. With this he believes that the conditionality has the virtue of breaking the reproduction of the poverty cycle because he supposes that children with a reasonable school education will have more possibilities for

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<sup>3</sup> For a more detailed discussion of these arguments, see: Silva, 2014, chapters 5 to 8.

<sup>4</sup> Translations into English of quoted texts written originally in Portuguese or French are mine.

social ascension; that is, they would have better conditions for leaving the chronic poverty from which their parents could not escape because they lacked school education.

Despite the lovable importance that his proposal gives to education – indeed, education is a central theme in Buarque’s intellectual and political agenda – it gives the impression that for him, this kind of income transfer, rather than being a permanent citizen’s right, is only an emergent and focused measure towards preparing its beneficiaries to be more competitive in the market as wage laborers or as entrepreneurs.

Buarque, however, is not the only one to argue in this way. Many years later, Patrus Ananias employed similar arguments regarding the Bolsa Família. As a minister during Lula’s government, Ananias had the Bolsa Família Program under his responsibility and wrote many articles commenting it. Ananias considered that the Bolsa Família Program is an “emancipatory policy” but linked the emancipatory dimension of the program to its conditionalities. In this regard, he writes: “The conditionalities improve the emancipatory character of the program” because they contribute, at the educational level, to the return of children and adolescents to school; and, at the health level, to families in keeping their medical controls up-to-date (Ananias, 2007). Thus, though he considers that such a policy has an emancipation potential, for him the true emancipation comes only by entering the labor market.<sup>5</sup>

It is possible to say that the formulations of Buarque and of Ananias, despite their differences, both belong ideologically to the moderate Brazilian Left. But the defense of conditionality can also be found in the arguments of politicians coming ideologically from the Right. This is the case of the two politicians I quote below. Andrade Vieira and Beni Veras were both senators of the Brazilian Republic during the debate on the Minimum Guaranteed Income Program (PGRM) presented by senator Eduardo Suplicy to the Brazilian Senate in 1991 (Silva, 2014: 85–100).

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<sup>5</sup> In his comments to a first Portuguese version of this paper, Luiz Gustavo da Cunha de Souza is right in calling attention to the fact that though both Cristovam Buarque and Patrus Ananias talk about emancipation, with the first emphasizing education and the second emphasizing the labor market, neither of them seems to believe in autonomy based on the idea of basic income. Though I cannot develop the argument here, I agree that he is basically correct on this point.

During the debate, Vieira gives his opinion in relation to the income transfer foreseen by the PGRM with the following words:

“I think we all agree that those who work, those who have a trade, those who develop an activity, be it in Rio Grande do Sul, in Rio Grande do Norte, in Acre or Espírito Santo, deserve a dignified wage, deserve an amount of money as a product of their work, enough not only to feed their family, but also to clothe them, to educate them, to shelter them in a decent house, with potable water, electric power, with those minimum conditions that the modern world offers to citizens. But to give a minimum income to those who do not work, who do not produce, who, for reasons of education, do not have capabilities for developing an activity that gives them an adequate income, I think is a temerity due to the negative consequences that this project carries out” (Vieira, in Suplicy, 1992: 85).

In this case, the emphasis on denying the possibility of distributing income without conditionality is not based on the supposedly progressive ideas according to which the fight against poverty and the promotion of emancipatory policies must be linked to insertion into the market, as in the cases of Buarque and Ananias. Differently from these two, who seem to consider the role of the socio-economic context to be behind the poverty of sectors of Brazilian population, fighting poverty and emancipation policy do not belong to Vieira’s vocabulary. Akin to the neoliberal *laissez-faire*, Vieira prefers to see the victims of poverty as responsible for their fate, while liberating society from any responsibility for the condition of its members.

This kind of conservative argument on public policies is shared by Beni Veras, another senator who participated in the debate over Suplicy’s minimum income proposal. Veras’ words, quoted below, testify it clearly:

“People are not necessarily good or bad, but their inclinations are not towards work and dynamism. There are people of a different nature, those who are motivated to work and those who, receiving that kind of income, would be stimulated to cross their arms and to lose initiative. We would have then, pretty soon, the possibility of a society anaesthetized in its initiative, people who,

receiving unemployment insurance, would lose completely the incentive to fight for life. This issue must concern us because *it can be proven that in countries that adopted similar systems a decrease in the incentive of people to work occurred*" (Veras, in Suplicy, 1992:106).<sup>6</sup>

Veras gives no evidence that in countries where such policy has been implemented a decrease in work incentives took place. But my aim here is not to debate with him, but just to reveal the prejudice behind such arguments. On the other hand, though the texts quoted above do not exhaust the arguments in defense of conditionality, they are good examples that illustrate very well the motives used by important political agents to justify it. In the two latter cases, the political actors mobilize even ancient prejudice in relation to the possible behavior of future beneficiaries of income transfer policies to justify their opposition to it. Besides, though they seem to have different aims, in all them – left-wing and right-wing politicians alike – the arguments navigate within a broad conception of society in which the solution for the problems of poverty passes necessarily, to major or minor degree, by the inclusion of the beneficiaries in the labor market, that is, with the logic of the economy having priority in relation to the logic of the social.<sup>7</sup>



Contrary to conditional income transfer programs like the Bolsa Família, whose logic maintains the subordination of such policies to the workings of the market, I see the basic income of citizenship as the possibility of inverting this logic in favor of the social. Changing the priority from the economy to society is the main virtue of distributing income unconditionally. However, as I hope it will become clearer later, what I mean by unconditionality is a more complex issue than it may seem at first sight.

Differently from the Bolsa Família, then, the Basic Income of Cit-

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<sup>6</sup> Italics are mine.

<sup>7</sup> For criticisms of public policies that give priority the logic of the market, see also: Monnerat et al., 2007; Sobottka, 2007.

izenship has unconditionality as one of its primary characteristics. In this regard, the Brazilian law sanctioned on 8 January 2004, which instituted the basic income of citizenship, does not mention any conditionality, at least of the kind found in the Bolsa Família Program; that is, the only condition is being a Brazilian citizen or a resident living in Brazil for five or more years. In this, the text of the law is very clear:

“It is hereby established, from 2005 onwards, the basic income of citizenship as the right of every Brazilian citizen living here and of foreign residents living for at least 5 (five) years in Brazil, irrespective of their socioeconomic condition, to receive a yearly monetary benefit” (Art 1o. Lei 10835, de 08/01/2004).<sup>8</sup>

This unconditionality can also be found in the following short definition of basic income by Philippe Van Parijs, one of its main theorists and proponents at the international level, as we can see in the following text: “A basic income is an income paid by a political community to all its members on an individual basis, without a means test or work requirement” (Van Parijs, 2004: 8). Though he does not explicitly mention the word conditionality in his definition of basic income, we can see that the idea is clearly present in his words: “without a means test or work requirement”.

Thus, despite the fact that there are many differences between Bolsa Família and basic income, the difference that calls more attention is the one that opposes conditionality to unconditionality (Silva, 2014: 147-163). The option for conditionality or unconditionality, then, is the basis for opposing the conceptions of public policy – Bolsa Família and basic income – because the former emphasizes conditionality as one of its main characteristics from its beginning, while the latter is based on the principle of unconditionality.<sup>9</sup> It is also the principle of unconditionality, understood in a broad sense, that makes it possible to

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<sup>8</sup> For the law, see: [https://www.planalto.gov.br/ccivil\\_03/\\_Ato2002-2006/2004/Lei/L10.835.htm](https://www.planalto.gov.br/ccivil_03/_Ato2002-2006/2004/Lei/L10.835.htm).

<sup>9</sup> For a more detailed comparison between the Brazilian laws on bolsa família and basic income, see: Silva, 2006: 149-160; 2014: 101-118.



invert the logical priority, transferring it from market to society, since the only condition for receiving a basic income is being a member of society (Wright, 2006; Caillé, 2014).

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In order to complete this section, I will make a short comment on the literature about the referred conditionalities of the Bolsa Família Program. I do not intend to analyze the mentioned literature I have already dealt with elsewhere (Silva, 2014). Here I only focus on some selected recent articles dedicated more directly to the issue of conditionality in Brazilian income transfer programs. Among them, I choose two that discuss the conditionalities connected to education, although they also mention the problem of health in the same context (Pires, 2013; Carnelossi and Bernardes, 2014). Holding different positions, both articles are good examples of the dissensions regarding the pertinence, or not, of conditionalities in strategies for fighting poverty.

More sympathetic to unconditionality in their analysis of the relationship between education and income transfer having in mind the aim of fighting poverty, Bruna Carnelossi and Maria Eliza Bernardes question the efficacy of conditionality, sustaining the following thesis: “However important, the participation of education is not sufficient to have a significant impact on Brazilian reality, which is characterized by an extremely unequal structure, responsible for statistics that bring shame to the nation in relation to the number of poor Brazilian citizens” (Carnelossi; Bernardes, 2014: 308).

Having in mind the omission of the state in relation to educational policies of quality, the fragility of educative measures, the bad infrastructure of schools, and the specificities of the social conditions of beneficiaries from the Bolsa Família, they argue that it will “result in a catastrophic situation”. For that reason, they conclude that, in such conditions,

“it is fundamental to re-structure the proposal of the Bolsa Família Program so that it takes into consideration the specificity of the pedagogical contribution of education; otherwise, its intentionality, justifying the link between the requirement of minimum school attendance in order to receive the financial benefit, will

be dissolved without contributing to changes in the life conditions of the population receiving benefits from the Program” (Carnelossi; Bernardes, 2014: 309).

Like Carnelossi and Bernardes, André Pires also deals with the problem of the conditionalities of income transfer linked to education by focusing on strategies of fighting poverty. But differently from the former authors, Pires has a more sympathetic, though shaded, position in relation to the conditionalities of the Bolsa Família. Seeking support from Marcel Mauss’ concept of gift, and based on his own empirical research, he bases his position on a broader understanding of conditionality; one that ought to improve the reciprocity links between the recipients of conditional income transfer and the state. For that reason, Pires directs the focus of his analysis to the symbolic dimension of these conditionalities by arguing that “the discussions about the conditionalities in education must be thought about in a broader perspective, not restricted to their practical results” (Pires, 2013: 524). According to him, in a broader vision, “the conditionalities of the Bolsa Família Program can be seen as inaugurating an exchange relationship and reciprocity between people that receive the benefits from public policy and the state” (Pires, 2013: 525).

To do that, he seeks support also in a broader notion of *reciprocity*, which he names reciprocity *of connection*, in contrast to a restricted conception of reciprocity he calls *of correspondence*:

“Differently from the so-called reciprocity ‘of correspondence or of equilibrium’, in which the gift has to be restituted in order to re-establish an initial situation of equity, in the so-called ‘reciprocity of connection’ what is at issue is not the sense of justice, but sentiments of belonging and of social recognition” (Pires, 2013: 527).<sup>10</sup>

Thus, based also upon the analysis of interviews with people who receive benefits from the Bolsa Família, he concludes that the conditionalities, understood in the broader sense referred to above, can contribute to

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<sup>10</sup> For two different views on reciprocity, see also: Galston, 2001; Hénaf, 2010.

“the improvement of sentiments of belonging and social recognition by the people receiving the benefits given by the effective accomplishment of the conditionalities included in the Program” (Pires, 2013: 527).

As it occurs with André Pires, Alain Caillé, whose formulations I discuss at the end of section II below, also bases his analysis of income transfer on Marcel Mauss’ concept of gift. But differently from Pires, Caillé employs that concept to justify his defense of an unconditional citizenship income.

## 2. Recognition, justice, and (un)conditionality

In this section, I will deal with the theme of (un)conditionality in the context of theories of justice. A good strategy to approach the theme of (un)conditionality in connection with theories of justice is to think in the relationship between income transfer and citizenship. By the way, as seen before, the Brazilian basic income law, sanctioned in January 2004, defines the basic income as citizenship income. It is also as a basic income of citizenship that Eduardo Matarazzo Suplicy, author of both the minimum income program in 1991 as well as the proposal that results in the basic income law in 2004, defines basic income (Suplicy, 2002; 2006).

An author of a classical work on the theme of citizenship, Thomas H. Marshall conceives this later on the basis that “there is a kind of basic human equality associated with the concept of full membership of a community” (Marshall, 1965: 76). In his formulation, this basic equality is based on a typology of rights – civil, political, and social – that gives substance to his concept of citizenship as belonging to a political community (Marshall, 1965; 1981). For him, then, basic equality means citizenship.

I will not develop here the discussion on Marshall’s well-known theory of citizenship, to which I have already dedicated other writings (Silva, 2008; 2012; 2014; 2015). What I want to do here instead is to suggest that the concept of citizenship permits the establishment of a bridge between the theme of (un)conditionality and theories of justice I deal with below.

Here I begin with David Miller's theory of social justice, whose first formulation appeared in his 1976 book, entitled *Social Justice* (Miller, 1976). In this book, he presents the three principles which constitute his model of social justice, formed by rights, desert, and need. There, Miller writes that *rights* "do not depend upon a person's current or other individual qualities". In line with Marshall's formulation about citizenship, this means that it dispenses conditionality except for the fact of belonging to a certain political community. As for the principle of *desert*, Miller writes that it "may be interpreted in number of ways, although it always depends upon the actions and personal qualities of the person said to be deserving".<sup>11</sup> In that case, the contribution of a person has relevance, but even in that case it is possible to also think in a conception of contribution broader than mere exchange relation in the market. *Need*, on the other hand, is connected to the principle that says: "to each according to his due" (Miller, 1976: 26–27), which also dispenses conditionalities.

Starting from the above typology, Miller writes:

"We have, then, three conflicting interpretations of justice which may be summarized in the three principles: *to each according to his rights; to each according to his deserts; to each according to his needs*. We should note, however, that the conflict between these principles is not symmetrical, and here the simpler division between conservative and ideal justice should be borne in mind. 'Rights' and 'deserts', and 'rights' and 'needs' are *contingently* in conflict, since we may strive for a social order in which each man has a right to that (and only that) which he deserves, or that (and only that) which he needs. If such perfectly just societies could be created, the contrast between conservative and ideal justice would vanish, since the actual distribution of rights would correspond to the ideal distribution" (Miller, 1976: 27–28).<sup>12</sup>

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<sup>11</sup> He adds that "man's deserts may be measured by his moral virtue, his productive efforts, his capacities, and so on". But, "there is no one principle of justice as desert, though the various principles offered show a family resemblance to one another" (Miller, 1976: 26).

<sup>12</sup> The first emphasis is mine.

In defining the three principles of social justice and calling attention to their conflicting aspects, Miller relates them to conceptions of society, which he refers, respectively, to the theories of David Hume (rights), Herbert Spencer (desert), and Peter Kropotkin (need). Then, taking into consideration that “these principles can be defended by appeal to different views of society”, Miller argues that Hume’s conception of justice has in view what he names “competitive society” which is characterized by a moderate utilitarianism; Spencer’s conception of justice, considering his idea of “industrial society”, is founded upon an individualist utilitarianism; and, finally, Kropotkin, whose definition of society Miller considers to be communist, bases his conception of justice on the principle “to each according to his needs” (Miller, 1976: 343).

Miller concludes this first book on social justice saying that such a concept emerged from the specific arrangements of market society, and “what is distinctive about the social thinking of market societies is their assessment of existing rights by ideal standards of social justice, and it is these ideal standards which stand most in need of sociological explanation” (Miller, 1976: 337).

In a second book, *Principles of Social Justice*, published in 1999, Miller retakes his theory of social justice, reaffirming the same principles as elaborated in the first book, but including some terminological innovation. Thus, in this latter book, he presents his model of social justice as formed by the three following principles: solidaristic community, instrumental association, and citizenship. According to Miller, these principles of social justice, which emerge directly from the various modes of relation and explain the forms of institutional relationships, are defined as follows: a *solidaristic community* “exists when people share a common identity as members of a relatively stable group with a common ethos” (Miller, 1999: 26). The main example he gives to illustrate it is the *family*. The second mode of relationship, or principle, is *instrumental association*, in which people relate to each other in a utilitarian way in order to get their objectives and purposes which can be attained in collaboration with others. According to Miller, *market economic relations* are the best example to illustrate this. The third mode of association he considers relevant for his theory of justice, is *citizenship*, which he defines as follows: “Anyone who is a full member of such a society is understood to be the *bearer of a set of rights and obligations* that together define the status of citizen” (Miller, 1999: 30). On the other hand, Miller adds:

“Although equality is the primary principle of justice governing relations among citizens, sometimes citizenship may ground claims of justice based on need or desert. Citizens who lack the resources necessary to play their part as full members of the community have a just claim to have those resources provided. Thus *medical care aid, housing, and income support* may for some people be regarded as needs from the perspective of citizenship.<sup>13</sup> The difficulty here is to separate what is actually implicit in the idea of citizenship from the claims people can make on one another as members of national communities” (Miller, 1999: 31).

For Miller, then, *equality* is the dominant principle of *citizenship*, *need* is the principle of *solidaristic community*, and *desert* is the principle of *instrumental association* (Miller, 1999).

Thus, even if we account for the slight difference in terminology between the two books, the substance of his threefold theory of social justice remains the same. On the other hand, what seems to be a distinctive characteristic of his theory of social justice in relation to precedent theories of justice is the emphasis on the need to connect normative theory with empirical research. In his view, dealing alone with social justice, neither normative theory nor empirical research can escape the risk of one-sidedness (Miller, 1999: 42–60).

The question now is how to think the problem of (un)conditionality dealt with in the first section in terms of such a model of social justice. It seems clear that the exigency of conditionality in the sense found in the Brazilian Bolsa Família Program does not apply to two of Miller’s principles of justice: the principles of need and of equality. In the case of these two principles, one cannot speak of conditionality, but of reciprocity in a broader sense (Hénaf, 2010). In both principles, there is no conditionality that could lead to any kind of punishment or privation of rights.<sup>14</sup> Thus, only the third principle of desert, which

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<sup>13</sup> The emphases are mine.

<sup>14</sup> Despite targeting the population in condition of extreme poverty, that is, people truly in material need, the Bolsa Família, with its conditionalities, is far from based upon the principle that says: to each according to his due.

Miller relates to utilitarianism, seems able to fit the sort of conditionalities found in the Bolsa Família Program.

Based on Miller's theory, then, the main criticism that can be directed to the conditionalities of the Bolsa Família refers to their incompatibility with the idea of citizenship. This latter has to be directed to the entire population of a political community, whose status of citizen has to be based only on the condition of belonging to such a community. In this way, one cannot take, as a policy that improves citizenship, such a restrictive social policy that puts into question the capacity for autonomy of their beneficiaries.<sup>15</sup>



Axel Honneth has elaborated his threefold theory of recognition, formed by love, rights and solidarity, through a critical appropriation of elements from Georg Hegel's philosophy as well as from George Herbert Mead's social psychology (Honneth, 1995). Coming from the Frankfurt tradition of critical social theory, Honneth also shares the intersubjective turn promoted mainly by Jürgen Habermas with his *Theory of Communication Action* (Habermas, 1984/1987). But Honneth differs from Habermas in relation to the central role the philosophy of language plays in the formulation of this latter, which Honneth considers excessively abstract. Proposing a return to Horkheimer, whose conception of critical social theory should be based on the experience of oppressed groups, Honneth seeks to give a more phenomenological foundation to his theory of recognition (Honneth, 1994; 2001a).

In developing his theory of recognition, Honneth presents this theory more and more as a theory of justice, himself calling attention to the similarity between the threefold model of his theory of recognition and David Miller's theory of social justice, as we saw above (Honneth, 2003; 2012a). Thus, as it occurs with Miller's theory, Honneth's three forms of recognition – *love, rights, solidarity* – remit, respectively, to the categories of *need, rights* and *desert* of Miller's theory of social justice. In Honneth's own words: "he (Miller) distinguishes between the prin-

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<sup>15</sup> On the issue of autonomy, see Fonseca (2001); on the relationship between autonomy and basic income, see Silva (2014: 47–62 and 185–194).

ciples of need, equality, and desert in the same way I have spoken of the differentiation of three recognition principles of love, legal equality, and social esteem” (Honneth, 2003: 182).<sup>16</sup>

Though the acknowledged proximity between his model and Miller’s regarding the tripartite concept of justice as well as to the need to connect normative theory and empirical research in the study of social justice (Honneth, 2003; 2012a), he also emphasizes the differences between their theories:

“In contrast to David Miller, who wants to proceed from a comparable pluralism of three principles of justice (need, equality, desert), the tripartite division I propose arises neither from mere agreement with the empirical results of research on justice, nor from a social-ontological distinction between patterns of social relations, but rather from reflection on the historical conditions of personal identity-formation” (Honneth, 2003: 181).<sup>17</sup>

In his first formulation of a theory of recognition, Honneth links solidarity with the primary sphere of individual contribution (Honneth, 1995), while in his latter, theorizing about justice, solidarity is increasingly replaced by desert (Honneth, 2001; 2003; 2014). Unless he conceives solidarity in a very strict sense, this can be interpreted as a change in his conception of the so-called third sphere of recognition, a change that suggests an increasing dominance of market relations in his model of justice as recognition, despite his understanding of the market as a socially embedded institution.<sup>18</sup> This change makes him closer to

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<sup>16</sup> Honneth continues calling attention to the similarity between his theory and that of Miller, writing the following words: “It should not be surprising that, in both cases, the term ‘equality’ turns up simultaneously in two levels of the conception of justice. On a higher level, it holds that all subjects equally deserve recognition of their need, their legal equality, or their achievements, according to the type of social relation. And, on a subordinate level, it then holds that the principle of legal autonomy implies the idea of equal treatment and thus in a strict sense has an egalitarian character” (Honneth, 2003: 182).

<sup>17</sup> In contrast with the pluralism of Miller, Honneth’s theory is conceived in terms of a monist conception of recognition.

<sup>18</sup> For a criticism of this increasing influence of the market in Honneth’s model, see: Jütten, 2015; for Honneth’s answer, see: Honneth, 2015.



Miller too. But we can see yet another difference between Honneth's and Miller's formulations, once this latter links solidarity to what in Honneth's model would be the first sphere of the family.

Now it is time to ask: How does his theory of justice based upon recognition deal, in the three spheres of recognition, with the problem of the conditionalities already put to Miller's theory? It seems evident that basic self-confidence in the first sphere of primary relationships cannot be dependent upon any kind of conditionality; rather, it depends on emotional and affect relations, or love, which provide conditions to make it possible that the person can develop an intact personality since the first infancy. In this way, either in relationships between adults (love and friendship), or in relationships of adults with children (maternal love), care does not remit to a type of reciprocity associated with any conditionality of the kind found in the Bolsa Família Program.

In the second sphere, that of equality of rights, Honneth refers to the notion of citizenship, which means an equality of status that supposes a form of reciprocity that is more abstract than that of the first sphere, but is also independent of individual contribution, once it is based on the basic equality of all its members. As shown in the quotation below, Honneth's theory of recognition also leaves a margin for unconditionally distributive policies:

“On the one hand, up to a certain, politically negotiated threshold, it is possible to call for the application of social rights that guarantee every member of society a minimum of essential goods regardless of achievement. This approach follows the principle of legal equality insofar as, by argumentatively mobilizing the equality principle, normative grounds can be adduced for making minimum economic welfare an imperative of legal recognition. On the other hand, however, in capitalism's everyday social reality there is also the possibility of appealing to one's achievements as something 'different', since they do not receive sufficient consideration or social esteem under the prevailing hegemonic value structure. To be sure, a sufficient differentiated picture of this sort of recognition struggle is only possible when we take into account the fact that even the social demarcation of professions (...) is a result of the cultural valuation of specific capacities for achievements” (Honneth, 2003: 152-153).

Thus, only in the third sphere, that of solidarity or desert, where personal contributions make it possible to distinguish between persons, is attributed personal esteem dependent upon desert. That is, like in Miller's theory, in Honneth's as well it is only in the sphere of desert that it is possible to make direct connections with the type of conditionality found in the Brazilian Bolsa Família Program. But, despite its differentiation in three spheres, the theory of intersubjective recognition as a whole remits to the social link in the same sense found in Durkheim's formula according to which behind every contract there is the pre-contractual solidarity upon which lies every contract (Honneth, 2014; Durkheim, 1984). This is also the substratum of Caillé's theory dealt with in the following.<sup>19</sup>

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The Founder of the MAUSS (Mouvement Anti-Utilitariste en Science Sociale), Alain Caillé is also one of the leading figures in the renaissance of the contemporary interest in Marcel Mauss' theory of gift. In his "Essay on the Gift" (Mauss, 2003: 183–314), Mauss describes the cycle of gift as a triad formed by the moments of giving, receiving, and restituting.<sup>20</sup> It is on the base of this model of gift that Caillé, who has also shown an increasing interest in the debates on recognition (Caillé, 2007), develops his arguments on the theme of (un)conditionality that occupies us here. But, differently from André Pires referred to in the first part of this paper, Caillé is a defender of unconditionality. In his book *Anti-utilitarisme et paradigme du don*, he writes, for instance, that "the second most important fight of the MAUSS has been the one in favor an unconditional basic income – which we name income of citizenship – which seemed to us to be the logical conclusion of the rights of man" (Caillé, 2014: 85).

On the other hand, Caillé's arguments in defense of unconditionality have a peculiarity hardly found in the mainstream defenders of

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<sup>19</sup> For discussions of income transfer and basic income in connection with Honneth's theory of recognition, see also: Sobottka, 2007; Cunha, 2014; Mulligan, 2013.

<sup>20</sup> For good introductions to the debate on Mauss' theory of gift, see the two following books: Schrift, 1997 and Martins, 2002.

basic income, whose arguments are usually limited to economic motives as the structural and technological unemployment. Besides considering these economic motives, Caillé turns his view more directly to the problem of the social link, as he writes: “Before anything and by hypothesis, almost by tautology, we have to observe that the social link – called also an alliance, being together instead of living separated, confidence – can only be generated with a dimension of unconditional bet, with a step into the unknown” (Caillé, 2002: 119).

His starting points are the Maussian paradigm of gift and a multidimensional theory of action he relates to the same gift paradigm. From them, Caillé distinguishes four dimensions of both gift and social action, which he names as obligation, freedom, interest, and altruism. He then links each of them, respectively, to forms of unconditionality that he defines as *violence* (always present at the hearth of obligation), *spontaneity* (things people do by themselves, without obligation), *interest* (the instrumental that always exists and persists behind the demonstration of generosity),<sup>21</sup> and finally a dimension of *conditional unconditionality*.<sup>22</sup>

It is this conditional unconditionality that, according to Caillé, rules the alliance, which he defines, following Marcel Mauss, as an agonistic gift (Caillé, 2004). Nevertheless, for Caillé,

“None of these four modes of unconditionality could concretely exist in an isolated manner. None of them could be totally absent either. In every social relation, unconditionality and unconditionated, conditionality (more or less) unconditional, and unconditionality (more or less) conditional always co-exist according to combinations and in infinitely variegated proportions” (Caillé, 2002: 131).<sup>23</sup>

As Caillé presents this formulation as mediated by the complexity of the social link, his conception of unconditionality (or conditional unconditionality) differs from the mainstream understanding of unconditionality in the debates about basic income because in the latter, the

<sup>21</sup> On the conception of gift as an ethic of generosity, see Schrift, 1997:1–22.

<sup>22</sup> For Caillé’s multidimensional theory of social action, see: Caillé, 2009.

<sup>23</sup> This means that his model is thought, as in Honneth’s, in monist terms.

idea of unconditionality hardly appeals primarily to the social link.<sup>24</sup> This link is to be understood in terms of reciprocity. This latter should be conceived not in terms of equivalence, as in commercial contracts (Galston, 2001), but in terms of the Gift-giving. Or, as expressed in Helmuth Berking's words, "reciprocity is gaining ground as a protest against equivalence" (Berking, 1999: 20).<sup>25</sup> On the other hand, in conceiving the *agonistic gift* as a form of *recognition*, Caillé's formulation comes closer to Honneth's monist theory of recognition, despite the difference between them regarding the issue of (un)conditionality (Caillé, 2004; 2007).

### 3. Concluding remarks: conditionality, unconditionality, and justice.

I begin this section with the theme of equality, which has been dealt with throughout this paper through the concept of citizenship, once in the theories of both Miller and Honneth it appears only as a specific sphere within their broader theories of justice and of recognition: the sphere of rights. For them, on the other hand, the concept of equality is not sufficient to form a theory of social justice, either in the plural version of social justice developed by Miller or in Honneth's monist formulation of justice as recognition. Indeed, neither of the two authors is satisfied by theories that limit the concept of justice to that of equality (Miller, 1999; Honneth, 2012a).<sup>26</sup> In both the theories of Miller and Honneth, however, the most salient sphere of their models of justice is not that of equality rights, but that related to desert, whose

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<sup>24</sup> For the broader debate on basic income, see the following collections: Van Parijs, 1992; van der Veen and Groot, 2000; Raventós, 2001; Wright, 2004.

<sup>25</sup> On this Maussian conception of reciprocity, see: Godbout, 2002; Hénaf, 2010. On the critique of justice as equivalence, see also: Ricoeur, 2004.

<sup>26</sup> Here I am leaving aside formulations like that of Michael Walzer, who develops his pluralist theory of justice by conceiving equality as "complex equality", to differentiate it from formulations as that of John Rawls (Walzer, 1983). On the difference between Rawls and Walzer, see Simon Wuhl's book *L'égalité. Nouveaux débats: Rawls, Walzer* (Wuhl, 2002).

substance are the individual contributions which distinguish between persons, not that equalize them. Thus, while the sphere of rights gives foundation to basic equality, the sphere of desert gives legitimacy to socially accepted forms of inequality.

Indeed, in the two cases, in Miller's theory of social justice and Honneth's theory of justice based on recognition, it is not just one sphere that counts, but the model as a whole (Miller, 1999; Honneth, 2009; 2012a). Even so, in both cases, when the content of one sphere of the model conflicts with that of the other sphere, they leave the impression that the resolution of the conflict remits to the sphere of desert. Of course, one can argue that this is due to the fact that both are dealing with the context of a capitalist economy, in which the market has always the last word. But it is also true that these theories, especially Honneth's, which he himself presents as a critical social theory, have to point to an emancipatory horizon which is able to put into question such a priority of economic relations by reversing it in favor of society.<sup>27</sup> For that reason, the proposition advanced by Caillé, understood within the cycle of gift – giving, receiving, restituting – which aims to renew the social link, seems to be more preoccupied with the inversion of such logic (Caillé, 1992; 2000; 2011; 2014).

We can also say that Caillé's theory, which includes a dimension of gratitude in its conception of recognition and refuses the idea of justice as equivalence, has a more visible utopian component than the other two. Though less systematic than that of the other two authors, Caillé's idea of conditional unconditionality gives primacy to the social logic over the logic of the market. It is this priority of the social that justifies his defense of an unconditional income of citizenship.<sup>28</sup> But we have to keep in mind that this is an unconditionality embedded in the social tissue which appeals to the proper reproduction of the social link. And in that, it seems also close to Honneth's notion of intersubjective recognition (Caillé, 1992).

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<sup>27</sup> In this regard, see: Wright, 2006.

<sup>28</sup> In this issue, Caillé's understanding is close to Eric Olin Wright's position (Wright, 2006).

But while the theories of both Miller and Honneth deal with the issue of unconditionality in a restricted way by limiting it to the spheres of need and equality of rights, in Caillé's theory unconditionality, conceived in a broader sense, remits more directly to the social totality.<sup>29</sup> Considered in this way, the idea of unconditionality legitimizes citizenship, while that of conditionality restricts the notion of citizenship. It also seems increasingly evident in a socially adverse context as how we live today under neo-liberalism. Thus, returning to the Brazilian context, despite the fact that some researchers of Bolsa Familia see that the valorization of conditionalities of income transfer by recipients can contribute to the learning of citizenship, we can also interpret it as an expression of gratitude by persons in extreme poverty, predisposed to inflate the value of benefits they never had.

In order to conclude, I defend the thesis that there is no pure unconditionality because it is always based upon a form of deep conditionality that is, indeed, the ultimate objective of which at first sight seems unconditionality. But such conditionality is not that of the contracts, based on a relation of immediate equivalency as in market exchange relationships. Instead it is closer, as I said before, to what Durkheim called "non-contractual conditions of contract". This, according to him, is what gives normative legitimacy to contracts and puts a limit to contracts based on the disparity of power between, for instance, buyer and seller (Durkheim, 1984).<sup>30</sup>

The type of unconditionality that Caillé names conditional unconditionality (what Honneth would call intersubjective recognition) aims to equalize people. That is the meaning of a social link upon which the theories of gift and that of recognition encounter their bases, even if one can interpret it differently. On the other hand, the unilateral conditionality appears more similar to what Durkheim calls a leonine contract because it is established by only one of the parts, the stronger one. And, if we think deeply, we can see that what is indeed unconditional

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<sup>29</sup> On the relationship between gift and unconditionality, see also: Martins, 2004.

<sup>30</sup> It seems me to that it is also close to Honneth's understanding of society as a recognition order (Honneth, 2001b; 2003).

is the unilateral conditionality, such as the one required by the Bolsa Família. It is, however, perversely unconditional because it is imposed from the top down on the weaker side; that is, the recipients of public policies like the Bolsa Família cannot refuse to obey the exigencies of conditionalities under the penalty of losing the benefit.

When Local Participatory Budgeting Turns  
into a Participatory System.

Challenges of Expanding  
a Local Democratic Experience

Emil A. Sobottka, Danilo R. Streck





## Introduction

In 1989, participatory budgeting was implemented in Porto Alegre (Brazil).<sup>1</sup> The idea was to mobilize the citizens to discuss and indicate by themselves the main priorities for investing a portion of the scarce public resources. Starting as an informal experience encouraging people to present their local demands in the public sphere, it proved to have unforeseen consequences, such as questioning the traditional model of representative local democracy, widening the circle of people interested in political affairs, and allowing the residents to question bureaucratic structures and to exercise a bit more control over their rulers (Sobottka, 2004; Guimarães, 2004).

The origins of the participatory impulses in the region reach back to the 1960's when local communities began searching for alternatives for development based on their own resources. In the 1980's, after the end of the military dictatorship, there were some experiences in South Brazil which took up the idea of popular involvement in municipal planning. There was also a strong democratizing impetus in social movements which had quite a significant impact on the Federal Constitution approved in 1988, opening space for citizen participation in a variety of forms and in all governmental spheres (Avritzer, 2008).

Between 2011 and 2014, this experience was expanded to the regional level as a participatory system, embracing geographical expansion and other issues. In this article, we discuss some more evident challenges of such an expansion, such as longer distance, the different levels of being affected, more bureaucratic mediations, the "inevitability" of some level of "representation", and the different regional cultures of participation, as well as persistent reasons for citizens and members of political parties to continue participating and for governors to invest in such a participatory process.

This effort represents the continuation, on the regional (state) scale, of a series of experiments carried out since 1999. It started with the classical model of participatory budgeting as implemented in Porto Alegre, based on local, municipal and regional plenary sessions with

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<sup>1</sup> The first version of this text was published in the *International Journal of Action Research*, volume 10, issue 2, 2014.

broad popular participation and debates. It later turned into a consultation process about priorities through ballots which could be cast in boxes located in public spaces such as schools and shopping centers or through the internet. During the period analyzed here, participatory budgeting was part of a rather complex system of participation which included a digital office and a permanent council for development whose members represented various segments of civil society and government.

In our research process, the tension between two different meanings of participation among the different actors has attracted attention: for some, participation is a democratic principle: public issues have to be discussed and decided by the affected citizens in the public sphere; for others, participation seems to be a strategy to mobilize support, legitimize positions, and present performances. Although there may not be a clear dividing line between these two poles of the tension, the appreciation of the outcome of participation may be very different in both cases. As a principle, participation correlates with radical conceptions of democracy, where sovereign citizens define the rules of their shared living and charge their government with specific tasks; as a strategy, participation is a resource, such as elections, which is used by citizens to legitimize their claims and by governments to ensure the legitimacy of their domination. In other words, participation can offer a political opportunity to ensure the conquest of citizenship rights by legal means and for deepening democracy, but it can also be used as an empty formula seeking power in adverse conditions while the decisions that really matter are made elsewhere (Sobottka, 2004; Sobottka et al., 2005).

As a principle, participation may be a creative force for permanently inspiring different procedures for dealing with public administration. At the same time, in a larger geographical scale, and with a larger population and more complex power relations among political parties and interest groups, strategy is a prominent feature of participatory budgeting. The argument in our article is that there is a risk that participation is turned into a mere strategy for the fulfilment of immediate needs, losing track of its motivating inspiration which is indispensable for keeping the participatory process alive. We then ask about some conditions for keeping this tension in a productive relationship. Among them we highlight the role of regional coordinators able to mobilize the local communities, the government's capacity to deliver the "products" approved in the process, the attention to organ-

izational matters (such as the site of the meetings, information about the program, etc.), and space for the discussion of priorities instead of just presenting demands previously agreed on within a given segment of the population. Trust and communication are identified as basic ingredients in participatory budgeting.

Our research methodology is based on participatory principles and procedures. The study can be also seen as an experiment in using participatory methodology with policies and projects involving large geographical areas (in this case, a state in South Brazil) as well as large populations (the state has over 10 million inhabitants). The research strategies ranged from classical data collection methods such as questionnaires and interviews to meetings with coordinators and community members, which we called “double reflection groups”. In the article we make room for discussing some learnings and identify challenges faced in the process.

### Research as active empathic presence

A study on the participatory budget in a state that has a geographic size and a population larger than those of many countries can be seen as a participatory research experiment on an expanded scale. Its purpose is to analyze the participatory budget as a political-pedagogical process in which, so it is presumed, one can identify signs pointing to alternatives to the globalized development model that shows symptoms of exhaustion in all regions of the world. Maybe in fact we are not only facing a financial crisis and a crisis of political representation, but a civilization crisis that, in terms of research, requires understanding the micro and macro levels in social relations as a unit.

Participatory budgeting is an important place to understand society on the move and the directions of this movement. Since research is not politically neutral, the researchers must ask themselves about the actions they wish to potentiate with their work. According to Zelman (2006, p. 112), “One must detect the realities that can be potentiated, but these realities are not necessarily prescribed in a theoretical corpus; rather, they will depend on what do I want to know for, which is an axiological or ideological ‘for what’.”

Throughout the research project we participated in a number of activities, mainly as observers. We placed ourselves intentionally in an initial position of listening, aware that many people involved in the process have extensive experience as public managers or as citizens involved in their communities. Therefore we participated in training seminars, in the government school, in regional public hearings, and in municipal assemblies. We also collected information through a questionnaire in which we sought the quantification of data on the profile of the participants and the entities they represent, as well as their expectations and frustrations at the process. Significant moments of the study were the meetings with state and regional coordinators with whom we discussed the objectives, the emerging results and the directions taken by the process.

There are two methodological features which we would like to highlight in this paper. The first one is the challenge of developing large scale research within a participatory and dialogical framework, where all stakeholders share the responsibility for the production of knowledge. Given the multiplicity of agents involved in the process and the variety of contexts, participation could hardly be considered as co-determination or co-production in a strict sense (Kristiansen & Bloch-Poulsen, 2010). Although there is a verbal agreement and a feeling of mutual expectations, the initiative resides in an academic research project. The expectation can be seen in the way our group is welcome in the meetings, sometimes greeted with the heavy responsibility of telling the story of participatory budgeting in the state. Participation might be identified as the active empathic presence of researchers in the process, i.e. a being which has an explicit purpose of advancing democratic procedures, but whose identification with the process does not preclude a critical appraisal.

As mentioned above, besides classical data collection procedures, the topic under investigation is a field for methodological experimentation. One such experience is what we called double reflection groups, requiring a whole day of working with a group. After individual interviews with members of the community, the coordination of regional participatory budgeting, municipal leaders and office holders, we – the research group composed of two senior researchers, two graduate students and four undergraduate students – presented preliminary findings in slides, each of which ended with the phrase: “We would like to

understand better...”, for example, why people with higher education degrees seem to be over-represented in the meetings, why so few women are chosen as regional delegates, or the role of the regional coordinator of popular participation. The discussion on each topic was recorded in audio and video.

In the afternoon the process was inverted. The research group reflected on the data presented in the morning and on the opinions exposed on each topic. For example, on the difficulty of the process to reach issues on a macro level, such as those which could affect the economic matrix of the region. In this particular case, the economy is basically built on agriculture, increasingly meaning agribusiness with large soybean plantations, the suppression of small farms, and the consequent depopulation of the region. Afterwards the floor was opened for all participants to engage in a common discussion. There was clearly a sense of dialogue where the engagement with the challenges identified in the previous reflections, for a moment, encountered the role distinction of the participants.

A second methodological feature, closely related to the first one, is what we identify as a convergence of disciplines (Fals Borda, 2013, 2010; Streck, 2013a, 2013b). Participatory budgeting has been analyzed from different disciplinary perspectives: as a democratic innovation (Avritzer & Navarro, 2003), as an effective instrument for partially correcting regional imbalance in the allocation of resources (Fedozzi, 1999), and as a pedagogical process for citizenship learning (Streck, Sobottka, & Eggert, 2005; Moll & Fischer, 2000), among others. Participatory budgeting is a quite special place from where one can see the community and the region as a heterogeneous totality, which would require much more than the convergence of classical academic disciplines. There, one can see different sets of knowledge coming together in a context of negotiation and dialogue. This is so because what counts at the end is not an individual advantage, but a gain for the community or region in which, eventually, individuals also claim special recognition. At a recent regional hearing, it was very interesting to see how people who did not know each other started to connect their knowledge about the frequent floods that affect the region. The urban dweller pleaded for protection of the houses in his neighborhood, the municipal officer presented data on the economic impact of such incidents, and finally a farmer concluded by saying that without vigorous support for the

rural area where water flows can or should be controlled, cities would hardly be safe from these frequent disasters. All of this can be expressed in academic jargon, but there is undeniably practical and theoretical knowledge being shared and formed in these places.

In this study, we will give special attention to socio-political and pedagogical dimensions of participatory budgeting within the larger framework of the State System of Popular and Citizen Participation (*Sisparci*), incorporating, whenever possible, reflections from other fields and from our fellow research participants.

### From participatory budgeting to the participatory system

The 1980's in Brazil, in macroeconomic terms often referred to as the "lost decade" was a very favorable time for civil society organization in social movements, trade unions, political parties, and civil associations, substantially expanding the possibilities of participation in the public sphere. Especially popular social movements succeeded in consolidating themselves as agents with their own identity and the ability to develop and articulate various forms of participation. As a consequence, they also succeeded in influencing the definition of various social policies (Sobottka, 2000). At the decline of the military regime, a substantive democratization beyond the electoral ritual was assumed by these movements as essential to the improvement of their living conditions.

Organization and participation in various formal and informal spaces were strengthened for creating political pressure in the nascent democratic life. Thus, in the short space of about a decade, civil, political and social rights were enrolled in the legal system, particularly in the Constitution adopted in 1988, at amplitudes never before seen in the country. But this expansion, in particular of the social rights of citizenship, would soon be revealed as ambiguous: between the registration of rights in the Constitution and the possibility of their effective realization, an abyss was gradually opened: and the institutional mechanisms available at the time were insufficient to overcome it.

This was one of the factors that led social movements to bet on a decidedly more direct participation in decision spaces. One strategic

objective became the conquest of state power by democratic elections in order to assure effectiveness for the formally guaranteed rights. Another strategic objective was the expansion of channels of direct participation in everyday decisions about public policy, and as a means for social control of government actions. The latter goal has found its expression in a variety of issue-related policy councils at all levels of government, and was also the origin of the claim to participate more directly in the definition of the public budget.

When the policy known as Participatory Budget was implemented in Porto Alegre, it consisted initially on a series of informal meetings in which municipal government representatives met with people interested in discussing how the resources of the city budget should be invested in the following year. Technical and political representatives participated in these discussions, collecting suggestions of the citizens and promising the effort to include them as much as possible in government planning as well as in the proposal of public budget that the government has to submit to the local parliament every year. They also committed themselves publicly to execute within the next year what the people had placed as priority.

With many aspects of self-organization, this informal consultation was gradually becoming more organized through its own rules and became part of the regular activities of local politics. Both the priority to invest public resources where the most needy population lived, as well as concerns with issues affecting the whole city and requiring a technically well-founded approach, such as public urban transportation, culture, and economic development, formed a political compromise between the social groups (Avritzer & Navarro, 2003).

The long associative tradition in the city of Porto Alegre facilitated the organization of the concerned population and gave support to this initiative, but the involved movements were very jealous of their political autonomy. Although it was defined by the authorities as a co-management of the city, the Participatory Budget in Porto Alegre remained an informal consultation of the executive power of the city. Even though it had a very strong legitimacy among the inhabitants, the Participatory Budget had a weak institutional basis and depended on the will of the local authority.

While for many participants this was seen as an open channel to share decision-making, it gradually became clear to the participants



that it was also an instrument of marketing, used by the political parties to strengthen themselves in their electoral goals, but at the same time moving important decisions away from the participatory process. This double-sided participation brought ambiguities to the process and took it, beyond the initial charm, to lose much of its legitimacy. After 16 years in power, the political group that created the Participatory Budget lost the elections in Porto Alegre in 2004. Part of the defeat has been attributed to a growing carelessness with the commitment to respect the will of the people expressed through the Participatory Budget consultations, delaying expected investments in several years, and even slowing down the approved policies.

When in 1999 the same political group that implemented participatory budgeting in Porto Alegre was first elected to govern the state of Rio Grande do Sul, there were already some initiatives to broaden the channels of participation. One of them were the Regional Development Councils (*Conselhos Regionais de desenvolvimento*: Coredes), created as regional forums of “leaders” to discuss regional development. They were not directly concerned with the public budget, but with the decentralization of public management. Nevertheless, they became the administrative and political reference for the subsequent experience of inclusion of citizens in participatory budgeting. Even partially changing its functionality, the new government made abundant use of this structure.

Another already existent initiative was a consultation on regional priorities to be included in the budget by voting. The Regional Councils drew up lists of potential demands of the regional community, and voters could choose some priorities from within those lists. The government pledged to include the most voted one as a priority in the budget within the limits of what was technically and financially feasible. Unlike participatory budgeting, this consultation did not involve physical meetings or discussions; it allowed only choosing between previously defined areas for investment by voting.

Between 1999 and 2002, a first experience of participatory budgeting on the entire state of Rio Grande do Sul was implemented. Drawing on the experiences accumulated over ten years, the ruling Popular Front structured a consultative process, starting from municipalities and the Regional Development Councils as local and regional units, to culminate in plenary representative meetings at the state level. Its primary

function was to point out the priorities for public investments during the preparation of the annual budget.

The cycle of the participatory budgeting on the regional level had a calendar that was repeated annually. It began with preparatory meetings in all 495 municipalities, with the goal of informing the public about the process and the amount of resources that could possibly be invested in their region. There was also defined the timing and content agenda of discussions for the meetings in the 28 regions of the state. The outcome of these regional meetings were then returned to the municipalities for debate and decision by the population, and were afterwards condensed in regional forums with elected representatives. Besides the meetings on the level of municipalities and regions, a set of thematic forums with a more technical focus also took place; they dealt with problems considered to be more technical, generally affecting many regions and specific to particular sectors.

The consolidation of the demands made in the forums of delegates was done in partnership with government representatives. This allowed for higher qualification and for the technical, legal, and financial suitability of the demands of citizens, but also gave the government a “golden share” at the end of the consultative process. Although it was very intense, partly due to strong opposition from other political parties, this experience of participatory budgeting lasted only four years and was not continued when the opposition won the next elections.

Having an area comparable to the Czech Republic, Slovakia, Austria and Hungary put together, distances in the state of Rio Grande do Sul represented a difficulty for all participants. And, taking into account that the entire process was a voluntary activity for the citizens, it is easy to see how difficult regular participation in the meetings was for members and for representatives from popular social movements. In place of the direct participation of citizens from the neighborhood in the decision about the priorities to invest their town’s resources, at the state level claims needed to be grouped together to stand any chance of receiving support also from other participants and of being approved. They also became publicly defended by regional representatives/delegates and not by the directly affected people. This changed the dynamics of the very public dispute over the priorities of the policy (Weyh, 2011).

Another important change was that the topics under discussion were becoming a little more distant from people’s everyday lives. While in

Porto Alegre's experience the prioritized items were often such as paving the street, running water for the neighborhood, or the regularization of land ownership where one's own home was located, in the state budget discussions were on the development of the municipality, on support to agriculture, or on the construction of a hospital that would serve the entire region. Even if they were considered important issues, many of them were perceived by participants as distant, and sometimes people even considered themselves barely able to influence decisions about topics considered "complicated" for them.

The opposition from some political parties also brought difficulties. A court prohibition to use state funds to pay for this consultation even resulted in government representatives who travelled through the state to organize the meetings having to have their costs covered by sources other than public funds. It certainly caused some difficulties (Charão, 2005), but it gave a more informal character to the meetings, motivating even the shyest of people to speak and to engage themselves, and it strengthened the emergence of local leaders committed to their communities (Herbert, 2008).

Despite these difficulties and limitations, there was a very satisfactory level of participation during the four-year term led by the Popular Front under the leadership of the Workers' Party. Family farming, small local enterprises, and public health and basic education received priority attention during this period. Still, a good part of the urban population did not participate in these mobilizations and themselves felt unaddressed by the idea of a more participatory democracy. They did not grant legitimacy to these initiatives and were sensitive to the arguments of the opposition of an "abandonment" of the cities.

During the following two terms, parties opposed to participatory budgeting ruled the state. Unlike what had happened in the city of Porto Alegre, where despite being opposed, the former opposition parties continued participatory budgeting, at the state level they discontinued this experiment of consulting the citizens and introduced much more restricted alternatives for participation. This shows that at the state level this process probably had not acquired such a great importance among the population that politicians would have to fear resistors.

In 2011, the government of the state Rio Grande do Sul, once again led by the Workers' Party, proposed a set of modalities of participation

and called it “State System of Popular and Citizen Participation”.<sup>2</sup> It was chaired by a management committee with equal representation of members of government and of civil society. Among the main agencies that composed the system was the newly created State Council for Development (*Conselho de Desenvolvimento do Estado*: CDES), with invited representatives of various sectors of society, the Regional Councils for Development (*Coredes*), with representatives of civil society from 28 regions, and a new government agency called the Digital Office (*Gabinete Digital*), a channel for “e-participation”.

Participatory budgeting was integrated into this system as a central element. An important innovation was holding regional plenary sessions to discuss priorities to prepare the Pluri-annual Plan which served as a “framework” for the annual budgets, the inclusion of the priorities voted at the municipal assemblies and the state level hearings into the budget law that would guide the elaboration of the next annual budget.

The annual budgets were prepared according to the following stages: regional public hearings in which the participants selected up to 10 among the 15 thematic areas that served as a base to present “demands” at the public assemblies which were held in each municipality. These 15 areas were defined in the Pluri-annual Plan and should guide the drafting of the budget for the next four-year period. This means that if a region chose health as a priority area, the projects in this area carried greater weight when the delegates of the municipalities (one delegate for every 30 voters of the local meeting) met again to define the items that would become part of the ballot on which the voters would mark their priorities in the next step. After the vote, which could be either in ballot boxes distributed around the municipality or via the internet, the delegates met to consolidate the proposal and sent them to the office responsible for elaborating the budget. Among the demands, the voting citizen chose equipment for the local police, hospital or school, support for ecological projects, or for NGOs that work with children and youth. Since the amounts for projects of the participatory budget had already been pre-defined by region, and since they had to fit the previously established guidelines, this procedure should ensure

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<sup>2</sup> See [www.participa.rs.gov.br](http://www.participa.rs.gov.br) (last access: 31 July 2017).

their inclusion in the proposal for the state budget that would finally be voted on by the state parliament.

The changes that occurred in the participatory process when it was first expanded from the local level (Porto Alegre) to the level of the state (Rio Grande do Sul) were to a large extent “necessary” adaptations to allow the consultation to reach the highest possible number of people, but at the same time to be held within an acceptable period of time and with acceptable costs for all. It can be said that they were pragmatic adaptations. The situation looked very different in the new edition of the participatory process at the state level. As the name indicates, the government now intended to implement a *system* of participation. Many more areas of public policy were involved, and the budget became only one part of this system.

Two other forms of participation of this system may be highlighted here: a more systematic dialogue with the mayors from the 495 municipalities in the state, and a council of economic and social development. The dialogue with the mayors was important for the population, because many of the public policies depend on funds transferred by the state government to the municipality. If this dialogue does not work, citizens are harmed by the lack of public services. At the development council, approximately 80 “leaders” of various segments of civil society, from churches and intellectuals to trade unions of entrepreneurs and of workers, meet to discuss problems and to give inputs for future policies. Despite being initially hailed as a major initiative to better listen to society, this council has also been criticized because it has no deliberative power, because its participants were invited directly by the government itself, and because the governor, who should chair it, was very frequently only represented by a substitute.

Under the name Digital Office<sup>3</sup> a more permanent communication channel was created between the government and the population. The initiative intended to offer a bidirectional communication between government and citizens. The practice, however, showed that it was above all a communication channel *from* the government *to* the people, informing about the development of projects and informing about the government’s initiatives.

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<sup>3</sup> See <http://gabinetedigital.rs.gov.br/> (last access: 31 July 2017).

Two other well-intertwined changes seem to have affected the idea of participatory democracy more directly. The first one is related to the budget line items that came under discussion. In the previous experiences of participatory budgeting a (perhaps relatively small) part of the resources for *investments* was a subject of discussion. All other current expenses of the city or state were defined in a very traditional way by government bureaucracy. Thus, for example, the two expenditures which together make up to 90% of the state spending, such as spending on active and retired staff and on the service of the public debt, were not discussed publicly. Several attempts were made to also include them in participatory budgeting, but the political and bureaucracy resistance was always higher than the pressure of citizens to change this procedure. Still, the priorities of the participants concerning investments were widely respected and were transformed into public policy.

During the second period and the current system of participation, the volume of investment resources was very small, possibly due to an economic crisis in the state. The amount of resources under discussion was inflated in that a portion of current *government expenditures* became dependent on having its priority defined in participatory budgeting. One consequence was that an important part of maintaining health, education, and security services, for example, which are the constitutional obligations of the state, became depend on the support they received in this participatory process; this resulted in many mandatory public services not receiving enough funding.

This shift in budget lines has a very close relationship with a shift in the participating public. While in the original experiences, participating citizens came mainly from what we might call civil society – people who came on their own, who became mobilized by neighborhood initiatives, or were participants in social movements, trade unions, or other civil organizations – in the second experience more than half of the participants in public meetings of the participatory budgeting process were public servants. They came to defend investment in their offices' everyday needs. Nurses wanted funds for the needs of day-to-day health posts; public school teachers wanted to ensure that there would be chalk, cleaning supplies, and school meals in their schools; police officers in their uniforms demanded cars to patrol the streets and life jackets to protect them.

One participant in a double reflection group remarked in this re-

gard: "It seems to me that this process may not be as democratic [as officially presented]; it is now more representative from institutions." Referring to the previous participation form, she continued: "that participation was more effective, more emanated from the popular classes, had more representation of the communities" [M., double reflection group]. Another respondent in our research explained how participants are currently mobilized in some governmental organizations. According to him, superiors constrain their subordinates to participate in the consultations, they have to carry mobile ballot boxes and collect votes for specific themes that the director chose. This participant concludes laconically, "so, this is not popular consultation, it's an induction, constraining a person to vote in a priority that is not what he chooses, but what institutions want" [G., double reflection group]. The risk that these procedures bring to the participatory process was so described by one of our interviewee: "We are taking a popular decision without the presence of the people" [Ma., Santo Ângelo]. At the same time, during observations directly in the regions we could note that there are still many ardent supporters of a genuine citizen participation in these consultations. They resist the "bureaucratization" of consultations and mobilize people in their social circles to defend the idea of a democracy created by citizens themselves.

Surely, further analysis will be needed concerning this change: what specifically led to it and what its consequences are. Still, two considerations can already be done now. On the one hand, during the second period there were less independent citizens and members of social movements participating in the meetings. On the other hand, the government was very capable in transferring conflicts concerning the distribution of very scarce resources to the participation process, thereby avoiding its responsibility for the lack of investment in certain public policies.

### Between principles and strategies

There is no single reason for participating in the public hearings. There are community leaders, accompanied by a group of dwellers from their communities, who may want to put housing among the priorities; the police and the fire department may claim support for safety; sometimes

a teacher comes in with a whole class and makes the case for education; NGOs are a quite permanent presence claiming for resources for their work in poor areas in the cities; there is also room for expressing needs that reach beyond the resources allocated for decisions in participatory budgeting, such as the one representing the “movement for a federal public university” in a largely populated area where there are only private or community universities.

Participation has a pragmatic sense according to each individual’s or group’s reasons to spend his/her free time in meetings that usually take place in the evenings. But there is also a deep understanding that participation is a value in itself, reaching beyond eventual immediate gains. It is a feeling that a democratic society, in spite of historical and contextual handicaps, is possible. In our view, there is no reason for dichotomizing between the principles and strategies of participation. The point we are raising is that democratic participation is antithetical with a purely instrumental use of participation, as can be learned from history where dictatorial regimes or market-driven interests exploit people’s involvement with no interest in sharing power. There must be allowed space for the emergence of principles, and not necessarily from the leaders of the process.

Participation has been at the forefront of the Brazilian political agenda since the second half of the last century. The well-known literacy method of Paulo Freire (1982), which was based on the assumption that reading the world as preceding the reading of the word, was a way of overcoming the democratic inexperience embedded in a history of authoritarianism, exploitation, and oppression; it was one among many manifestations of popular and community involvement in gaining some say regarding their well-being. In the Northwest region of Rio Grande do Sul (municipality of Ijuí), the Base Community Movement (*Movimento Comunitário de Base*), as early as in 1961, developed a methodology of small group discussions that would reflect on the local situation and propose collective actions. The three principles of the movement refer to the human person as a) having dignity, value and excellence on his/her own; b) as having the capacity to create, to perfection him/herself while improving their world; c) as a being of relation, i.e., it is through assuming co-responsibility with others that men and women “humanize themselves, make history, create culture, and construct civilizations” (Brum & Marques, 2002, p. 35).



The military dictatorship installed in 1964 represented an interruption in the process, but as soon as 1983 a pioneering experience in South Brazil (municipality of Pelotas) put participation as the key element for municipal planning under the slogan "All the power emanates from the people." While acknowledging the existence of similar experiments, there was reaffirmed the importance of what was called the "conceptual fundamentals of popular participation", which were "popular sovereignty and the qualification of representative democracy through participatory practices of democracy" (Souza, 2002, p. 19). Participatory planning consisted basically in going to the communities and listening to the demands of the people. Models, they argued, would have to be created according to local and regional conditions.

What we see in this process is a movement from humanistic and communitarian values, certainly very much influenced by the theology of liberation, to an emphasis on the democratization of Brazilian society. The participatory budgeting, initiated in Porto Alegre in 1989, can be seen as a landmark in this development. Here, participation became focused on what is the hard core of any public planning. It was not a governmental concession, but the result of pressure exercised by popular organizations that demanded more resources for poor areas in the city in what has been also claimed as an "inversion of priorities" (Horn, 1994). The municipality of Porto Alegre accomplished the development of strategies of participation which later became integrated in state participatory budgeting, such as the regional thematic hearings for the identification of a set of priorities which serve as parameters for demanding particular projects, the election of regional delegates, and the appointment of regional coordinators of participation.

The observations of the process confirm that the larger the geographical area and the heterogeneity of the population, the greater the importance of creating adequate strategies which, in turn, may contribute to overshadow some of the underlying principles. These nevertheless tend to be kept alive not uncommonly by individual participants who may be regional coordinators of participation, community leaders, or simply citizens who believe that something is being created that can make a better democracy.

The tension between participation as a principle and as a strategy is of particular interest when dealing with the integration of participatory budgeting within a broader system of citizenship participation.

Our observations up to this point lead us to suggest that there is the risk that the opacity of the system as a whole, with many channels of participation very loosely connected or not connected at all, as well as the managerial abilities required to deal with the complex relations within each sector and among them, tends to overemphasize the strategic dimension.

Participatory budgeting has its logic and procedures quite clearly defined, but in this very process it tends to become mechanical. The amount of resources to be allocated for projects decided by popular demand is already determined by the administration, according to criteria which include population and participation in the previous year. There are usually three minutes for each citizen to defend priorities or present specific demands, there is the election of delegates who will participate in the process until the final draft to be included in the state budget, and there is always an official report from a government official. All these procedures are increasingly structured, controlled by the organizers of the public meetings, and they reduce the space for direct and spontaneous communication that is essential to a public sphere open to everyone for an effective participatory democracy.

This process is adequate insofar as one accepts the limits of individual and community participation in open discussions. These limits can be seen in the message given to students in an assembly: "You should be mobilized with your friends, to create a big network in the internet to vote for the demands that you presented, and this has to be constant; this participation cannot be only this year and the next year I will not go; we are also in a pedagogical process" (Nova Santa Rita). But there is also a growing feeling that this is not enough. People miss discussions that reach beyond immediate and localized needs that can be supplied with quite small funds. There are many voices that manifest a desire to have a say about projects that see local and regional development in a broader perspective. When people refer with some nostalgia to the experience from 1999 to 2002, it is the discussions on larger scale projects that they are referring to. For instance, at this time among regional priorities there would be included the discussion about roads that connect various municipalities and which therefore required a much greater involvement in discussions and negotiations. When asked if participatory budgeting accomplishes its aim, this answer expresses what can be heard by many participants: "I think it does (accomplish

its aims) in part, then we still don't have a debate or mass decisions. As a dialogue, a debate, a participation" (Missões). In this sentence, dialogue and debate are integrated with participation.

## Conditions for democratic participation

Democratic participation cannot be taken for granted, as it moves between principles and strategies. In this study, we are interested in identifying some conditions which may favor or which may represent an obstacle for democratic participation. By democratic participation, we understand a process in which there are present at least these essential elements, as identified by Fricke (2013): an open dialogue; a space for collective reflection; and the voice of each individual being heard in an open change process. We ask to what extent participatory budgeting represents a rupture with traditional ways of doing politics, and what conditions would be necessary to enhance the development of democratic participation. In this section, we explore some of these conditions summed up in two points: trust in people's sovereignty and knowledge, and organizational matters and communication.

### Trust in people's sovereignty and knowledge

Trust between elected officials and citizens is a very rare feeling in most representative democracies today. Participatory budgeting, as seen earlier in this paper, originated from the experience of citizens having felt deceived by generations of politicians, thus taking in their own hands the possibility of having a direct influence on the use of at least a small part of public funds. One condition that sets the tone for the type of participatory budgeting is the trust in people's sovereignty and knowledge, in the trust in the "wisdom of the many" (Roth, 2011). The depth of political will, which could be defined as a precondition for democratic participation, depends on the degree to which citizens are trusted.

The fact that at least some spaces of participation in public budgeting in the state have continued over many years, having passed through three administrations with quite different political perspectives, is a sign

that officials cannot dismiss people's knowledge of reality as just commonsensical public opinion. It is the people who know better where the shoe pinches, but as the process shows, there are many shoes that pinch, and the pain does not necessarily have the same intensity.

Participatory budgeting can be seen as a place for building up trust which is in turn a basic condition for legitimacy in democracy. Let us see how this happens. From the side of the government, the movement for constructing bridges is manifested by the presence of officials who are part of the executive power. They may not necessarily be the highest-ranking ones, but nevertheless they are there as government, and have to account for what their government does or does not do. There is the expectation that critiques and proposals will somehow echo in some place where decisions are made. Since this is a process that extends throughout the year, people know that there will be other opportunities to bring up the issues. It can be noticed that year by year more attention is given to feedback on funds which have been spent on demands made by local communities or regions.

However, the vast majority of people who do not participate in meetings and do not vote on priorities and projects may have different opinions about the relationship with state officials. This can be exemplified in the words of a citizen who points out the difficulty of mobilizing the population for the "discredit." This discredit has, as its primary target, the state government, but not only that. It can be observed that in places where there is a greater level of trust within the community and municipality, there is not only more participation in terms of numbers of citizens but also in terms of the quality of participation. For example, at the end of a recent regional hearing for selecting the ten priorities, the leader of a caravan from a municipality stood up to say that they were glad to notice that the priorities they had agreed upon in their local meetings had been indicated. It means that a lot of discussion had been done before coming to the official hearing, but also that those people who came to the regional meeting were entrusted to represent their communities.

The situation mentioned above points to one of the major challenges of Brazilian democracy today. On one hand, there is little expectation that state officials, in all government levels, provide the framework for trusting relationships. Many of the constitutional spaces of participation become instrumentalized for pragmatic party or personal interests.

On the other hand, local organizations do not find adequate channels for objectifying their needs in terms of viable projects, which weakens the motivation to participate. The fact that there are so many public agencies in the participatory budgeting meetings is a symptom that there is still a long way to go before having a trusting relationship on a broader social scale.

### Organizational matters and communication

Of no minor importance are organizational matters which have to do both with participation as a principle and with strategies for participation. In a state with a great diversity in terms of population density, there is to be considered first of all the difficulty posed in organizing participation in less populated regions where people have to travel great distances. This may be, for instance, one reason for having a relatively high involvement of public organizations that can count on transportation provided by their departments or by the municipality.

Another important organizational factor apparently of major importance is the place where the meetings take place. Since in the present structure of participatory budgeting the Regional Development Councils play a major role, and since they are presided over by university presidents or representatives, most meetings happen in university settings. This may account for the relatively high proportion of citizens with an academic degree participating in meetings, usually much higher than the average of the whole local population.

A key element for the functioning of participatory budgeting is communication on all levels and in all dimensions. Our observations allow us to argue that communication is still a weak point in the entire process. It starts with the information on the process and of some data regarding projects which were approved and implemented, without space for reactions of the public. They are listeners expecting their turn to speak, and when it comes they will present their demands in a couple of minutes sometimes cleverly integrated in a network of arguments. But this does not seem to be enough to understand this as a significant process of communication. A participatory democracy depends on a strong public sphere (Habermas, 1995) and participatory

budgeting can be an important part of such a public sphere (Fischer & Moll, 2000; cf. Pålshaugen, 2002). The first experiences, in fact, were much closer to an open and integrative process of communication. By structuring the meetings rigidly, the participatory system may become technically more efficient, but it fails to provide an important contribution to democracy.

One major problem of communication starts with the invitation to the meetings. In the excerpt below, a teacher incisively confronts government officials and authorities because they are not familiar with the local reality, or do not take it into account when organizing the meeting:

People (!), just to confirm what Diego said here: the reason for the distance from what happens in our town. First: it is badly disseminated, not everyone has access to the newspaper at school, at the school it has been three months since we last have seen it. Second; most of those who are here get up early, to go catch a bus to Porto Alegre, Esteio. They go to work in other places because here there are no jobs for them. So they leave the dormitory town and then they come to school, go home, lie down and sleep (Inajara, Nova Santa Rita).

The study revealed the difficulty of communicating through the classical mass media, such as the radio, newspaper or sound truck. Either the newspaper does not arrive, or people are at the factories, stores or schools, and the message does not reach them. At the same time, one sees the important role of the personal invitation. The research project ratifies what José Luis Rebellato (s. d., p. 98) found in Uruguay: “The issue of how to reach the non-organized neighbor becomes outstandingly relevant and may be an essential key to the development of a radical democracy.” We still need to determine what role the digital media has in these personal invitations (Malone, 2012).

The regional coordinators of participation play the important role of making the process work on the regional and municipal level. As defined by one of these coordinators himself: “This figure of the regional coordinator was created precisely so that one could interact with the municipalities, so that one could make this approximation between state government [and people], discuss the problems, discuss the demands

and even discuss here the demands of the party, and be with you [the people] in all municipal assemblies” (Nova Santa Rita). This coordinator is aware of his mediating role between the state government and local communities, between the various agencies that are institutionally part of the process (Coredes and Comudes), and between the local and regional organizations and institutions (schools, social movements, NGOs, etc.). The words of a participant in another region confirm this strategic role of the coordinator: “This person who functions as coordinator of popular and citizenship participation has to have an insertion in all municipalities where he has to hold dialogue with a variety of political agents as much from the government as from the civil community; he has to know these persons, has to listen to them, has to have the sensibility to understand what these persons demand and what they expect; and this role, I believe, has been made with much competence by our regional coordinator” (Santo Ângelo, Missões).

### Concluding remarks

The study brought to light some challenges that emerge when a local experiment of participation is applied on a large geographical scale. While the expansion may represent hope for the advancement of democracy, the experience in Rio Grande do Sul, besides new potentials, also shows adaptations that become necessary and difficulties that need to be overcome.

Among the potential for overcoming historical and present-day handicaps, we identify the following:

a) Participatory budgeting points to the vision that development does not depend on one strong leader or party. Within Brazilian society there are forms of organization that can be mobilized for developing regional projects. However, mobilization should refer not only to the acquiescence to previously defined projects, but should also encompass the trusting relationship in identifying priorities and creating strategies for their implementation.

a) In participatory budgeting, there is the possibility of creating a productive confluence of social and popular movements with social

and state organizations. It is a space for new institutionalizing forces to make their argument for the expansion and democratization of existing institutions as well as for institutions to make adaptations or promote changes.

b) It allows for individual or small group (minorities) expression in a public space. As we have seen in this study, participatory budgeting has the potential of being an instrument for producing a rupture with the historical “culture of silence” in Brazilian society. However, when losing the dimension of participation as a principle, this important aspect tends to be obfuscated by the supposedly more urgent and not necessarily explicit agendas of strategies.

What are the weaknesses, especially when participatory budgeting could be considered as a test for implementing a system on a state or, as planned, a national level? We highlight only some of them identified in our study:

a) The development of open and efficient communication channels. In all contexts covered by our study, communication seems to be a basic obstacle for the success of participatory budgeting. It is not only communication from governmental agencies or officials to the citizens through the distribution of more folders, more media time or more internet information, as sometimes understood by the promoters. This is obviously important, but communication as required by citizens entails mutually and actively listening to each other. This is a very difficult goal to reach, given the variety of players that take part in the game with their respective agendas.

b) To view participatory budgeting, as well as other participatory initiatives, as a long-term project with a strong pedagogical potential. In a democratic society, there is always the possibility of discontinuity of projects and policies due to the periodic electoral events. This, however, should not be seen as an argument for not betting on the introduction of processes with long-term pedagogical consequences, creating a higher level of politics and a social contract where differences and equality are well balanced (Streck, 2010).

c) To not lose sight of participation as a principle, which allows for the development of different models and strategies of participation. These should be seen as the consequence, and not as the starting point. Comparative studies on participatory budgeting and of other forms of



citizen participation will be of great importance for the development of new models, according to the particular cultures of participation, and anchored on broad principles of democratic participation.

For us, as researchers, as already pointed out in the methodological notes, the topic poses challenges and produces learnings that will deserve a closer look at some other time. Besides the more evident ones as the financial resources needed, the conditions for mobility in a large geographical space, and the difficulty of combining the schedules among the various stakeholders, there is the highly differentiated social, political, and cultural context that emerges at a closer look on the map that is beginning to be designed. These challenges take us to reaffirm the importance of larger scale studies in the tradition of action research (Fricke, 2011; Gustavsen, 1994; Fals Borda, 1979), and our interest in enhancing the social, political and pedagogical relevance of our active empathic presence in the process.

## II

### Disputes on Moral, Legal and Secular Discourses



On the Moral Distinction  
Between Morality and Moralism

Marco Antonio Azevedo



*I call 'moralism' a system of normative moral principles sufficient for the positive regulation of life. In other words, moralism excludes the possibility of morally indifferent actions. According to it, every action must be characterized as either fulfillment or violation of duty.*

Leonard Nelson (1956, p. 89)

## 1

*Morality* and *moralism* are social and psychological phenomena. Both comprise a broad set of acts, practices, habits, and beliefs, as well as sentimental and emotional dispositions, by means of which people try to regulate and control the actions and behavior of others. Both comprise, to borrow a term from Lawrence Bloom, a *lived morality* (Bloom, 1998, p. 233). But what is the difference between them? By *morality* I mean a socially *legitimate* system of normative principles and rules for the positive regulation of human behavior; I'll take "moralism" as the designation of a set of practices and attitudes rather than as an actual system, or, better yet, as the designation of a peculiar stance that leads people to falsely take their preferred system of duties as legitimate. A normative attitude can be charged as illegitimate if a reasonable claim is applied to a context where it happens to be inappropriate (Taylor, 2005).<sup>1</sup> Moralism therefore turns out to be problematic when people intend to live in accordance with it. One consequence is the promotion of behavior under the pretext of doing what is right and just beyond (and sometimes against) the positive legal rules that guide liberty and justice.

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<sup>1</sup> Craig Taylor elaborated a sustained approach on moralism as a vice. "Moralism, to the extent that it is a vice", says Taylor, "would seem to involve some distortion of the proper activity of the moralist" (Taylor, 2005, p. 2). But, continues Taylor, "the distinction between the moralist and those guilty of moralism" cannot "always be so clearly drawn, or that there is not always something faintly suspicious in the *desire*, say, to morally judge others" (in a note, p. 2).

John Kekes said that “moralism” is an “illegitimate inflation of reasonable claims either by exaggerating their importance or by extending them to inappropriate contexts” (Kekes, 2002, p. 503). Along the lines of Anthony Coady, moralism involves “an inappropriate set of emotions or attitudes in making or acting upon moral judgments, or in judging others in light of moral considerations” (Coady, 2008a, p. 17). But moralists usually act with sincere dispositions. This happens because moralism is usually, albeit equivocally (even though sometimes maliciously), taken by agents as a legitimate practice. Since moralism is a widespread behavior, it is on the two sides of the coin of human interactions, both on the agent and the patient sides. This helps to explain why it is so effective. In fact, the moralistic attitude is a very effective way of controlling human behavior.

Some philosophers famously took moralism as an equivocal but very effective psychological phenomenon. Nietzsche is the main example. His harsh critical stance to moralism nevertheless led him to adopt a kind of nihilistic position concerning morality. Nietzsche’s anti-realism on morality is probably a consequence of his own reactive attitude against moralism. I somewhat sympathize with Nietzsche’s critical stance, but I don’t think that morality as such reduces itself to moralism.<sup>2</sup>

Both morality and moralism comprise not only practices, habits, and emotional and sentimental dispositions, but also *beliefs*. Beliefs are peculiar mental states.<sup>3</sup> Philosophers of mind are still trying to clear up the distinction between states of belief and the other cognitive states,

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<sup>2</sup> Bernard Williams is one who famously presented the moralistic attitude as a characteristic piece of morality as a *peculiar institution* (Williams, [1985] 2006). But what Williams calls “moralism” is connected with his opposition to approaches on “external” reasons for action (Williams, 1981, p. 101-113). Williams’ view turns all external moral reason approaches *moralistic* (perhaps to him only internal reason approaches are not moralistic). This is not the view I will sustain below. Nevertheless, Williams’ approach on “oughts” and on “moral obligation” (Williams, 1981, p. 114-123) in the same volume is elucidative. In the same line, we found the account developed by Williams in this posthumous paper “Realism and moralism in political theories” in which he worked against the views he also called “moralistic”, but now in the context of political theory (he called *political moralism* the view that morality is normatively prior to the normative domain of politics).

<sup>3</sup> Beliefs are in fact so peculiar that, even if they are related to one’s mind in some sense, they cannot be called states of one’s mind, that is, *conscious* states of a person (Hacker, 2004) – see note 5 below.

such as knowledge, and also between the cognitive (conscious) states and the assumedly non-cognitive ones, like the volitional and the emotional. Cognitive states were usually taken as perceptions in the mind, and the emotional states were usually taken as purely volitional (Descartes' *modi cogitandi* is the main reference here).<sup>4</sup> It is undisputable that we have *cognitive* mental occurrences (such as visual and other sensory perceptions, being veridical or not) and that we also have *affective* occurrences, like the emotions and "bodily pleasures and pains" (Hume, 1896, p. 275), but beliefs cannot be reduced to any of those simple mental occurrences. Hume famously said that beliefs are complex (or composite) perceptions (and are ideas related to present impressions). This led Hume to reject the view that there could be something like "moral beliefs". He argued that beliefs are ideas related to present "external" impressions, directly linked only to (ideas of) matters of fact instead of moral matters or even "internal" emotions. However, beliefs involve not only perceptions and ideas, but also mental and behavioral dispositions; and they are certainly influenced by our emotions (Damasio, 1994).

It is also very plausible that beliefs are not only phenomenological mental states (that is, ideas related to present impressions). It is certainly meaningful to say that "Hypatia believes that the Earth is round" even when she is in bed or not thinking about it. Likewise, if we say that "Locke truly believed in God's real existence", we are not describing any of Locke's particular phenomenal experiences. Beliefs are, then, not mere perceptions, although they require perceptions in order to occur as events in one's mind.<sup>5</sup> If beliefs are not reducible to external sensory perceptions, it is not, at least *prima facie*, implausible to accept that,

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<sup>4</sup> See Williams, 1978, p. 72.

<sup>5</sup> See: Hacker (2004). Peter Hacker concluded that belief is not a feeling, neither a mental state, nor a disposition. Previously he critically remarked against "a much popular view" on the ontology of beliefs that beliefs are mental or psychological states. Within the "popular view", Hacker includes Donald Davidson, John Searle and Timothy Williamson as exponents. Williamson in fact said that belief is a "paradigmatic mental state" (Williamson, 2002, p. 21). Mental states are states of consciousness, that is, "states in which a person is while conscious (awake)" (Hacker, 2004); but beliefs are not states a person is in while awake. Hacker suggests that if we want to form a better idea of what beliefs are, we should look to the primary uses of the verb "to believe". Hacker highlights that the verb "to believe" serves different uses, albeit familiar or proximate. One of them is for



besides Humean “natural” beliefs, we may also have “moral” beliefs; that is to say, we have beliefs concerning *matters of fact*, but in addition to that we also have, or at least we can have, (true and false) beliefs concerning *moral* matters.

Therefore, if I am right, we can have moral beliefs besides *moralistic* ones. Since legitimate beliefs are true beliefs, moral beliefs are true *moral* beliefs; moralistic beliefs nevertheless cannot be true beliefs. They are beliefs that express mere opinions, not moral knowledge. They are *false* moral beliefs, perhaps systematically false. My view is a kind of moral realism that incorporates a metaphysical anti-realistic position, but only to moralism. [It is a criticism of moralism as well, but the fact that moralism can be wrong (because it is false) is different from the fact that it is unwise and imprudent (for this deserves further evidence and argumentation).]

Furthermore, I’m using ‘moralistic’ in one of its common usages, like when someone says to someone else “You are being moralistic about this matter!” (said, perhaps, to a rudely opinionated person regarding homosexuality). Here, the statement conveys the belief that the other person is wrong about some normative facts on the issue of homosexuality. (In other words, that there are rights and wrongs about the morality of homosexuality and that the other person is not appropriately considering the issue.) In this guise, my target is “not morality but certain distortion of morality, distortions that deserve the name ‘moralism’”, as Tony Coady says, though in another context (Coady, 2008a, p. 14). But, in a similar context, using John Kekes’s analogy (Kekes, 2002), my view is that moralism is opposite to morality in the analogue sense that scientism is opposite (and usually prejudicial) to science.<sup>6</sup>

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qualifying assertions, that is to indicate that the information being conveyed is not certain, or that the possibility of things being otherwise cannot be excluded (“I believe this is not the right road to the city”). There is also another use of “to believe” in contexts we simply trust (or bet) that things are so and so (“I believe he does not agree with you on this matter”). Another different use is as a “prefix to an assertoric sentence to indicate endorsement or commitment” (“I believe that Japanese food is healthy”). My view is that when people make moral claims they are indicating an assertoric commitment, hence expressing a moral belief in this third sense.

<sup>6</sup> Marek Hrubec commented (in a personal conversation) that scientism has a role in the history of science, and it is not literally true that its role is prejudicial. He is right;

I am, therefore, supporting a metaethical realist view on both morality and moralism;<sup>7</sup> it is different not only from Nietzsche's and Mackie's anti-realism (Mackie, 1980), but also from the expressivist non-cognitivist views on morality. Expressivists think that moral beliefs simply do not exist. Some expressivists accept that we usually express beliefs in assertoric speech, but they also think that these assertoric statements cannot express a *moral* belief in a very strict sense of "belief" (Blackburn, 1993). Hume probably advocated the same opinion, so he avoided using the expression "moral belief", preferring to treat moral assertions as "moral pronouncements", stressing that, by means of those pronouncements, one does not express any discovery about matters of fact. Nevertheless, Hume is wrong, and here I suggest that even Hume's moral pronouncements express literal beliefs. And even if Blackburn's answer to the so-called Frege-Geach problem against the traditional expressivist denial on the pretended meaningfulness of moral assertions was a good answer (I'm not convinced), the fact is that we do make utterances with at least *pretended* moral propositional contents, intending to express at least pretended *literal* beliefs.<sup>8</sup>

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ancient theories that are nowadays considered mere scientism were respectable in their own time. Even today, scientism pushes science to progress. It reminds me of Feyerabend's remarks against "method" (as I see it, a caveat against any methodological monopoly) (Feyerabend 2010). We can easily make an analogy here that it is true that moralism has a role in moral progress, and since morality is made in a sense that science is not, the role of moralism as the creation of new moral "truths" is certainly non-negligible. We therefore cannot simply assume that moralism is prejudicial, even though not to disclose our bias towards moralization in a controversy can be morally censurable.

<sup>7</sup> A brief note on "realism". There are two different sorts of "realism": the *pragmatist* realism and the *metaphysical*. The pragmatist is the realism that Brian Leiter characterizes as *Classical Realism*, and it is compatible with an anti-realist position in metaethics (Leiter, 2001, p. 245). The metaphysical realist is a general, broad view that supports the thesis that moral beliefs can be true, and that some actually are true. Here I advocate an empirically guided metaphysical realism. For empirically guided metaphysical realist approaches to morality, see the Cornell realists, notably Richard Boyd (1988) and Nicholas Sturgeon (1985; 2006, p. 91-121). I also include David Copp (1995), but there are others, such as Sayre-McCord (1988) for a general description of the map of metaethics.

<sup>8</sup> Blackburn's reply is that the adoption of propositional form and style in moral discourse is a pragmatic (deflationist) device that meets our necessity of sharing and discussing our dissenting attitudes (Blackburn, 1993, p. 185). If Blackburn is right, then people do involve themselves honestly in discussing their moral attitudes by means of

Therefore, we do believe that we have moral beliefs, and we usually try to communicate them to other persons as well, and note that when we do that we use different statements from the typical prescriptive statements, like commands and advices. Suppose Peter says that Hitler was a mad man, or Helen says that her friend John is wrong in lying to his boss that he was ill for the sake of merely staying at home and not going to work. Both Peter and Helen have moral beliefs, viz. the belief that Hitler was a madman and the belief that John acted wrongly in deceiving his boss about his intentions. Anyway, both statements are made in the assertoric mode, and this is a linguistic fact that deserves explanation. One good explanation seems to be that assertoric speech has the function of transmitting or communicating Peter's and Helen's respectively moral "opinions" concerning Hitler's character and John's action. But Peter's and Helen's *opinions* about Hitler's character and John's action are nothing but their moral *beliefs* concerning them. One could suggest, following an expressivist lesson, that their opinions are actually nothing but their *attitudes* concerning Hitler's character and John's action. But, in addition, beliefs are (or in a sense involve) attitudes (for attitudes are states, and it is plausible that to believe is a state that at least involves cognitive attitudes – concerning certain propositions, evidences, experiences and theories, besides others' beliefs). The expressivist could amend this by saying that the attitude is that of reproaching (perhaps, in the first case, of condemning Hitler). But those practical attitudes are plainly compatible with the "cognitivist" view, for it is just because they think that Hitler *is* a mad man and that John *did* do wrong in deceiving his boss that to condemn Hitler and to reproach John are morally (in a broad sense) appropriated.<sup>9</sup>

Moral beliefs are expressed by moral statements that intend or at least pretend to be true and not false. If it were true that moral state-

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assertoric speech, but without knowing that this is only a pragmatic deflationist maneuver – certainly, only philosophers and maybe linguists could be aware that they are doing this. I think this is strange, besides being against common sense (see: Nichols, 2004 for a criticism of what we should call the "conceptual internalist" assumption that underlines expressivist theories).

<sup>9</sup> David Copp suggested a name for this view, that is *expressivist-realism* (Copp, 2001). I think my theory fits with the expressivist-realist approach.

ments always pretend and never express true moral beliefs, then there would be no moral facts besides the fact that people think there are. If Mackie were right, moral propositions would have the very strange peculiarity of being false by a posteriori necessity – they would be like the belief in the real existence of unicorns, a belief that following Kripke is a paradigmatic example of an *a-posteriori* belief necessary false (Kripke, 1972). Mackie assumed that moral propositions are things that can be true or false, but that we do not have any good evidence or reason to believe that none of them are in fact true. This is Mackie’s well-known cognitivist anti-realism: there are no facts on the grounds of morals, albeit people actually do think and behave as if there were. Hence, for Mackie, none of these moral propositions represent moral facts.<sup>10</sup>

Now imagine a moralist who adheres to Mackie’s view – in fact, a learned ethical moralist can perfectly see themselves as a kind of nihilist without inconsistency. Moved by a kind of scientific spirit, they can eventually advocate a plain “realistic” approach on ethics, accepting that all moral beliefs do not express moral facts, that they only pretend to express them, but that they are nonetheless necessary to life and politics. Realizing this, they can embrace a moralistic stance without compromise and shame. It’s without surprise that we have, in international and even domestic political theory, several pragmatic approaches in defense of the political utility of “morality”. After all, even if moral beliefs are plainly false, the plain and crude fact is that they stimulate behavior and move people to action – so a nihilist could turn himself into a less severe moral skeptic embracing a consequentialist justification for moralistic practices. There could be good reasons for such consequentialist beliefs because, regardless of the fact that moral beliefs are false, the consequences of having them are good and useful (Mackie argued in this fashion in his book *Ethics, inventing right and wrong*). Moreover, figuring out that there is not now any other secure and effective technological way to improve or “enhance” peoples’ dispositions to promote welfare, this skeptic consequentialist can realisti-

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<sup>10</sup> Mackie is side by side in this nexus with Nietzsche’s statement on *Daybreak* (§ 103) when he says: “I deny morality as I deny alchemy” (Nietzsche, 1997, p. 103). Nihilists actually deny both morality and moralism, for since all moral beliefs are false they cannot see any difference between them.

cally find himself without any other solution but to preach morality. Something very similar can and in fact does occur with some religious persons. A religious person can find themselves without any grounds for continuing to believe in God, but can continue to preach as long they think their faith is nevertheless a useful and prudent guide to their and others' behavior.<sup>11</sup> For nihilists, moralism is a kind of systematic bad faith, or maybe a kind of false consciousness, and a consequentialist skeptic can agree with that, but with the complementary belief that moral beliefs have a positive rather than negative social role. For this kind of nihilist, it is not "bad" as such to act by mere faith, and even "bad faith" can, in this guise, eventually prove itself as socially *good*.<sup>12</sup> Skeptical naturalists can think that there are evolutionary explanations for this social phenomenon (and they are certainly right, at least in part).

Although this is partially true, I mainly disagree, for there are good reasons to think that there are at least some moral beliefs that are in fact true. If this is sound (and metaethically true), then *moralism* is *essentially* different from *morality*. By "morality" (or "morals") we should denote only what is current, hence, actual and effective. Agreeing with Copp, it is difficult to take the idea that all moral claims are simply false seriously (Copp 2001). The nihilist view implies that there are not any justified moral standards but considers the very plausible claim (shared by almost all moral philosophers) that if a moral statement is true, then an enforceable consequence follows – let's follow Hart and call this the view of the *enforceability of all obligations* (Hart, 1955, 1961; Nozick, 1974). If a moral sentence states a moral fact, that is if the moral sentence is true, the moral fact can be presented as a reason (perhaps not necessarily sufficient, but still at least a *pro tanto* reason) for some enforceable command (usually directed to another person) or for an agent's own action. It is a common view that morality implies enforceable advices or commands. Now consider the nihilist view

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<sup>11</sup> Atheist physicians sometimes stimulate patients to keep their faith in God and their religions. There is good evidence that faith improves the capacity of recovering from illness (Sapolsky, 1998).

<sup>12</sup> In a similar fashion, Mandeville ([1714] 1989) thinks that private vices can be useful devices for peace, cooperation, and progress within society.

and try to figure out how it could be possible that false claims warrant enforcements. Take, for example, the general view about reasons for actions. Reasons for action are facts that warrant decisions or actions (Raz, 1975). Therefore, there should be reasons for action in general, and for moral actions in particular. Now, if there are also reasons for moral actions, are these reasons therefore facts or falsities presented as reasons? Isn't this last possibility, however, simply insane? Hence, reasons for moral actions must be *facts* only. But if there are no moral facts, only "natural" or non-moral facts could be offered as reasons for moral actions. How, then, could it be possible for a non-moral fact to warrant a moral action? Wouldn't that be a plain violation of the so-misunderstood Hume's Law? Hence, if there are actions that are morally warranted, and if those actions are of the kind that are susceptible to being enforced (by means of advice, commands, and acts), then the reasoning that rightly concludes that those actions should be done, or *ought* to be done, must be supported by at least some true moral beliefs.

Commands or imperatives cannot be substitutes for moral beliefs as reasons for moral actions. Imperatives are not assertoric utterances; as we know, they are not statements that can be true or false. Moreover, imperatives should only be followed if they are *valid*. So one should have a reason to follow any imperative (or to fulfill any order or command), and the fact that a command or imperative was made is obviously not a valid reason to act.<sup>13</sup> Even if imperatives could be transformed in assertions by some linguistic maneuver (as in Blackburn's quasi-realism), they are still not reasons for action, for imperatives are the sort of "things" that can only be rightfully performed if they are *reasonable*, that is if they are well supported by normative facts. But only moral beliefs express normative facts, and since natural facts do not warrant moral conclusions, there must be moral facts, viz. facts with moral significance for human actions – otherwise, we would be committed to an infinite and vicious regress.

I conclude that moral beliefs can and should express true moral facts, and this includes beliefs on duties. But how can we know that

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<sup>13</sup> It is still correct even if it is true that people in fact follow commands by habit (for habits can be normatively assessed).

a moral belief expresses a fact? This is another epistemological rather than metaphysical problem. I don't have space to develop it here, so let me go back to the semantics of moral language, and more specifically to the semantics of duty.

## 2

Let's admit that the language of morals is a mess. We use such thin notions like good and bad (and evil), or right and wrong, in a very fuzzy sense. The philosophers Stephen Toulmin and Albert Jonsen once said that although at the theoretical level disagreements are very easy to produce, in the practical domain there is more moral consensus than disagreement (Toulmin & Jonsen, 1989, p. 24). Toulmin and Jonsen think that this is a reason to prefer a casuistical approach in practical ethics over theoretical. They are right, but I suspect that our fuzzy moral concepts employed in moral theoretical discourse contribute more to the difficulty of attaining agreements on the theoretical side than our disagreements on theories and principles. Some say that the days of linguistic philosophy are finished, and some say that it happened for the best; but, agreeing with Crisp, "it is in some ways regrettable that reflection on ethical concepts is now significantly less common than it was in the days of 'linguistic philosophy'" (Crisp, 2006, p. 1).

The task is not easy, however, and one problem can be found on some basic semantic agreements. Philosophers do not agree about the scope of morality, and they even agree about the meaning of "morality". We have to make decisions: so by "morality" let us take something like Leonard Nelson's definition, that is, as the „domain of duties“ (Nelson, 1956, p. 32-33). Nelson understands morality in a restrictive scope, which led him to differentiate real morality from mere moralism; for if morality is restrictive in scope, this implies that moralism "cannot be valid" (Nelson, 1956, p. 89). Nevertheless, Nelson's view is that morality should restrict itself to negative restrictions on behavior. But this is not sensible; there are claims to positive actions, and not only to omissions. Hence, if moralism represents the (though *invalid*) attempt to positively regulate social behavior, then it must be taken seriously as an issue of a theory of morals, at least at the "critical level" (Hart,

1963).<sup>14</sup> In any case, to say that morality is simply a system of norms for the positive regulation of human life is unfortunately to not give an instructive definition. Human life can be regulated by several different kinds of norms, so what follows if we assume that all of them are “moral” norms? In principle, nothing bad at all; but if we attach to the general idea of “normative regulation” the specification that it serves to qualify *every* action of either fulfillment or violation of a duty, then what we have is a real practical problem, and this is Nelson’s justifiable complaint (Nelson, 1956, p. 88–89).

Nelson’s restriction of morality to the theory of duties turns duty into the main concept of moral theory. It is controversial (at least for critics of deontology), but let’s assume that the concept of duty is at the core of the domain of morality. It is plausible that there are different kinds of “duties”. We have duties as citizens, duties as spouses, duties as teachers, as physicians and other professional jobs; we have also duties as friends, as fellows, etc. Some think that we have duties simply by the fact of being humans (I don’t think so). In spite of this, all duties seem to concern morality. Several thinkers claim that our duties concern obligations of justice, such is the case of Nelson (1956, p. 126).<sup>15</sup> Justice is certainly at the core of the domain of morality; the other notions are either inside or outside the scope of morality depending on other characterizations. See, for example, the notion of “goodness”. Certainly, there is moral goodness besides several other kinds of non-moral goodness. Several things can be good: my car can be a good car, Judith Thomson’s toaster can be a good toaster, a wine can be a good wine, and so on. But, of course, those claims do not quality those objects as “morally good” (see Geach [1956], 1976, Thomson, 1997). In the case of duty, it is different. Certainly, cars, wines, and even Thomson’s toasters are not the kinds of things that can accomplish any duty at all. Could we say that animals can fulfill duties? If so, how

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<sup>14</sup> See Hart: “I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished ‘positive morality’, the morality actually accepted and shared by a given social group, from the general moral principles used in criticism of actual social institutions including positive morality. We may call such general principles ‘critical morality’” (Hart, 1963, p. 20).

<sup>15</sup> This is also the case of John Stuart Mill.



could they do that? We can command an animal, but this does not imply that if the animal complies with my command it is fulfilling any duty. The same applies to infants and people with mental disabilities. Only rational adults can bear duties, even if other beings, including non-rational and non-human beings, can be the beneficiaries of them. Hence, duty is not like “good” (and “goodness”), a term that can be applied meaningfully to different contexts, except the moral context.

So then, *duty* is a distinctively moral concept, and “duty” is by the same token a distinctively moral term. “Good”, “goodness”, “right” and “rightness” are not specially or distinctively moral, for they can be employed meaningfully outside the moral domain. Duties as such are also distinctively social. Even if there would be duties concerning oneself (like Kant thought about the duty of not committing suicide), they would only be meaningful in social contexts (but this is not consensual). Of course, words can be used with different meanings. “Duty” can sometimes be used to refer not to duty as such, but to some requirement of prudence, or only to “rightness” in some emphatic sense.<sup>16</sup>

Let’s take “duty” as a moral term by excellence and morality as eminently social. Now “morality” can of course be viewed in a broad and a narrow sense, but it can also be viewed in a very broad sense. This very broad sense of morality in the field includes speculation and questions about issues like the search for personal happiness and what makes one’s life meaningful. But today “morality” is basically viewed as *social* morality; that is, the notion behind Scanlon’s idea that there is a set of things and actions that “we owe to each other” (Scanlon, 2000). This is a narrow view on “morality”. In this case, duty (or moral duty) is presumably the core notion of any social positive morality, since the function of duty is, in a very broad sense, to “regulate social behavior”. All duties, in effect, coincide in its range and meaning with (and only with) the requirements of positive justice.

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<sup>16</sup> See Mill in *On Liberty*: “What are called duties to ourselves are not social obligatory, unless circumstances render them at the same time duties to others. The term duty to oneself, when it means anything more than prudence, means self-respect or self-development, and for none of these is any one accountable to his fellow-creatures, because for none of them is it for the good of mankind that be held accountable to them” (Mill [1859], 2003, p. 150).

Moralism, then, is the attitude of extending duties beyond positive justice. Tony Coady considers that there are different sorts of “moralisms”: moralism of scope, of unbalanced focus, of interference, and of the abstractionist, absolutist and deluded power moralist (2005, p. 17). Since I am focusing on the metaphysics of morals, my attention will be on the problem of scope of deontic notions associated with that of duty. “To overmoralize” on duty will mean here the attitude of reducing all possible deontic attitudes to the deontic notion of duty. Let’s see.

Let us again take Nelson’s critical view that, by a moralistic guise, every action is either a fulfillment or a violation of duty. This view expresses an absolutist view of moralism, and this is plausibly the common sense moralistic view. Let’s simply call this *moralism*. What does this imply? Take  $\alpha$  as a symbol of some action. The moralistic view is that either  $\alpha$  is a fulfillment or a violation of duty. Take S as a subject; either the assertion that “S has a duty to  $\alpha$ ” or the assertion that “S is forbidden to  $\alpha$ ” is true. Note that by this guise “permissibility” simply means “duty”, for if S has a duty to  $\alpha$ , then S has permission to  $\alpha$  and is forbidden to not- $\alpha$ . But in this case, if S is permitted to  $\alpha$ , then they are necessarily under a duty to  $\alpha$ ; for if S is permitted to  $\alpha$  they cannot be forbidden to  $\alpha$  (since “forbidden” simply means “not-permitted to”). The only remaining possibility is that they are under a duty to  $\alpha$  (otherwise they would be prohibited to do it).

Note that *moralism* conveys an insane deontic logic. Duty implies permissibility; but in all deontic systems permissibility does not and cannot imply duty; if permissibility implies duty, duty and permissibility would be deontically equivalent.<sup>17</sup> But duty and permissibility are not and cannot be equivalent modal notions. The statement that “S has a duty to  $\alpha$ ” is not equivalent to “S has a permission to  $\alpha$ ”, for the permissibility to  $\alpha$  does not imply any duty.

One consequence of *moralism* is that in extending duties outside their proper domain, the modal idea of permission simply becomes meaningless. This is of great consequence for the discussion on “moral permissibility”. An action is morally permissible in one sense if it is an action required by some duty. This is true because duty implies per-

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<sup>17</sup> The emphasis on the impossibility of moral permissions seems to be a remarkable characteristic of modern consequentialist moral theories.

missibility. However, we can speak of permissible actions in two other distinct senses. An action can be permissible even if it is not required by duty. The common-sense view sees this action as “morally” permissible; but in a non-moralistic guise it is *simply* permissible. Forbidden actions cannot be required by duty; but permissible actions can be required either by duty or by other “broad” moral requirements (besides supererogatory actions; but permissibility includes actions required, in a broad sense “morally”, not exactly by duty – they are actions that deserve our praise for the fact that their agents have made them with no personal interests but for the best reasons, sometimes even at personal cost). Note, nevertheless, that no one has a duty to perform neither supererogatory actions nor permissible but commendable actions; and, importantly, no one deserves reproach or censure, blame or indignation, in the case of omissions.

This opens up a case for the notion of “moral ought”. “Ought” is not a moral notion as such.<sup>18</sup> Like “good”, “goodness”, “right”, and “rightness”, or “wrong” and “wrongness”, “ought” can be employed outside moral domains. Nevertheless, it is certainly meaningful to say that a person “morally ought” to do something.<sup>19</sup>

So then, what is the relation between our duties and what we *ought* to do? It seems acceptable to say that if S has a duty to do  $\alpha$ , then S

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<sup>18</sup> See: Skorupski, 1999: Chapter VII (The Definition of Morality). Since we can obviously use the word “ought” in spite of “duty”, some definitions of *duty* can appear to be circular. This can be solved if we interpret, like Skorupski’s interpretation of Mill’s view on the concept of “duty”, that the “ought” in the *definiendum* is moral (in my words, “duty”) and the “ought” in the *definiens* is not. This was what Mill tried to say when he wrote that duty is a “thing that may be exacted”; so, in some stipulated circumstances, “ought” should be exacted in some way. “General utility” in Mill’s theory, as remarked by Skorupski, “stands outside morality, as the practical source of rational practical oughts” (p. 139). Even if I we disagree that all “rational practical oughts” are grounded in “general utility” (in fact we are still in need of a good theory about what grounds are relevant, if one or more principles are involved, and the practical reasonable human decisions in use), Mill’s broad distinction between duty and oughts is correct and persuasive.

<sup>19</sup> It is meaningful even if Elizabeth Anscombe is right in saying that “morally ought” is a fishy term inflated by mere pretended meaning, and that the expression is a residue of some old conception of morality that does not have social valence anymore. See Anscombe’s *Modern Moral Philosophy* (1958). For a criticism on Anscombe’s view, see Crisp (2004, 2006).

*morally* ought to do  $\alpha$ . It is possible, through an arrangement of circumstances, that although in fact S has a duty to  $\alpha$  they actually ought not to do  $\alpha$ . I'm not sure if, in this case, we should say that S *morally* ought not to do  $\alpha$  besides the fact that they have a duty to do  $\alpha$ .<sup>20</sup> I prefer to simply say that in this case, S ought not to do  $\alpha$ , besides the fact that they actually have a duty to do  $\alpha$  (that they have a *moral* pro tanto reason to do  $\alpha$  but, all things considered, this is not what they actually ought to do).<sup>21</sup>

It's not easy to present examples, for all examples are subject to controversial discussions. Take the duty of not lying. Suppose that Smith has a duty not to lie. Smith is a witness to a crime and, in a trial, the judge asks Smith to say what he knows about the incident. Smith fears that if he tells the truth, he or someone in his family could be endangered, for the murderer is free. Thinking about what to do, Smith decides not to tell the truth. Suppose that Smith was right; the murderer almost certainly would harm someone in his family if he tells the truth. This is a case where we could say that S (Smith in this case) has a duty to do  $\alpha$  (to tell the truth about the incident, for he is a witness), but in fact S ought not to do  $\alpha$  (that is, Smith ought to lie and act against his duty). Would we say that, in this case, Smith *morally* ought to lie? Why? Would we say that Smith had two conflictive duties, to tell the truth and to not tell the truth? In which sense does Smith have a duty to not tell the truth? He doesn't have this duty, yet nevertheless, to act contrary to his duty is what Smith ought to do.<sup>22</sup> But although it is correct to say that Smith ought not to tell the truth considering all the circumstances, to say that Smith had a "moral obligation" or a moral duty to lie in this context is beyond the truth; this would be an exam-

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<sup>20</sup> Richard Kraut in *Doing Without Morality* proposes that "when we say that someone has a duty to X, meaning that it is a moral duty, then we will be taken to mean that there is a reason in favor of his doing X, namely the very fact that X is his moral duty" (Kraut, 2006, p. 167).

<sup>21</sup> I'd like to stress here a difference to the famous Ross account on *prima facie* duties (Ross, [1930] 2002). See Thomson (1990).

<sup>22</sup> This difference between "duty" and "ought" was splendidly presented by Judith Jarvis Thomson in the first chapters of her book *The Realm of Rights* (1990). My view here is simply an extended use of her very precise notions. We could call it a Thomsonian approach on the difference between duties and "oughts".

ple of what I'm calling moralism. After all, if Smith decided to tell the truth he would certainly be accomplishing his duty.

Another way of showing the difference between an action that we ought to do because it is required by duty and a permitted action that we ought to do by several good reasons (perhaps "moral" in a broad sense) is by paying attention to the different reactive attitudes displayed in the case of non-fulfillment of a required action (Strawson [1962], 1974; see also Copp, 1997, and Prinz, 2007). See, for example, indignation. Indignation is a vicarious reactive attitude we normally display in the face of the belief of violation of others' rights (and also a reaction we display against others in the face of their violation of our own rights).<sup>23</sup> To illustrate this, let's take a previous case but substitute Smith for John. John also has a duty to tell the truth, since he is involved in a trial, but suppose that he doesn't have any good reason for

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<sup>23</sup> Jesse Prinz called indignation an emotion secondarily derived from anger, but calibrated to injustice (Prinz, 2009, p. 69). Therefore, indignation is not only a vicarious attitude, as Peter Strawson thought (Strawson, 1962). In the face of an injustice committed against us we don't feel resentment, but anger and indignation. Prinz also distinguishes between anger and indignation. Indignation is, as was said above, a reactive moral emotion calibrated by injustice. Since Prinz takes justice as meaning "fairness, equity and proportion", he concludes that there are rights that are not claims for justice, and the moral reactive emotion related to their violations he calls only anger, or better *righteous* anger (p. 70). It is nevertheless plainly true that people can feel anger without any conscious claims about rights. Prinz describes an example described by Baier (1967) of a son that is angry with his parents because they used the money saved for his educational costs for their extravagant vacation. The son realizes that he cannot claim the money and says to his father: "You don't have any obligation to pay my debts, but I'm angry at you for your choice". My point is that if the son rightly concluded that he didn't have any rights to claim, his anger is wrongly "calibrated". This would be an example of what I call the phenomenon of moralism. What the son is actually trying to do is use a psychological artifice to cause reactive emotions in his parents (perhaps unconsciously), but it would in fact be normatively inappropriate if the parents actually did not have any duty to pay his education. Perhaps, however, the correct analysis of the situation is different. Of course the son had rights to the money. In this case he has reasons to feel angry, for the father had a duty to pay his educational debts. What has happened is that the son accepted the parents' decision maybe because they had good reasons (without moral permission for sure) to use the money in their vacations, or maybe because they have the power to change their son's rights. In any case, the parents certainly have to apologize. The son can understand the situation, but the reactive emotion is ineffable.

doing otherwise. John then lies. One can feel indignation from John's behavior, especially if John's lie contributed to an injustice. But now take Peter who, like Smith, had good personal reasons for not telling the truth. In Peter's case, we probably also excuse him for lying, and our reactive attitude of indignation would be markedly different, diminished or, in some cases, even suppressed (depending on the stringency of his reasons). Suppose he eventually does not lie. What Peter did was exactly what was required by law; that is, he told the truth. Peter could have lied of course, and in this case we would have approved of it (for he also, like Smith, had good reasons to lie). But, contrariwise to Smith's case, in John's case we would have gone too far if we had felt angry and indignant with him because he didn't do what we thought he should have done (what we think we would and *should* do in his place). *Disappointment* is perhaps the common and correct vicarious attitude in this respect.<sup>24</sup>

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<sup>24</sup> Perhaps we could say that there are *moral* disappointments besides *indignation*, that is a reactive attitude that is *always* moral. Copp also suggested the possibility of a "morally neutral reaction" besides those hot reactions like anger and indignation (Copp, 1997, p. 452). I'm not sure about this, but my suspicion is that the added "moral" qualification is superfluous in both cases. If, for example, I ask for some help but my request is not accomplished, if I really don't have any claim-right to the help, it's not appropriate for me to feel indignant, only disappointed. People feel angry in those cases, but this is just what I'm trying to note regarding the issue of moralism. An example nevertheless would be a situation in which we may feel indignation when someone does not reciprocate a favor (or at least say "thank you") (see Prinz, 2009, p. 69). He is certainly right that we may feel indignation in those cases, but this does not imply that our reactions are "well calibrated". Perhaps people think that all persons have a duty to reciprocate favors by answering "thank you". Perhaps we have a moral duty of gratitude that is precisely discharged this way. But indignation is sometimes excessive and a sign of moralism. Nevertheless, since disappointment is not of course the right reactive emotion in those situations, Prinz can be right that this implies that people have a moral duty to manifest gratefulness. Anyway, all disappointments are reactive attitudes concerning actions we think are required from others. Those actions have a marked moral importance in a broad sense. Disappointment, moreover, is (like indignation) usually vicarious. We can feel disappointment towards ourselves (with some kind of detachment), but frustration or feeling upset are maybe the usual reactions. But what makes the difference between disappointment and indignation here is that in the first case we are not dealing with actions strictly required by duty. Perhaps there is an intermediate case; I'm thinking of those situations of duties required by laws whose infringement represents not a *mala in se*, but only *mala prohibita*.

Maybe my examples are too parochial. Perhaps we should illustrate the same point through a better example, the problem of “dirty hands”. But the problem with dirty hand examples is that there are not any general rules that can support the idea of a “moral warrant” for those political practices for every casuistical situation. All tentative generalizations of the problem, in trying to stipulate a general rule by means of which a politician or an official can be said to have acted for good reasons besides the “dirty” one, are unsuccessful. But it is plainly possible to devise a general situation where a politician or an official has a duty to disclose information publicly and this is what they ought to do. My suspicion is nevertheless that this does not apply to the situations frequently cited in the literature, especially those of war. In war, an authority is usually not under any duty to tell all the truth to the public. Hence, it is plausible that in periods of war authorities are licensed to not publicize information that in times of peace they have a duty to disclose. Someone could say that to lie is different than not telling the truth. Maybe so, but the circumstances can make it the same. It is possible that in times of war, authorities could have the privilege to tell lies to the general public for the sake of military aims. Nevertheless, some think that this privilege applies also to issues of national security even in times of “peace”. One big difference between those two circumstances is that only in the first case is the privilege acceptably a *legal* privilege, that is a transparent legal privilege – at least in democratic societies. Moral (or political) arguments in defense of the morality of the second kind of practice seem to involve a kind of moralism (should we call it a pragmatist or a utilitarian moralism?). In any case, the problem of “dirty hands” is more complex than the problem of the existence or not of a political duty to disclose information to citizens in exceptional situations.

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In cases of *mala prohibita* the reactive attitude is usually a kind of “disappointment”. This emotional difference is compatible with what psychologists call the “conventional-moral distinction” (Blair 1995). Nevertheless, even in those cases people can feel indignation when they realize that the accomplishment required with those civil laws is also required by a civil duty of all of us to respect the law (that is, a duty correlated with a common claim-right that all citizens obey the laws).

Judicial Procedure and Argumentation:  
How Discursive is the Legal Discourse?

André L. S. Coelho





## 1. Introduction

In *Between Facts and Norms* (BFAN), Habermas gives little consideration to the judicial procedure. The issue makes its first appearance in Chapter V, where it plays the role of a discursive substitute for Dworkin's monological judge Hercules, then comes again for a discrete farewell in Chapter VI, where problems of the separation of powers and the open character of the constitutional project stand out as the main subjects of concern. In both cases, the judicial procedure is depicted as a discourse that must have place within the constraints of a legal order and of factual limitations. This approach is not only insufficient to deal with the vast complexity of the issue, but also idealized and impotent to the point where its critical-theoretical key becomes barely recognizable. The concept of the judicial procedure as involving a tension between correction and consistency on one side and between argumentation and regulation on the other side is too simplistic, narrow, and naïve and in serious need of a reformulation.

The aim of this paper is to point out the shortcomings of Habermas's approach to the judicial procedure and to propose a reformulation of that approach. As both our criticism to Habermas's treatment of the subject and our proposal of reformulation will be grounded on the idea of the tension between facticity and validity (TBFV) as a critical-theoretical scheme of investigation, we consider it necessary to explain the central role of the TBFV in the structure of BFAN as a whole, then to detail the elements of the TBFV both in law in general and in the judicial procedure in particular. Next, we list and explain the shortcomings of Habermas's approach in a way that already makes clear what we think a suitable reformulation should bring to the table. After that, we present our proposal of reformulation, where we change the elements of the TBFV in the judicial procedure both in the internal and the external sides of the tension. In the end, we try to justify our proposal in terms of a critical theory where concepts simultaneously satisfy the history of the theory and the potential for a diagnosis of time.

## 2. Structure of BFAN

BFAN is composed of nine chapters and can be divided in four main parts. In the first part, corresponding to Chapters I and II, Habermas presents the notion of the TBFAV as passing from language to law and formulates the kind of critical-theoretical methodology that he deems appropriate for the study of law and democracy. In the second part, corresponding to Chapters III to VI, Habermas deals with the internal TBFAV and provides a rational reconstruction of the self-understanding of the modern legal orders, concentrated in the concept of human rights and popular sovereignty and of their relationship from the point of view of a discursive theory. In the third part, corresponding to Chapters VII and VIII, Habermas deals with the external TBFAV and confronts the highly idealized version of the relationship between law and democracy provided in the second part with empirical models of legislation and of the public sphere capable of sustaining the realistic character of those idealizations. Finally, in the fourth part, corresponding to Chapter IX, Habermas provides what he takes to be his diagnosis of time, where he describes two social visions of society (the paradigms of law) that have informed the relation between law and democracy to the moment and perceives the rise of a new paradigm of law, the procedural one, where the co-originality of private and public autonomy would be taken seriously and the struggle for human rights would take the form of a struggle for participation in the self-legislative process.

As we can see, the idea of the TBFAV not only is important for the explanation of that historical-sociological scheme of the four main characteristics of modern law that Habermas names the “legal form” and plays a very important role in many of the arguments of the second part of the book, but is also an organizing idea for the structure of the book as a whole. For the project, exposed in Chapter II, of explaining the relation between law and democracy from the point of view of a theory that integrates ideas and interests in the social order, instead of separating the normative and the empirical or confronting them as separate reigns, can be fully realized only by a conception of law and democracy that already conceives of both the normative idealization and the empirical reality as integrating ideas and interests. That’s why the TBFAV cannot but permeate every level of the argument throughout the whole book.

### 3. TBFAV in Law

In Chapter I, Habermas explains the TBFAV as passing from language to law. In language, the tension arises from the fact that both meanings in the semantic level and validity claims in the pragmatic level are at the same time connected to their contexts of enunciation and committed to idealizations that overcome every possible context. So words and statements on one hand bring idealizations to reality, giving ideas a concrete and particular existence in time and space, but on the other hand they commit reality to idealizations, leaving room for every realization to be criticized in the face of the exceeding value it always fails to realize. This dynamic creates a sort of dialectical “push-and-pull” movement between reality and idealization, which Habermas calls a “tension between facticity and validity”, that appears even in the German title of the book.

According to Habermas, modern law, inasmuch as lost connection with tradition, needed to be based on discourse and reason, and that’s why the TBFAV that exists in language manifests itself also in law. However, when Habermas formulates the version of the TBFAV that shows in law, he does not indicate elements, like those of language (meanings and validity claims) that are linked to reality and idealization at the same time, but now he presents pairs of concepts in law that have between them the same kind of TBFAV that meanings and validity claims have within them in language.

What these pairs of concepts do have in common with meanings and validity claims is that one of the pairs relates to the equivalent of the semantic level (the level of product, that is, to norms themselves) and the other one with the equivalent of the pragmatic level (the level of process, that is, to the production of norms). At the level of product, the first conceptual pair is freedom and coercion. Habermas recurs to Kant’s formula that legal laws must be at the same time laws of freedom and laws of coercion, that is, laws that protect freedom but are allowed to employ coercion for that very protection of freedom. At the level of process, the second conceptual pair is positivity and legitimacy. As the context of modern law is post-traditional and post-metaphysical, the laws must result from fallible and alterable decisions of some men empowered with authority but have to meet the rational demands of subjects that are not willing to obey just any laws put upon them.

Modern law must find out a way to be at the same time humanly and timely produced and rationally acceptable, that is, positive and legitimate. Those are the double axis of the TBFAV in law, namely the tension between freedom and coercion and the tension between positivity and legitimacy. But they do not cover all the aspects of the TBFAV that concern to modern law. There is another aspect.

Both the tension between freedom and coercion and that between positivity and legitimacy emerge in the very idea of the modern law. They do not emerge *from* the idea of law, because Habermas explicitly says, while talking about the legal form which comprises as elements the four poles of the two tensions referred above, that it cannot be conceptually (or transcendently) deduced and results from a social-historical process of societal modernization. But they emerge *in* the idea of law, because they form part of the self-understanding of modern legal orders. This self-understanding must be confronted with empirical explanations of the functioning of democracy, especially with those that raise doubts about the reality of the classic idealizations in democratic thought. This confrontation between self-understanding and empirical models brings about a second kind of TBFAV that Habermas calls “external tension” and which is the main subject of Chapters VII and VIII.

For the aims of our paper, it doesn’t matter how Habermas tries to develop and resolve those tensions, but the role that said tensions play in the structure of the method and argument of BFAN does matter. It matters because we will, in point 5, insistently compare with that more advanced treatment of the TBFAV the considerably more simplistic and naïve version of it that Habermas applies to the judicial procedure, which we will now present in point 4.

#### 4. TBFAV in the Judicial Procedure

As we said in the Introduction, the judicial procedure makes its first appearance in BFAN in Chapter V, dedicated to the indeterminacy of law and the rationality of jurisdiction. At that point, the judicial process is invoked as the discursive substitute of Dworkin’s monological judge Hercules, the dialogical process capable of setting him free from his argumentative solitude and theoretical autism. Habermas’s argument

goes like this: judges must apply the law respecting the deontological character of the subjective rights and reinterpreting law as a whole in search for the only right answer – Dworkin is right about that; but they must not rely in a contextual substantial liberal morality neither construct, compare and select imaginary interpretive theories about legal rights – Dworkin is wrong about that; instead, they must rely on the discursive character of the judicial procedure and recur to pre-interpretations of rights in the paradigm of law that they belong to – that would be Habermas’s reformulation of Dworkin, taking Hercules away and replacing him with the legal discourse in a micro (judicial procedure) and a macro (paradigms of law) level.

The judicial procedure, therefore, places Dworkin’s interpretive practice into a discursive frame. The fact that the judicial procedure plays the role of a discursive corrective and counterbalance in Habermas’s argument of Chapter V explains why the TBFV that Habermas applies to the judicial procedure in particular is far less demanding and critical than the one that he applies to law in general. When he says something about the TBFV in the legal procedure, that is what he says:

In the administration of justice, the tension between the legitimacy and positivity of law is dealt with *at the level of content*, as a problem of making decisions that are both right and consistent. This same tension, however, takes on new life at the pragmatic level of judicial decision making, inasmuch as ideal demands on the procedure of argumentation must be harmonized with the restrictions imposed by the factual need for regulation (BFAN 234, emphasis in the original).

So, similarly to what happens with law, the judicial procedure presents two internal tensions: at the level of product (that Habermas refers to as the *level of content*) the tension is between correction and consistency; at the level of process (that Habermas refers to as the *pragmatic level*), the tension is between argumentation and regulation. Besides, Habermas treats the first tension in the judicial procedure (at the level of product), that is, that between correction and consistency of the final decision, as resulting from the second tension in law (at the level of process), that is, that between positivity and legitimacy. Although Habermas says nothing further, we can suppose that what he meant

is that the demand for the law to be rationally acceptable (legitimate) converts into the demand for the judicial decision to be rationally acceptable (correct), while the need of law to be determinate (positive) converts into the need of the judicial decision to be corresponding to the existing law (consistent)<sup>1</sup>. At the level of process, Habermas brings about a new tension, now between argumentation and regulation. The judicial procedure is conceived of as a discourse, not idealized and diffuse, but actually realistic and institutional. Because of that, the judicial procedure must take the form of a regulated discourse, with the regulation at the same time embodying and limiting the ideal conditions of discourse with its temporal, social, and material determinations. That tension ends up being between normatively ideal and empirically possible.

## 5. Shortcomings of Habermas's Formulation

We said that the role of discursive corrective and counter-balance that the judicial procedure plays in Habermas's argument in Chapter V of *BFAN* explains why the *TBFAV* applied to the judicial procedure in particular is far less demanding and critical than the one applied to law in general. In the current section of the paper, we will make more clear many of the shortcomings of Habermas's formulation of the tensions typical to the judicial process.

First, Habermas's approach depends on the controversial claim that the judicial process is a discourse. Habermas argues that although the plaintiff and defendant are invested in pursuing their own interests, they have to formulate their claims and arguments *as if* they were con-

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<sup>1</sup> There is no explanation of why the level of product of the judicial procedure is not related instead to the level of product of law, that is, to the tension between freedom and coercion; one might think that the judicial decision, in order to be correct, ought to be freedom-protective, that is, right-based, while, in order to be efficacious, ought to be coercive, for a judicial decision is nothing but a norm, one with strict limits of content given by the laws; Habermas, however, gives no account for that relation between the level of product of the law and that one of the judicial procedure neither appears to take seriously the consequences of the fact that the judicial decision is also a norm.

tributions to the discovery of the right answer, while the judge, as an uninterested part, has to consider their speeches only from the point of view of that cognitive value. Apparently, the interaction between plaintiff and defendant is something like a strategic relation that is institutionally constrained to take the form of a communicative relation and that has their contributions taken and evaluated *as if* that performative cooperation were true.

We now see that if the judicial procedure is to be taken as a discourse, that means that the conception of discourse employed here is far away from (not to mention at odds to) that cooperative search for the truth with intelligibility, sincerity, freedom, and equality that made Habermas's discursive ethics worldly known in the 70's. For this discourse that we find here is not only institutionally limited and constrained, but also open to all kinds of manipulation, falsification, coercion, and inequality under its pompous veil of discursivity. But nothing of that appears to be a serious obstacle for the classification of the judicial procedure as a discourse as long as the parties play their characters and the impartial judge redeems the relation from all its sins by simply and naively taking its make-believe seriously.

The objections against that claim are many and of different kinds. In the judicial procedure, the speakers don't try to convince each other, but a third party, and the decision is not the product of their learning and consensus, but an act of decision and authority taken by the judge. In the judicial procedure, the parties formally have the same opportunities and terms most of the time, but material differences of means and of judicial bias produce serious distortions and inequalities. In the judicial procedure, the real parties, plaintiff and defendant, barely understand the language in which the debate is given and the measures that their counselors take throughout the process. In the judicial procedure, the parties retain evidence or facts that the other cannot prove to exist or be true, they rearrange their testimonies to make them suitable to their interests, they omit, distort, simplify, amplify, seduce, manipulate, mislead, deceive, pretend, and give the facts so many faces and cuts to the point where truth ceases to exist, or to be recognizable, or even to matter. Some of those distortions are possible within the law, some of them are possible despite the law, but all them are possible with the knowledge, acquiescence, and connivance of the law. That makes it very difficult to defend that the judicial procedure is a discourse.



The second shortcoming of Habermas's formulation is that the TBFV in the judicial procedure suffers a *deficit of facticity*. Looking back at the TBFV in law in general, we see two poles of facticity, that is, coercion and positivity, that represent non-normative, factual features necessary for the certainty and efficacy of the law and solid limitations to the normative claims of freedom and legitimacy. They are factual conditions that are also factual limits, a sort of resistance against the claims of validity from the part of *rival* claims. But if we look ahead again at the TBFV in the judicial procedure, the two new poles of facticity, that is, consistence and regulation, are not non-normative, factual features and do not raise a rival claim. On the one hand, consistence is agreement to the law, which, in modern law, is not a limitation on the correction of the final decision, but is rather a part of what means for a legal decision to be correct. *Legal* correction demands consistence, for a legal decision would be *less* (not more) correct without its agreement to the law. Consistence is more of a *component* of legal correction than a rival claim against it. On the other hand, regulation might be considered a genuine limit on the logic of argumentation, for the argumentation would be more realized if the regulation did not impose limits of time, space, themes, persons, and evidence, and the debate could take whatever form it needed to and keep going for as long as it takes. By limiting the factual argumentation, regulation comes as a condition for the judicial procedure to have an institutional realization and to provide the parties with a solution for their controversy. It is not that regulation satisfies any purpose other than understanding itself, but rather that it gives argumentation the necessary conditions and limits for an empirical manifestation. In that sense, regulation is not a rival claim, but rather a limit on the normative claim as a factual cooperative condition to make it happen in the world. Consistence being a normative requisite and regulation being a factual cooperative condition, both poles of facticity in the judicial procedure exhibit, compared to the ones in law, a serious deficit of facticity.

This problem of a deficit of facticity is aggravated by a third problem, which is the lack of an external TBFV. In law, both the tension between freedom and coercion and the one between positivity and legitimacy are aspects of the internal TBFV, which in turn is complemented by another tension that Habermas calls "external": the tension between the self-comprehension of the modern legal orders and the

empirical realization of democratic processes. This external tension is crucial for a critical-theoretical approach that seeks to go beyond both a normative philosophy detached from reality and an empirical realism blind to the normative aspects of the social (BFAN, Ch. II). By reconstructing the self-comprehension of modern law, Habermas makes the discourse theory to fill the gaps of the false dichotomies that the tradition deemed insoluble. By providing the self-comprehension of modern law with a believable conception of the empirical functioning of democratic processes, Habermas inbreathes the theory with some plausibility. But that concern is absent from Habermas's treatment of the judicial procedure. There the tensions within the self-comprehension of the modern law are all that he deals with. Apparently, one century of philosophical criticism and empirical denunciation against the idealized conception of the judicial procedure as an impartial and rational decision-making have not sufficed to warn Habermas against the perils of taking the self-comprehension of the judicial procedure to be true without proper evidence. Habermas trusts in the argument of the discursive character of the judicial procedure more than would be advisable or justified for a critical-theoretical approach.

Finally, there is a fourth problem with Habermas's formulation of the TBAV in the judicial procedure, which is its *diagnostic deficit*. A critical theory is supposed to give a diagnosis of time, spotting trends of domination and potentials of emancipation in a concrete epochal context. Now Habermas's formulation is not a complete critical theory of the judicial procedure, so it seems inappropriate to demand from it diagnostic power. In a critical theory, however, the theorist must formulate a concept or treat a phenomenon taking account of its implications for a social diagnosis. That's why we should consider unsatisfactory conceptual choices that, when faced with the social context in question, appear to give no critical standpoint to evaluate its scenario and trends. In the case of the judicial procedure, the major trends of our time are, as far as we see it, the standardization of jurisprudence, the turn to forms of alternative dispute resolution (ADR), and the judicialization of politics (which we will speak about in the next section of the paper), none of which even begin to be critically analyzed by the tensions between correction and consistence and between argumentation and regulation.

## 6. Proposal of Reformulation

Considering the above explained shortcomings of Habermas's formulation of the TBFV, we find it necessary to depart from a reformulated version of it. In this section of the paper we will present our proposal of reformulation and show how, in our opinion, it surpasses Habermas's in every one of the indicated shortcomings.

For solving the problems of the naïve assumption of the discursive character and of the facticity deficit, we propose to replace the poles of the TBFV in the judicial procedure. At the level of the product, instead of a tension between correction and consistence, we propose a tension between *legal correction* (that includes consistence) and *social functionality*. With *legal correction* we mean that the final decision is supposed to be the most rationally acceptable solution for a particular case within the limits of the existing law. It does not insist in the false opposition between correction and consistence, but rather takes consistence as a component of the legal correction. With *social functionality* we mean the extralegal political, social, and economic consequences of the decision that can be taken in account by the judges and the public as a competing claim against legal correction, that is, as an extralegal reason not to make the most legally correct decision. By conceiving of the social functionality as grounded in extralegal consequential reasons, we provide the judicial procedure with an anti-discursive force and a feature heavier in facticity. With the idea of a tension between legal correction and social functionality we refer to the tension between (a) the decision as a sole result from the elements within the existing law and the case in question and (b) the decision as a means to affect some ends in a particular way rather than another. In a way, this tension mirrors the one in Austin and Searle's speech acts theory between illocutionary meaning and perlocutionary effect, which in Habermas is related to the dichotomy between the strategic and performative use of language.

At the level of the process, instead of a tension between argumentation and regulation, we propose a tension between *institutional argumentation* (that includes regulation) and *institutional decisionism*. By institutional argumentation we mean the purpose of the judicial procedure to be a cognitive search for the correct answer within the institutional limits of legal regulation. Again, instead of insisting on the opposition between argumentation and regulation, we take regulation

as a necessary condition for the sort of argumentation that takes place in institutional contexts. By institutional decisionism we mean the claim of the judicial procedure to be an authoritative exercise of political power to say the last word and put end to a social conflict. By conceiving the institutional decisionism as related to political authority and power, we provide the judicial procedure with an anti-discursive force and a feature heavier in facticity. With the idea of a tension between institutional argumentation and institutional decisionism we refer to the tension, much known in the history of the theory of the judicial procedure, between knowledge and power, *cognitio* and *voluntas*, truth and authority, that is, between (a) the judicial procedure as a search for justice and (b) the judicial procedure as an exercise of power. Now the closest relation would be with Habermas' dichotomy between communicative and administrative power (BFAN, Ch. IV), both of which must be recognized to be present in the judicial procedure.

Still in our reformulation, we would add to both internal tensions an external one: between the self-comprehension of the judicial procedure and its empirical realization. Here we would have the proper space and chance to welcome criticisms and denunciations against the idealized conception of the judicial procedure formulated by both the legal realist movement and the social sciences. It would be necessary to respond to such challenges by proposing a believable empirical model of the judicial phenomenon capable of retaining the constitutive force of the idealizations without losing grip of the critical point of view on the subject. We must not dismiss at the outset the critical studies by using something like a trick of words, sustaining that they have not understood correctly the discursive character of the judicial procedure. Instead, we must distinguish which of those studies can be incorporated or translated to a critical-theoretical point of view and which are too dependent on reductionist behaviorism, raw realism, and blatant non-cognitivism. Themes such as unequal access to justice, judicial bias, jury manipulation, and the preservation of the judicial status quo cannot be ignored by any serious attempt of critical theory on the subject.

Last, but certainly not least, is the diagnostic power of our reformulation. As we said briefly earlier, there are three contemporary phenomena that we consider to be the major trends concerning the judicial procedure in our time: the standardization of jurisprudence, the turn to forms of alternative dispute resolution (ADR), and the judicializa-

tion of politics. Our demand was that the formulation of the TBFV in the judicial procedure provided at least a critical standpoint to evaluate each of them. Now we will speak of them and of how our reformulation helps to assess them from a critical-theoretical point of view.

The standardization of jurisprudence is a trend, observed in legal systems both in the common law and in the civil law traditions, to submit the judicial decisions of lower courts to standards previously established by higher courts. The aim is to reduce the time spent with repetitive cases and to prevent scenarios where the decision made by the lower court would have no chance of prevailing in the appeal stage given the already solidly established decision standard of the higher courts. That saving-time policy is usually justified by saying that equal cases must have equal decisions and that a late justice is another form of injustice. Translated to the language of rights, those reasons would be formulated as the right, belonging to the parties, to be treated equally and to have their cases decided as soon as possible. A critical theory of the judicial procedure must give tools to evaluate this trend and its alleged reasons.

We consider that the tension between argumentation and decisionism has something to say about that trend. From the angle of argumentation, a legally correct decision must treat parties in equal cases equally, providing, in the ideal scenario, equal responses for their claims. However, the correction of the decision depends on the consideration of the arguments raised by each party in each case. The standardization of decision provides equality of results, but not of opportunity to interfere in the final decisions. The arguments of some parties will be heard, but the arguments of others will simply be assumed as not more relevant than the first ones and will remain unheard. By standardizing the decision for a type of case, the courts freeze the state of discussion in a particular point of the flow, denying the nature of open learning process implicated in the constant retake of the case. At the same time, from the angle of decisionism, solving multiple cases with a single decision-making is valued, with the standardization of decision representing a fantastic means to that end. Although the subject requires further examination, the appearance that we are before a case of celebration of decisionism over argumentation is very bright and transparent.

As for the turn to forms of alternative dispute resolution (ADR), we refer to the welcoming of methods of conflict-solution diverse from

the regular jurisdiction, such as arbitration, mediation, conciliation, negotiation, etc., in many legal systems in the world. Although these ADR's have many differences among them, they all have in common the preference for a type of solution negotiated and consented to by the parties themselves, with or without a third party, instead of by the judge through the mere application of the existing law. The justification for the turn to the ADR's consists in criticisms (functional and normative) to the regular jurisdiction, functional arguments about costs, time, and efficacy, and normative arguments about participation, dialogue, and consent. Not all the arguments listed can be translated to the language of rights. But some of them, if translated, would result in the following claim: citizens, even before being converted into parties in a judicial procedure, have the right to negotiate their interests with each other and to settle their own conflicts in the way they find is best. Put that way, the claim that supports the ADR's sounds not only plainly acceptable, but also an important increment to the discursive and inclusive character of the legal decision-making.

But the scenario changes its colors dramatically as soon as the trend in question is examined from the point of view of our proposed tension between correction and functionality. From the angle of correction, a decision must be the most rationally acceptable solution for a particular case within the limits of the existing law. The problem an ADR creates, then, is double: on the one hand, it disconnects the solution for the case from the existing law, cutting off the link between the decision in a particular case and the democratic will embodied in the laws; on the other hand, it embraces a strategic use of reason and language, for the "dialogue" that it promotes is not a cooperative search for the correct answer, but an exercise of negotiation with the advances and retreats typical of the calibration of interests. In lieu of the most rationally acceptable solution for a particular case within the limits of the existing law, it invites the parties to come to an agreement that is not a consensus, but rather a compromise. From the angle of functionality, the ADR's are not only sustained on extralegal reasons like costs, time, and efficacy, but they encourage the very parties to deploy functional and extralegal reasons to come to an agreement about their particular interests. Again, although the subject requires further examination, the conclusion that in this turn towards the ADR's there is a risk of functionalization of law appears to be very likely.

From the three trends in question, the judicialization of the politics is perhaps the most tortuous to be dealt with. In the sense that is most relevant for our debate, this phenomenon consists in the search for the judicial procedure to impose on the state the concrete obligation to promote a certain public policy or to realize for the individual in a particular case the abstract right that he or she would have had satisfied only by means of a public policy. The justification of this trend is normally made on the basis that the constitutional lists of rights make promises to the individual citizen which the state is charged to fulfill and that, owing to deficits of political representation, this individual citizen finds less and less in the traditional political channels and institutions efficacious means to make it happen. The judicial power would have the opportunity and the duty to make democracy more democratic by deploying its armed hand to coerce the state to be all its subjects deserve and expect it to be. In the language of rights, citizens cannot have the right to the end without having the right to the means to make it happen, if not through political methods, through judicial ones. Having a right would bring within itself the possibility of judicialization in case of repeated refusal.

We think that both of the internal tensions in the judicial procedure have some say on the judicialization of politics. Besides the political problems of violating the separation of powers and of transferring the decision on public resources and ends of the community from politics to law, the judicialization of politics implies, from the angle of correction, the submission of issues linked to the realization of ends to the language of rights and duties and, from the angle of argumentation, the treatment of issues of general interest in a discourse that does not contemplate different voices and competing demands and also does not rather listen to all the affected subjects. It would be a distortion of the type of discourse employed and a violation of the rule of consulting all the affected. On top of that, the trend to judicialize political debates would be explainable from the angle of functionality and decisionism: what makes the judicial courts appealing for the politically misrepresented citizens is that by resorting to functional and extralegal reasons, the legal discourse opens up for the wide range of motives in the argumentative spectrum of politics, while, by relying on authoritative decision-making, it gives the individual citizen the kind of power he or she usually feels deprived of in modern mass democracies. So,

despite the obvious complexity of the subject matter, our reformulated version of the TBFAV in the judicial procedure gives clear signs of its diagnostic potential regarding this phenomenon in particular.

Certainly, there is still much to be done in refining and developing our proposal of reformulation to Habermas's approach to the judicial procedure. From our point of view the TBFAV is a key concept for understanding and evaluating critically the judicial procedure in general and its contemporary trends in particular. But, precisely because of this crucial relevance, it requires a formulation that exempts it from the criticisms that Habermas' is vulnerable to and enables the critical-theoretical thinker to have a relevant say on some of the major trends of our time.





Democracy and Secularism:  
Remarks on an Ongoing Dispute

Luiz Bernardo Leite Araujo



One of the most disputed issues in recent years is the proper role of religion in democratic politics. Usually, the various positions taken on the debate are classified according to a binary code representing ideal-type perspectives: exclusive and inclusive.<sup>1</sup> What is troubling about this classification is the fact that no one holds a pure exclusivist or separatist view and, perhaps with the sole exception of Nicholas Wolterstorff,<sup>2</sup> all political philosophers endorse one version or another of the so-called standard approach exemplified by the work of John Rawls. According to the standard approach, as presented by Paul Weithman<sup>3</sup> and summarized by James Boettcher and Jonathan Harmon,<sup>4</sup> “respect for the freedom and equality of fellow citizens implies that basic or coercive political arrangements should be justifiable to them by the right sorts of reasons”, or by a suitable political justification “which addresses a diverse group of citizens and which satisfies some proposed condition or criterion”. In this sense, targeting primarily the problem of *political legitimacy*, concerning “how coercive laws and policies may be politically justified in light of a philosophically defensible normative standard”, the discussion also revolves around the quest for an *ethics of citizenship*, concerning “which obligations or excellences should be associated with persons in virtue of their roles as liberal-democratic citizens and officials”, thus requiring citizens not only to pursue a non-sectarian justification “but also, at times, to exercise restraint in

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<sup>1</sup> For an attempt to compile some of the most significant contributions to the debate concerning whether citizens should allow their religious convictions to filter into their lives within the political domain: Clanton, 2009. Representatives of the separatist and integrationist views, another way of classifying the two broad categories, are Bruce Ackerman, Robert Audi, Stephen Macedo, Thomas Nagel, and Richard Rorty, on the one hand, and Christopher Eberle, Paul Weithman, Michael Sandel, Jeffrey Stout, and Nicholas Wolterstorff, on the other.

<sup>2</sup> See his contributions in Audi and Wolterstorff, 1996.

<sup>3</sup> Cf. Weithman, 2002: 6–9.

<sup>4</sup> The following quotations come from their helpful introduction to a special issue on religion and the public sphere: Boettcher and Harmon, 2009.

their political appeal to religious doctrine”. My claim is that Charles Taylor does not pay sufficient attention to the inclusive, albeit weak, dimensions of John Rawls’s approach over the issue of religion and democracy. Once removed a possible ambiguity in the Rawlsian idea of public reason, I think that the controversy is strongly determined by Jürgen Habermas’s post-secular paradigm, which proposes a new implementation of the translation proviso but opposes the deflation of the distinction between religious and secular reasons.

“We are condemned to live in an overlapping consensus”. This statement is not of John Rawls, as one would expect, but of Charles Taylor, one of his most incisive and permanent critics<sup>5</sup>. Like the former, the Canadian philosopher tries to identify acceptable forms of coexistence and integration among citizens of liberal democracies characterized by a plurality of worldviews and conceptions of the good. Since the “modern moral order” is founded on the basic principles of the rights and liberties of its members (human rights), the equality among them (nondiscrimination), and the principle that rule is based on consent (democracy), it cannot but be organized around a “philosophy of civility” that emerged from the crumbling edifice of the cosmic-religious outlooks, giving rise to a new conception of the political in which the idea of “secularism” or “laïcité” has become an essential component. In modern democratic societies, social cohesion depends on an ethics of citizenship supported by communities whose reasons differ one from another, requiring a political justice equidistant from the different positions and a public language free of assumptions drawn from one or another form of belief and also – importantly – of disbelief.

So, for Taylor, a broad consensus was established on the secular (or *laïque*) feature of any liberal democracy. But a secular regime, whose main purposes are respecting the moral equality of individuals on the one hand and protecting their freedom of conscience on the other, should be understood in the larger context of the diversity of beliefs and values – religious or nonreligious – of the citizens. In his opinion, the so-called “secularism” refers to the response of the democratic state

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<sup>5</sup> Taylor, 2010: 33. The sentence reappears in at least two other texts, although inexplicably without the preposition (“We are condemned to live an overlapping consensus”): Taylor, 2011a: 319; Taylor, 2011b: 48. In what follows, see Araujo, 2011a.

to widespread diversity, and not exactly to the relationship between religion and political institutions. Taylor's notion of secularity "stands not only in contrast with a divine foundation for society, but with any idea of society as constituted in something which transcends contemporary common action",<sup>6</sup> and that's the reason for his agreement with the late-Rawlsian formulation of an "overlapping consensus"<sup>7</sup> between incompatible comprehensive doctrines on a "common philosophy of civility". As he says, "the point of state neutrality is precisely to avoid favoring or disfavoring not just religious positions, but any basic position, religious or nonreligious. We can't favor Christianity over Islam, nor can we favor religion over nonbelief in religion, or vice versa".<sup>8</sup>

However, considering Taylor's insistence on the self-sufficiency of reason as a distinctive feature shared by two of our major contemporary political thinkers, Rawls and Habermas, some disputed issues remain in this controversy whose origin seems to be in the very polysemy of the term "secular". From Taylor's standpoint, the complexity of this term disappears in the master narratives of secularization. Their "subtraction stories" make a "special case" of religion, defining secularism in terms of specific institutional arrangements, whose "fetishization" obliterates the fact that they are derived from the need to balance the goods – not always easily combinable – of the modern moral order, and invoking the "Wall of separation" or the "laïcité" – based on the radical opposition between the religious and the secular – as the ultimate criterion of modern secularity.<sup>9</sup> In this way, both philosophers, Rawls and Habermas, adopt one of the forms taken by the "myth of

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<sup>6</sup> Taylor, 2007: 192.

<sup>7</sup> On this notion, see Lecture IV (The Idea of an Overlapping Consensus) in Rawls, 2005: 133–172.

<sup>8</sup> Taylor, 2011a: 311.

<sup>9</sup> It is worth noting that the "Wall of separation" and the "laïcité" correspond to two historical models of what constitutes a secular regime, linked to the founding contexts of the American and the French Revolutions. These two forms of the dominant self-understanding of western secularism interpret the separation of religion and state as "exclusion" – mutual or one-sided, respectively –, as shown by Rajeev Bhargava, whose conception of secularism based on the idea of "principled distance" is endorsed by Taylor. And for him, Mark Lilla's *The stillborn God* is a representative book of the mainstream conceptions of western secularism.

the Enlightenment”, that is, the distinction in rational credibility between religious and nonreligious discourse, and hence remaining stuck in the old rut of a “fixation on religion” as the problem of political life in democratic societies.

In regard to Rawls, it seems to me very important to notice that the growing interest in the relation between religion and democracy led his political liberalism to an even more inclusive view of the public reason. In fact, in the Introduction to the Paperback Edition of *Political Liberalism*, the American philosopher identifies in particular attention to the nonliberal comprehensive doctrines the fundamental problem of the work, presenting the philosophical question it primarily addresses in the following way: “How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also to hold a reasonable political conception that supports a just democratic regime?”<sup>10</sup> Then he fosters a new revision of the idea of public reason exposed in the sixth lecture of the book, and refers for the first time to the *proviso*, specifying what he calls the “wide view” of public reason and adopting an even more permissive position concerning the introduction of comprehensive reasons in the public political forum. As Rawls puts it, “reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons - and not reasons given solely by comprehensive doctrines - are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support”.<sup>11</sup>

What am I trying to point out here? Briefly, my point is that, contrary to what Taylor assumes, Rawls rejects the identification of “public reason” and “secular reason”, insofar as the latter is defined “as reasoning in terms of comprehensive non religious doctrines”, whose values “are

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<sup>10</sup> Rawls, 2005: xxxvii. On the inclusive view of Rawls’s idea of public reason, cf. Araujo (2011b).

<sup>11</sup> Rawls, 2005: 462. This quotation comes from his last article, published in 1997 and included in the expanded edition of *Political Liberalism*. According to Rawls, “the Chicago article is by far the best statement I have written on ideas of public reason and political liberalism”, especially regarding their relation “to the major religions that are based on the authority of the church and sacred text, and therefore are not themselves liberal” (438).

much too broad to serve the purposes of public reason”.<sup>12</sup> Philosophical and moral doctrines are on a level with religion and are subject to the same restrictions imposed by the “criterion of reciprocity”. Therefore, Rawls emphatically denies that his arguments constitute a veiled form of secularism, considering – not without irony – that they could be regarded as a veiled form of religiosity. In his vision, there are two kinds of comprehensive doctrines, religious and secular, and the political arguments in terms of public reason are the common ground on which people can understand each other and cooperate.<sup>13</sup> Rawls’s central distinction is not between secular and religious reasons, but rather between public and nonpublic reason, the former applying only to fundamental political questions, namely, constitutional essentials and matters of basic justice.

The controversy lies more in the place and the application of the language shared by the members of a political community than in the religious or secular character of public reason. Taylor himself admits that “there are zones of a secular state in which the language used has to be neutral”, acknowledging that “the lines are hard to draw, and they must be drawn anew. But such is the nature of the enterprise that is the modern secular state. And what better alternative is there for diverse democracies?”<sup>14</sup> In this sense, I think that, once removed from the Rawlsian idea of public reason a possible lack of clarity to discriminate between political discussion and political decision-making,<sup>15</sup> the debate turns around the distinction between faith and knowledge preserved by Habermas, as well as around the appropriate forum for the basic political language of the secular state, an idea entertained to some extent by the three thinkers.<sup>16</sup>

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<sup>12</sup> Rawls, 2005: 452.

<sup>13</sup> Cf. Rawls, 1999d: 619–20. The “*Commonweal* Interview with John Rawls”, incorporated in his *Collected Papers* (pp. 616–22), took place in January 1998.

<sup>14</sup> Taylor, 2011a: 320–21.

<sup>15</sup> Larmore (2003) observes that “neither in *Political Liberalism* nor in *The Idea of Public Reason Revisited* does he note the difference between two forms of public debate – *open discussion*, where people argue with one another in the light of the whole truth as they see it, and *decision making*, where they deliberate as participants in some organ of government about which option should be made legally binding” (p. 382).

<sup>16</sup> In a recent article, Menny Mautner (2013) comes somewhat close to my claim when he notices Rawls’s failure to distinguish between “deliberation” and “justification”, argu-



Against Rawls, as is well known, Habermas argues that the so-called overlapping consensus is possible only with the adoption of a “moral point of view” independent of, and prior to, the comprehensive doctrines, which counts as a normative criterion for a nonarbitrary identification of the reasonableness of metaphysical and religious worldviews.<sup>17</sup> Habermas’s main criticism of political liberalism, based on his rejection of Rawls’s strategy of avoidance in regard of the notion of truth, addresses a consensus resulting from a “felicitous overlapping” of comprehensive doctrines and the “lucky convergence” of reasonable worldviews.<sup>18</sup> Nevertheless, Rawls’s position, in my opinion, is more complex and subtler than it appears at first sight. The Rawlsian idea of public reason, at least in the last phase of its development, indicates that the so-called overlapping consensus is not a casual result of convergence between conflicting comprehensive doctrines. On the contrary, since it is bound to an ideal of justification whose central aspect resides in the public reasoning of citizens, it may only play an appropriate role in political justification when it contributes to the social stability by means of right reasons. Instead of being interpreted as a mere accommodation of diverging worldviews, Rawls’s conception of political justice must be analyzed on the light of the notion of rational acceptability grounded on the liberal principle of legitimacy.<sup>19</sup>

Probably, however, Habermas’s notion of acceptability is stronger than the Rawlsian one. As Finlayson and Freyenhagen state in the Introduction to a new book dedicated to the dispute between Habermas and Rawls, “while Rawls’s strategy of avoidance is arguably his downfall, Habermas by contrast might be said to take too many (philosophical)

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ing that Habermas’s position on public reason is superior to that of Rawls in that it is premised on a clear distinction between deliberation and justification, even though some of Habermas’s critiques of Rawls are unjustified. I agree with this, but I don’t see any contradiction in the German philosopher’s position, since in my opinion Habermas’s concern when he talks about the asymmetrical burden imposed on religious citizens is relevant not only to religious fundamentalists, but also to non-fundamentalist religious believers.

<sup>17</sup> Cf. Habermas, 1999: 86–94.

<sup>18</sup> Habermas, 1999: 78 and 83.

<sup>19</sup> Cf. Araujo, 2007.

hostages to fortune”.<sup>20</sup> In any case, the German philosopher reaffirms, in his recent review article on Rawls’s posthumous publication on religion, that “it ultimately remains indeterminate which of the two authorities should have the *final* word in the justification of the political concept of justice – faith or knowledge”.<sup>21</sup> Taylor is therefore correct when he says that Habermas “has always marked an epistemic break between secular reason and religious thought”, even though “his position on religious discourse has considerably evolved”.<sup>22</sup>

Such a change in Habermas’s perspective, dated roughly around the turn of the millennium, can be credited to his appropriation of Rawls’s idea of the public use of reason. Thus Habermas calls Rawls “the first among the major political philosophers to take religious and metaphysical pluralism seriously and to launch a fruitful debate concerning the status of religion in the public sphere”.<sup>23</sup> Habermas’s intention is to avoid the confusion between arguments incompatible with the secular character of the state and well-founded objections to a secularist understanding of democracy and the rule of law. For this reason he tries to meet both the empirical and the normative objections to the Rawlsian *proviso* – objections to the feasibility and the fairness of Rawls’s approach to the question of public reason and religion – with a different kind of implementation of its requirement of translation.<sup>24</sup>

Understanding Habermas in this way may clarify his relationship with Taylor. The main point of disagreement between Taylor and Habermas is not the need for an “institutional translation”, but the importance of the difference over types of reasons for political discourse, as well as the delimitation of the spaces in which the language of the state should be neutral. Taylor believes that their disagreement lies more in their rationales than in the practice they recommend. Thus he concludes that they “both recognize contexts in which the language of the state has to respect a reserve of neutrality and others in which freedom of speech

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<sup>20</sup> Finlayson and Freyenhagen, 2010: 19.

<sup>21</sup> Habermas, 2010: 452.

<sup>22</sup> Taylor, 2011b: 49–50.

<sup>23</sup> Habermas, 2010: 452.

<sup>24</sup> Cf. Habermas, 2011: 25–27.

is unlimited”.<sup>25</sup> Habermas, in contrast, thinks that behind the strategy of deflating the distinction between religious and secular reasons there is a defensive reaction of those who call for a deeper grounding of the basic principles of the modern moral order. In this way, the *politics* of secularism renews the discussion about the concept of the *political* as (supposedly) located beyond its pure self-immanence, or about the coherence (whether or not) of the basic political ideals of modern democratic societies when divorced from their religious origins. I will not pursue this point here. Let me just remind that we don’t need to revive political theology to be sure that “in the course of its democratic transformation, ‘the political’ has not completely lost its association with religion”.<sup>26</sup>

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<sup>25</sup> Taylor, 2011b: 58 (note 12).

<sup>26</sup> Habermas, 2011: 27. Both Habermas and Taylor allude to the important distinction between *le politique* and *la politique* proposed by Claude Lefort in his famous article “Permanence du théologico-politique?”, originally published in 1981 (*Le Temps de la Réflexion*, n. 2, pp. 13–60).

### III

## Tense Relations between Legal and Political Justice



The Concept of Justice:  
How Fundamental is it in Ethics  
and Political Philosophy?

Christoph Horn



Many contemporary philosophers consider “justice” to be the crucial normative concept in ethics and political philosophy. The theoretical fundament for ascribing such a key function to our idea of justice has, as far as I can see, two different origins. It can be traced back, on the one hand, to J.S. Mill’s little treatise *Utilitarianism* (1861; Ch. 5), and of course, on the other hand, to J. Rawls’ *A Theory of Justice* (1971). In this paper, I wish to challenge both of these views by raising a series of objections against those current ethical and political theories which ascribe such a dominant role to justice. To my mind, the wide-spread appreciation of the idea of justice is exaggerated. We should neither maintain that justice expresses the core of our normative convictions (in ethics as well as in political thought) nor defend the claim that whenever our central normative convictions are involved, we are faced with questions of justice. As I will try to show, our idea of justice is a much more specific one. It turns out to be an important but nevertheless subordinate normative concept. Instead, I think, one should reserve the role of the dominant normative concept for “good” and “evil” (in the moral sense); but I can’t argue for this in the present context.<sup>1</sup>

In order to achieve my purpose, I will also provide a series of semantic considerations about the meaning of “justice” and “injustice”, based on examples of how we use the expressions in everyday life. In the vast philosophical literature on justice from the last four decades, I found astonishingly few reflections on these semantic fundaments; in contrast, numerous philosophers and political theorists simply repeat the shared conviction which I would like to label “the primacy thesis”.

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<sup>1</sup> I do that in Horn 2014.



## 1. Preliminary remarks on the primacy thesis

To formulate my thesis in a somewhat provocative way: Justice is one of the most misconceived and overrated concepts in contemporary philosophy. Let me start with two preliminary remarks. (1) As I just mentioned, it is certainly a somewhat surprising fact that the concept under consideration has rarely been the object of close semantic scrutiny.<sup>2</sup> My basic concern here is that, within the debate on Rawls, the expression “justice” has started a career as a semi-technical concept more or less independent of our ordinary use of it. In this context, it is, to my mind, interpreted in an extremely incorrect way (given that the criterion for a correct use is our common everyday application of the term), and it is strongly overrated by philosophers, lawyers, and political theorists (namely compared with what we normally think of the importance of justice). I am well aware of the fact that not everybody using the concept of justice as a basic normative concept in his or her moral and political philosophy wants to give a semantic reconstruction of what we ordinarily mean by the expression. And of course, every theorist in this field is free to use “justice” as a purely technical term. One might go so far as to define “justice” e.g. as “what is normatively crucial in ethics (or political philosophy)” – regardless of the content which might turn out to be crucial. But this should clearly be indicated; most authors, however, suggest that their philosophical considerations are close to how we ordinarily think about justice.

(2) By pointing out that the emphatic interpretation of “justice” in moral philosophy can be traced back to J.S. Mill, I don’t want to claim that it was he who primordially brought up this way of employing our concept. As a historian of philosophy, I know very well that a similar use of justice can already be found, e.g. in Adam Smith who, for his part, received it as a coinage from the Protestant line of the early modern Natural Law tradition.<sup>3</sup> Also in Kant’s *Metaphysics of Morals* (1797),

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<sup>2</sup> An exception is an essay written by Koller 2001; Koller to some extent undertakes a semantical analysis. Cf. also Krebs 2000 and Horn/Scarano 2002.

<sup>3</sup> We find a quite similar distinction as that provided by Mill in Smith’s *Theory of Moral Sentiments* (1759) where he contrasts justice and beneficence and parallels this distinction with an antithesis between enforceable and voluntary moral duties (Part II, Sect. II).

we find the distinction between “duties of justice” (*Rechtspflichten*) and “duties of virtue” (*Tugendpflichten*), echoing the dichotomy of “perfect obligations” and “imperfect obligations” in the *Groundwork* (1785) and going back to the same historical line. This usage has roots in the medieval Natural Law tradition, and its origin can ultimately be identified in Cicero’s distinction between the *iustum*, the *honestum* and the *utile* in his *De officiis* (II.10). But the decisive impact on modern debates is, I think, that of Mill’s wide-spread and influential little treatise.

We can easily see the enormous impact of Mill’s primacy thesis on the Anglo-American contemporary debate on justice. The same holds true for the discussion of this issue in German-speaking countries: We find the idea expressed in the primacy thesis in authors such as Otfried Höffe (2001), Stefan Gosepath (2004), or Rainer Forst (2007). The well-known philosopher Ernst Tugendhat even explicitly invokes Mill’s treatise as the concept ever written on the fundamental signification of justice (1993: 364-391).

## 2. Mill’s idea of the primacy of justice

In order to get an impression of Mill’s use of the term, let us look at a famous quotation to be found in *Utilitarianism*, Ch. 5:

When we think that a person is bound in justice to do a thing, it is an ordinary form of language to say that he ought to be compelled to do it. We should be gratified to see the obligation enforced by anybody who has the power. If we see that its enforcement by law would be inexpedient, we lament the impossibility, we consider the impunity given to injustice as an evil, and strive to make amends for it by bringing a strong expression of our own and the public disapprobation to bear upon the offender. Thus the idea of legal constraint is still the generating idea of the notion of justice, though undergoing several transformations before that notion, as it exists in an advanced state of society, becomes complete.<sup>4</sup>

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<sup>4</sup> Mill, 1985, p. 245-246.

In the quoted passage, Mill tries to identify the core idea behind our notion of justice. For him, justice is basically a highly specific moral sentiment, namely an emotion which contains the desire for revenge or retaliation towards the perpetrator of a moral or juridical law. Mill's fundamental intention in Ch. 5 is to reconcile our justice-based moral intuitions with utilitarianism (since the latter seems to leave no room for justice). According to him, utilitarianism is fully compatible with justice, if the latter is correctly understood. In Mill's view, justice has always to do with the desire for compulsion; obligations of justice are those the compliance of which we want to see enforced. Therefore, he contends, claims of justice constitute a normative class of its own, namely the so-called "duties of perfect obligation". This is expressed in a second passage from the same chapter:

Now it is known that ethical writers divide moral duties into two classes, denoted by the ill-chosen expressions, duties of perfect and of imperfect obligation; the latter being those in which, though the act is obligatory, the particular occasions of performing it are left to our choice, as in the case of charity or beneficence, which we are indeed bound to practise, but not towards any definite person, nor at any prescribed time. In the more precise language of philosophic jurists, duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality.<sup>5</sup>

Following Mill, the distinctive feature of a duty of justice is that it must be strictly fulfilled by the bearer of the obligation (the individual has to do some precisely defined actions). This implies the existence of a corresponding right on the part of the addressee. Cases of justice are what we would call negative duties: i.e. obligations to omit violations of some basic moral or legal rights. Furthermore, while we react on

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<sup>5</sup> *Ibid*, p. 247.

violations of duties of charity and beneficence with the emotion of disappointment, we are touched by cases of injustice in a much deeper form: we are outraged and feel the desire for revenge, sanctions, and punishment. As this emotional reaction shows, we regard the unjust person as someone who acts against absolutely crucial rules of conduct. Let me add a third passage from Ch. 5 of *Utilitarianism*:

To recapitulate: the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule. There is involved, in addition, the conception of some definite person who suffers by the infringement; whose rights (to use the expression appropriated to the case) are violated by it. And the sentiment of justice appears to me to be, the animal desire to repel or retaliate a hurt or damage to oneself, or to those with whom one sympathies, widened so as to include all persons, by the human capacity of enlarged sympathy, and the human conception of intelligent self-interest. From the latter elements, the feeling derives its morality; from the former, its peculiar impressiveness, and energy of self-assertion.<sup>6</sup>

In this third quotation, we get a certain idea of how Mill tries to reconcile our common idea of justice with Utilitarianism, namely by interpreting justice as an expression of a fundamental anthropological capacity to expand our sympathy to all of humankind and to include other people in our well-considered rational interest. This is certainly an interesting, but ultimately doubtful strategy since justice, as described by Mill, need not imply the aspect of universalism which is crucial for Utilitarianism. Be that as it may, what we found in Mill's text is the idea of a primacy of justice as a moral concept. Questions of justice are identified with the core of what is morally relevant.

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<sup>6</sup> *Ibid*, p. 249-250.

### 3. Rawls' version of the primacy thesis

As is well known, we find quite a different idea of what is constitutive for the primacy of justice in the ground-breaking early monograph of John Rawls. Here, Rawls is not concerned with individual cases of morality (although the later Rawls shows some interest in justice as a personal feature of individuals as their "highest-order interest"). Instead, he considers "justice" as the most fundamental normative concept within a theory of social institutions. Rawls thinks that a society is adequately organized in a normative sense if its basic structure is "just". In order to be just, it must consist of institutions which establish a lexical priority for rights and liberties with relation to all other political goods, especially socioeconomic ones. What he has in mind are the rights and liberties of the early modern liberal tradition – and in this respect Rawls is not that far away from Mill. In a famous passage from the very beginning of *A Theory of Justice* (1971), Rawls compares justice as the first and decisive virtue of social institutions with truth as the crucial virtue of epistemic systems such as theories. He then explains what he means by justice and by the analogy between justice and truth (*A Theory of Justice*, Ch. 1.1):

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.

According to the quoted passage, justice signifies the idea of the categorical overridingness of certain basic liberties. For Rawls, a possible restriction (or abolition) of individual rights to freedom cannot be

compensated by a higher degree of socioeconomic welfare or any other advantage; liberties must be distributed equally (and in the biggest possible “packages”) among the citizens of a legitimate society. Only if this idea is taken seriously, the society merits to be characterized as just. The concept of justice resembles, following Rawls, the idea of truth in that both are absolute and uncompromising.

Both Mill and Rawls defend the idea of a strong normative primacy of the concept of justice, even if there are considerable differences between their views. Whereas Mill thinks that justice basically is a moral sentiment connected with a desire for retaliation – a sentiment directed to cases in which someone infringes the rights of some other person (and thereby contravenes his or her perfect duties), Rawls, emphasizing the overridingness of a set of basic liberties, believes that justice is the adequate label to designate a basic order of social institutions being in a normatively optimal state. And while Mill speaks of justice in a moral sense, Rawls uses the term in a socio-political context. The common point shared by Mill and Rawls is the idea of the primacy or a privileged normative function connected with the concept of justice. Both philosophers clearly want to be close to our everyday usage of the term (Mill more explicitly than Rawls, but I think it can also be said of the latter). Both philosophers exerted and exert an enormous influence on the following discussion and especially on the current debates.

#### 4. Some fundamental considerations about justice

Justice is certainly one of the most important evaluative concepts in everyday life as well as in ethics and political philosophy. If we consider as person as just (or fair), then we believe to have identified a deeply valuable feature of this person; and if we regard a given social institution as deeply unjust, we find ourselves in a state of outrage and strongly demand for a change. As these examples imply, we use the term justice and its cognates both for individuals (*grosso modo* in the sense of a personal virtue) and for the conditions of social institutions (the organization of economy, the tax system, the educational system etc.). The oldest use in the Western conceptual history seems to be that of “cosmic justice” meaning the distribution of natural goods and evils

among persons – and additionally signifying the “moral order of the world”, i.e. the principle of divine reward for the just individuals and of divine punishment for the unjust ones. Both the idea of personal justice and of cosmic (or natural) justice are not strongly present in contemporary philosophical debates, except in the sense that the former is discussed in the context of virtue ethics (including the topic of desirable persons features of citizens and politicians in our societies), whereas the latter appears in discussions on the welfare state: We would ask, e.g., which natural handicaps of a person should be considered as reasons for support by a welfare state and which ones should simply be seen as someone’s personal fate.

The concept of justice has a very complicated sort of usage. Let me illustrate this, in more detail, regarding the various objects which can semantically be characterized as just or unjust. As far as I see, one can distinguish between ten different sorts of objects: (1) persons and social groups (*personal use*), (2) characters, attitudes, motives of individuals (*virtue ethics use*), (3) judgments, ideas, values of persons (*ethical use*), (4) procedures, social principles, guiding lines (*procedural use*), (5) social institutions (*institutional use*), (6) abstract principles, theories, and arguments (*theoretical use*), (7) distributions of goods and evils (*distributive use*), (8) relation between a gift and a result or an investment and the benefit (*relational use*), (9) result of a procedure, e.g. a competition (*resultative use*), and (10) the state (of the world or of a particular social situation) in which goods and evils are allocated in a certain way (*situative use*, also *cosmic use*). I have argued at some length for the thesis that (10) is our primordial idea of justice while the other variants are derivations of it (see Horn/Scarano 2002).

A further point of some importance is that “justice” can mirror at least the following eight basic ideas: (i) Justice as equality in the distribution of goods and evils (distributive justice), (ii) justice as impartiality of the application of rules (impartial justice), (iii) justice as equivalence of goods in trade-offs (commutative justice), (iv) justice as compensation of disadvantages and handicaps (corrective justice), (v) justice as gratification of merits and achievements (meritorious justice), (vi) justice as equivalence of criminal action and punishment (retributive justice), (vii) justice as equivalence of investments and results (connective justice), (viii) justice as adequate distribution of natural goods and evils (cosmic or natural justice).

A point of even greater systematic relevance is the distinction between the Platonic and the Aristotelian ideas of justice. Both of them are still of major importance for our understanding of justice in general – in everyday life as well as in philosophical contexts. The Platonic concept can be rendered by the famous Latin formula *suum cuique tribuere* – “to give everybody his own”, whereas the Aristotelian idea is that “equal cases should be treated equally and unequal cases unequally”.<sup>7</sup> Justice in the first, Platonic sense is based on the idea that persons merit to gain something regardless of what the others get; they have a “right” to it or deserve it. Justice in the second, Aristotelian idea is founded on the idea of interpersonal comparisons: some person A gets x *since* B gets y; what A and B are receiving is always interrelated. One can easily see that justice in the Platonic sense is quite different from the Aristotelian idea: the first signifies an *absolute* or *personal* understanding of justice while the second is based on a *relational* or *interpersonal* concept. I will come back to the relevance of this distinction.

## 5. Objections against the primacy thesis

Whatever the precise conceptual content of “justice” may be, Mill and Rawls defend the primacy thesis – even if they do it in quite different senses. Since the impact of both philosophers on the current debate is deep and thoroughgoing, I would now like to raise several objections against it. To clarify my basic intention, let me explain that I wish to reject the following four claims:

- (1) Cases of essential moral importance are always simultaneously questions of justice.
- (2) Cases of justice are always at the same time questions of essential moral importance.
- (3) Cases of justice have basically to do with aspects of the legal or political order.
- (4) Cases of justice are never morally neutral or indifferent.

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<sup>7</sup> Plato, *Republic* IV, 433a8 ff.; 586e and Aristotle, *Politics* III 12, 1282b14-22.



Let me try to provide some intuitive support for these rejections. One of the most serious cases in which we see someone violating a moral norm is that he commits a murder. We clearly consider cases of murder to be instantiations of what Mill calls perfect duties; having extremely strong sentiments, we wish the murderer to be punished by the legal order. Yet we would not call these incidents occurrences of injustice in any of the Western languages (as far as I know). The same holds true for many other cases in which crucial moral rights or interests of persons are violated: I am thinking of torture, mutilation, rape, robbery, deprivation of personal liberty. It seems true for all of these crimes that normally, they aren't regarded as cases of injustice while they are unambiguously seen as hard moral cases, i.e. as violations of essential moral rights.

The point I have in mind is quite clearly expressed by a passage one finds in H.L.A. Hart<sup>8</sup>:

There are indeed very good reasons why justice should have a most prominent place in the criticism of law arrangements; yet it is important to see that it is a distinct segment of morality, and that laws and the administration of laws may have or lack excellences of different kinds. (...) A man guilty of gross cruelty to his child would often be judged to have done something morally *wrong*, *bad*, or even *wicked* or to have disregarded his moral *obligation* or duty to his child. But it would be strange to criticize his conduct as *unjust*. (...) "Unjust" would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer.

I think that Hart is exactly right in pointing out that cruelty is usually not seen as an injustice. While nobody would classify one of the crimes mentioned above under the category of injustice, the issues which are in fact discussed in the debates on justice are mainly the following seven: (i) political justice (in the sense of basic rights and liberties),

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<sup>8</sup> Hart, 1961, p. 154.

(ii) social and economic justice (questions of the distribution of goods within a society), (iii) justice between men and women (gender justice), (iv) justice with regard to social minorities, (v) intergenerational justice, (vi) juridical aspects of justice (especially the question of just and unjust punishments), and (vii) international justice (e.g. world poverty).

In our common language, nobody classifies crimes like murder as cases of injustice, and in contemporary philosophical debates, nobody subsumes questions of justice under the crucial issues of ethics. Seen in this way, it seems even difficult to figure out examples for which it might be true to maintain that they are simultaneously cases of injustice and hard moral cases (violations of perfect duties). Within the philosophical literature on issues of justice, we find instead such examples as that of a children's birthday party. It serves as a typical paradigm for injustice that, *ceteris paribus*, one child receives a smaller piece of cake than the others. I will come back to this in a moment.

Let me first give two somewhat elaborate examples (a-b) showing cases in which the aspect of injustice can be more or less easily distinguished from the aspect of moral importance. (a) Think of two situations in a bakery shop. In the first, the customers are waiting in a queue, and Muhammed, an Islamic man from Nigeria, is part of his line; but from reasons of racism and xenophobia, he is at first neglected for a while by the shopkeeper. In the second case, Sandra, a girl from the neighborhood, waiting in the same queue, is also for some time neglected by the shopkeeper; but in her case, the reason for this is simply that a close friend of the shopkeeper enters the bakery and gets a privileged service. Suppose that both persons, Muhammed and Sandra, are treated in the same unjust way: they are not served when it is their turn. Nevertheless, the two different motives of the shopkeeper make the cases strongly different. In Muhammed's case, the injustice is done from a genuinely immoral attitude, racism; in Sandra's case, it is done from a (more or less acceptable, at least not discriminating) attitude of privileging friends. (b) Suppose that a military instructor treats young recruits quite differently. In the first situation, he privileges young men of his own ethnic origin assuming that they need to be supported and fostered in a more or less hostile surrounding. Let us add two elements: he is mistaken in his assumption (there is no disadvantage for the people from his group), and he does not damage the others. In this case, he commits an injustice without doing moral harm. But think now of

a case in which he privileges his fellow-natives while seriously distressing and afflicting the young soldiers belonging to a different minority. In this case, we are confronted with a violation of basic moral rights which we wish to see legally punished and an instantiation of an injustice which “cries out to heaven”.

So far, I think we have formulated considerable challenges for Mill’s view: the moral primacy of “justice” is certainly not a highly convincing claim. Let us now have a look at the Rawlsian view. A first point to be made is that Rawls neglects all topics of justice except those of the “basic order”. Aren’t there genuine cases of justice and injustice which have nothing to do with the basic order of a given society? And aren’t there virtues of a basic social order which aren’t, at the same time, aspects of justice? It seems quite artificial to suppose that normatively virtuous, perfect, choiceworthy, or desirable institutions can simultaneously be called “just” in the same sense in which we say that normatively ideal scientific theories are those that turn out to be true. We wish institutions to be, e.g., efficient, lean, non-bureaucratic, open-minded, easily accessible, inexpensive, or flexible (which are different from being just and for which I see no precise equivalent in scientific truth). Consequently, not every respect in which a social institution can be excellent is a case of justice, and, *vice versa*, not every case in which a social institution is just is at the same time a case of essential normative importance.

What is worse for the Rawlsian view is the fact that not even the moral implications of institutions can always be classified as cases of justice or injustice. Take the case of a protester beaten up by some policemen in a dark narrow street at night. To my mind, we should distinguish here between two possibilities: (i) The violation of the protester’s bodily and psychic integrity and civil rights is simultaneously a case of injustice if there exists e.g. an order given by a local politician who instructed the officers to do so. (ii) Imagine the policemen are frustrated by their hard-working conditions, drunken, and feel underprivileged compared with the academic protesters they are facing; then their aggressive act of beating up a protester would still be morally intolerable, but we should not classify the case under the heading of injustice. It would rather be something like “aggressive behavior” or “unacceptable brutality”.

If I am right, what we see from our considerations is the following: The examples of the queue in the bakery shop and the military in-

structor make plausible that the perspective of justice (at least in many cases, perhaps even always) presupposes the element of interpersonal comparisons. What is unjust about the shopkeeper's and the instructor's behavior is that he is treating the recruits unequally. In the case of the aggressive policemen, we are confronted with an example of injustice only if they are following an official rule or a decree that allows or orders them to behave like that. But seen from this perspective, the discriminating decree is what is really the unjust element here. If the policemen acted out of some spontaneous frustration or hatred, they would not have behaved unjustly, but then they were simple criminals who should be punished and should quit their service. If this distinction is correct, then cases of injustice have (at least) two possible constitutive features: They either have to do with unequal treatment in relevant respects (which implies interpersonal comparisons), or they presuppose rules of conduct, decrees, or guiding principles which are unlawful or normatively inappropriate.

In many contexts, justice can be understood in terms of lawfulness. An example illustrating this intuition is, to my mind, that of a referee involved in a soccer game: if the referee privileges one of the teams while disadvantaging the other, he commits the paradigmatic case of an injustice. He neglects the principle of impartiality which is one of the key ideas constitutive for lawfulness. Note that we would count an unfair soccer match neither among the cases of violating a perfect moral duty (in the Millian sense) nor among the cases of disorganization of the basic social order (according to the Rawlsian understanding). But clearly we would speak here of a basic instantiation of unfair conduct.

I think we have so far considered a sufficient number of examples to come to the crucial point within my line of argument. We can clearly see that it is not due to the component of being just or unjust that a given case of misbehavior can be characterized as morally essential or marginal. There exist many cases in which perfect duties and moral rights are violated that aren't simultaneously cases of injustice: murder, torture, rape, robbery, and so on, and there are many cases in which justice is involved without a strong element of morality being present. Only think of the standard example of a children's birthday party where the underprivileged child receives a minor piece of cake, but is thereby *not really* damaged. If we would speak here of a damage at all, we

might perhaps say that the detriment is confined to the *surplus zone* of the child's goods. Even if the child might feel outraged and believes to be strongly disrespected, it is not mistreated in a moral sense. As Mill correctly points out, our sense of injustice gives us a strong feeling of being discriminated even in peripheral cases of an affront. To corroborate this point, imagine the following possibility: the father who wanted to prepare the cake for the birthday party failed and had to put the cake ultimately into the rubbish bin; in this case, no child is "damaged" at all by the fact that none of the children receives a piece of cake.

Let me now make just a little detour or digression. I would like to give an extremely brief (and necessarily insufficient) answer to the question of what is the moral element – the fact of being moral or immoral – within our actions. I think that an adequate answer should be founded in the idea of *basic human goods*, goods which can either be respected and supported in our interpersonal relations or disrespected and destroyed. I think that the list of morally relevant goods (and evils) must include survival, physical health, bodily integrity, and social and political autonomy (and their contraries respectively). And I think that our basic intuition here is that there exist morally central goods of a minor, peripheral interest such as e.g. spare time interests, travel habits, musical or artistic taste, etc.

I want to go one step further with my observation that justice is not the constitutive aspect for the morality or immorality of an action, since there are both cases of injustice which are morally marginal and cases of morality which have nothing to do with justice. This step goes as follows: cases of justice and injustice are not only sometimes morally marginal; they can also be morally neutral or even deeply immoral. Take the simple example of a band of robbers that discusses the problem of how to distribute the haul: they can allocate goods, e.g., according to the rank of a robber within the gang or according to his achievement or according to his neediness or health state or whatever else. If they are discussing their standards, they might finally arrive at a solution which is regarded by them as just. Here then we are confronted with a just distribution of goods (let us assume: with a *perfectly just distribution*), but it is a case of immoral behavior from the outset, since the goods under consideration have been robbed from their legitimate owners. Compare the following four examples:

(1) Just and unjust distribution

(a) A band of robbers is discussing how to distribute the haul: according to the rank of a robber or according to his achievement or according to his neediness or according to whatever else. Depending on how they decide, we might be willing to concede that their distribution is just. But this just distribution does not legitimize the entire situation *in a moral sense*. On the contrary, we would say that there is an overriding aspect that determines our moral judgment in this case, namely that the goods to be distributed have been gained before in an immoral way, by an act of robbery. Note the remarkable fact that a just distribution does not outweigh this immorality committed before; it does, from the moral point of view, not even count here to the slightest extent.

(b) A group of nuns living in a monastery prepares lunch for homeless people. They do it every day, seven days a week, and it is a quite demanding and expensive element in the life of the monastery. Among the homeless coming to the meals is Carl, a funny and good-humored guy who is the favorite guest of the nuns. They always prefer him and give him a better share of the lunch (without giving less than a normal share to all others). Carl is privileged, but all other homeless are not in danger of malnutrition or starvation. In this case, again, the injustice committed by the nuns does not modify the fact that they are doing a morally admirable job. Again, the aspect of justice does not morally count.

(2) Murder

(a) There is again a band of robbers. After having distributed the haul, one robber, Jim, brutally kills one other, Tom, from avarice. Suppose that it is a clear case of murder showing all the constitutive elements of such a crime. Assume additionally that the distribution which preceded the murder was unjust, and this injustice was part of the motivation of Jim to kill Tom. Even then the only thing that counts for our moral judgment is the murder. Note the fact of an unjust distribution which immediately preceded the murder may *explain*, but not *justify* the conduct of Jim. In our moral judgment, Jim is guilty of having participated in a robbery and of having committed a murder. The additional injustice is without any relevance.

(b) A group of nuns again, on a regular basis, serves lunch for homeless people. They are distributing the meals in exactly equal portions. But one day Herbert, one of the homeless, wants to have a double portion. He accuses the nuns of committing serious injustices, which is a completely unjustified allegation. Bernadette (one of the nuns) thereby becomes so angry that, finally, she murders Herbert by beating him with a fry pan on his head. In this case again, the unjust allegation might explain the murder, but not justify it. And also the fact the Bernadette is usually doing a morally admirable job does not justify her conduct. Nevertheless, we have to take it into account when we try to give a moral judgment on her. But note that the fact that Bernadette always distributed the meals equally does not count at all for our moral judgment on this situation. Even if she might have been unfair, this would be an irrelevant part of the story.

Note that justice is not only morality-neutral (in the sense that it does not constitute morality), but even morality-insensitive (in the sense that it is perfectly compatible with deeply immoral background conditions).

Take a very classical example to see this point even clearer. In the Homeric *Iliad*, the hero Achilles is angry and outraged since he has been deprived of his concubine named Briseis. The young female has been given as a present to king Agamemnon because of his higher rank, although Achilles has been the most courageous and efficient warrior so far. We are clearly confronted here with a case of injustice, and this explains the extreme anger (*mênis*) of Achilles. But obviously, we are at the same time confronted with a case of serious immorality – namely the practice of giving young females captured during war to merited warriors as their awards. If someone regards his slave as legitimate property gained by his enormous efforts, he is clearly justified in feeling outraged when he is treated in an unjust manner. But slavery is immoral in itself. As this shows, justice is nothing but a secondary normative idea, an idea which can even be applied when we are facing cases of serious immorality.

## 6. The Aristotelian and the Platonic idea of justice

I have been discussing until now all of my four theses. Let me add one final remark. One might object that so far I have only considered the Aristotelian concept of justice and neglected the Platonic one. This is certainly correct, and I want to catch up this now in a very brief form. I take both classical theories – the Platonic and the Aristotelian ones – as genuine paradigms of our ordinary way of thinking about justice. Justice is always about the distribution of benefits and burdens, of goods and evils, of advantages and disadvantages. These can be distributed according to a relative, interpersonal principle (Aristotelian idea) or according to an absolute, personal principle (Platonic Idea). But our moral idea of how goods and evils should be distributed is at best partially that of justice: Person A sometimes deserves a good X because person B already has it; and sometimes person C unconditionally deserves the good Y irrespectively of what person D should get. But the paradigmatic case of our moral intuition is none of them. Instead, we are accustomed to think that A, B, C, and D should get the *moral goods* X and Y simply as human beings. But to elaborate and defend this line of thought would be a different story to be told.





Shame, Identity and Modernity:  
On the Politicization of the Subject

Fabricio Pontin



## Introduction

Nowhere in modern political thought is the notion of political and ethical identity more sharply distinguished than in Kant. In the Prussian author we see an attempt to cast two “realms” of action for the individual; on the one hand we see the individual trying to make sense of his own conceptions of values and reasoning about what “is” right and wrong. These conceptions of values will, in time, create a sense of personal identity and values that constitute an identity – a “self”. On the other hand, these same conceptions will be in tension with the public realm in which the individual is inserted: even if personal convictions take the communitarian insertion of the self as a starting point, they are, in Kantian language, “abstracted” in order to build a sense of morality in the self. Still, the self that comes out of this program of “abstraction” enters in direct conflict with that same political reality he was attempting to abstract. In this sense, individual conceptions of good are mitigated (and limited) by public coercion. My individual life is constrained in a public space.

There is no way to overestimate the impact of Kant’s reflections on identity and subjectivity. In fact, his analyses of political philosophy have dominated the discussion on these matters, especially when we talk about identity and the rights that come associated with a certain conception of individual. After Kant we seem to have made our peace with the fact that we are ourselves as we conceive of ourselves, but that our self is also affected and limited by our political surroundings. The discussion on political philosophy – and moral philosophy, to a lesser extent – has been a discussion on how to mitigate this situation.

However, when we use the terms used by Kant to analyze our current situation as subjects, as individuals trying to make sense of our identity (say, Brazilian, student of philosophy, foreign, Italian, anarchist, pro-choice, etc.), we also find out that these conceptions are limited for the complexities of contemporary life. Contemporary life seems to defy any static notion of being-a-subject. Classical categories of political philosophy, the “private” and “public” space, the individual and the political life, the “right” and the “left” ideology, the class divisions and even the state boundaries have lost much of their relevance as categories for analysis and comprehension of politics. Our private space has been politicized deeply, and the public space has been left para-

doxically private. Any one might be under surveillance in New York, but the cameras cannot really control much. We have the complete description of our biological constitution in the Genome Project, but what does that really say about our personal constitution? It seems we have never had so much information about our surroundings and about ourselves, and yet there is a sense of nausea that comes with how little we actually know.

Michel Foucault arises, in this context, as an interesting way into the debate of liberalism and modernity. Foucault's main concern, it seems, was with the space that the expression of one's own identity had once the idea of the subject became normative. That is, once the individual is defined and constrained by sovereign decisions, how is it possible to "recover" the space for expression? Emotional tonalities, in this context, become increasingly important. Are we going to reduce the modes of expressions of determined experiences to the definition of the "proper" use of these expressions? It seems to me that Foucault pointed at a relationship between emotional tonalities and political philosophy, one that situated the importance of an emotional tonality "q" to a certain political action or phenomena. For Foucault, not only do emotional tonalities have a role in social action, but they are also fundamental for our understanding of the structure of social action and organization.

In order to illustrate this relationship, I will take as an example the case of shame. My contention is that the notion of "nuda vita" (bare life; Bloss leben), as developed by Giorgio Agamben, is an attempt to find in the structure of shame the most fundamental emotional tonality for the understanding of self-identity and the development of our identity as it relates to others – better yet, how others participate in the development of the "self". But in order to understand the development of Agamben's notion of bare life, we need to first investigate into Foucaultian biopolitics that are, in Agamben, operative in the processes of "subjectivation" and "desubjectivation". In what follows, I want to stress the importance of shame as an operative concept and experience in the political philosophy of Foucault and Agamben. In order to do so, I will defend that, already in Foucault, the passage of anatopolitics into biopolitics draws the emergence of the politics of bios as a politic of shame, that is, the use of the dispositifs of power, in the state, as dispositifs of desubjectification – of a weakening of the subject into the so-called "docile" and "exposed" bodies that will be disposed by

governments. Subsequently, I will take on Agamben's re-appropriation of Foucaultian vocabulary and his unique reading of biopolitics under the lights of Levinas' philosophy. My intention is to show that Agamben's take on Foucault expose both the advantages and limitations of working with a "weak" notion of immanence (such as it is the case in Foucault) and an ontology of political thought (as Agamben clearly seems to attempt). Finally, I want to point at the first appearance of the term *biopolitics* in Foucault's philosophy in order to investigate how Foucault could give us not only a critical clue of interpretation of political liberalism, but also offer a way into understanding the historical emergency of subjectivity.

### 1. From anatopolitics into biopolitics

I want to dislocate the discussion of anatopolitics and biopolitics from the usual field wherein these discussions operate. Usually, the discussion of the passage from anatopolitics into biopolitics, in Foucault, focuses on the relationship between knowledge and power, and how the establishment of determined forms of knowledge is taken over by the government as a mechanism of domination. In anatopolitics, the main concern of the sovereign is with the creation of dispositifs that will control the body and the movement of subjects – prisons and mental hospitals are Foucault's favorite examples here. From crime up to etiquette, the social framework is marked by this structure of power – Foucault calls it a technology of power. Very well, biopower, conversely, is a new "phase" of anatopolitics, where governments are no longer concerned with the physical coercion of its subjects, but the structure of the subjects themselves. That is, the power of the sovereign is no longer focused on the bodies, but on the definition of who is allowed protection and how protection is fulfilled. It is interesting to note that both anatopolitics and biopolitics are operating on a grammatical level, that is, on the definition of the linguistic limits of what constitutes a body and what is life and what is a subject. I realize this is already clear in the biopolitic phase of Foucault's work, since the bios is only under the control of the sovereign once it is reduced to a definition, but on the level of the body this is not so clear: Foucault wants to hold that

the disposition of bodies by the government is only possible because the definition of the normal and the abnormal is also under the control of the sovereign. That is, the normal conduct, the normal person, is something which is defined by psychiatric and judiciary power – both under the control of the sovereign.

My interest, however, is somehow marginal to the discussion on the relationship of power and knowledge in Foucault. Though I do not dispute this narrative, I want to take it a bit further in order to investigate how both modes of control operate directly into the subject. It seems to me that both the power over bodies (anatopolitics) as well as the power over life itself (biopolitics) indicate the exploration of a determined emotional tonality in the self that will be depleted in order to allow the process of desubjectification in which governments can take over the space of individual expression. In a sense, both disciplinary and normative power over life operate negatively into the space of individual expression, first (in a disciplinary dimension) defining the space wherein expression is possible, and later (in a normative, biopolitical, dimension) defining what is the self that can possibly express its own subjectivity.

Perhaps this is not persuasive enough. Just claiming that a determined emotional tonality is being depleted by a sovereign power is too vague, and I still need to show how this is the case. If one looks at the history of torture, for example, the political relevance of the process of desubjectification becomes denser. Let us see the procedures that are defined as “Harsh Interrogation Techniques” by the CIA:<sup>1</sup>

1. The Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.
2. Attention Slap: An open-handed slap aimed at causing pain and triggering fear.
3. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage.

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<sup>1</sup> These are the descriptions that the CIA provided for ABC Networks in 2005. See: <http://abcnews.go.com/WNT/Investigation/story?id=1322866>, last access: 03/28/2011.

4. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions.

5. The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.

6. Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.

As forms of disciplinary punishment, all these conducts would fall, in Foucault, under the definition of anatopolitics. Certainly, we can all agree that they aim at inflicting pain and terror in the subjects, but is that all there is to these processes? It seems to me that it is possible to point at a process of desubjectification at play here. How so? The individuals are not only exposed to physical pain and an immediate sensation of horror – they are indeed faced with the limits of their own bodies and expression. Every one of these punishments have in common a radical restraint in the prisoner's body in order to “weaken” the power of the individual and cause a “break” in the resistance of an uncooperative subject. However, the critical element is not the defacing of the identity of the self, but the political exploration of this process. Interestingly, Foucault seems to have pointed out that shame, in this sense, is already operational in the government and protection of society as a way of creating the “docile” bodies that government can dispose of for war, interrogation, incarceration, and so on.

The movement into biopolitics will dislocate the “place” of the sovereign in the sense that the power over the subject is no longer located in establishing a “docile” body by external force, but by domesticating life by defining the stances in which life is worthy of protection and how it is worthy of protection. In this sense, the processes of subjectification and desubjectification are from the beginning limited by a sovereign imposition of modes of living and normative differences for different “profiles”. Please note that Biopolitics is not only negative – it grants



an important set of rights, such as social security, public healthcare, and public hospitals – but Foucault is quick to point that the right to social security, public healthcare and public hospitals (just to point out some examples) is dependent on whether or not one is contemplated as having rights. Racial and social identity are not a matter of an individual making sense of his own history, but rather a matter of external imposition of a profile that will grant you more or less protection – or, in some cases, no protection whatsoever.

Just as disciplinary power had operated on the level of desubjectification by imposing constraints to the individual, now a normative imposition defines the limits wherein expression will occur in order to be granted protection. Now the dispositive of power is no longer a physical object (the instrument of torture, the hospital, the hospice, etc.), but a form of law imposing the forms of living. Legislation operates directly on the bios, and the most sophisticated form of biopolitics – and, consequently, of desubjectification – will attempt to regulate sexuality and the expression of sexuality.

## 2. Biopolitics and the play of immanences in Foucault: an interlude

Still, sexuality is also a way *out* of the dynamics of domination and control in Foucault. In Foucault shame is operational, in a less structural sense than what we usually find in immanent narratives. I will need to spend some time here on the Foucaultian take on immanence in order to explain how it is possible for individuals to turn the process of desubjectivation and domination inside-out.

In *On the Archeology of Sciences*, Foucault looks back at the project of *The Archeology of Knowledge* and its discursive practices of truth. It seems that a particular passage in that article summarizes what is at stake both in the Foucaultian conception of truth:

These discursive sets should not be seen as a rhapsody of false knowledges, archaic themes and irrational figures which the sciences, in their sovereignty, definitively thrust aside into the night of a prehistory. Nor should they be imagined as the outline of future

sciences that are still confusedly wrapped around their futures, vegetating for a time in the half sleep of silent germination. Finally, they should not be conceived as the only epistemological system to which those supposedly false, quasi- or pseudo-science, the human sciences, are susceptible. To analyze discursive formations, positivities and the knowledge which corresponds to them is not to assign forms of scientifically but, rather, to run through a field of historical determination which must account for the appearance, retention, transformation, and, in the last analysis, the erasure of discourses, some of which are still recognized today as scientific, some of which have lost that status, some have never pretended to acquire it, and finally, others have never attempted to acquire it. In a word, knowledge is not science in the successive displacement of its internal structures; it is the field of its actual history.<sup>2</sup>

This is one of the few places in Foucault's oeuvre that one is able to find a direct definition of what knowledge is and how it is posited as an available form. The first thing we know about knowledge in the Archaeological method, then, is that it is discursive. The author is concerned with the discursive practices that seek to establish knowledge as truth. However, it is important to stay attentive to the multiplicity of knowledge in Foucault. In the aforementioned quote, Foucault informs the reader that sciences have a claim of sovereignty on what is knowledge. One who is familiar with Foucault will clearly identify an imposition in this claim, since the act of sovereignty is an imposition of knowledge from the outside – as the form of rationality that imposes the discourse on madness, or the Order of Resemblances that imposes relation of things and ideas-of-things as necessary.

For Foucault, the condition of possibility of knowledge is not some transcendental Being or in a dialectical relation of past and present points given in revelation. Knowledge is singular in its relation to itself, but it is multiple in its narrative relevances. It is also invented as a narrative practice, as a field of illimitable possibilities of truth and knowledge that are subsequently posited from different conceptions of truth and

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<sup>2</sup> Foucault, 2000, p. 326.

narration. Everyone who has a language will have a different claim at a “truth” from within one’s own discourse.

When I speak of a weak notion of immanence in Foucault, this is the main point at view: The forms of knowledge that are had as actual are actual insofar they arise from certain discursive practices. Had Foucault developed a strong notion of immanence, we would find a substantial form of knowledge that would pertain to all forms of regional knowledge. Such a condition of possibility is not had in the archaeological period of Foucault’s philosophy. However, Foucault does develop a weak notion of immanence in the sense that forms of knowledge trust the relevance of discursive practices and the individuals that are performing these practices. Foucault will defend that certain aesthetic practices imply different regimes of desire and power that are more or less relevant to conceptions of truth.

Maybe it is still not clear why such implications are understood as a weak-immanence. The key here is Foucault’s regional use of actual positing of history. Actual History, in Foucault, is not had as a stable form that establishes a strong sense of Reality. It is rather had as an actual history of *a* form of knowledge, *a* determined conception of truth. Any attempt to super-impose these local practices and conceptions of truth is met with the accusation of sovereignty, of imposition of forms of knowledge against practices of the self. Sovereign power, in the form of scientific positivism or grammar, will try to “pacify” this multiplicity of claims into a standard form of truth.

In short, Foucault’s epistemological perspectivism is overall incompatible with a strong notion of immanence; it is also incompatible with a notion of transcendence. Honneth points this out very well when he writes that for Foucault, every type of knowledge “must be seen as being so closely bound up with a given relation of power that a transcendent perspective from which these processes could be defined as deviations from an ideal situation is no longer possible”.<sup>3</sup>

This discussion brings direct consequences for the understanding of emotional tonalities in Foucault, especially as they refer to politics and power. For Foucault, it is clear that there is not a single structure

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<sup>3</sup> Honneth, 2007a, p. 40.

that will enable us to speak of shame, for example. Foucault is more interested in how shame appears in discourse, that is, when one claims to feel shame or to be ashamed of something; the discursive practice already constitutes the feeling as truth. This is clearly a consequence of what I called a “weak” notion of immanence in the author: truth is constituted by discourse, and in this discourse we can analyze how shame is operative in that subject.

However, because we are dealing with discursive practices and not with regular or static structures that hold this process of “constitution” of truth together, Foucault manages a way out of the riddle of control and desubjectification. This way out is characterized by an inversion of the mechanisms of domination – the dispositive.

But how is that possible? This is possible because the emotional tonalities that are explored by sovereign power in order to constitute a repressive regime of truth can be turned upside down as mechanisms of resistance. In this sense, Foucault does not accept the idea of a static structure for emotions – or for knowledge in general, for that matter – turning the project of enlightenment into a project of resignification of practices.

Again, I must get back to the example of torture. In the last volume of *The History of Sexuality*, Foucault spends a long time describing the practices of domination and submission in sadomasochism. Regardless of what one might think of Foucault’s choice of example and lifestyle, he is trying to point out the redefinition of dispositifs of punishment into dispositifs of pleasure. The care of the self appears as an antidote to the technologies of power. The shame of being “subjected” or “reduced” is now reconstituted as a form of re-approaching the limits of one’s own body as something to be celebrated. This is the emergence of the technologies of the self as a “positive” side of biopolitics, the care for one’s own body, one’s own identity and the exploration of one’s relationship with others as something that does not need to be mediated by the pre-defined conceptions established – grammatically and constitutionally – by a sovereign power. Freedom, in Foucault, will be embracing the limits of one’s own self while at the same time emancipating the construction of one’s own identity and expression from the restraints of an external power.

But this is only possible because Foucault operates outside the realms of a substantial notion of knowledge and a structural defini-

tion for emotional tonalities. This undoubtedly moves him away from the grounds wherein Agamben will take the discussion on shame and politics. And we should trace this difference directly to the influence of Levinas in Agamben.

### 3. Radical Passivity and Shame as essentially negative: Agamben's take on Foucault

To be ashamed means to be consigned to something that cannot be assumed. But what cannot be assumed is not something external. Rather, it originates in our own intimacy; it is what is most intimate in us (for example, our own physiological life). Here the "I" is thus overcome by its own passivity, its ownmost sensibility; yet, this expropriation and desubjectification is also an extreme and irreducible presence of the "I" to itself. It is as if our consciousness collapsed and seeking to flee in all directions were simultaneously summoned by an irrefutable order to be present at its own defacement, at the expropriation of what is most its own. In shame, the subject thus has no other content than its own desubjectification; it becomes witness to its own disorder, its own oblivion as a subject. This double movement, which is both subjectification and desubjectification is shame.<sup>4</sup>

Remnants of Auschwitz is not the first place where Agamben speaks of shame. Interestingly, the topic appears in the essay "In this exile"<sup>5</sup> which deals with the question of the terror squads in Italy. Agamben starts with the question of the experience of traumatic events and the emergence of political life and biological life in the same space. Here, he anticipates the interpretation that will be forwarded in *Remnants of Auschwitz*, which is that the camp and the situation of the subject in the camp exposes the bare structure of the I as one's biological body becomes

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<sup>4</sup> Agamben, 2002, p. 105–106.

<sup>5</sup> Agamben, 2000, p. 120–142 ("In this exile (Italian Diary, 1992–94)").

the place where politics occur.<sup>6</sup> Previously, I tried to show how both anatopolitics and biopolitics, in Foucault, expose the impossibility of speaking of a “private” body or a “private space” of subjectivity. Intimacy is invaded by a politics of bios, a politics of the most bare and interior aspect of subjectivity.<sup>7</sup> There is something intolerable about this aspect of politics, but this experience of disgust beyond the intolerable is paradoxical, because you speak of it while you are at the same time being-immersed in this situation.<sup>8</sup> I find the idea of a young man being kept in a small prison cell, without clothes and being deprived of sleep to be intolerable, but at the same time I put up with it.

In a sense, when Agamben writes *Remnants of Auschwitz*, the Foucaultian considerations regarding the government of bodies are presupposed. When he reads Levinas and the question of shame within the context of the concentration camps he is, in fact, situating the discussion on shame as a political situation.

But political here is not a modality of thought, but a modality of space. In Agamben, politics are considered the field where subjectivity is immersed in its bareness. After a number of essays pointing at the concept of bare life from the late eighties until the early nineties, Agamben started with the development of his main work on what I will call a political ontology. This work became a trilogy called *Homo Sacer*, where Agamben seeks to provide a history of the sovereign subject and the impossibilities of the sovereign subject.

The question of the placement of the subject is immediately politicized by Agamben; the body of the subject becomes the place where politics occur and the situation of this body is immersed in a point of indistinction between private and political life. The political subject that was inserted in a polis is now exposed in a camp. For Agamben, the reality of this point of indistinction is found in its utmost bareness in the concentration camps

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<sup>6</sup> Agamben, 2000, p.122.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 124–125.

From these fields there is no possibility of returning to any classical conception of political philosophy;<sup>9</sup> any illusions that made the modern separation of a private and a public space possible are left aside when the process of desubjectification arises.<sup>10</sup> Our own physiological life becomes the object of a political experiment.

In *Remnants of Auschwitz*, the last part of the trilogy, Agamben focuses on the way these political experiments of oblivion, where the subject is exposed to its own disorder, allow us to speak of shame, the trace of this disorder, as the most proper emotive tonality of subjectivity.<sup>11</sup> The Italian philosopher takes Levinas as the main reference for his development of shame at this point. If in his earlier work he was mostly concerned with Foucault and Gramsci, now the dynamics where identity arises are set differently. This is because Levinas points at the limitations of being-in-language (Dasein) as a matter of intimacy alone. The I who speaks is always subject to the limitations of language. The event of language is precarious, and being, as being-in-language, finds in its intimacy this limitation. Becoming a subject is to become conscious of this discourse while at the same time being exposed to the trauma of the limitation of language.

However, it is still somewhat counter-intuitive to think of the description of shame that Levinas provides in a political sense, as Agamben seems to suggest. I must stress that the philosopher wants to focus on politics as the placement of a determined form of being. In a way, Agamben accepts the anarchical placement of the subject in Levinas, but unlike Levinas he doesn't seem to resist the idea of politics. Rather, he suggests that being-in-language, in its process of identity – which is a process of desubjectification – is in an anarchical position which is, at the same time, political. In doing so, he will identify that all politics are, from start, biopolitics. They are always dealing with the *bios* of the individuals – there is not, in Agamben, a passage from the disciplinary power into biopolitical power. Sovereign power is always operating on the essence of the individual, on restraining the modes of expression of an individual and his relation to others.

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<sup>9</sup> *Ibid.*, p. 138–139.

<sup>10</sup> Agamben, 2002, p. 107.

<sup>11</sup> *Ibid.*, p. 110.

For Agamben, our language attempts to give testimony to the emergence of this strange, but because language still reproduces intimacy, it seems it is not enough. The affected subject can never completely make sense of its own passivity. The proximity of the other is never identical to the self, and the history of my being becomes the history of this conflict between trying to be a sovereign subject and being-subject. As we move into a more “political” exegesis of what Agamben has to say, we can see that our demographic dislocation of the “undesirable” expresses an attempt at “domesticating” this process of desubjectification. Even as violence and poverty have decreased – and they have decreased much in the last hundred years – we seem to have dislocated the placement of the poor in our cities. We seem to have created small pockets of poverty (or, in the developing world, “pockets of development”) that are dislocated to the margins of the city, in an attempt to separate – once again – the Camp from the City. This is a classical view in political philosophy, even in Aristotle: the political relevant life lives in the city – slaves and foreign live in the fields outside. Locke justified slavery in terms of “being outside” the “scope of protection” of the law. Recently, we have a project of law in Arizona that states that if you do not have the proper documents at hand when you are stopped by a state officer, you might be arrested or even deported. If we compare the number of violent deaths in the peripheral region of any major city with the global number of deaths in the city, this is even more clear: the number of violent deaths in the south side of Chicago amount for almost five times the average of the city, the number of deaths in the favelas of Rio de Janeiro in the last landslide amounted for nearly 95% of the total in the city, black and Latino citizens in the United States have the standard of living of a third world country – even though they are, geographically, in one of the richest and best developed democracies in the World.

These ambivalences seem to be the political phenomena Agamben is trying to point out when he takes the issue of shame and desubjectification. The situation of our own political bodies is ambivalent, and even if we aren’t ourselves victims of a determined failed policy or social experiment (as are those who live in favelas and the projects), we are exposed to the intolerable situation of these events. The limit situation of the Concentration Camps, in Agamben, explicit the bare life which is potential in all of us – the naked and hungry bodies of the



survivors, when they face the liberator of the camps, expose a mutual shame. An impossibility to master one's own broken subjectivity.<sup>12</sup> Agamben never provides us with a way out of this situation where the subject is exposed as bare; he is quick to provide a grim description of the political situation and point at the need for an anarchic return to a notion of eudemonia.

#### IV. Modernity and Anarchy

When Virgil finds Branca Doria in hell his first reaction is one of surprise: how can Branca Doria be in Hell if he eats, drinks, and wears his clothes in Genova? After a while it becomes clear that Branca's body is in Genova, but his soul already breathes in Hell. His existence had already drowned into oblivion.

The romantic period in literature is rich in these sorts of paradoxes: in *Paradise Lost*, the condemned can only see the world through cracks in the walls of hell. In a way, all these examples are trying to make sense of our own position as both active subjects that seek to understand something about that which surround us while at the same time being affected by phenomena that cannot be quite reduced to words. The unspeakable horror of the situation in the camps and the beauty of a loved person are both always in tension with ourselves.

For Agamben, the only way by which to mitigate this tension is to drop the idea of external government, or sovereign power, as a tool for the administration of people. Agamben follows Levinas in identifying a structure to the subject and a fundamental emotional tonality that places this same subject in immediate relation with others. Shame is not essentially negative in itself; it is essentially negative *provided that there is a government*. As long as there is a structured organization of power and domination, for Agamben, the dynamics of totalization will be at play. But here Agamben moves away from Levinas since, as I have mentioned, politics do not *require* sovereign government. In this sense,

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<sup>12</sup> *Ibid.*, p. 87-94.

dropping government for the exploration of the “experiment” of oneself with others is the main quest of the “emancipated” individual. In this sense, even Democracy and Liberalism will still be dimensions of that same totalitarian power that ultimately seeks to erase expression.

But from a philosophical standpoint there is plenty to be said about the problems in both analyses. If Levinas is successful in describing the limitations of the self and the need to account for the Other within a different discursive framework, it is still not clear what we can really do about it. This is perhaps a criticism that goes outside the scope of the Levinasian analysis, but it seems to me that if his concern is with the field of Ethical Theory and the modes in which we can account for the other in philosophy, it is not enough to describe how our forms of description or relation with the other ought to be. It is, of course, an interesting exercise in philosophical abstraction, but if we want to insist on the concreteness of the situation of the poor, the widow, and the refugee, we also need to focus on the need of developing policies in order to deal with these situations. Levinas does not propose any policy. He rather suggests that thinking policies through might even indicate an attempt at totalization – but I am not sure that any policy would fall into this problem. At least not for Levinas – and perhaps that’s the bridge that needs to be thought of: one that takes the Levinasian take onto political philosophy (or at least a kind of policy towards those who need government).

However, if Agamben is proposing a sort of Levinasian take on political philosophy, I am increasingly convinced that it is not a profitable one. In both *Homo Sacer*, I, II, and III along with “In this exile” and several other essays, Agamben takes a number of false premises as the justification for his arguments. For example, the question of the placement of the poor and the failure of modernity is taken according to an assumption that poverty, violence, and sickness have been increasing.<sup>13</sup> There is no way one can take this argument to be the case. All statistics indicate that the world is less poor, less violent, and less sick than it was 70 years ago. Even with two world wars and two major economic collapses, the twentieth century marks an improvement in the global

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<sup>13</sup> Agamben, 2000, p. 128; 133.

condition of life. We have plenty of issues to take care of, but we also need to acknowledge that within the last 20 years, 400 million people left the poverty line in China. Plenty of people – way more than it is tolerable, for that matter – live below the poverty line, but we will not understand their condition by assuming that the global situation has been getting worse.

This is not to say that Foucault gives us a more satisfactory conclusion than Agamben. It is true that Foucault is less conservative than Agamben and his conclusions at least allow some saving grace for the role of government. Foucault himself said that if power was only repressive, then no one would actually want to follow rules. In a sense, there is a possibility of building an identity in the set of rules established by the government and creating one's identity inside the framework of institutions. However, Foucault wants to leave some space out of these institutions wherein individuals can also seek different forms of expression and identity.

Foucault understands the dimension of freedom within modernity, and he tries to increase the scope of equality to also contemplate different narratives. But his lack of structural ground to implement such a process brings complicated consequences. It is well known, for example, that Foucault used examples that were simply not truth in *Madness in Civilization* (the ships of fools were never a *fact*, as he seemed to indicate. They were urban legends). Perhaps this would be of no consequence for Foucault, since the narrative is more important than “facts”. But don't we want to be able to say that waterboarding is torture regardless of the discursive appropriation that calls it an “enhanced interrogation technique”? Don't we want to be able to say that a certain situation is shameful, regardless of the narrative that attempts to describe it as something else?

For all his interesting insights and suggestions, Foucault seems to fall into an epistemological trap in denying the importance of a general structure which allows us to speak of phenomena. Of course, I am at fault here myself, since I criticize Foucault from the standpoint of a Transcendental (and structural) Phenomenology – something that Foucault could never accept.

But both Agamben and Foucault, and to a lesser extent Levinas, point at the importance of understanding the role and structure of

emotions – shame, especially – in order to make sense of the ongoing process of identity in the unfinished project of modernity. If we are to understand the ambivalences and problems of contemporary politics – and the surprising absence of a liberal philosophy that takes the body seriously is an important issue to be taken here – we also need to admit the benefits of modern and liberal philosophy.

## V. An early preoccupation: Foucault and the limits of the modern state

In 1974, Foucault gave a lecture titled “The birth of social medicine” in the Institute for Social Medicine of the State University of Rio de Janeiro. This was the first instance in which Foucault used the term *biopolitics* in a public lecture. Curiously, this is situated somewhat before what is generally identified as the “genealogical” turn in Foucault, what Rabinow has called “the move towards power”, in 1975-6 with the development of the now famous course in the *Collège* – Society must be defended – and his first full text on the matters of biopolitics, *The history of sexuality*.

But this early text is more than just an introduction of the term *biopolitics*. It is also a completely different interpretation, given on a more intense Marxian verve, of the phenomena. In this sense, this short paper, dedicated to the great Roberto Machado (who also translated this article into Portuguese), gives us some interesting insights into the interpretation of what Foucault understands as biopolitics.

I want to take advantage of the context wherein Foucault presents the paper in order to explain what is at stake here. Of course, by the time he presented his paper in the State University, Michel Foucault could not know what the future held for Rio de Janeiro. Back then, Rio was a different place. The military regimen was at the peak of the repression, the so-called projects of urbanization and relocation of the population into the Collective Habitations were still ongoing, and the biggest safety concern of the government were guerrilla groups in the countryside and student/union protests in the city.

Still, Foucault might have been able to realize that there was an

ongoing project of *territorialization* going on in Rio. Nobody would claim that the “favelas”<sup>14</sup> had not been a part of the geography in Rio since the 19<sup>th</sup> century; the novelty, at that moment, was the attempt to situate the favelas within a certain zone. The local government in Rio (and in many other cities in Brazil) decided to take issue with the uncontrolled dissemination of unauthorized housing, moving entire populations from one zone to another, moving the poor populations outside the downtown zone and attempting to “domesticate” the process of migration that was causing the overpopulation of the metropolitan area of Rio.

In this sense, the solution given for the problem of overpopulation and poverty in Rio was to treat the individuals affected by this situation as a “group” and to insert this group into the body of a society. By the time Foucault gave his lecture in the State University, this was the core of the definition of Biopolitics: the control of population moves from the singular individual into the population. The migrant, the poor, the sick, as individuals, do not concern the government. It is society, as a whole, that demands protection. At this stage of his work, Foucault understands “biopower” as a way by which capitalist society *invests* in this form of power as something that constitutes the social body. At first, Foucault tries to show how the history of biopolitics is tied with the history of capitalism; with the emergence of cities, the emergence of health *policies*. The leading clue here is the emergence of these policies within the German state, better yet, as a unifying force for the German state. Foucault tries to point out that the development of capitalism in Germany happens because the German state lacks the tools that England and France had at hand to develop a state. Where England and France could count on strong armies and strong economies, Germany had to count on a different aspect: the medical.

But why is this noteworthy? It is noteworthy in the sense that it creates a different form of expression for sovereign power. The focus, for Foucault, is not in the change of mode of production – though this is important – but in the change of *strategy* in order to enable governance. This strategy of power is identified in Foucault as a first “phase” of biopolitics, that is, medicine of state. This is peculiar to the devel-

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<sup>14</sup> Some translate “favelas” as “shanty towns”. I prefer to keep the original term.

opment of capitalism as it relates to the modern, Westphalian, State and the Westphalian mode of sovereignty. For Foucault, this mode of governance is the most important historical feature for our understanding of the period, as the *Staatswissenschaft* are perfected in the Prussian state as a meticulous control of the general health of the population.

Wherein previous models of sovereignty were concerned with individual bodies – domesticated by the army, controlled by the police, and punished in the prison – now we have the emergence of the sovereignty as the manager of a population, a group of individuals under a same rubric. In Germany, the first individual to be “normalized” is the doctor – the State establishes general norms, criteria, to allow the construction of medical schools, and the State issues the final stamp that permits one to practice medicine legally. It is also the State that will verify the means and conditions that qualify an epidemic and how to deal with one – but in order to identify the “sick”, first the State will need a model for the normal. This model was the physician, so now we had a concept of sick and a concept of health, both under control of a sovereign structure. Surely, Foucault is aware of the *necessity* of such a move in a Europe that still suffered the consequences of the plague; but we also need to be aware that this move also plays a part in the transformation of the government.

How exactly does it change the role of the government? The movement into biopolitics will dislocate the “place” of the sovereign in the sense that the power over the subject is no longer located in establishing a “docile” body by external force, but by domesticating life by defining the stances in which life is worthy of protection and how it is worthy of protection. There is a sovereign imposition of modes of living and normative differences for different “profiles”. Please note that Biopolitics is not only negative, it grants an important set of rights, such as social security, public healthcare, and public hospitals, but Foucault is quick to point out that the right to social security, public healthcare, and public hospitals (just to give some examples) is dependent on whether or not one is contemplated as having rights. Racial and social identity are not a matter of an individual making sense of his own history, but a matter of external imposition of a profile that will grant you more or less protection – or, in some cases, no protection whatsoever.

In this early paper, this strategic imposition of a *mode of living* was thought so that individuals would pursue occupations that do not serve

their own interests, but the interest of society. The dislocation of the population from farms and into industrial areas, in the first moments of Capitalism, denotes this biopolitic. The State first develops the science that will allow for the identification of a profile, and later it uses this profile in order to create a workforce. And note that Foucault doesn't express any moral judgment about this movement – at this moment, biopolitics is neither negative nor positive. Rather, he seems to want to point out how this creation of a workforce, and the consequential urbanization of the modern space, are dependent on the birth of social medicine. Or, if you prefer, on the birth of biopolitics.

But how could the State protect the entire labor force? Certainly, not as individuals. As the number of individuals moving into urban areas increases, so does the necessity for a system of sanitation. The chaotic design and jurisdiction of the feudal cities (Paris, for example, had more than seven different authorities and regulations for different parts of the city) had to be unified under a same system of sanitation, education, police, and so on. The concept of a municipality was born from the need to create the conditions in which a society could be understood and controlled homogeneously.

In this sense, the idea of health becomes a dispositive, as it is used as a tool, a technology, that enables the State to identify those who are fit to work, to serve, and to govern. More importantly, it allows the State to identify those who *do not fit*. On the one hand, this is a realm of protection, a realm of *rights*, if you wish. On the other, it is also a realm of alienation or exclusion (often of alienation *and* exclusion). Now the biopolitical turn starts to acquire the density that will allow us to speak of “positive” and “negative” biopolitics, or, technologies of power *versus* technologies of the self.

Make no mistake: at first, even in its most positive moments, the realm of rights here is strictly of subsistence. The labor force would be given the bare minimum so it wouldn't starve; preferably it would be so minimal that they would also not have enough force to rebel. This strategy, somewhat unsurprisingly, backfires and leads to a number of socio-political revolutions. As a result, some space is eventually conceded to labor unions and the circulation of goods is more dynamic. More importantly, fresh air and water will be more widespread within the city.

Thus, urban medicine is not a medicine of *people*, but rather a medicine of *things*. It is a medicine of the *conditions* of life and the *means*

of existence. Though these means and conditions are somewhat distributed within the city, they are not distributed in the same way. Only in the 20<sup>th</sup> century were potable water and sanitation homogeneously available in most cities in Europe, North America, Japan, and Oceania. Elsewhere, it remains somewhat present, but still hugely unequal. However, the *means* for the distribution are there, and they are regulated by a central power. This would be a persistent element in any city that we would identify as going through a process of “modernization”.

We can now divide biopolitics, *qua* social medicine, in three phases:

1) Medicine of State: wherein the sovereign power develops a concept of medicine as a technology that will allow us to speak of a “citizen” whose health is defined from a set of concepts under the control of the State. The life of the individual becomes the space wherein the sovereign acts. Let us call this the emergence of a “normative concept of person” which is dependent on the establishment of this Medicine of State.

2) Urban Medicine: wherein the citizen, as part of a population, is dislocated onto a homogeneous space wherein basic means and conditions of existence will be given. This basic means will build the framework wherein the modern city will be built.

3) Popular or Labor Medicine: In this paper, Foucault calls it the *poor-men’s medicine*. Given that the doctrine of the bare minimum backfires in the social revolutions of the 18-19<sup>th</sup> century, governments provide a system of protection and division of the population. The geographical divide between rich and poor becomes more well-defined within the city, as does the scope of protection. Poor populations are given a special kind of assistance, since they cannot provide for their own health with their own means – in this sense, the rich sectors of the population will pay for the healthcare of the poor population and hopefully avoid another revolution. In a way, this movement is at first a reconsideration of the doctrine of the bare minimum, which is not the “bare minimum to avoid revolution”.

For Foucault, different countries within Europe will go through these phases in a different manner, with different justifications and ultimately different technologies behind the movement. But it is still the case



that these three phases are historical conditions for our understanding of the formation of the modern state.

You must have noted, by this point, that the history of biopolitics is the history of political liberalism, as society becomes an issue for the state – that is, the government becomes the government of the living, who are governed in a homogeneous whole called a “society”. The development of a “reason of the state” is then the biopolitical project *par excellence*.

But why is it that Rio matters?

It matters because it expresses the very tension Foucault is describing in this paper.

Rio, since 2011, has been going through a marked process of re-territorialization. The strategy for the government has been clear: it was necessary to introduce “satellite” police stations inside the favelas, so the movement of police and the control of those parts of the city would be simpler. The local government had realized that the situation in some of the favelas was completely out of control, with policemen stopping at barricades armed with anti-artillery and AK rifles before they could enter the favelas.

In a sense, then, the state had lost control of those territories. And if one sees the pictures of the favelas that the police was trying to control, one would hardly find anything resembling pavement, sewer or even legal housing.

When Foucault was in Rio, in 1975, these areas were still being populated. The government was moving into the third phase of biopolitics, wherein the poor population was drastically separated from the rich. But the corruption of the police forces, allied with 30 years of administrative neglect, transformed these zones that were at first idealized as controlled territories where the poor could receive some degree of protection, into zones where the state is nowhere to be found. The introduction of police stations into these zones, in a certain sense, is a recognition that the process of integration of these populations is in the square zero. They are hardly part of the homogeneous unity called Rio de Janeiro. At this point, there hardly exists a homogeneous unity called Rio de Janeiro.

But Rio is a leading clue to a more universal problem. The outskirts of Detroit, Paris, or London – just to name a few that are, obviously, much less violent than Rio – are also going through a similar process of exclusion and abandonment. The scope of *rights* that was somewhat integrated within our understanding of political liberalism is dropped in favor of the scope of domination and alienation, which was *the* ghost of political liberalism, as Marx pointed out so well – and so decisively.

Rio, where Foucault introduced the idea of the history of liberalism as the history of biopolitics, has become a kind of living symbol of modernity as an ongoing and unfinished project, a project that Foucault so interestingly notes, as he talks about a philosopher called Jurgen Habermas, allows for a different kind of technology, a different form of existence, techniques that

“permit individuals to effect, by their own means, a certain number of operations in their own bodies, their own souls, their own thoughts, their own conduct, and this in a manner so as to transform themselves, modify themselves, and to attain a certain state of perfection, happiness, purity, supernatural power. Let us call these techniques ‘technologies of the self’”.

For Foucault, these technologies meant that we are not doomed to alienation and fetish in the modern, capitalist, state. Rather, it means technologies can always be flipped upside down. As we see the history of the Westphalian state as a history of a permanent crisis of subjectivity and sovereignty, we also see that even individuals within the society are struggling to keep some sort of order, some sort of structural framework. The discourse of minorities or of repressed individuals does not usually call for an *end* of the regimen of rights – it calls for more equality, for an expansion of the *domain* of rights. Foucault was not an anarchist, he was a historian of the crisis of political liberalism. In Rio, he found a venue wherein this ongoing crisis was, and still is, exposed.



Self-Authored Human Rights  
as Claim to Universality

Petr Agha



## 1. Introductory remarks

In the debate about the universality/relativity of human rights, which has arguably been rambling on in various forms for centuries, three principal types of argument have been deployed on both sides: conceptual (claims about what core terms and ideas mean), empirical (claims about the way the world is in fact) and normative (claims about how things ought to be).<sup>1</sup> The core of the universalist case is that human rights are conceptually universal because they derive, by definition, from our common humanity and are, and should be, independent of whatever else divides or distinguishes us from each other. A number of observations have also been made about other alleged empirical universals in the human experience, including that individual human biology, psychology, basic needs, potential, and the capacity for reason are the same the world over; that reason is the only universal guide to values capable of transcending specific contexts because the other alternatives – intuition, sentiment, imagination, empathy, and revelation – are all highly culture-specific; and that globalisation is producing the world’s first global value system grounded fundamentally upon individual human rights. From this perspective, two prominent contenders for the primordial natural/human right are the right to life and the right to liberty on the putatively self-evident grounds that without life no other rights are possible, there is no “natural” reason (ignoring the distortions of culture and prejudice) why any given human being (particularly a newborn) should have a greater entitlement to survive than any other, and that individual freedom requires no justification whereas each and every restriction upon it does.<sup>2</sup>

With compelling arguments on both sides of the universalist/relativist debate, most commentators now accept that human rights are universal at the conceptual, global and international legal levels, while simultaneously relative on the dimensions of national, regional and

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<sup>1</sup> See, e.g. Donnelly, 2013, chs. 6 & 7; Walsh, 2010, p. 45; Osiatyński, 2009, ch. 4; Donnelly, 2008, p. 194; Goodhart, 2008, p. 183; Donnelly, 2007, p. 281; Cowan, Dembour and Wilson, 2001; Wilson, 1997.

<sup>2</sup> See, for example, MacDonald, 1984 and Hart, 1984.

cultural implementation.<sup>3</sup> Several other observations might be added about the relative universality of human rights. First, analogies can be drawn with other “relative universals” in the human experience. Take death for example. While we all must die (a universal), this can happen in diverse or relative ways including, before birth, at a ripe old age, as a result of crime, accident, ill-health or quirks of physiology, suddenly or slowly, peacefully and painlessly, or in great anguish and distress. Language is also a relative universal, manifested not only in all human cultures, but also in some 7,000 highly diverse and mostly mutually incomprehensible contemporary languages. Admittedly neither death nor language is the same as a standard or norm. But these examples nevertheless illustrate that, at least as concepts, “universality” and “diversity” are not inherently incompatible.

While the global universality/relativity debate is typically conducted in terms of universality and *cultural* relativity, human rights are, in fact, relative in a variety of ways. This is particularly true in circumstances where they conflict with each other and with public interests.<sup>4</sup> Friction between rights, and between rights and public interests – such as that between the rights to freedom of expression and to respect for private life, or between the right to respect for private life and the protection of national security – are commonplace not only in the ECHR context, but in contemporary liberal democracies generally.

The debate about the universality/relativity of human rights has three principal dimensions. It is anchored, first, in the now widely-accepted realisation that the controversy over the universality/relativity of human rights in general is ultimately irresolvable because no knock-down arguments are waiting to be deployed, and no discoveries to be made, which will conclusively settle the matter. Most commentators now accept that the most profitable and practical territory lies in the middle ground; that is to say, in the acknowledgement that human rights are “universal” in some senses, particularly as abstract individual entitlements, and “relative” in others, particularly in terms of the specific implications they have in concrete circumstances at national level.

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<sup>3</sup> Donnelly (2007) (n 4), for example, calls this “relatively universality”, while Osiatyński (n 4) pp. 182–186 distinguishes between “hard” and “soft” universalism.

<sup>4</sup> See, e.g.: Osiatyński (n 4); Zucca, 2007.

## 2. Emancipation of the subjects (of law)

In his 1996 collection of essays, *Emancipation(s)*, Laclau schematises four possible concepts of the relation between the particular and the universal. The first two are immediately relevant, and I shall return to the third and fourth later. The first conception Laclau identifies is really a case of non-relation between the universal and the particular. According to this conception, there is a strict “dividing line between the universal and the particular” and yet “the pole of the universal is entirely graspable by reason”. Laclau writes: “In that case, there is no possible mediation between universality and particularity: the particular can only *corrupt* the universal. We are in the terrain of classical ancient philosophy” (such as Plato’s metaphysical theory of forms, for example).<sup>5</sup> Laclau’s second conception is drawn from the history of Christianity, wherein universality is not accessible to human reason but rather occurs, opaquely and unpredictably, through revelation. Because in Christianity, as Laclau explains, the universal “has to realize itself in a finite reality which has no common measure with [it], the relation between the two orders [of finite human particularity and God-given universality] also has to be an opaque and incomprehensible one. This type of relation was called *incarnation*, its distinctive feature being that between the universal and the body incarnating it there is no rational connection whatsoever”.<sup>6</sup> On this theological conception of incarnation, it is God alone who mediates between the realms of the universal and the particular. Over time, this theo-logic of *incarnation* becomes secularized. Laclau observes:

A subtle logic destined to have a profound influence on our intellectual tradition was started in this way: that of the *privileged agent of history*, the agent whose particular body was the expression

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<sup>5</sup> Laclau, 1996, p. 22 (emphasis added). This book is a collection of previously published essays. The essay in which Laclau lays out his four different models is entitled “Universalism, Particularism and the Question of Identity” (pp. 20–35) but my own, later, elaboration of his fourth model in this chapter is culled from other essays in this collection.

<sup>6</sup> *Ibid.*, p. 23 (emphasis added).



of a universality transcending it. The modern idea of a “universal class” and the various forms of Eurocentrism are nothing but the distant historical effects of the logic of incarnation.<sup>7</sup>

Laclau goes on to argue that modernist versions of this originally theological idea are not simply echoes and repetitions of a theological inheritance but in fact represent a reformulation and a radicalisation of them. A thoroughgoing secular version of this theo-logic, after all, calls both for the elimination of God and for the idea that the universal is incomprehensible to human reason. Neither proposition is acceptable to a secular, rational modernity. Accordingly, we move from a concept wherein the particular body is, as Laclau puts it in the quotation above, “the [rationally incomprehensible] expression of a universality transcending it,” to a starker, immanent, less mediated conception. He encapsulates it thus: “We have to postulate a body which is, in and of itself, the universal”.<sup>8</sup> With this, we arrive at a familiar (modernist) history of Eurocentrism, colonialism and imperialism. “The universal had found its own body, but this was still the body of a certain particularity – European culture of the nineteenth century. So, European culture was a particular one, and at the same time the expression – no longer the incarnation – of universal human essence,” which meant that “European imperialist expansion had to be presented in terms of a universal, civilizing function, modernization and so forth,” to which resistances were presented “not as struggles between particular identities and cultures, but as part of an all-embracing and epochal struggle between universality and particularisms – the notion of peoples without history expressing precisely their incapacity to represent the universal.”<sup>9</sup> The (European) particular thus, simply, becomes the universal. The processes by which particular cultural or political formations manage to arrogate to themselves the position of the universal are exemplified in a range of historical and contemporary examples, both within and without the place called “Europe”.

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<sup>7</sup> *Ibid.* (emphasis in original).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 24.

Once a certain political or cultural formation manages to install as universal, and thence invisibilize and forget, its particularity, then other traditions are cast in the position of having either to reject these supposed values (in the name of their own particularism, tradition, cultural purity or difference) or to emulate, assimilate, and insert themselves into a putatively universal history not of their own writing. It is hence unsurprising that so much critical energy has been expended in debunking claims to encapsulate the universal and thereby to expose the ways in which it is nothing other than a parochial particular masquerading as a universal standard for the whole of humanity. This critical exposure of the non-universality of the universal has been extraordinarily powerful and politically productive. It is safe to say that the old, modernist universal of Europe is in increasingly bad odour – and has been for some time now.

The third conception that Laclau offers of relations between the particular and the universal is one of pure particularism, wherein the very possibility of an appeal to universal values beyond the limits of any given particular is withdrawn. This conception provides the social and political background to Laclau's own theorizing. He observes: "If we wanted briefly to characterize the distinctive features of the first half of the 1990s, I would say that they are to be found in the rebellion of various particularisms – ethnic, racial, national and sexual – against the totalizing ideologies which dominated the horizon of politics in the proceeding decades".<sup>10</sup> The spectre conjured up by this "proliferation of particularisms" is that the universal is "increasingly put aside as an old-fashioned totalitarian dream".<sup>11</sup> While politically sympathetic in many respects to the social and political movements of the 1990s – the rebellion of racial, ethnic and sexual minorities; claims of cultural difference and multiculturalism; movements for national self-determination – and their critique of totalising, or modernist, fantasies of universal closure, Laclau worries about the utter evacuation of the universal implied by the turn to particularism. He thus offers two concise critiques of the logic of pure particularism. "In the first place," he argues, "the assertion

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<sup>10</sup> *Ibid*, vii.

<sup>11</sup> *Ibid*, p. 26.

of pure particularism, independently of any content and of the appeal to a universality transcending it, is a self-defeating enterprise". This is because if the "only accepted normative principle" is the defence of particulars (cultural, religious, ethnic, etc.) then one must accept the claims of self-determination of any and all groups (even those cast in racist, discriminatory or reactionary ways). If and when such claims and community practices clash, then there is a necessary appeal to some general principle to resolve the tension. "In actual fact," he concludes, "there is no particularism which does not make appeal to such principles in the construction of its own identity".<sup>12</sup> Laclau's second critique is more pointed and polemic. Here he argues that if one grants the hypothesis of a pre-established harmony between different particulars, then the identity of those particulars have to be understood as "purely differential and relational; so it presupposes not only the presence of all the other identities but also the total ground which constitutes the differences as differences". "Even worse," Laclau continues, "we know... that each group is not only different from the others but constitutes in many cases such difference on the basis of the exclusion and subordination of other groups". This, he says, ultimately leads to the logic of "separate development".<sup>13</sup> Without some orienting horizon, the defender of particularism is placed in, at the very least, a difficult and disabling position.

Laclau's analysis helps us grasp the basic sense of a universal which is not closed off to political and legal contestation on behalf of excluded particulars but there are yet multiple ways in which once could understand, and practice, this newfound mobility of the universal in terms of human rights. One way can be found in the work of the historian Lynn Hunt, most clearly in her 2007 book, the *Invention of Human Rights*. On the account offered by Hunt, we might say that the universal content of human rights is *temporalized* so as to admit of particular contestation and renewal. Hunt shows how the Rights of Man, putatively universal and yet racially, sexually, and religiously exclusionary in their contemplated (and actual) application, come to be progressively taken

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 27.

up and claimed by those it excluded. Hunt's strategy to reconcile the putative universality of the Rights of Man with their practically limited and particular application is to suggest that, as the historical experience of the French Revolution and its aftermath demonstrates, "human rights have an inner logic". According to this logic, once a declaration of universal rights is made, then sooner or later the particular groups not envisioned (or, actively excluded) in its constitution as universal come to insist on their place in the universal. Hunt refers to this logic throughout the book as a kind of "cascade,"<sup>14</sup> and the assumption is that the universal remit of rights is gradually expanded over time. This progressive cascade operates according to what she calls a "kind of conceivability or thinkability scale":

No one knew in advance which groups were going to come up, or what the resolution of their status would be. But sooner or later, it became clear that granting rights to some groups (Protestants, for example) was more easily imagined than granting them to others (women). The logic of the process determined that as soon as a highly conceivable group came up for discussion (propertied males, Protestants), those in the same kind of category but located lower on the conceivability scale (propertyless males, Jews) would inevitably appear on the agenda. The logic of the process did not necessarily move events in a straight line forward, but in the long run it tended to do so. ... In the workings of this logic, the supposedly metaphysical nature of the Declaration of the Rights of Man and Citizen proved to be a very positive asset. Precisely because it left aside any question of specifics, the July-August 1789 discussion of general principles helped set in motion ways of thinking that eventually fostered more radical interpretations of the specifics required.<sup>15</sup>

Several elements can be distilled from the above formulation. First, the universal at play here is (unlike the classical or modernist variants) only

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<sup>14</sup> Hunt, 2007, p. 147.

<sup>15</sup> *Ibid.*, p. 150-151.

“supposedly metaphysical”. It is not removed from time and space but rather fully temporalized itself and responsive to politics and society. Secondly, this temporalized and mobile universal moves precisely in response to the claims of particular groups for inclusion within the franchise of rights. Thirdly, the mobility of this universal is (despite Hunt’s qualifications) linear and progressive – over time, more and more groups come to insist on their equal status as humans within the rights franchise as they are gradually imagined to be equals. Fourthly, it is precisely the claimed universality of rights that invites this expansionary logic (that is to say it “help[s],” as she puts it above, “set in motion ways of thinking [and political acting]”). So, here we have a renewed conception of the universality of human rights which understands the universal and the particular dimensions to be in tension, but this tension is seen as politically productive in that it gradually conduces to the expansion of the rights franchise so as to include more (and hitherto unthinkable different) particulars.<sup>16</sup> And yet despite the more grounded, politicised conception of the universal offered by Hunt, hers remains a curiously *depoliticised* account of the politics of human rights. It is an account of the politics of human rights that lacks any sense of contingency, unpredictability, rupture or political agency. As Samuel Moyn observes, “[t]he protagonists of her book are not people thinking and acting on their convictions but rights themselves, which do things like ‘creep,’ ‘thicken,’ ‘gain ground,’ ‘gather momentum,’ ‘reveal a tendency to cascade,’ have a ‘bulldozer force,’ ‘make their way ineluctably,’ ‘take shape by fits and starts,’ ‘take a backseat,’ and ‘remain in need of rescue’”.<sup>17</sup> This elision of political agency in the making of the meaning of rights can be sourced back to Hunt’s insistence that there is a logic immanent to rights themselves which vouchsafes their progressive directionality – it is as if the long run tendency of rights to expand and

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<sup>16</sup> Hunt is by no means alone in adopting such a view. It is implied, for example, in Jack Donnelly’s understanding of the ever-expanding liberal franchise of human rights law in which first non-propertied men, and then women, and finally a succession of racial and ethnic others came to insist upon their equal humanity as rights-holders (see his “Human Rights and Asian Values: A Defence of ‘Western’ Universalism”, 1999, p. 63–64).

<sup>17</sup> Moyn, 2014, p. 8.

become more inclusive (*more* universal) stands in for the present, and difficult, political work of agitating for new rights and new conceptions of the holders of rights. The key to such an account is the celebration of “progress”, but this is to miss the point that what we call progress or evolution is the outcome of political contestation:

There may well come what we later will call progress, and new identities may be allowed or ushered onto the threshold of justice, but progress does not come with its own guarantee, nor is it a meaningful criterion to guide us. In the moment we do not know in what progress might consist, and new claims may seem laughable. Looking backward, we can say with satisfaction that the chrono-logic of rights required and therefore delivered the eventual inclusion of women, Africans, and native people into the schedule of formal rights. But what actually did the work? The impulsion of rights, their chrono-logic, or the political actors who won the battles they were variously motivated to fight and whose contingent victories were later credited not to the actors but to the independent trajectory of rights as such?<sup>18</sup>

What is missing from such chronological accounts is the sense of unpredictability and the possibility that, in fact, the limits of the human can at any moment contract rather than happily expand – that is, precisely, a *politics* of human rights that appreciates that the expansion (or contraction) of the category of the universal is a hard-fought and unpredictable affair. Hans Joas, writing of such demands for inclusion within the universal, reminds us helpfully that they always “had their opponents; some – such as the abolition of slavery – were bitterly resisted, implemented for a time but quickly reversed; others – such as full rights for women – were viewed, even by the most radical universalists, partly as preposterous, and partly as a danger to the life of society”.<sup>19</sup>

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<sup>18</sup> Honig, 2009, p. 47.

<sup>19</sup> Joas, 2013, p. 18–19.

### 3. Discursive regime(s) of human rights

For human rights to be *effective* they need to be used, applied and exercised in relation to other (human) rights and other considerations, and all this always happens in an uncertain balance. But, if the variables of a case (the rights in question, local cultural, political and religious sentiments, or even the pan-European perception of certain subjectivities) are constantly in a state of a change, than there is no stable ground for self-evident facts and a ready-made judgment. Furthermore, and to complicate matters even more, it is not only the object of adjudication that exists in a continuous state of transformation, but also the “subject” doing the interpretation – the European societies – change in time and across space as well.

This discursive aspect of the Convention system has a dimension which is often overlooked and which we can expound using some of Jacques Rancière’s ideas. He holds that politics is democratic not in the sense of a set of institutions, but in the sense of *forms of expression*.<sup>20</sup> He develops a concept of the so-called subjectification, a process through which *new ways of doing and being come into existence*.<sup>21</sup>

Human rights frameworks tie the claim of an individual to a certain language and (normative) frame of reference while at the same time providing the nation state discourse as well as the aggrieved individual a certain surplus in relation to the world of nation states, where we find carefully dispersed roles, tasks and the languages, understood as suitably fitting to the individuals and groups within the particular communal order. At the same time, (the claim) cannot be reduced to that frame of reference only, since for it to be effective, it must also be embedded in common tradition because this particular tradition is also the precondition for the observance and subsequent implementation of this ideal in the first place – In this way it “decomposes and recomposes the relationships between the ways of doing, of being and of saying that define the perceptible organization of the community”.<sup>22</sup> Precisely for

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<sup>20</sup> Rancière, 2003, p. 101.

<sup>21</sup> Rancière, 1999, p. 26.

<sup>22</sup> Rancière, 1995, p. 40.

this reason this supplement also divides the existing order<sup>23</sup> because the process of subjectification, is always also the process of “disidentification, removal from the naturalness of a place”, which by way of its appearance also disrupts, the hitherto existing communal order and balance.<sup>24</sup> The struggle of an unrecognized party for equal recognition within the established order is then possibly capable of reconfiguring the situation in which it is enunciated.<sup>25</sup>

Habermas shows the importance of discussing, arguing, and of making demands in a variety of registers – moral, legal, or political – and postulates an important condition of legitimacy for the norms binding individuals.<sup>26</sup> This process is never strictly linear however, but involves transformative ruptures, U-turns, and dead-ends. Any (philosophical) attempt to posit a unique and universal solution across Europe and different communities is not just impossible but is also highly undesirable in terms of the goals of the Convention.<sup>27</sup> In order for such (far reaching) norms to be legitimate, individuals and communities need to leave their mark on the creation, interpretation and application of those normative frameworks.<sup>28</sup> Each human rights claim is then perhaps better understood as an advent in the inherent plurality of sharing the polis with other members than its failure, where members of the polity determine definitions of basic norms of living together, such as human rights, but not (only) as protective shields, reason blocking arguments,

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<sup>23</sup> Rancière, 2003, pp. 224–225.

<sup>24</sup> Rancière, 1995, p. 36.

<sup>25</sup> Rancière, 2006. “Politics exists when the figure of a specific subject is constituted, a supernumerary subject in relation to the calculated number of groups, places, and functions in a society.” (p. 51)

<sup>26</sup> Habermas, 1984.

<sup>27</sup> “In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’ ...” ECtHR, judgment of 7 July 1989, *Soering / UK*, Series A, Vol. 161, § 87.

<sup>28</sup> See further Marks, 1995, pp. 209–238, p. 211 and Mowbray, 1999, pp. 703–725, p. 704.



etc. but rather as integrative tools of the common project.<sup>29</sup> On this reading, human rights application does not require an authoritative top-down statement which is justified by a universal set of principles transcending the political life of the polis – it is transformed into a process where human rights become not an end in itself (i.e. trumps), but means for the continual shifting of the common normative framework we have established and which we share. As Habermas has put it: “The desired internal relation between human rights and popular sovereignty consists in this: human rights institutionalize the communicative conditions for a reasonable political will formation. Rights, which make the exercise of popular sovereignty possible, cannot be imposed on this practice like external constraints.”<sup>30</sup> They construct a scene on which (political) subjectivity occurs. This is why it is vital that both the argument and the stage against which a statement is going to be counted as a valid argument must be generated, that is, it is necessary to simultaneously produce both the argument (the human rights in question) and the situation in which it is to be understood (the particular circumstances of the case). The forum which is created by the human rights dispute brings together not only the parties of the dispute and the Court but also other factors that are at play in the given case (principles, passions, identities, power relations).

There is no proper model or content of a given human right, the concrete meaning of a human right in a concrete situation, and by extension the more general human rights framework therefore does not really pre-exist the particular dispute in any meaningful way, for they are uniquely constituted by it.<sup>31</sup> Human rights can therefore be appropriated by anyone. And as such they never simply just pre-exist politics or govern it from some vantage point of principle; rather they are pre-supposed and verified by the very activities which the subjects of politics engage in. One of the corollaries of this view is not the rejection of human rights standards but the rejection of the ability of the political community to identify absolute criteria of judgement which

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<sup>29</sup> Habermas, 1998, p. 159–161.

<sup>30</sup> Habermas, 2001.

<sup>31</sup> As Rancière, 1999, p. 27, explains: “[p]arties do not exist prior to the conflict they name and in which they are counted as parties.”

would precede the concrete coordinates of the case (without any remainder) and which could traverse time and space.

Perhaps the following example may help to illustrate the tension inherent in human rights frameworks and demonstrate how productive and necessary it is for the successful application of human rights. In *Did Somebody Say Totalitarianism?* Žižek re-tells the story of Antigone. Illegally burying the dead body of her brother Polynices who had waged war against the city, Antigone challenges the laws of the City, with reference to “laws of God and heaven”.<sup>32</sup> Her act challenges the laws in place as well as the symbolic economy of the community by raising the claim that transgresses the arrangement of the normative framework in place, by demonstrating a possible gap within the societal arrangement of the community. In her eyes, her brother’s dead body and the rule which prohibits his burial represent a gap in the laws of the city. And while Creon denies the realisation of what is under common circumstances considered to be a universally accepted right of every citizen of the polis, on the grounds that he had waged war against his own city and community, Antigone challenges this exception to the universally recognised right as well as the justification which was offered by Creon, who in this respect acts as the representative of the polis, and she eventually buries her brother’s body. What this act does is to bring together in one moment all the variables that make up the normative system of a community, its symbolic economy, and the legal norms which refer to this framework as well as the popular understanding of what constitutes valid norms in the given community. Antigone also reveals that there is a normative as well as symbolic system in place which excludes some different understandings of the normative framework in place from becoming their integral part.

The claim of Antigone is not put forward to claim protection from the majority, to claim help for the aggrieved individual whose right to X was violated by majority. The lesson of Žižek’s Antigone is quite different. The claim of Antigone does not come to public domain *ex*

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<sup>32</sup> “Justice that dwells with the gods below knows no such law. I did not think your edicts strong enough. To overrule the unwritten unalterable laws of God and Heaven, you being only a man. They are not of yesterday, or today, but everlasting, though where they came from, none of us can tell.”

*nihilo*; she makes reference to the normative order in place, an order which is higher than rule of man but, at the same time, the primacy of such an order is acknowledged by the members of the community as well as the exceptions which were imposed on their otherwise universal validity. Her act challenges the limitations imposed on the rights which are otherwise afforded to all members of the community and in the very same vein challenges the inconsistency and deficiency in how that which is accepted as universal is applied to some cases. Antigone's claim is not rooted solely in some external normative domain; she remains firmly rooted within the normative order of the polis. Antigone indeed makes reference to a higher order principle, the laws of gods, but at the same time, she wants the polis, her polis, to hear her out and consider the reasons she puts forward while using the very same normative frameworks and language as the polis which excluded her from the scope of the right to X as agreed upon. Individual applications, on this understanding, invoke the language of human rights in particular circumstances, and reveal that "in what is given to us as universal, necessary, obligatory, what place is occupied by whatever are singular, contingent and the product of arbitrary constraints?"<sup>33</sup>

Human rights emerge as relations and not just as one-dimensional negative constraints on the political life. If human rights are contingent expressions and products of the social struggles in which they arose, the individual once again, via the individual application, becomes the central figure of the process of human rights adjudication, this time not as a figure in need of protection, but as a political actor *par excellence*. This is when and where human rights translate into concrete forms of practising critique and effective change. Antigone's act is an act which on the one hand takes a step beyond the existing normative and symbolic order by engaging the (higher) law of gods but is, at the same time, entirely embedded within the concrete legal, political, and moral order. And for this reason, Antigone's act is by definition political because it is in common with others.

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<sup>33</sup> Foucault, 1984, pp. 32–50.

#### 4. Concluding thoughts

Resonant with this is the emphasis this chapter puts on human agency as realized through local political practice. What kind of structure might be capable of producing and implementing “self-authored” human rights? First of all, human rights are not something to be determined by tiny elite-cultures of experts. Nor are they merely the outcome of bargaining among interest-groups. It is rather the *repeated* action of generating argumentation, reasons, language as well as recognition which allows individuals and groups to author their way into the shared symbolic structure of the public sphere. This interaction provides for the opportunity of generating new and sophisticated (legal) language which allows to capture that which was inexpressible before. This act of “rendering visible the invisible”<sup>34</sup> helps to identify the possible blind spots in human rights application.

This chapter has so far put forward a different form of reflection than we commonly encounter in the literature on human rights, one that transforms human rights into a practical inquiry. It is primarily concerned with creating an opening, spaces where the individual dissenting position may re-form the conditions under which it arose in the first place. Individual human rights claims were presented as a form of critique that has the capacity to re-establish the productive tension between human rights and the political life of the society. It occurs, as it were, each time when something new and different interacts with the normative order in place and cannot fit within the existing domestic (human rights) framework. Such claims, however, are not a step outside the inconsistency of the domestic legal, political and moral framework or the particular circumstances in which the individual finds herself; on the contrary, it is a step *into* the very inconsistency of that particular order.

This chapter re-conceives human rights as embedded within community and as “self-authored” by their own addressees (individuals and nation states alike) and emergent through collaborative activities. In this sense, human rights lend powerful critical stance, but this stance is not

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<sup>34</sup> Derrida, 2005, pp. 68–75.

one-directional – it requires a field of recognition within the existing structure of other supportive social claims and implying some degree of institutional support. Human rights depend on others for their existence and implementation and are rooted within the boundaries of the nation state, and yet they transgress borders and nation state jurisdictions. The emergence of the universal human rights frameworks also means that human rights lost the one meaning as well as one centre of authority – instead of one “sovereign” we have an expanded framework including a wider community of actors, reasons, and values.

There is a double bind here, the fact of plurality and the overarching sense of incommensurability visibly indicate that there is no master discourse on which to depend; and so we are completely dependent on the public sphere to generate human rights meanings. Since our world is the world of relations, human rights do give structure to our social world, but not as transcendent entities as some would like to have it. Is it not, rather, that the very gesture of a human rights dispute presupposes a particular shared position of the parties with reference to shared universal values? To say that we can protect human rights by dislocating them from politics while leaving the underlying political situation untouched will not work. Instead, we need a forum where, with a critical contextual inquiry, we can address why it exists in such a way.

Although the interplay between politics and human rights adjudication has generally been acknowledged, there has been a tendency to construe human rights as somehow apart from the political and, moreover, to situate human rights adjudication somehow exclusively within the domain of courts, institutions of the state, and the language of the law. This chapter has looked to the political as the visible appreciation of the function of human rights, which were conceived of as imbricated in complex relations between various elements of human lives. It has also looked to the manner in which various practices attune us to the manner in which human rights issues are made manifest and cognised. To an extent, as argued above, such framings draw upon the political life of the polis, but they are also concerned with the wide-ranging debates on the character and import of the role of human rights as transgressing the very same debates. The implementation of human rights is thus only enabled by a continuous re-constitution of political explanations and objects of human rights discourse which also packages locally specific components into forms applicable across societies.

Indeed, it would be difficult to envisage any meaningful human rights framework which would be divorced from the communities it binds.

It was in response to debates on the role of human rights that this chapter has outlined a framework that, following Rancière, construes human rights as a significant site of political struggle. This account prompts the questioning not only of the imperatives of a human rights law, but also the prevailing social order within which human rights law operates and is embedded in the epistemologies upon which that social order is founded. To return to the issues raised in the introduction to this chapter, however, I want to speak to the broader relevance not only of the politicised account of human rights that I have offered, but also of what lies at the heart of the adjudicative practices. What this chapter demonstrates, I wanted to suggest, is the relevance of “the political”, which brings human rights and politics into some form of collaborative engagement, working together to engage public interest in the vital political and ethical issues of our day, making visible the policies, practices, artefacts, and lifeforms that emerge from within the polis.



The Human Rights Between Morals and Politics:  
On Jürgen Habermas' Cosmopolitanism

Luiz Repa





Brazil has been targeted by the politics of human rights for quite a long time. International intergovernmental and nongovernmental organizations have tirelessly denounced the country's precarious situation regarding the defense of the fundamental rights since the process of overtone and democratization, mainly concerning police brutality and the conditions of the Brazilian prison system. Nevertheless, to this situation, which has achieved some improvement in recent years, a new circumstance which seemed possible to take place only in the most advanced European countries and in the United States – and which frequently harms the Brazilian emigrants – has been recently added. Clandestine immigrants, especially Bolivians, find themselves, due to their illegal condition, totally unprotected and submitted to all sorts of humiliating coercions, as slave work, for instance.

Despite this aggravation, a certain trend of suspicion regarding the policy of human rights in Brazilian political thinking does not seem to have been deeply changed, neither to the left nor to the right. As soon as the question of how effectively to protect the human rights of citizens and noncitizens is posed, for their violation is often protracted by the State or is allowed for several reasons due to the omission of the State, the moral sympathy for the “pariahs” and the “derelicts” fades into the defense of the principle of national sovereignty.

At best, one defends that it is only through democracy that the means and the legitimate basis for a successful implementation of human rights may occur, even though they are already provided in the law in accordance with the Constitution as a matter of fundamental rights or in accordance with the several international treaties of support to the human rights, of which Brazil is often a signatory. The most suitable answer for the demands of the politics of human rights would not properly be an enhancement of the law, but rather an accomplishment of the law by means of democratization, so that the principle of self-determination might be preserved.

The fact remains unnoticed, however, that the systematic disrespect to human rights parallels the voluntary or nonvoluntary respect for international agreements in the economic area which since the late eighties

has reduced the margins of action of some sort of independent politics of development. Despite the recent relative success of the BRICS grouping in comparison to the countries which were at the core of the 2008 crisis, one cannot disregard that globalization has decreased and has truly affected the political autonomy of nearly the whole world, perhaps with the strong exception of the United States and China. Thus, the extolled principle of self-determination, in what concerns the politics of human rights, must coexist with a realistic view according to which capitalism has reduced the possibilities of the democracy and the national State to solve problems which, in their turn, often create the conditions denounced by the politics of human rights.

By rights, it is not a paradox, since both of them can be situated in different levels: a properly normative level and a more descriptive one. But to the ones who intend to mingle these two levels, Jürgen Habermas' "cosmopolitan" political thinking may sound appealing from at least a philosophical point of view - even though the most important institutional arrangement he has foreseen, the European transnational democracy, seems to be very far. It is worth remarking that Habermas has introduced his thinking on the cosmopolitan right, almost invariably, from the point of view of the safeguard and the effectiveness of the popular sovereignty; we might add, from a perspective which tries to respond to the postnational condition which has undermined democracies all over the world. It is, as Pauline Kleingeld quickly states, a "more clearly political" cosmopolitanism.<sup>1</sup>

On the other hand, it is also worth mentioning that the fact that Habermas does not extend the idea of transnationalization of democracy beyond the European borders - as much as he defends the protection of human rights by a worldwide organization - generates misconception on the normative status he confers to this sort of rights. Thus, it seems that Habermas oscillates between a politico-juridical foundation of human rights which is suggested by his strategy of starting everything by the democratization of the European Union and a moral foundation of human rights which is introduced every time similar conditions to the ones offered by the European Union lack. Such moral foundation

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<sup>1</sup> Kleingeld, 1999, p. 505.

seems not only to retroact to the first step but also to free the project from a sort of paternalistic cosmopolitan politics, ruled by the democratic Western societies – which means, by some European countries, as the Brazilian sociologist Sérgio Costa denounces, in virtue of Habermas' defense of the military intervention in Kosovo.<sup>2</sup>

I will attempt to support here that Habermas does not yield to a strictly moral foundation of human rights, even though the moral point of view still plays an important role in them; from this refusal, on the other hand, one should not infer, as some cosmopolitans argue, that Habermas is still attached to a concept of democracy which is connected to the tradition of the national State.<sup>3</sup> Certainly, there is some ambivalence concerning the civil solidarity required by the transnational democratization, but this ambivalence should not obliterate the fact that the discourse theory breaks with the normative framework provided by the nation-state. The discourse theory upon which the Habermasian approach of cosmopolitanism is supported denies the idea that a former collective identity is always required for the establishment of solidarity nets. Thus, I shall argue that the ambivalence of the Habermasian cosmopolitanism is due to a sort of phasing in whose initial stage might only be the European Union. It is in this sense that one may say that Habermas is stuck to the model of the national State, i.e., to the national State's political model of development, from which he thinks the European process of unification. The "realistic" perspective Habermas intends to confer to cosmopolitanism induces him to idealize Europe and to lose sight of other promising possibilities to cosmopolitanism which emerge out of the European project nowadays.

In many senses, the cosmopolitan project introduced by Kant stands as a challenge for Jürgen Habermas' political thinking. The Kantian project is interpreted by Habermas from the idea of a constitutionalization of the international law aiming at guaranteeing the rights of the individuals, regardless of their belonging to the national States, even becoming able to lay legal claims against these States. He adds to that the idea of some sort of worldwide internal politics without worldwide government which should be able to deal with the several socio-eco-

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<sup>2</sup> Costa, 2006, p. 46.

<sup>3</sup> Fine; Smith, 2003.

conomic imbalances of an uneven worldwide society, but, above all, with the imposition of human rights and the guarantee of peace.

In a normative sense, Habermas must somehow reconcile the cosmopolitan law, understood as a law applicable to every individual and thus fitted with typically juridical mechanisms, with a foundation, within the framework given by the modern national state, of fundamental rights by means of the discourse theory. The peculiar strategy adopted for this foundation is worth mentioning.

Its main content lies in the idea that there is a logical co-originality between the fundamental rights, which guarantee private autonomy, and the political rights, which constitute the sense of popular sovereignty. One does not go without the other, contrarily to what the traditions of liberalism and republicanism have intended in their own ways, Kant and Rousseau included, the ones who got closer to the idea of co-originality. In liberalism altogether and in Kant – our main concern by now – in a particular way, it is the moral foundation of the subjective rights of equal freedoms of action which is mainly criticized, since thus operating, the political legislators limit themselves to state positively a set of rules given in advance to the process of deliberation. This subordination of rights to morals is seen by Habermas as premodern in its structure and, in addition, leads to a paternalism of the Rule of Law in relation to the citizens. Thus, Habermas states that “nothing is given prior to the citizen’s practice of self-determination”,<sup>4</sup> other than the discourse principle and the legal medium as such; therefore, a procedure of legitimation and a formal principle of structuring norms, but not a set of norms, whatever nature they might have. On the other hand, the subjective rights which guarantee private autonomy may not be set in such a way that they are at the legislator’s disposal, thus, the political autonomy is also affected: the ones who can take part in the process of political formation of the opinion and of the will must have the required independence to leave the political public space as well. Furthermore, there is no right itself without that set of subjective rights. Therein lies Habermas’ peculiarity in comparison to the liberal tradition or perhaps the whole philosophy of law: the juridical form

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<sup>4</sup> Habermas, 1998c, pp. 127–128 [1992, p. 161].

itself implies the rights of liberty, independently of a moral ground. Otherwise, the law would not be able to have its coercive character as a fundamental property: one may not coerce those who do not have freedom of action and freedom of will. Withal, a form of norms which makes it possible for a negative space of freedom to exist and is directed by nature to external coercion cannot be morally grounded.

On the other hand, subjective rights must be configured and politically positivized. If they are immanent to the juridical form as such, their concrete configuration must be set by means of the citizen's political autonomy. In the public space formed by political rights, therefore, moral discourses for grounding the content of fundamental rights unfold beside ethical-political discourses related to the concrete values of a certain political collectivity. Thus, a moral basis of fundamental rights emerges from within the process of deliberation, for, due to their claim for universal validity, these fundamental rights present themselves as human rights.

Therefore, concerning the debate on whether human rights are originally moral or juridical, Habermas undoubtedly chooses the second option: "The conception of human rights does not have its origins in morality; rather, it bears the imprint of the modern concept of individual liberties and is therefore distinctly juridical in character. What gives human rights the appearance of being moral rights is neither their content nor even their structure but rather their form of validity, which points beyond the legal order of the nation-state".<sup>5</sup>

In other words, human rights are primarily basic subjective rights, without which a juridical order in the modern sense is not possible, i.e. it is characterized at once by liberties of action to be fulfilled according to each one's free will as well as connected to a power of coercion. Nevertheless, the constitutional texts refer to them as "innate" – which means that they are paradoxically positivized as innate. This feature, typical of the historical declarations of human rights, is primarily due to the fact that they are not at the legislator's disposal, thus, otherwise, a juridical medium by means of which one may legislate cannot be constituted. The fundamental rights form, as Klaus Günther states, a grammar of

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<sup>5</sup> Habermas, 1996a, p. 222 [1997, p. 137].

legislation; a grammar which the legislator must regulate though. In this proper political level, one is required to ground these subjective rights. It is in this regard that they seem to correspond to moral norms. For the sense of their validity is not restricted to the members of a political-juridical collectivity, although one may guarantee them, in governmental grounds, only to the members. In other words, the juridical validity is universal, even if the execution is limited to the space constituted by the political collectivity. One may not think that a fundamental right might be grounded and solely attributed on behalf of one's belonging to a collectivity. As, for instance, that the right to life may be claimed and safeguarded only to these or those peoples, even if only a member of these or those peoples may lay legal claim to this right.

Thus, the universal validity of fundamental rights coincides with the universal validity of moral norms. That is the reason why, in the scope of the regulation of the matters of rights of liberty, as well as social rights, the strictly moral arguments may suffice for grounding, whereas for the other juridical categories, ethical-political and pragmatic arguments also intervene. That is, in the case of the rights of liberty and welfare, the legislator may recur to moral arguments in order to give reasons why the rules expressed by those rights are good for everyone.

From this moral grounding, nevertheless, it does not follow that any identification between fundamental rights and moral norms may be traced, insofar as the first ones keep their juridical properties: they dissociate any subjective right from moral duties, conceding to the legal subject a morally undetermined and negative space of action. And, it is worth stressing, these juridical properties cannot be morally grounded or, moreover, cannot be normatively grounded anyhow, so that the juridical form remains a mechanism for social integration for which there are no alternatives in modernity.

Nevertheless, Habermas adds one more reason to the fact that there is a conflation of fundamental rights with moral norms: "The mistake of conflating them with moral results from their peculiar nature: apart from their universal validity *claims*, these rights have had an unambiguously positive form only within the national legal order of the democratic state. Moreover, they possess only weak validity in international law, and they await institutionalization within the framework

of a cosmopolitan order which is only now emerging”.<sup>6</sup> This account is curious. What leads to the conflation of moral with right is the fact that the institutionalization of fundamental rights is still precarious or even absent outside the national State. Thus, its validity claim is only met in this framework, seeming to become a merely moral requirement beyond the borders of the state. If the positive law is absent, there it becomes the morals.

However, is it in fact possible to talk about non-institutionalized rights in a juridical sense? For Habermas, as one may notice, the cosmopolitan institutionalization of the fundamental rights only complies with the universal validity which concerns this juridical category, which, in its turn, has already accomplished a relatively robust institutionalization only in the national level of law. Yet, as this same institutionalization demonstrates that such rights are not originally moral, beyond the national level, it remains not a moral demand in the proper sense, but the coherent institutional development of the validity of the fundamental rights. It is always the same kind of right in the several areas of what Kant named public law. Thus, one may say that the cosmopolitan right is the culmination of a universalistic logic which is inherent to the fundamental right in its strictly juridical character.

On the other hand – inasmuch as this universalistic element is a condition of possibility of popular sovereignty, which crystallizes itself in the framework of the national State, resulting, in its turn, in the fundamental rights themselves – there seems to be some tension between the universalistic right and the ever particularistic democracy, or else some tension between the universal claim of right and its particular accomplishment. This tension (or ambivalence) has not remained unnoticed by some critics, according to whom the Habermasian cosmopolitanism tends to be mitigated – what is particularly at stake here is the refusal of the idea of a worldwide democracy – because the philosopher is still attached to the conceptual framework provided by the nation-state. Thus, if Robert Fine and Will Smith recognize that Habermas “presents cosmopolitanism as the logical culmination of the principles of right”, they quickly

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<sup>6</sup> Habermas, 1996a, p. 224. [1997, p. 140].



add that he is very “cautious about breaking the connection between democracy and the nation-state”, i.e. he conceives of democracy in such a way that “it can hardly be approached in the cosmopolitan level”.<sup>7</sup>

In fact, it is surprising that Habermas writes the following in his decisive essay on the post-national constellation and the future of democracy – a passage which is often criticized by the most radical cosmopolitans:

[The world organization] is distinguished from state-organized communities by the principle of complete inclusion – it may exclude nobody, because it cannot permit any social boundaries between inside and outside. Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular political community. Even if such a community is grounded in the universalist principles of a democratic constitutional state, it still forms a collective identity, in the sense that it interprets and realizes these principles in light of its own history and in the context of its own particular form of life. This ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens.<sup>8</sup>

If, on the one hand, Habermas emphasizes the universalistic character of the fundamental rights which signalize beyond the borders of the national state, on the other, he underlines the particularism of the democratic interpretation of these very rights which is determined by the belonging to a community in particular and by a certain collective identity. Now, this restriction of the cosmopolitan democracy ends up contradicting not only the co-originality between human rights and popular sovereignty – for the aspired institutionalization of the fundamental rights qua cosmopolitan rights is independent of a worldwide

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<sup>7</sup> Fine; Smith, 2003, pp. 470, 473–475.

<sup>8</sup> Habermas, 1998b, p. 161–162 [Habermas, 2001, p. 107].

democratization – but also contradicts a great part of the arguments Habermas supports in favor of the European Union’s democratization. For, in this context, Habermas resorts to the nation-state not to confirm the only “logical space” for political self-determination, but, to the contrary, to prove the possibility of widening this “place” even more, independently of a previously formed identity. The notion of constitutional patriotism as well, which must be able to substitute nationalism as a source of civil solidarity, is structured in such a manner upon abstract principles that it is hard to see the reason why it should be limited to the national or European borders. Inversely, the constitutional patriotism goes together with a desubstantialization, with a proceduralization of the popular sovereignty whose first outcome is exactly to take away from the people the marks of an inclusion or exclusion of principles, only remaining the determination of being a member or not.

It is hard to figure out the reason why Habermas suffers from this sudden Schmittian attack or, at best, a Hegelian attack, as if a worldwide democracy would only be conceptually possible due to the presence of a non-man people, as an invasion of extraterrestrials representing the “other”, the non-member. If, from the beginning, I stressed the Habermasian criticism to liberalism in virtue of the refusal of subordinating the right to morals, which would mean to previously delimit the autonomy of the political legislator, I must now emphasize that a similar criticism may be directed to republicanism in general, and to Rousseau in a particular sense: a previous consensus based on the *ethos* of a given community is refused by Habermas due to the same reasons as well. It means that Rousseau would not have been properly radical in his conception of unlimited sovereignty. Strictly speaking, for Habermas, there must not be a people in order to the people’s sovereignty may be constituted. It is normatively reduced to the democratic principle according to which “only [...] may claim legitimacy [the juridical law] that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted”.<sup>9</sup>

Surely, such a discursive procedure must be able to take into account ethical-political discourses concerning which sets of values are

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<sup>9</sup> Habermas, 1996c, p. 110 [1992, p. 141].

exemplary for the political collectivity, but all that managed in such a way that the juridical conditions of the procedure are not affected, i.e., without prejudice to the juridical equality and liberty individually taken. Precisely because they are submitted to the discursive processes, collective values, whatever origins they may have, tend to suffer a desubstantialization, whose outcome is exactly an opening to the other (i.e., the other from a different culture, which nonetheless may be a co-citizen).

It is not a matter of minimizing the importance of civil solidarity, especially concerning its role of supporting the risks of a political redistribution of goods. However, from the normative baseline given by Habermas with the idea of co-originality between human rights and popular sovereignty, this civil solidarity presents itself as far more created, out of the enlargement of democracy, than presupposed as given beforehand. One may not forget to consider here an insight from the discourse theory and the deliberative democracy which is underexplored, including by Habermas himself, but which did not go unnoticed by Richard Sennett: that the discussion and the disagreement may bring the participants closer in the sense of creating solidarity bonds than the affirmation of common values.<sup>10</sup>

It is also important to notice that Habermas approaches the nation-state from the perspective provided by Benedict Anderson,<sup>11</sup> according to whom a nation is above all an imagined community, constructed in many different ways, often departing from the State in order to reach the nation (as in the Brazilian case, for instance). The artificial and constructed character of the nation-state would then act in favor of a widening of the civil solidarity beyond the national borders, in favor of a sort of European solidarity. Nevertheless, it would only be possible by means of political anticipations for the development of the democratic process – and it is within this process that the civil solidarity which is crystallized around the idea of constitutional patriotism, both in the national and European levels, seems to be grounded.

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<sup>10</sup> Sennett 1999, p. 172. Sennett has mainly in view the studies by Amy Gutmann and Dennis Thompson on deliberative democracy, but I believe this reasoning can be easily extended to the Habermasian model.

<sup>11</sup> Anderson, 1983.

Now, the idea of constitutional patriotism as a substitute for nationalism makes sense mainly in a multicultural environment, where the idea of nationality loses the concrete reference, even if imaginary, to an origin. But in this case, for Habermas, it reflects less a one-and-the-same reaffirmation of a character than the disposition of interpreting the constitutional principles from the point of view of the others: "A liberal political culture is only the common denominator for a *constitutional* patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society. [...] One's own tradition must in each case be appropriated from a vantage point relativized by the perspectives of other traditions [...]. A particularist anchoring of *this kind* would not do away with one iota of the universalist meaning of popular sovereignty and human rights"<sup>12</sup>

Such an understanding of the constitutional patriotism, which keeps the universalistic sense of human rights within the multiplicity of cultural interpretations which are open to one another, seems to make the collective identity even more subtle; for Habermas, this sort of identity would be required in order to project the cosmopolitan democracy, but that would be accessible only in the European framework. For, this identity would mean, in the light of the constitutional patriotism, the respect for otherness and a defense of juridical and political principles which assert exactly such respect, i.e. everything that leads to the inclusion of the other, rather than a demarcation in relation to the other.

Altogether, one may say that the Habermasian distrust in relation to the possibilities of a cosmopolitan democracy, concerning the conditions of a political collectivity, ends up in concepts which make this collectivity rather porous, not to say abstract, so that it is difficult to understand, eventually, the reason why one may distrust the possibility of the cosmopolitan democracy. If democracy is capable of creating, or at least recreating, the sources of civil solidarity among strangers, then the crux of the matter is less in the collective identity, which is presumed to have always been artificial and constructed, than in the

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<sup>12</sup> Habermas, 1996c, p. 500 [1992, p. 643].

first steps towards democratization and, with it, into the worldwide juridical configuration of the human rights, a process which might create itself solidarity nets spread beyond the national borders.

As problematic as this appeal to a collective identity, which has little particular concreteness in the end, seems to be the premise which grounds all the Habermasian diagnosis on cosmopolitanism and the post-national condition, namely the premise according to which cosmopolitanism will really have a chance if the European Union advances some steps towards its political unity. Habermas goes on to say that what is utopian in the cosmopolitan project is exactly the absence of other “Unions” in different regions of the globe.<sup>13</sup>

He thus proposes a view of the cosmopolitan project as dependent upon a progress towards a growing regional transnationalization, for which, nevertheless, only the European Union stands as a concrete example. Everything happens as if the political units were supposed to incorporate themselves into the increasingly larger ones so that the proper condition for a reform of the UN – aiming at the implementation of a global internal politics, i.e. the overcoming, by each member, of the idea of sovereignty according to the model of national sovereignty – would take place. It is this gradual learning process of surpassing its own sovereignty that Habermas imputes to the development – still unaccomplished and full of disturbances – of the constitutionalization of the European Union, for which other examples in the world still lack.

For Habermas, Europe is the only example of it for various reasons. The most important of them, however, are connected to the commonplace diagnosis of that time centered in the expression “post-national constellation”. This diagnosis basically consists of the occurrence of a sort of democratic deficit within the economic globalization and, therefore, together with it, a deficit of legitimation of the organisms which create political determinations that affect the national context of contemporary society. In the Habermasian vocabulary, a new over-

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<sup>13</sup> “A reform of the United Nations, however successful, would remain ineffectual unless the nation-states in the various world regions come together to form continental regimes on the model of the European Union. For the moment, only modest steps have been taken in this direction. Herein, and not in the reform of the UN, lies the genuinely utopian moment of a “cosmopolitan condition”. Habermas, 2004, p. 107 [2006, p. 109].

lapping of systemic imperatives with the life-world takes place, despite not even the systemic mechanisms having a legitimate basis in the life-world. The immediate political translation of this diagnosis means that the popular sovereignty finds itself prevented from being carried out. Thus, the post-national constellation means above all a threat to democracy. While creating new social and political conflicts with the dissolution of a great deal of institutional structures of the national State that might give room to popular sovereignty, the post-national constellation resulting from the pressure of globalization hinders the management of these matters within the national compass. With the States' loss of competence, some blanks which become fulfilled by organisms based on agreements of the international public law are opened. The most appealing example of this transference of competence is the loss of financial sovereignty which took place in the European Union area with the introduction of the Euro as the common currency and with the independent European Central Bank, thus denationalizing the monetary policy. Basically, Habermas sees in these new intergovernmental organs, non-democratic, functional responses – or, at least, without the democratic legitimation required – to the risks that globalization itself poses in every field and whose treatment requires international cooperation. Thus, the globalization also results in a worldwide society systemically produced; a society characterized by huge social inequalities among the different regions as well as inside every region and, at the same time, kept under the constant threat of ecological catastrophes.

Withal, Habermas considers that returning to the national State democracy is impossible under a systemic point of view, because it would mean pushing the internationalization of the economic means of reproduction back by force – a force which is inexistent within the scope of the national State itself. Besides, it would also be undesirable since it can mean an upsurge of nationalisms. Thus, the only way politics can cope with economics again is exactly by means of the transnationalization of democracy, which implies putting the popular sovereignty back again beyond the traditional and historical boundaries of the nation-state.

This last aspect is worth stressing, since one of the criticisms that seem to have gained notoriety against Habermas' cosmopolitan project refers to the ideological function it might perform for the consolidation of a hegemonic domination intrinsically bound together with economic globalization. What lies behind the demand for an increasing juridifi-

cation of the international relations, as Habermas aims, would be the attempt to restrict every country's national sovereignty, be it in Europe or in the rest of the world, asserting a policy of human rights and of a solely Western democracy, thus consolidating some sort of cultural hegemony of the West over the East, of the North over the South. An author that stands out in this matter is certainly the sociologist of law Danilo Zolo.<sup>14</sup> Unlike Habermas, Zolo proposes a minimal political order on the international level, without having any international authoritative source ascribed to intervene in the national sovereignty, unless in particularly exceptional cases.

As I see it, the fulcrum of Habermas' project is not the liquidation of national sovereignty, but the critical assumption that, nowadays, it is sovereignty itself, in its more democratic sense, as the self-determination of a political collectivity, which is being restricted by economic globalization. The transference of sovereignty does not have to mean the end of popular sovereignty, although it may move from the state organization to the supranational organization. This displacement has been already carried out, without any legitimation, but precisely that of the national States.

Nevertheless, the excessive emphasis Habermas gives to the agony of the European democracies reveals an important feature of his diagnosis: it is in Europe, where the process of transference of sovereignty is accelerated, where the political effects of transnational administrative restrictions are more immediate, that, at the same time, the treaties signed by now point to the possibility of an effective democratization of the European Union. Thus, in one of his latest books, Habermas declares that "the European Union of the Lisbon Treaty is not as far removed from the form of a transnational democracy",<sup>15</sup> once it confers primacy to the European law over the national law, even though the EU does not hold the monopoly of violence. Besides, the treaty seems to confer the constituent power of the European Union exclusively to the citizens, considered as members of the Union as well as of the member State.

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<sup>14</sup> Zolo, 1999.

<sup>15</sup> Habermas, 2012, p. 3 [Preface. In: *The Crisis of the European Union: A Response*, p. ix].

However, it is worth insisting in this particular manner of thinking of the conditions of possibility of cosmopolitanism from the European unification. Herein Habermas seems to be stuck to the example provided by the national State, since it would represent a progressive incorporation of political units, overcoming the local community belongings. But there is a series of debilities in transposing this model of political development into the register of cosmopolitanism. One of them is obvious: several European States, such as Spain and Belgium, reveal that their national units are far more fragile than what they are supposed to be. On the other hand, perhaps the greatest weakness is of theoretical order: to get to cosmopolitanism, a gradual political integration is required on the model of nationalization, because it would mean learning to overcome the local sovereignties.

And again, it seems to be possible to resort to the model of democracy supported by Habermas to think of another framework in which cosmopolitanism loses its somewhat ethereal character. In any case, that would mean abandoning a sort of Eurocentrism and giving attention to the fact that the hegemonic centers have lost part of their strength, that several governmental and non-governmental actors have emerged, that the multilateralism supported by these new actors can be much more advantageous to the development of the politics of human rights than a new, at once supranational and national giant. The more this multilateralism is capable of imposing itself in the globalization environment which affects all at the same time, the more and more the central idea that the democracy and the fundamental rights have less to do with an identity, with a sovereign “we”, than with the freedom and the autonomy which must be imputed to every individual in a public sphere of discussion and deliberation, may gain strength.









# Justice and Liberty in Hegel

Thadeu Weber



## Introduction

By constructing principles of justice to be applied to society's basic structure, Rawls understood Hegel's critique to the excessive formalism in Kantian moral and the consequent valorization of "ethicity" (*Sittlichkeit*) and its social institutions. Recovering them is fundamental for a theory of justice, since they are the place where liberty, the proper content of justice, is actualized.

Liberty is the guiding and founding principle of Hegel's *Philosophy of Right*. To talk about justice means to point to its forms of actualization. More specifically, to make justice means to assure liberty on its instances of mediation of juridical and social structures. The system of right is, this way, "the kingdom of actualized liberty" (Rph §4).<sup>1</sup>

On this configuration – although the whole *Philosophy of Right* could be considered a theory of justice – two moments are especially important in the referred text: one refers to "abstract right" and the other to civil society. Those are two levels on which Hegel approaches directly to the justice topic, bound to the idea of liberty, as Concept of Right. The State could be referred to as the third moment, considering it is the actualization of the "ethical substantiality." However, there is no explicit reference in it to the concept of justice, since this is par excellence an attribution of civil society, considered as the "external State." It is fundamental to demonstrate how, at the level of ethicity, individual self-realization is assured through the effectuation of rights, duties, and liberties on social institutions. For justice is, fundamentally, social justice.

We need to bear in mind that Hegel's *Philosophy of Right*, accordingly to what is announced in its first paragraph, aims to expose the underlying thread of the internal logics of juridical and social structures while actualizations of the Concept of Right. Hegel rebuilds the rational course of the internal logic of the determinations of the Idea of Liberty. The Science of Right, on its turn, is a part of Philosophy, insofar as it seeks on the latter its own guiding principle. Hegel proposes a "philosophical science of right," which has as object the "idea of right," i.e., the philosophical idea of liberty. In this manner, to expose

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<sup>1</sup> Rph stands for *Rechtsphilosophie* (Hegel, *Grundlinien der Philosophie des Rechts*, 1986).

the internal structures of the right means to show the unfolding of the Concept of Right while actualization of the idea of liberty.<sup>2</sup> Justice permeates all of these configurations. It actualizes itself through the actualization of liberty. This is the “content of the idea of justice.”<sup>3</sup> On the abstract right, it is discussed at the level of individual liberties; on morality, as the right of subjectivity; on ethicity, it is focused on the subject-society-State relation. The challenge is to show how it is possible to conciliate justice and liberty on these instances of mediation. Put in other words: how to concretize liberty on juridical and social structures within reasonable standards of justice? How to conciliate individual interests and liberties with collective ones? The guarantee of this actualization, ultimately, happens on the level of ethicity. However, isn’t it proper of the Concept’s dialectical movement to weaken or even to annihilate individual wills in favor of the affirmation of the substantial will? Isn’t liberty, ultimately, recognition of necessity? Isn’t there a subordination of individuals’ liberty to the ethical authority of the State? And isn’t the standard of justice justified on that basis? The purpose here is to refuse this suspicion and demonstrate that Hegel’s theory of justice is founded on the principle of individual liberty equally mediated by the liberty of all. Self-determination and reciprocal recognition are key categories here.

## 1. Justice and immediate determinations of liberty

The exposition of the idea of justice on the actualization of the idea of liberty on the “abstract right,” as the first figure of the *Philosophy of Right*, starts from a fundamental presupposition: the person of right. Person is the subject conscious of itself; it implies “legal capacity.” To be person means to be subject of subjective rights. It is the most abstract and indeterminate manifestation and, as such, it establishes the fundamental

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<sup>2</sup> Regarding this subject, see Weber, 1993, chapter 2.

<sup>3</sup> Salgado, 1996, p. 467.

equality of all human beings. It indicates that the man is worthy as man. That they should be recognized and respected as free and equal. Hence the categorical statement: “Be a person and respect others as persons” (Rph §36). This doesn’t imply, though, an equal distribution of goods, since “wealth depends on one’s diligence” (Rph §49). Equality refers to the fact of being persons; it regards its legal capacity, even if potential. For instance, it means that every person should have property, in order to satisfy their material basic needs and the expression of their will. However, justice does not require that everyone’s properties be equal. Hegel argues: “In relation to external things, the rational aspect is that I possess property; the particular aspect, however, includes subjective ends, needs, wills, talents, external circumstances, etc.” (Rph §49). The emphasis is on the distinction between what is necessary and what is contingent for the development of the Concept of Right. The question is qualitative, not quantitative. It becomes an important criterion for the effectuation of justice. “What and how much I possess is contingent as far as right is concerned” (Rph §49).

This notion of person of rights underlies the whole process of actualization of the idea of liberty on the juridical and social structures and, therefore, of the idea of justice as well. In this way, it needs to be set out as the expression of liberty. To be person means to be inviolable before justice and liberty. It means to be respected and protected. Honneth argues that the determination of the free will on the “right” is the “core of a theory of justice that seeks to guarantee the intersubjective conditions of individual self-actualization.”<sup>4</sup> The satisfaction of these conditions is a demand imposed to ethicity, as we shall see.

The first juridical form of a person to concretize its free will is the possession, whence derives the fundamental right of use. It is the most immediate form by which a person relates with the world; as effectuation of its legal capacity it is the “external sphere of its freedom” (Rph §41). However, this right needs to be recognized in order to become a right of property, which, in its turn, includes one more right: the right of exchange. This recognition only happens through a contract. This is

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<sup>4</sup> Honneth, 2007b, p. 52.



the mutual recognition of rights and duties. It shows that Hegel's idea of justice, even on the level of immediate determinations, is based on self-determination and reciprocal recognition.

The exigency of the contract is due in order to guarantee the property and the possible transference of it to another person. It is established at the level on interpersonal wills. The most important here is the free will of the parties involved, not the thing or its attributes. It is the will that legitimates the contract. The recognition of property is the recognition of the free will. It is a mutual concession of rights and duties. Bound to this idea of free will is the "idea of individual autonomy or self-determination."<sup>5</sup>

Contracts are made between "immediately independent persons" through the manifestation of each one's individual wills. This manifestation is what legitimates the contract. Its origins are in the "immediate will" (*Willkür*); there is no social mediation yet. That is why contracts are at the level of the abstract right. Persons express their immediate and, as such, contingent wills. "The particularity of the will for itself is arbitrariness and contingency" (Rph § 81). It means that these may not coincide with the "will existing in itself" the "universal will," i.e., on the level of abstract right, it cannot be hindered the possibility of one imposing its own will over the other's, repressing it. Whence injustice arises. Disregarding the pact is unjust, for it is the expression of free wills. The contractual relation happens between "immediate persons, in which it is purely contingent whether their particular wills are in conformity with the will which has being in itself" (Rph §81). While particular, the will is different from the "universal will" and, according to Hegel, "if its attitude and volition are characterized by arbitrariness and contingency, it enters into opposition to that is right in itself, this is unrightful (*das Unrecht*)" (Rph § 81). The origin of the unjust lies on the immediacy of the will, which is contingent. We cannot forget that the immediate will is a moment of liberty. That is why the just-unjust relation presupposes free acts. It is important to highlight that a contract or another agreement encompasses the "right to reclaim its execu-

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<sup>5</sup> *Ibid.*, p. 57.

tion.” However, that depends, again, on the particular will, which, by its turn, may act contrary to the right as such. This is where injustice lies. Hegel argues that the will “needs to be purified from its immediacy” (Rph §81). It means that it should pass by the process of mediation and recognition; the will needs to free itself from this “suffering from indeterminacy.” The wills are not eliminated through this process, but, through mediation, they are overcome and conserved in a higher level. To free itself from indeterminacy is to enter the dialectical movement of mediations and determinations.

At this first level of actualization of liberty, justice, and its effectuation, is bound to interpersonal relations and, therefore, to individual immediate wills. Hence the need for instances of regulation and guarantee on other levels of mediation. In the contract, the parties “still maintain their particular will.” This moment is necessary, but not sufficient for actualizing liberty and justice. We are at the level of the immediate will, and its exercise is subject to injustice. Other instances of mediation and determination are imposed. We need to get rid of the indeterminacy of the immediate wills and search for the ethical substantiality through the mediation on the social institutions, for it is through them that liberty and justice are actualized.

It is important to notice that the unjust is a consequence of the free will. The damage is provoked by the conflict originated through the confrontation between a particular will and the universal will, represented by the right in itself. The cause of this confrontation is a caprice of the particular immediate will that is completely vulnerable. As actualization of the idea of liberty in its most immediate figure, the contract is the product of two contingent wills, and, as such, can be terminated at any time. A contact between contingent wills has by its very nature the possibility of being terminated. Besides that, these wills may not necessarily coincide with the universal will. This, says Hegel, is due to the own logic of the Concept. The particular will can impose its individual right. Although it may seem that there is an excessive emphasis on the downside of the contingent particular wills, we have to notice that it is from the same wills that creative acts arise, capable of modifying the process of interiorization of the necessary structures of Right. It is the passage from indeterminacy to determinacy, mediated by the individuals’ free wills.

At the level of the abstract right, the central problem is about a contractual relation between two wills that are still unable to respect themselves mutually, for they have not yet mediated their individual interests. They are still bound to their immediacy. At this level, the Concept is considered before its process of determination and its effectuation. The wills have not yet been overcome and conserved on the universal will, the right in itself. The possibility of injustices emerges from this relativity of the abstract right. The injustice is a mere semblance of what “must be,” the right in itself (the essence). “A semblance is existence inappropriate to the essence” (Rph §82). The injustice is a semblance that must disappear, giving rise to the right as something determinate and valid. The relation between the right in itself and the particular will is the relation between the essence and its appearing. The essence is the necessary and the true; the semblance, if not adequate to the essence, is injustice. This is an indeterminacy from which it is needed to escape.

For Hegel, there are three levels of this semblance of right, while particular, before the “universality of its being in itself” (Rph §83). Put in other words, there are three levels of violation (three degrees of violation intensity) that a particular will, subject to the immediate will, may cause:

*a) The good faith injustice*

At this first level, the will of one of the parties is injured in an involuntary way, for the unjust is taken as just. The semblance is taken as essence. The violation provoked is not voluntary. The possession and the contract are the “juridical bases.” It may happen, however, that regarding the same thing, different people reclaim rights. Each one of them may consider to have property over the same thing, taking as ground “their particular juridical basis.” This is where the juridical conflicts originate. At this first level, regarding the conflicts, there is “the recognition of right as the universal and deciding factor, so that the thing may belong to the person who has a right to it” (Rph §85). The good faith injustice denies only the particular will, but respects the universal right. This is the least harmful violation. There is the recognition of right. The person wants and must have what rightfully belongs to them. What happens is that, at this first level of injustice, the right is mistaken for the contingent particular will.

*b) The deception*

This violation has a higher intensity. In this case, “the unjust is not a semblance from the point of view of right in itself; instead, I create a semblance in order to deceive another person. When I deceive someone, right is for me a semblance” (Rph §83). In this case I am unjust. A misleading is provoked with the purpose of entering in a contract. Information is withheld by the seller in order to sell a good.

*c) The violence and the crime*

This is the most intense form of harming the other’s will. The perpetrator wants to be unjust. He disrespects both the right in itself and how it appears to him (cf. Rph §90). He does not recognize the other’s right, for his intention is to harm someone’s liberty. The violation of a contract, the harm of juridical duties towards the family and the State are examples of violence. A. Valcárcel makes a remark about the crime as a form of violence: “Crime is violence against the right, and, for restoring the balance, this violence has to be nullified by the violence that rights bring implicitly. This violence, moreover, only expresses itself in this case.”<sup>6</sup> That is why the right is authorized to coerce. The penalty applied to the perpetrator is a way of reestablishing the pact and reverting the harm caused. The penalty is not an act of revenge from society, but must be understood as a way of making justice to the evildoers. It seeks to restore the constituted juridical order. The crime is objective, and, as such, must be nullified through the application of the penalty. It is not something irrational, but “the expression of a free will that freely opposes to the right.”<sup>7</sup> That is why the perpetrator can be punished.

In these three levels of violation, the free will of the acting subjects is presupposed. Hence their responsibility. This collision of wills demands an instance on which they can be administered. This is the role of the right as law. And this brings us to civil society.

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<sup>6</sup> Valcárcel, 1988, p. 338.

<sup>7</sup> *Ibid.*, p. 342.

## 2. The right of emergency

From the right of morality point of view, it is appropriate to highlight Hegel's critique to the formalism of Kantian moral, especially by the "right of emergency" (*Notrecht*). For the philosopher from Königsberg, recognizing the universal validity of the moral law and at the same time making an exception in one's own favor is to incur in a contradiction. There is a defense of the *a priori* validity of the law, regardless of the circumstances. In contrast to this, Hegel argues for the right of making an exception in one's favor in case of extreme necessity. What is at stake is a threat to life. It is a right, not a concession. It means that "the necessity of the immediate present can justify an unjust action, because its omission would in turn involve committing an injustice – indeed the ultimate injustice, namely the total negation of the existence of freedom" (Rph §127). The emergency situations do not invalidate the law, but show the level of its relativity regarding justice. The defense of life justifies any action against the law. This right of emergency implies "the benefit of competence, whereby a debtor is permitted to retain his tools, agricultural implements, clothes, and in general as much of his resources – i.e. of the property of his creditors – as is deemed necessary to support him, even in his accustomed station in society" (Rph, §127).

The right of emergency is, in fact, a resource against injustice or unjust consequences resulting from the application of the law. The conflict between rights in their effective exercise demands pondering and hierarchizing. The guarantee and the protection of life justify any exception to the law. Such as the right states, the emergency is current and demands a decision in the immediate present, for the future wholly depends on contingency. This is a heavy blow to the formalism of Kantian moral, since he admits no exceptions. Kant does not recognize the right of equity and the right of necessity, even though he refers to them as presupposed rights. The background of the exercise of this right is the distinction between rules and principles. When the application of the former brings unjust consequences, one should invoke the principles, which may not even be written. The same applies to the precedent rule: similar cases may not have a similar approach if the consequences of it show themselves unjust. The judge only applies an unjust rule if he wants to. Of course, the right of emergency refers to situations of serious threat to life. It is, in fact, a right that comple-

ments the right of morality, i.e., the right to know and will, while conditions of subjective responsibility. The issuance of a moral judgment cannot ignore these rights or avoid assessing them.

It is yet important to highlight – regarding the conditions of subjective responsibility, discussed by Hegel in the figure of morality – the right of intention. To know and to will to do are conditions for the issuance of a moral judgment. However, “an intention to promote my welfare and that of others [...] cannot justify an action which is unjust” (Rph §126). An unjust action, here, is an action against the right. It shows that in the logic of realization of the principle of liberty, morality and ethicicity overcome and conserve the rights guaranteed by private law (abstract right). Morality does not oppose the abstract right, but states its insufficiency. Thus, the incompleteness of Kantian moral is demonstrated. On the ethicicity, the individual frees himself from the suffering from indeterminacy: the abstract right and the morality.

### 3. Justice and civil society

To talk about civil society and family is to talk about the institutions of social mediation of the free will. The instances of mediation of the idea of liberty find in ethicicity – third figure of the *Philosophy of Right* – their complete concretion and realization. For Honneth, one of the minimum conditions the ethicicity sphere must fulfill in order to free itself from the “suffering from indeterminacy” is “to make available accessible possibilities of individual realization, self-actualization, whose use can be experienced by each individual subject as practical actualization of their liberty.”<sup>8</sup> Since ethicicity deals with the social mediation of the free will, the individual realization encompasses “reciprocal recognition.” The intersubjective actions of the ethical sphere “express determinate forms of reciprocal recognition”<sup>9</sup> and individual actualization.

Within the ethical sphere, the administration of justice lies in the civil society. The judiciary is, therefore, a power of civil society, not of

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<sup>8</sup> Honneth, 2007b, p. 106.

<sup>9</sup> *Ibid.*, p. 109.

the State. It shows that the civil society must assume the guarantee of its conditions of possibility. In this second moment of the *Philosophy of Right*, justice assumes a fundamental role. Civil society (corporations) constitutes, along with family, an ethical base of the State. Two principles comprise this base: the “concrete person” – while particularity of interests – and the social context. Bearing in mind that civil society is a place of conflicts, which result from the satisfaction of needs, the challenge is how to conciliate particular interests with collective ones. Hegel defines civil society as “the field of conflict in which the private interest of each individual comes up against that of everyone else” (Rph, §289). The search for the satisfaction of personal interests many times superposes the collective ones. Corporations are associations of individuals motivated by a “system of needs” that requires the mediation of the others’ wills for its own satisfaction. Ethicity must fulfill the intersubjective requirement and, through this, actualize justice. Regarding the administration of justice, Hegel focuses – among other things – on the safeguard of property and personality by justice, for it is the instance that seeks to assure reciprocity (reciprocal recognition) on the satisfaction of needs. It is the right exercised.

Hegel, in paragraph 209, insists on a basic presupposition: “a human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German or Italian.” This is the common base on which Hegel discusses the themes of justice and liberty. From then on, to make justice explicit on civil society means to treat the right as law before which everyone is equal. “What is right in itself is posited in its objective existence – i.e. determined by thought for consciousness and known as what is right and valid – it becomes law” (Rph §211). The right, in its objective reality, must meet two basic conditions: being known and being valid, and therefore, as Hegel states, “becoming known as universally valid” (Rph §210). This is the role assumed by the law. It becomes known as what is valid and what is just. For administering justice, on the level of civil society, the criterion is the law. However, this is not yet the actualization of the Concept.

When transformed into law, the right reaches its “true determination” and acquires the character of obligatoriness. It then defines positively what is just, which does not mean it is conceptually just. However, it is important to underline that contingency accompanies all the moments of determination of the idea of liberty. D’Hondt states: “The dialectical

Hegel cannot conceive an absolute negation of the contingent.<sup>10</sup> It means that the determination of the right as law may encompass “the contingency of caprice and other particularities,” which, on its turn, may not coincide with the right in itself. What is “of right” is given us by the law, but it does not mean that the law is always in accordance with the Concept of Right (what must be). Therefore, justice is given by the Right in itself, not necessarily by the law. Since the law is a determination of the Concept, and since there may be contingency in this determination, the law may distance itself from the Concept. With the “administration of justice,” Hegel wants to render explicit the application of the law to the singular case. It implies knowing the case in its “immediate individuality” and the submission to the law in order to reconstitute the right (cf. Rph §225). What is in accordance to the positive law only tells us what is lawful. In that way, “the determination by the concept imposes only a general limit within which variations are also possible” (Rph §214). The positive law states what is legal or illegal, not what is just.

The actualization of justice goes through different levels of mediation of will on the ethical institutions. On the level of civil society, the guidelines are the law. On State, the Concept. The determination of the Concept on civil society is the law. “The fact that right is posited also makes it applicable to the individual case” (Rph §214). The “pure positiveness of the law” is on its immediate application. The difficulty in this application of the law to the individual case is to reach justice (originating in the concept). Put in other words: how does one know if a penalty is just, considering, on the one hand, a determination from the Concept of Right, and, on the other hand, the contingent character of the individual case?

We can resort to a clarifying excerpt from the *Philosophy of Right*:

“It is impossible to determine by reason, or to decide by applying a determination derived from the concept, whether the just penalty for an offense is corporal punishment of forty lashes or thirty-nine [...] or imprisonment for a year and one, two, or

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<sup>10</sup> D’Hondt, 1966, p. 207.



three days [...]. And yet an injustice is done if there is even one lash too many (*zuviel*) [...] or one week or one day in prison too many or too few (*zuwenig*)” (Rph §214).

What is a lash too much? Who defines it? It is what goes beyond the law or the Concept? Hegel says, here, that it is not possible to quantify a penalty starting from the Concept (what should be). It has to be done by the law, which always implies some arbitrariness. But when the law and the Right are not the same? Although it is difficult to determine what is just when applying the law, one needs to make decisions, within some limits, even if they have an arbitrary character. Administer the injustice of an extra day in prison may indicate two things: On the one hand, for determining the penalty according to the law, one needs to apply the law. It is contingent that a penalty of two years of prison be determined to a certain crime, but it is a necessary contingency; the law says the Right, it says what should be done. One day more or less than the established is unjust. Here is a concept of formal justice. On the other hand, the just is not defined by the law, but by the Concept of Right. Here the too many or too few is what goes beyond what should or should not be. Laws, albeit having the role of actualizing the concept, never fully reach it. It is the Right as law. The law is the Right put in its objective existence. Says Hegel: “it is the reason itself which recognizes that contingency, contradiction, and semblance have their (albeit limited) sphere and right, and it does not attempt to reduce such contradictions to a just equivalence” (Rph §214). The fundamental point is to actualize the Concept of Right as law, even if the latter does not fully actualize the former. For that, one needs to determine and decide within limits. However, the Concept (what must be), elaborated by reason, is the idea that, at the same time, regulates and constitutes it. There is still one ambiguity left: If it is the Concept that defines the just, how to affirm that what the law states is just?

It is important to underline the contingent character of the administration of justice, which is acknowledged by reason. That is why the law must be a “general determination” to be applied to individual cases. The quantity of a penalty has always an arbitrary dimension. It cannot adapt itself to the Concept. But a decision must be made even though within numerous options. Hence the contingency of the right as

law. That is why Hegel says: “this contingency is itself necessary” (Rph §214). Whence derives the impossibility of reaching the completeness of a legislation. “There is essentially one aspect of law and the administration of justice which is subject to contingency” (Rph §214). This, though, is proper of a normative science. Without contingency there is no liberty. For this reason, it should be recognized as having its right, albeit limited. The Concept of Right, i.e. the idea of liberty, when actualized, determines itself on the contingent particularity. Hence the difficulty of actualizing justice. For all of those reasons, the law must be a general determination to be applied to individual situations and cases. Hence the role of legal hermeneutics.

It is important to highlight that the obligatoriness of obeying the law demands, most of all, that they be known by all, i.e., publicity is the condition for obligatoriness. Besides that, they need to be well specified in order to be applied to particular cases.

#### 4. Justice and State

The civil society is unable to solve its own conflicts. These antagonisms, originated in the satisfaction of a “system of needs” of individuals and groups, require the vigilance of other instance of mediation: the State. Is the State able to fully actualize justice through the guarantee and protection of liberty, i.e., of individual autonomy and self-determination? Would it sacrifice individual and collective interests and liberties in order to assure the substantial, or are the fundamental rights and liberties put aside and preserved on the substantial? What is exactly the limit of the State’s liberty? Doesn’t one take the risk of justifying a totalitarian State, regarding the subordination of the “rights of individual liberty” to the State’s authority? This suspicion is raised against Hegel.<sup>11</sup>

The answer to these questions demonstrates the level of justice possible within the Hegelian State. Affirmation implies negation. To actu-

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<sup>11</sup> Cf. Honneth, 2007b, p. 48. See also Popper, 1974, p. 37.

alize the idea of liberty requires the actualization of justice within the proper limits of mediation of the wills. To regulate institutions does not mean to eliminate or to weaken liberty, but to make them feasible intersubjectively. The different forms of social mediation of the free will that constitute the ethicity sphere are nothing but different ways of reciprocal recognition. In Honneth's words: "The ethicity sphere must encompass a series of intersubjective actions on which individuals may find both individual actualization and reciprocal recognition."<sup>12</sup> Family and corporations are places for it to happen. The State is the last instance. The actualization of justice has a difficult course between the "immediate ethical relation," proper of the family, and the State's ethical substantiality. This substantiality is built through the process of mediation and recognition of the individual's free wills. That is why the ethical is a universal way of acting." The mediated and recognized immediacy is then substantialized.

Hegel refers to the State as the "actuality of the substantial will" on which the "particular self-consciousness [...] has been raised to its universality" (Rph §258). He argues that on this substantial unity, "liberty reaches its supreme right" and that the individual has the "supreme duty of being member of the State." Here we are before the most absolute justification of the State. It is not possible to actualize liberty and justice outside it. Albeit prior to civil society on a historical point of view, on the logics of the actualization of the idea of liberty the State comes after it. This emphasizes the need for an instance that administers the conflicts originated on its ethical bases, especially the corporations of civil society.

The challenge now is to demonstrate until what level the State effectively assures the actualization of liberty, and, consequently, of justice. In paragraph 260 of the *Philosophy of Right*, Hegel states that "the State is the effective reality of the actualized liberty." What does it mean? How to assure particular interests among social institutions? How to assure individual actualization and self-determination among reciprocity? Hegel dedicates some paragraphs to demonstrate that in order for liberty

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<sup>12</sup> Honneth, 2007b, p. 110.

to be actualized, particular and collective interests must be conciliated. The actualization of individuality is assured through the exercise of “a universal activity” (Rph §255). In paragraph 260, Hegel says:

“Concrete freedom requires that personal individuality and its particular interests should reach their full development and gain recognition of their right for itself (within the system of the family and of civil society), and also that they should, on the one hand, pass over of their own accord into the interest of the universal, and on the other, knowingly and willingly acknowledge this universal interest even as their own substantial spirit, and actively pursue it as their ultimate end” (Rph §260).

Concrete liberty, therefore, means the actualization of particular interests in the universality; while conciliated, overcome and conserved (or sublated), but not eliminated. Individual actualization implies reciprocal recognition, having, on this way, “a universal life” (Rph §258). Honneth is right when he affirms that recognition means “a reciprocal affirmation without any coercion from certain personality traits that relate to each mode of social interaction.”<sup>13</sup> The individual only deserves to be recognized if their behavior towards the others can be universally valid. That is why, on the level of ethicity, the individual acts in a universal manner. Intersubjective actions are the expression of reciprocal recognition.

The state is just when it develops and recognizes the rights of their citizens, but at the same time points to the “general interest” as limit to their exercise. This shows the mutual dependency between the particular and the universal. The latter is not actualized without the “interest, knowledge, and volition of the particular,” neither is the individual actualized as a private person without “directing their will to a universal end” (Rph §260). Concrete liberty requires the recognition of both particularity within universality and universality within particularity. The universality guarantees the actualization of the particularity, since the

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<sup>13</sup> *Ibid.*, p. 108.

latter has the former as its ultimate end. That is why family and civil society are the State's ethical bases. The individual only makes itself sure of its individuality, in its particularity and reciprocity, as member (*Mitglied*) of a family and a corporation. It is important that the individual can find within the State his own individual interests – of course, mediated and recognized. The State actualizes justice inasmuch as it assures fundamental rights and liberties. Hegel is clear when arguing that the role of the State is “to protect and secure the life, property, and immediate will of everyone” (Rph §270). The individual's particularity is only assured on the three levels of ethicity – family, civil society, and State – for these are the instances on which it is mediated and universalized. “The individual subject is included in the ‘State’ when it be able to rationally form his ‘abilities’, dispositions and talents, so that they can be utilized for the universal good.”<sup>14</sup>

In paragraph 261, Hegel recovers the paragraph 155 and reiterates the identity between rights and duties at the level of the “ethical State.” The duties towards the substantial are, at the same time, the existence of the particular liberty, i.e., “duty and right are united within the State in one and the same relation” (Rph §261). An ethically correct State, i.e., a just State, presupposes equality between rights and duties. If the slave has no rights, he also must have no duties. Thus, slavery is, by definition, unjust. It is the most serious violation of the human dignity. It transgresses the principle “be a person and respect others as persons,” presupposition that defines the “person of right.” Hegel emphasizes the importance of the particularity moment and its satisfaction. “In the process of fulfilling his duty, the individual must somehow attain his own interest and satisfaction or settle his own account, and from his situation within the State, a right must accrue to him whereby the universal cause becomes his own particular cause” (Rph §261). The particular interests, thus, must be overcome and conserved on the substantial. The latter is the result of the mediation of the former ones. What is demanded as a duty from the State is equally a right to individuality. This State is just and ethically correct.

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<sup>14</sup> *Ibid.*, p. 122.

## Final considerations

The concept of justice is directly bound to the effectuation of the fundamental rights stipulated by the “abstract right.” While actualization of the liberty, they must be protected and assured as expression of the person of right’s legal capacity.

Inasmuch as it deals with the determinations and actualizations of the principle of liberty as a historical conquest, the *Philosophy of Right* can be considered a theory of justice. This is made clear by the process of overcoming and conserving the individual rights in this dialectical movement of actualization. Self-determination and reciprocal recognition underlie these mediations. The suspicion that the *Philosophy of Right* brings along “anti-democratic consequences” in the sense that “rights of individual liberty” would be “subordinate to the State’s ethical authority,” is definitely weakened.<sup>15</sup>

The right of emergency is the landmark of the dialogue between Kant and Hegel. It is essential to demonstrate Hegel’s advance regarding the actualization of justice in situations of extreme necessity. The guarantee of the life and everything it implies (e.g. material basic needs) is the basic principle of any institution that aims to assure the minimum standards of justice.

Since the State is the instance of actualization of the citizen’s liberties, it is its duty to assure the protection of fundamental rights and liberties, whether individual or social ones. In doing so, it will guarantee justice. The contribution of Hegel was crucial in the sense of pointing out the place of the actualization of liberty within the dialectical movement of social institutions. This presupposes, obviously, that the Concept of Right – whose object is the idea of liberty – dialectically binds Right, Morality and Ethicity.

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<sup>15</sup> *Ibid.*, p. 48. The author presents this suspicion as a prejudice against Hegel’s *Philosophy of Right*.



Do Emotions Matter for Justice?  
An Alternative Proposal in Light of Hegel

Filipe Campello





## 1. Why Hegel?

In the last years, the acknowledgment of the limitations of strictly rational-based models has led, in different fields, to an increasing debate on the role of emotions and affective components in the analyses of decision-making, preferences, or dynamics of social movements.<sup>1</sup> Even if one can talk here of a “renaissance” of these subjects, almost every philosophical tradition was balanced between the discussions of reason and emotion, the prevalence of one or the other, and the implications of these tensions in politics. If we take the rich variety in modern philosophy, these discussions are easily associated with Machiavelli, Bacon, Hobbes, Spinoza, or Hume. At first glance, the name of Hegel, however, seems to be quite odd here. Indeed, many interpretations of his philosophy have neglected the role played by passions and emotions, insisting instead on a rather obscure concept of “rational”. Conversely, I have suggested that emotions play a fundamental role in Hegel’s theory of ethical life (*Sittlichkeit*), where an institutional framework should have in view the power of the emotional – or what we can call “affective” – dimension in ethical life.<sup>2</sup>

The set of questions that guide my argument comprehends the revision of a theory of rationality through a weak naturalism, wherein the social spaces are orientated not only by communicative rational standards, but also by emotive and cognitive inclusion of plural reasons. In this way, I suggest that Hegel can offer not only a descriptive account of the affective content in ethical life, but also a kind of normative aspect of emotion and its specific reasons that are not reducible to an orientation towards a universal or abstract regulative idea but rather are permeated by reasons for action whose logic involves an intrinsically emotive dimension. In fact, Hegel’s critique of the formal morality was motivated by the role that passions play in human agency, where an external universal moral law would not be able to endorse all aspects

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<sup>1</sup> See for example Hall 2005; Hoggett/Thompson 2012; Kingston/Ferry 2008; Krause 2008; Walzer 2006; Nussbaum 2013; Prinz 2008.

<sup>2</sup> See Campello (in preparation). With the concept of “affective” content we have in view a kind of both naturalistic and intersubjective component. For this broadly issue, see Hartmann 2010, Demmerling/Landweer 2007, and Rorty 1980.

of a normative theory. Since Hegel's Frankfurt writings, the core of his critique on Kant was that the external submission of the laws of the positive character of religion was, through the Kantian morality, only internalized, so that there remains what Hegel identifies as alienation and submission by a slave to a master, represented in this case as an *internal* moral law.<sup>3</sup> The reconciliation with the subjective dimension – where the subject expresses himself not through submission, but as autonomous – Hegel saw the embodiment of a moral theory with the nature of subjectivity: the role played by drives, desires, passions. Hegel called these dimensions – in reference to Christian tradition (mainly in St. Paul) – the fulfillment (“pleroma”) of the law, both of a positive law as well as the moral one.<sup>4</sup>

Still in his time in Frankfurt and under the influence of the Romantic Movement, mainly from Schiller and Hölderlin, Hegel saw the paradigmatic case of this fulfillment, a kind of reconciliation of morality and nature, in *love*.<sup>5</sup> In this view, love has an emotive character that at same time expresses a particular concept of duties, not only an obligation in the sense of a juridical or moral law. Already the core idea established is that one is not free while submitted to any kind of law, either external (in the case of the juridical) or internal (in the case of morality), but only when the very content of one's will is freedom itself. This idea encapsulates the first intuitions of Hegel's theory of ethical life, with the same logic of “be one self in the other”, the conciliation of nature and morality in a more organic and lively concept of “Sittlichkeit” that Hegel developed later in his *Philosophy of Right*.

This development was guided by the discussion on the transition from a natural and primary level – Hegel's concept of arbitrariness (“Willkür”) – to the *free will*. In this picture, the link between social dimension and human nature – expressed in the concept of “second nature” – is in Hegel intrinsically connected to a theory of freedom: Freedom means a self-restriction of an empty arbitrariness in a social context that makes it possible to give it content, a shape, a determi-

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<sup>3</sup> See Hegel, 1971a, pp. 301.

<sup>4</sup> *Ibid.*, p. 326.

<sup>5</sup> *Ibid.*, pp. 242 ss.

nation. We thus find, in different texts from Hegel, a kind of regulative idea to be found in the link between freedom and desires, where a self-limitation of an egocentric arbitrariness gives way to a “rational” will. “Rational” means therefore a will that has freedom as its content: the *free* will is only free when it *wants* itself to be free, that is, it depends on taking freedom as its content. In doing so, Hegel contested a “negative” concept of freedom by this conceptual scheme where the *content* of freedom is fundamental for the freedom itself. It is at this point in his *Philosophy of Right* that Hegel sees as a paradigmatic case of a “concrete” freedom – as in his Frankfurt writings – in the intersubjective relation of friendship and love:

[The] concrete freedom we already have in the form of sentiment, as in friendship and love. Here a man is not one-sided, but limits himself willingly in reference to another, and yet in this limitation knows himself as himself. In this determination he does not feel himself determined, but in the contemplation of the other as another has the feeling of himself. Freedom also lies neither in indeterminateness nor in determinateness, but in both. The willful man has a will which limits itself wholly to a particular object, and if he has not this will, he supposes himself not to be free. But the will is not bound to a particular object, but must go further, for the nature of the will is not to be one-sided and confined. Free will consists in willing a definite object, but in so doing to be by itself and to return again into the universal. (§7, addition)

Whereas love remained, since Hegel’s Frankfurt writings, the paradigmatic case of this intersubjective and affective content of freedom, a new tension emerges when Hegel – influenced by economic theories such as those of Adam Smith – realizes that this conceptual framework was quite impotent to analyze more complex relations in civil society and state, where a kind of affective component was more fragile and completely different than in the cases of primary relations.<sup>6</sup> A central

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<sup>6</sup> See Honneth 1994b, p. 172 ss. and Honneth 2011, p. 317 ss.

aspect, then, presented by the young Hegel is how the affective content of love, that at the same time is not reducible to a kind of sentimentalism, involves duties and expectation – a relation between affect and agency – can be also founded in the social sphere. On one side, Hegel saw the persistence of these kinds of (only primarily affective) bonds in the other spheres of ethical life as problematic, insofar as it led to patriarchal political forms. Therefore, the content and the conceptual description to be used in more complex relations should be clearly different for those types of affective bonds in, for example, family or primary relationships.

In this way, Hegel insists on an important and clear distinction between the relations in family, civil society, and state. However, he does not deny a volitional content in these other spheres, emphasizing the role of passions in both spheres. I would like to suggest that, as in the process of subjectivation and in his primary moments in the family, Hegel saw the other spheres of ethical life in the market and the civic participation in the state as an actualization of subjectivity through a decentralized perspective, in consonance with the same concept of free will and a formation of affects to an inclusive dimension. In this sense, concerning the sphere of civil society, interpretations of Hegel have discussed two main lines, one connected with different issues on the public sphere (which Hegel in his time discussed rather regarding the sphere of state) and another linked to Hegel's political economy.<sup>7</sup> Whereas, regarding the first, an emotional content can be found in the oft discussed role of passions in historical transformations (or, still, in the conflictive character of the public sphere besides a rational character), in Hegel's discussion on market and economy, this emotional dimension – as I see it – can be found in the complex relationship between passions and interests.<sup>8</sup> I shall explore this point more closely in the following discussion.

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<sup>7</sup> See Cohen/Arato 1999, Pelczynski 1984.

<sup>8</sup> See for discussion: Frank 1988, Solomon 2003, Blackburn 1998.

## 2. Passions and Interests

In an important study in the history of economic ideas entitled *The Passions and the Interests*, Albert Hirschman reconstructs the transformation of the arguments used to support the rise of capitalism.<sup>9</sup> The main idea is that the best way found to legitimize it was neither a repression nor a harness of passions, but rather their reciprocal neutralization, what he calls “the principle of the countervailing passions”.<sup>10</sup> Based in different nuances from Machiavelli through Bacon, Spinoza, and Hume, this principle claims that only a passion is strong enough to contradict another passion. Hirschman argues that it was this idea that came to be used with the rising centrality of the concept of interest, which was not a concept opposed to passion but rather a “countervailing passion” impregnated with a passionate or emotional content. In this internal conceptual change, interest was seen as a kind of “positive” passion – the pleasure found in obtaining money – that at the same time was legitimized as a necessary passion against other passions considered as negative. On the other hand, this relation, Hirschman argues, grounded some strategic motives and here interests should *appear* to be as opposed to passions: whereas passions broadly understood were seen as violent and unpredictable, interests were associated with predictability, constancy and calm – “money-making as a calm passion”<sup>11</sup> – which should justify the preference for it.

In the arguments used to support the rise of capitalism, however, it is not clear if interests should have a decentralized, inclusive perspective in a social dimension. Rather, since the beginning the internal transformation of the discourse on passions was used fundamentally as legitimation only of egoistic interests. Even if, for instance, Adam Smith wanted to break with some vertical relation, as in the feudal societies, and sees the market now as a possibility of equal autonomy and space of freedom, his solution, proposed with the self-regulation of markets, tried to put together the realization of self-interests inside a theory of

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<sup>9</sup> Hirschman 1977.

<sup>10</sup> *Ibid.*, p. 20.

<sup>11</sup> *Ibid.*, p. 63 ss.

the free market. This concept, however, was based on the assumption that given a space where the individuals could act more freely, these autonomous and free agents in the market could be compatible with social progress and the benefit of all society.

Curiously, as Hirschman observes but without keeping the consequences of it, Smith did not discuss the difference between passions and interests. A possible interpretation is that the consequences of his theory of moral sentiments was so intrinsically connected to his economic theory that what moves on this self-interest was seen as impregnated with emotional content. Here emerges the so-called “Adam Smith problem”: the broadly discussed issue of Smith’s theory of moral sentiments and his economic theory as ambiguous or coherent, or, in other words, if there is or is not a tension between rational calculation actors guided by self-interests and a social mediated relation.<sup>12</sup>

As I see it, the argument of Adam Smith is partially plausible in the sense of having in view the emotions involved in self-interest and not only in the sense of a previous rationality but at the same time through the sentiments that move it. It is here that Smith’s thesis is more promising for our reconstruction. In fact, it is meaningful that his argument can be based on a theory of moral sentiments: even with the emphasis on self-interests, also in the market should there be presupposed a kind of inclusive *sentiment* that could ensure the success of contractual relations. Smith, then, sees, for example, “trust” in the base of that relation guided from self-interest. The dichotomy between interests and passion is contested here in a particular way, where interest seems to be linked to the idea of a rational calculation, but one that for its part depends on a previously emotive content. In that way, at the same time that Smith sustains the idea of self-interest as guide for economic agency, he seems to indicate another thesis: that a previous frame of moral sentiments could secure the success of actions based on interests. The assumption that could be hereby shared with Smith, then, is that of a more realistic approach, in which the agents in the economic relations *effectively* behave for self-interest, which itself depends upon a passionate content. Precisely because of this fact is it central

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<sup>12</sup> For this issue, see Honneth 2011, p. 317 ff.

to stress the perspective of a reframing of these passions, in which his theory of moral sentiments could give a first light.

However, the reconstruction of Hirschman does not highlight the name of Hegel, but this is not by chance. Even if – as I suggest – Hegel has in his theory of ethical life a strong attention to passions and emotions, his kind of social ontology was fundamentally different from the tradition that Hirschman describes. Exactly at this point, Hegel can be helpful in giving a complementary position to this relation between passions and interests: at the same time that he shares with this tradition that emotional content and a similar concept of human nature, the picture that he suggests has a fundamentally both intersubjective and *normative* approach. The question here is not only reducible to the passionate content of interest, but it also tries to elucidate an institutional framework that having in account this social mediated formative process of the will.

If, at first, the principle of countervailing passions shows that interest is not understood as a pure rational strategic action, it should be shown, in a second step, what the differential point that Hegel's argument suggests is; with the thesis that passions are constitutive from interest, one should then look not only at a rational level, but at the working out of passions: interests related with a formation of passions in a decentralized perspective, as was pointed out concerning Hegel's idea of free will.

### 3. Emotions and “institutionalized solidarity”

With this background I come to my last step. In the work of different authors, we find the specific emotional and affective content related to the market or broadly social relations expressed in the concept of *solidarity*. In the tradition of critical theory, then, this concept was mainly used by Jürgen Habermas<sup>13</sup> and, more recently, Axel Honneth. In contrast to Habermas, Honneth – referring to Durkheim's idea of organic

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<sup>13</sup> For a detailed approach, see Pensky 2008.



solidarity – understands solidarity not as a formal normative principle, but rather as a result of recognizing the activity of other citizens as a contribution for a group that has *shared goals*. This first step from this Durkheim picture is therefore different from a universalist concept of solidarity. For Honneth this notion is spelt out with the idea that a solidary appreciation of the activities of others includes a certain emotional component: one feels affected by the fact that the other is acting in a way which helps our commonly shared goals to become real.

Here, the Kantian solution of dignity based on the fact that we are rational beings seems – at first glance – to be connected, in this emotive dimension, to something like a sentiment of humanity that can be shared. In Honneth’s idea of solidarity, however, shared goals are needed and therefore it would be possible to extend this idea to something like “humanity” only insofar some goals can be seen as shared, or if there is here a real sentiment of cooperation. Different from respect or some kind of moral rule, one could see in this presupposition a moral content linked rather to an affective tone as a shared sentiment,<sup>14</sup> and he defends that the market can be a sphere of social freedom, but only insofar as previously there is a non-contractual relation. Claiming for a “solidary consciousness” (2011, p. 329), Honneth writes:

In Hegel’s terminology it is possible to express the idea that a co-ordination of simple calculation of individual preferences – which is proceeded in the sphere of market – can only be successful if the involved subjects are recognized not only as juridical contract partners, but also morally and ethically [*sittlich*] as members of a cooperative community. (Honneth, 2011, p. 329)<sup>15</sup>

Honneth says that both Hegel and Durkheim have in view that the effectuation of the contractual sphere in the market depends on previous guarantees based on a solidarity consciousness. The emphasis here is on a non-contractual dimension, where an affective content could

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<sup>14</sup> See Honneth 1994b; 2011.

<sup>15</sup> The translations from Honneth are my own.

be emphasized, what Honneth sees as solidarity in Durkheim, trustful relation in Smith, or “honor” in Hegel. In this way, this approach on solidarity grounded in shared interests and goals can help to answer the question of how solidarity can have that content that Hegel had in mind, namely the question of what can lead to this sentiment of cooperation. As we have briefly seen, Hegel was, from the beginning, skeptical about the Kantian solution of an obligation to a moral law guided by the respect to rational beings, so that these inclusive interests could not be found only by force of a moral argument; this not only because of that submission and limitation to an internal moral law, but also because – as we saw in the second step of the argument – the fictitious differentiation between passions and interests (as something rational opposed to passions), so that the very level of passions become central in this picture.

The other idea we find throughout Hegel’s works (not only in his *Philosophy of Right*, but also in his *Encyclopedia*) is that the concept of free will is not predeterminate, but a result of a complex, social articulated working out of inclinations, drives, desires.<sup>16</sup> In this way, neither a juridical nor a moral law, but rather the institutions express the most adequate locus for the mediation of emotions and free will. In this way, Hegel develops the spaces of realization of freedom in his theory of ethical life (“Sittlichkeit”) as a theory of institutions – as the “kingdom of actualized freedom” (Hegel 1991, §4). In this sense, a normative approach – understood not as an external, formally/based principle but rather, as *immanent normative critique* – concerns the question of how far a social, institution mediated framework makes possible the realization of individual freedom as an expression of social embodied relations.<sup>17</sup>

Hegel’s own solution to give a normative and critical inflection to this individualistic interest in the emerging capitalist society was in his ground concept of “Bildung” (formation): the transition from arbitrariness to free will which, in the specific case of the sphere of market, appears as a working out of interests. In fact, in consonance of the

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<sup>16</sup> See Honneth 2001, p. 21 ss.

<sup>17</sup> For this issue, see also Honneth 2011.

picture of a learning process inside each sphere of ethical life, Hegel's intuition of the formation specific to civil society indicates that interest is the specific component relating to satisfaction of those needs which refer to the market.<sup>18</sup> In Hegel, this is mainly one grounded on the constitutive formation through institutionalized forms, like in his idea of "corporation" and through work and cooperation. He also shares that individuals can be guided by self-interests, but instead of a kind of invisible hand, it depends on a reorientation of action and purposes – on the content of will itself, not as a secondary consequence, but as a substantial characteristic of the will.

However, Hegel saw, mainly regarding the civil society and its economic relations, the contingency of such individual agency, while depending only on a solidary consciousness, to avoiding poverty and promoting social justice. In fact, whereas on one side of this process, Hegel indicates emotive dimensions as "emotion" and "love",<sup>19</sup> on the other side the point in view of his approach should not reduce the concept of solidarity to a kind of benevolence or pity, which would

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<sup>18</sup> "Education [*Bildung*], in its absolute determination, is therefore *liberation* and *work* towards a higher liberation; it is the absolute transition to the infinitely subjective substantiality of ethical life, which is no longer immediate and natural, but spiritual and at the same time raised to the shape of universality. Within the subject, this liberation is the hard work of opposing mere subjectivity of conduct, of opposing the immediacy of desire as well as the subjective vanity of feeling [*Empfindung*] and the arbitrariness of caprice. The fact that it is such hard work accounts for some of the disfavour which it incurs. But it is through this work of education that the subjective will attains *objectivity* even within itself, that objectivity in which alone it is for its part worthy and capable of being the *actuality* of the Idea. - Furthermore, this form of universality to which particularity has worked its way upwards and cultivated [*herausgebildet*] itself, i.e. the form of the understanding, ensures at the same time that particularity becomes the genuine *being-for-itself* of individuality [*Einzelheit*]; and, since it is from particularity that universality receives both the content which fills it and its infinite self-determination, particularity is itself present in ethical life as free subjectivity which has infinite being-for-itself. This is the level at which it becomes plain that education is an immanent moment of the absolute, and that it has infinite value". (Hegel 1991, §187, Note)

<sup>19</sup> "The subjective aspect of poverty, and in general of every kind of want to which all individuals are exposed, even in their natural environment, also requires *subjective* help, both with regard to the *particular* circumstances and with regard to *emotion* and *love*." (Hegel 1991, §242).

be a misunderstanding and would in no way substitute the grounded importance to have rights secured through moral grounded institutional framework.<sup>20</sup> Rather, a “*particularity* of emotion” should be connected with the “public conditions”, as he writes in his *Philosophy of Right*:

The contingent character of almsgiving and charitable donations (e.g. for burning lamps before the images of saints, etc.) is supplemented by public poorhouses, hospitals, streetlighting, etc. Charity still retains enough scope for action, and it is mistaken if it seeks to restrict the alleviation of want to the *particularity* of emotion and the *contingency* of its own disposition and knowledge [*Kenntnis*], and if it feels injured and offended by universal rulings and precepts of an *obligatory* kind. On the contrary, public conditions should be regarded as all the more perfect the less there is left for the individual to do by himself [*für sich*] in the light of his own particular opinion (as compared with what is arranged in a universal manner). (Hegel 1991, §242, Note)

Therefore, Hegel concludes, the achievement of social justice would be only possible through the “payment of taxes” (Hegel 1991, §184, Addition). At the same time, the very consciousness of the role of the taxes is already dependent on a social decentered perspective that is not opposed to the realization of particular interests, but neither is independent of social fairness. So puts Hegel:

most people regard the payment of taxes, for example, as an infringement of their particularity, as a hostile element prejudicial to their own ends; but however true this may *appear*, the particularity of their own ends cannot be satisfied without the universal, and a country in which no taxes were paid could scarcely distinguish itself in strengthening its particular interests [*Besonderheit*]. (Hegel 1991, §184, Addition)

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<sup>20</sup> “But since this help, both in itself [*für sich*] and in its effects, is dependent on contingency, society endeavours to make it less necessary by identifying the universal aspects of want and taking steps to remedy them”. (Hegel 1991, §242).

The emphasis, therefore, on an emotional content cannot deny the fundamental moral progress guaranteed – as a normative reconstruction can show – in forms of institutions and rights: an institutionalized solidarity. The point is rather to identify a model not only for how an ideal model of solidarity should be, but also to try to better understand what is going on in social transformations. Regarding its normative character – as was proposed with Hegel’s idea of “fulfillment” – it is the result of a way of putting out some expression of subjects, not only as a submission neither to external or moral law, but rather where they can experience themselves in their action. In this idea of “Bildung” the laws are, on the contrary, an expression of what is experienced; not self-referenced and limited as in its primary egocentric moment, but as a result of complex and plural forms of freedom founded and elaborated in the ethical life.

John Stuart Mill on Justice  
and Self-Development

Gustavo Hessmann Dalaqua



I would like to talk about John Stuart Mill's thinking on justice, especially around the question: "What is justice?" Philosophy has puzzled itself with this question from time immemorial, and I assume no one here is expecting to get back home with an answer that could work once and for all. That would be against the very nature of our colloquia. For if we are expected to meet year after year to discuss justice, then something must have changed. It would be simply a waste of time to meet again if nothing new came up.

Time and again we gather and endeavor to pose the question anew: "What is justice?" This proves, if it needs proving, how provisional our consensus on the issue is. Now and then people assemble not only to debate but also to *demand* justice (we shall return to this issue when talking about civil disobedience). Justice has been out and about, on people's lips, on the streets; indeed, one can scarcely think of a political revolution or a public turmoil in which it has not been of prime concern. And here lies the chief difficulty in studying justice nowadays. Since it is so stored with past echoes and conflicting associations, justice cannot be captured by a single and indisputable definition.

That is why I shall concentrate mainly on Mill and see what he has to say about justice. Initially the question of justice seems to be confined only to *Utilitarianism*, and when scholars want to discuss Mill's thinking on justice, that work is usually where they turn to. In *Utilitarianism's* final chapter, we read: "justice is a name for certain moral requirements" that belong to "social utility" (Mill, 1861, 200). Justice, Mill believes, is grounded not on an absolute, transcendental standard but rather on social utility, that is to say, on human happiness and well-being.

Far from being immutable, social utility is a historical phenomenon which changes over time; what is considered useful for one age may not be so for the next. That which one generation regarded as conducive to human well-being can become burdensome or even contrary to happiness for the next generation. The way we look at utility is established and improved through public debate and social intercourse (cf. Mill, 1859, 41). Justice and utility, in short, are open to discussion and



*a fortiori* can only be sustained through debate, in the broad sense of the word. Justice, I shall argue, requires public debate as well as inner debate, an activity which one exercises through self-development. Justice is anchored in self-development and is conducive to human happiness.

Happiness should not be mistaken for contentment. It is not merely a succession of pleasant mental states; when Mill speaks of happiness, as Rawls has noticed, he means “a way of life” (Rawls, 2007, 259). One is happy insofar as one leads a critical way of life and cares for one’s self. Those who passively conform to society’s mandates and do not develop an intelligent relationship with them cannot be called happy and are not properly speaking individuals.

According to Mill, being an individual presupposes the ability to develop and care for his or her self, which in turn allows the individual to gain some distance from his or her background, whereupon critique becomes feasible. Self-development and the critical thinking thereby produced are essential for justice. In what follows, my aim will be simply to underscore the relationship between justice and self-development, a theme scholars often neglect when talking about Mill’s thinking on justice.

When Mill asks himself, “What is justice?”, he notices people have different answers for it. Mill writes from a background of assumed conflict and knows that he cannot rely on a shared opinion, for there is none. People began to conceive justice in different ways in the nineteenth century and that is why an all-embracing definition will not do. In genealogical fashion, Mill then attempts to trace the genesis of the concept “justice” and turns back to the Greeks and Romans. I quote him:

Among so many diverse applications of the term Justice ... it is a matter of some difficulty to seize the link which holds them together. ... Perhaps, in this embarrassment, some help may be derived from the history of the word, as indicated by its etymology. In most, if not in all, languages, the etymology of the word which corresponds to Just, points to an origin connected either with positive law, or with that which was in most cases the primitive form of law —authoritative custom. *Justum* is a form of *jussum*, that which has been ordered. *Jus* is of the same origin Δίκαιον comes from δίκη, of which the principal meaning, at least in the historical ages of Greece, was a suit at law. Original-

ly, indeed, it meant only the mode or *manner* of doing things, but it early came to mean the prescribed manner; that which the recognized authorities, patriarchal, judicial, or political, would enforce (Mill, 1861, 181-182).

The concept of “justice” was connected with “law” and “custom” both in Rome and Greece. It meant conformity to a set of prescriptions which were imposed upon the individual by an external authority, which was not necessarily judicial. Usually the source of authority was what determined whether the prescription was a “law” or “custom”. Such a distinction, according to Mill, remained valid in the nineteenth century and still makes sense in our time (cf. Mill, 1859, 23ff).

For one thing, it seems safe to say that laws and customs are not the same. Laws are prescriptions issued by a judicial authority. When one disrespects them, the punishment one faces is exercised mainly by juridical institutions, such as the police. Customs, by contrast, are not necessarily regulated by judicial power. Usually they are imposed upon us by non-judicial power mechanisms and the punishment we get when we disobey them is of a different nature. Mill offers an interesting analysis of how such extra juridical power shapes individual conduct, but to explain it here would lead us too far afield.

So far what the etymology of the word has revealed is that *the concept of justice is not exclusively juridical*. Justice is much more than a legal matter; it signifies acting in conformity not only to law but also to custom. Thus we are led to the questions: what is law and what is custom? According to Mill, both can be seen in two ways: (i) something man-made that can be changed; (ii) something sacred and immutable that emanates directly “from the Supreme Being” (Mill, 1861, 182). To each one there is a corresponding morality: (i) a morality of creation, that is to say, a creative morality; (ii) a morality of passive obedience, where one is not expected to question but only to conform to the never changing law and custom.

It is Mill’s view that since the birth of Christianity, morality (ii) has been superseded by (i) and, not surprisingly, his proposal will be to favor the latter and reverse or relieve, so to speak, the harmful effects of institutionalized Christianity. Ancient ethics functions as a model for modern morality. As those who are familiar with the etymology of the word may probably know, ethics derives from the Greek word *êthos*.

The concept, according to Mill, has a twofold meaning (Mill, 1843, 54). On its collective aspect, *éthos* means the guiding principles and beliefs of a community. On the individual level, it means an attitude opposed to blind obedience, a way of life, as it were, in which individuals breed an active relationship with their community precepts and “fashion themselves” (Mill, 1859, 26). Let us note from the outset there is no necessary antagonism between individual *éthos* and collective *éthos*. One can respect one’s community while at the same time fostering a critical relationship with its precepts.

To be sure, Mill is going to argue that one can honestly respect one’s community only if one critically reflects upon its laws and customs. For Mill, one ought to respect only what is just, and if any law happens to be unjust, one should challenge it for the sake of justice. This is a strong claim which is not difficult to understand, at least not if you have read Aristotle, Kant, or Thoreau before.

In *Nicomachean Ethics*, Aristotle dedicates his fifth book to studying justice. He asks himself, “What is justice?”, and in order to answer it, he appeals to common sense and uses widespread beliefs as a starting point. Aristotle reports that when the Greek people spoke of justice they meant that which was lawful, whereupon he concluded “that whatever is lawful [*nomimon*] is in some way just” (*NE*, 1129b13). One should not read this sentence as meaning that whatever is legal is automatically just. Not every positive law is lawful, and Aristotle states clearly that “it is within our power to alter the current law [*nomos*] and to make it useless” when there is good reason for doing so (*NE*, 1133a32). Like Mill explained, the Greeks envisaged law as something man-made which could be faulty and hence improved.

Kant also supported a critical relation towards positive law. To be sure, in *What is Enlightenment?* he advanced the thesis that law is legitimate only insofar as the people to whom it applies reasonably accept it. “The touchstone of all those decisions that may be made into law for a people lies in this question: Could a people impose such a law upon itself?” (Kant, 1783, 57). Enlightenment, the age of critique, gave birth to a new public *éthos*, one which brought forth a critical way of life. Henceforth the individual would respect only those laws which he himself could have approved. However, lack of respect does not imply disobedience. For Kant, one should abide by the law even when one disagrees with it. That is to say, even when one has realized through

critical examination that a given law is not legitimate, one must obey it anyway. One ought to contest and attempt to amend it, no doubt, but one must obey it anyway.

That is not the case for Thoreau. With him we see the rise of a new ethics of disobedience that was beginning to take shape in nineteenth century philosophy. He writes: "Unjust laws exist. Shall we be content to obey them, or shall we endeavor to amend them and obey them until we have succeeded, or shall we transgress them at once?" (Thoreau, 1849, 7). Whereas Kant would go for the second option, Thoreau espoused the third one. In his view, individuals had the duty to disobey any law they thought unjust. "Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? ... It is not desirable to cultivate a respect for the law, so much as for the right" (ibid, 2). Resigning one's conscience should be avoided at all costs because it entails risking one's human status and one's selfhood. *A fortiori*, whoever does not think for his or her self is not human at all. When men do not exercise their conscience and care for justice, "they put themselves on a level with wood and earth and stones" (ibid, 3). Needless to say, a state made up of men is much better than one made up of stones. For Thoreau, those who bred a critical relationship to the law were good citizens because their civil disobedience, that is, their resistance to complying with unjust laws, exposed injustice which needed amending.

Thus, for Aristotle, Kant, and Thoreau, justice and law are not one and the same. Bad governments may promote unjust laws, and when that happens, our duty is to review the law. Kant, Thoreau, and Mill valued individual critical thinking, which was not at odds with community love. Instead, individual critical thinking is good precisely because it provides a safeguard for justice. Far from weakening communitarian bonds, critical examination of customs makes one's respect for community stronger. I quote Mill:

[T]o conform to custom, merely *as* custom, does not educate or develop in him [*sc.* the individual] any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom,

makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing only because others believe it. If the grounds of an opinion are not conclusive to the person's own reason, his reason cannot be strengthened, but is likely to be weakened, by his adopting it (Mill, 1859, 74-75).

Adhering mechanically to a precept is tantamount to not understanding it. It is only through critical examination that one can grasp the grounds of one's rule of conduct. If one does not know why one acts according to custom, one does not comprehend it. And since one does not comprehend it, one cannot even say one sincerely respects custom. Critical examination, in sum, fortifies our reason for acting in conformity to custom.

Granted that it fortifies our reason for acting in conformity to custom, could one say critical examination also fortifies our reason for acting justly? Indeed one could. As Mill has pointed out in the aforementioned quotation, one can only develop an intellectual and moral sense if one critically examines custom. To adopt custom unreflectively dwarfs self-development. From here it follows "that an intelligent following of custom, or even ... an intelligent deviation from custom, is better than a blind and simply mechanical adhesion to it" (ibid, 75).

The reason Mill is going to advocate an intelligent relationship with custom is threefold. First, keeping a critical relation towards custom should be encouraged inasmuch as it brings about a greater respect for it. Furthermore, it should be encouraged because it promotes justice. Critical examination is capable of revealing unjust laws and customs. Finally – and here is where my stress will fall – critical thinking is important because it leads to self-development. The latter is a key issue in Mill's philosophy and plays a fundamental role in his thought.

How is self-development relevant for justice? Can there be justice without self-development? For Mill the answer is no. There can be no justice without self-development for one cannot act justly if one does not develop one's self. Through self-development one constitutes one's self as an ethical subject. Such constitution is also, as Mill likes to put it, a *fashioning* of the self. As the word suggests, self-constitution bears

an artistic dimension, and both “justice” and “ethics” belong to what Mill calls “the Art of Life” (Mill, 1843, 140). Art here stands for the Greek *tékhnē* (ibid, 134); the “Art of Life” Mill alludes to is what the ancients used to name *tékhnē tou biou*. According to them, no technique or professional skill could be acquired without exercise, and neither could men fully enjoy life without engaging in the “Art of Life”, a set of practices which was designed to train the self. The training [*askēsis*] of the self was of paramount importance in ancient ethics and Mill suggests it is a good idea for modern morality to recover that. Modern morality can benefit from ancient ethics.

To show you how relevant self-development is for justice, I quote Seneca’s *De Ira*:

All our senses ought to be trained to endurance. They are naturally long-suffering, if only the mind desists from weakening them. This should be summoned to give an account of itself every day. Sextius had this habit, and when the day was over and he had retired to his nightly rest, he would put these questions to his soul: “What bad habit have you cured to-day? What fault have you resisted? In what aspect are you better?” Anger will cease and become more controllable if it finds that it must appear before a judge every day. Can anything be more excellent than this practice of thoroughly sifting the whole day? And how delightful the sleep that follows this self-examination – how tranquil it is, how deep and untroubled, when the soul has either praised or admonished itself, and when this secret examiner and critic of self has given report of its own character! I avail myself of this privilege, and every day I plead my cause before the bar of the self. When the light has been removed from my sight, and my wife, long aware of my habit, has become silent, I scan the whole of my day and retrace all my deeds and words. I conceal nothing from myself, I omit nothing. For why should I shrink from any of my mistakes when I may commune thus with myself? (Seneca, 2006a, 339–341).

It is not difficult to see how Seneca’s self-training can prevent wrongdoing. For the training he recommends requires not only endurance and self-control, but more importantly, self-examination. To the extent

it compels one's self to "appear before a judge every day", self-examination keeps injustice at bay. As soon as one leaves one's friends, "all deeds and words" are meticulously judged. The principle according to which "the bar of the self" issues its verdict is goodness, which obviously includes justice. "Did you do anything wrong today?" – the question our internal judge trouble ourselves with has the purpose of making us better persons.

The practice of communing, of developing a relationship with one's self is exercised through conscience, which is not identical to consciousness. That one is a conscious being does not mean one has a conscience. The latter implies one cultivates an interest in one's self, and that, we all know, should not be taken for granted. Some people are not interested in developing themselves, and a few do not even think twice before doing an act of injustice because, let's face it, they simply do not care. The self and its conscience are not purely natural features which are born with us already in a mature form. On the contrary, both need to be called forth by society if they are to develop. The self and its conscience are, in one word, historical. They are not *only* historical, for Mill does say that memory, the ability to recollect an experience, is natural (cf. Mill, 1865, 212). To the extent they are grounded on memory, the self and its conscience indeed have a natural basis. Yet one cannot deny their development and consolidation happens over time. Therefore, they are historical as well as natural.

Like justice, conscience has a social and historical dimension: it can only arise in "properly cultivated moral natures" (Mill, 1861, 161). That is why Mill emphasizes the necessity of a proper cultivation of human beings, of a moral education that allows conscience to emerge. One can steal, one can kill, and yet one may sleep at night as if nothing had ever happened. Should we say those people are not conscious of their acts? Of course not. They are rational beings and they know what they did. We should say, instead, that something went wrong in their upbringing, and that is the reason they do not exercise their conscience.

"Conscience leads to a habitual exercise of the intellect on questions of right and wrong" (Mill, 1873, 153). The fear of having to face one's self after going to bed acts indeed as a strong dissuader of injustice. Conscience, as Hamlet used to say, makes us cowards because unjust actions have a price of their own. Never mind no one saw the terribly unjust act you committed today. You saw it, and you know that was

wrong. To be sure, reproach that springs from within is much more invasive than that which comes from outside. No matter how much someone else despises my conduct, if I do not think my action was wrong, external reproach is not likely to be effective at all. Now things are very different if the person who is condemning me is myself. If after reflecting upon one of my actions I realize it was unjust, I will try my best not to do it again.

I will try my best but that does not rule out my doing it again. Maybe the injustice I am doing is caused by what Mill refers to as a “lower” part of myself (Mill, 1861, 140). As you can see, the Millian self is not univocal. It is, as it were, divided into parts (cf. Mill, 1859, 79, 83). I say “as it were” because, as none will object, the inner constitution of the self is not spatial; the word “part” is employed with some hesitation. Be that as it may, what matters here, I would argue, is that the splitting of the self in different parts is the *sine qua non* of conscience and therefore, of justice.

According to Mill, the self is internally divided and must remain so if it is to exercise its conscience. The only possible way one can judge one’s own actions is by splitting up one’s self in two difference parts. Conscience implies a dialogicness, lacking which no critical thinking can exist. To be simultaneously accused and accuser requires a dyadic self. Thus the inevitable question: what comes into being when conscience splits up the self in two? In other words, if the self is dyadic, what are its two parts?

Mill names the two parts of the self as “the selfish part” and “the social part” (Mill, 1859, 79). The former denotes an “area” – quotation marks are used here, for we are not talking about something spatial – opposed to and insulated from sociality, whereas the latter replicates one’s social background. Interestingly enough, human beings are such social creatures that they are never capable of being alone. Even when one withdraws from social companions and retires into the darkness of one’s bedroom, one is not alone. One finds one is populated precisely when one believes one is deserted.

The self carries within it difference and opposition. Conscience is exercised by a plural self, and the silent conversation Seneca used to entertain himself with as soon as “light has been removed” was not a monologue but a dialogue. As Seneca assures us, someone was addressing someone else. Speaking on “conscience [*conscientiae*]”, he writes:



“Whatever I shall do when I alone am witness, I shall count as done beneath the gaze of the Roman people” (Seneca, 2006b, 151). Like I said before, it does not matter whether the terribly unjust act you committed today was seen by no one. If you saw it, the punishment you will face afterwards will be just as harsh as if it had been seen by everybody.

Diversity within the self as well as diversity outside it – human diversity – is essential to self-development because

the unlikeness of one person to another is generally the first thing which draws the attention of either [men] to the imperfection of his own type, and the superiority of another, or the possibility, by combining the advantages of both, of producing something better than either (Mill, 1859, 87).

Self-development is carried out in concert with other people. Human progress requires plurality because it is through social intercourse that the self knows and unfolds its capacities. Making a choice is the only way we have to exercise our faculties and develop ourselves as moral beings (cf. *ibid*, 74–75). That, in turn, presupposes a variety of options; to choose is, after all, to choose among different alternatives. Hence Mill’s emphasis on the importance of “experiments of living” (*ibid*, 72). Diversity must be a social reality if we are to develop ourselves. Human plurality is the *sine qua non* of self-development, and since the latter is also the *sine qua non* of justice, that means plurality is indispensable to justice. To work against plurality is to work against justice.

I suggested earlier that Mill believed that self-development is crucial to justice. Developing and caring for one’s self allows one to keep a critical distance from which it is possible to judge not only one’s actions but also one’s surroundings. That the “social part” has the power of judging the “selfish part” does not exclude the possibility of a reversal. Eventually the “selfish part” assumes the judge post and critiques social norms. Conscience is also exercised when the rightfulness of society’s orderings is put into question by the individual self. Indeed, individual social critique is the kernel of Mill’s so-called “intelligent following of custom”.

Civil disobedience is one plain example of the “intelligent following of custom” and displays the importance of individual consciences for the maintenance of social justice. Take Thoreau for instance. His

refusal to pay poll tax which sponsored slavery was justified by his inner conviction that slavery was unjust. Nowadays the injustice of slavery is plain as a pikestaff, but at that time the majority of the people believed it was natural to enslave someone because of his skin color. Thoreau's disobedience acted as a way of denouncing a legal and widespread custom as unjust.

"[C]ivil disobedience", Rawls explained, "is intended to address the sense of justice of the majority" (Rawls, 1969, 182). When he wrote these lines, Rawls was not thinking of Thoreau. 1968 was a very hectic year in global politics. Worried about justice, people occupied the streets everywhere. In May, there were protests in France, in June, the *Passeata dos Cem Mil* in Rio de Janeiro, then in November, one of the largest acts of civil disobedience in recent history took place in the United States, namely, the refusal of thousands of young men to take part in the Vietnam War. By burning their draft cards on the public square and in broad daylight, the protesters wanted to denounce the injustice of a law which compelled men to participate in a war which they found unjust. They assembled to demand justice, and although they were imprisoned, their disobedience was effective in the long run. Eventually the draft ended, and public opinion realized the war was unjust. This shows how justice is not exclusively sought in law courts. Justice is not only juridical, and more often than not it is on the streets that we fight for it.

History proves that justice and law are not fixed once and for all and are open to discussion. Justice is always implicated in debate: debate within the self, as well as public debate. Actually, both are deeply intertwined and cannot subsist without one another (cf. Mill, 1859, 33). When the soundless debate between me and myself tells me something is unjust, the judgment I arrive at urges for public expression and impels me to public debate. Judging an action unjust and watching that action being carried out day after day is unbearable, even when you are not the one suffering it. People or, rather, critical people are inevitably bound up in public discussion. The Millian self is indeed never isolated. The "I" shapes itself and is shaped by a broader sociality. His judgment echoes his social background, yet that does not imply that the relationship between self and community is causally linked.

The self is not produced by community. We have *to some extent* the power of fashioning, of molding ourselves (cf. Mill, 1843, 26-27). Just

like there is no artistic creation *ex nihilo*, so there is no self-fashioning that can fully stand apart from its historical background. Self-fashioning is a constrained operation; the material available for the self is limited by culture and prior to its emergence. The way we look at justice is historically conditioned and reflects our community, but that does not mean we have no freedom whatsoever to make our own judgment. We may produce opinions of our own, opinions that sometimes are at odds with the prevailing thinking and may challenge it. But the challenge and the contestation neither arise nor occur *ex nihilo*. It is through the prevailing matrix of thinking that a different conception is formulated. It was by engaging in public debate and listening to the arguments which folks from his time adduced to justify slavery that Thoreau realized slavery was unjust.

Contestation and critique are orchestrated from within the prevailing matrix of thinking, not from outside. They arise out of a redoubling of the self, which constitutes a process of individuation. A man who only repeats what others say, whose self is pure social reflection and has no interiority, does not qualify as an individual to Mill. Critique is the effort of systematically distorting sociality, and it is from this refraction and distortion that individuality comes into being.

I have reached the end of my presentation, and like I warned in the beginning, no definite answer has been offered. That would have been too presumptuous and quite misplaced for someone who is used to studying John Stuart Mill. I do not think it is up to me or to any other person in this room to establish unilaterally what justice is. "What is justice?" – Mill does offer one answer for the question: justice is a moral requirement for utility. Morality is a creative art and requires developing and caring for one's self. Therefore, justice entails constituting one's self as an individual. Justice deals with ethics, in the ancient sense of *êthos*, and one can only care for others if one has cared for one's self.

Utility is never defined once and for all, and neither is justice. According to the circumstances, the conception of justice may change, and it is through the analysis and comparison of the various perspectives of an individual action that we can conclude whether it was just or not. Justice is a matter of debate. Ultimately, it is a matter of politics too: to inquiry about justice demands coming together and asking whether our laws and social practices are rightful or not.

V

Phenomenological and Deontological  
Deficits of Justice



Reflective Equilibrium  
and Normative Reconstruction:  
Recasting the Phenomenological Deficit  
of Critical Theory

Nythamar de Oliveira



1. In an ongoing research, I have tried to investigate in what sense social, political constructivism (Rawls) and formal, pragmatic reconstruction (Habermas) may be taken as defensible instances of a weak or mitigated methodological social constructionism to the extent that both preserve the idea of objectivity, and that is articulated in terms of cognitive moral normativity. By exploring the Rawlsian idea of “reflective equilibrium” and Habermas’ program of “normative reconstruction”, I have been arguing for naturalism and cultural relativism without giving up on a conception of normativity, albeit not absolutist, with the help of new interfaces that can encompass the differences between mitigated conceptions of naturalism and normative, empirical takes on culture. (Oliveira, 2011; 2012c; 2013) In the final analysis, the problem of striking a balance between mitigated conceptions of naturalism, normativity, and social constructionism helps to consolidate a sustainable view of neuroethics that refers back to the practical-theoretical articulation of ontology, language, and subjectivity. From a strictly ontological perspective, nature has to do with all real things that exist, inorganic, organic, and living beings that can be investigated by – to employ Husserl’s terminology – “regional ontologies” such as physics, chemistry, biology and natural sciences overall – given the parts-whole problems in formal ontology and logic. (Smith, 1982) Thus, natural ontology deals with real, natural beings, what things are and how they come into being, become, evolve and cease to be. Hence, ontology deals *grosso modo* with being and beings as they exist, necessarily, possibly or contingently, very much as traditionally and broadly conceived, as the study of what there is. In analytic philosophy, the ontological dimension has been aptly evoked to call into question essentialist, culturalist, and historicist definitions of nature and naturalism, as “methodological (or scientific) naturalism” assumes that hypotheses are to be explained and tested only by reference to natural causes and events. Thus Willard Quine’s “naturalized epistemology” and metaphysical naturalism (or ontological naturalism) refer us back to the question “what does exist and what does not exist?” as the very existence of things, facts, properties, and beings is what ultimately determines the nature of things. In the continental



camp, Quentin Meillassoux (2006) has articulated a radical critique of correlationism, which has dominated post-Kantian antirealism from German idealism through phenomenological and hermeneutical interpretations of reality and nature (esp. Hegel, Husserl, Heidegger, Sartre, Merleau-Ponty, Foucault, Derrida), as well as in contemporary analytical critics of realism (esp. Putnam, Davidson, Blackburn). Accordingly, correlationism holds that one cannot know reality as it is objectively or in itself, but only insofar as it is posited for a (transcendental) subject, *pro nobis* (“for us,” as in the Lutheran formulation), as a correlate of consciousness, thought, representation, language, culture or any conceptual scheme. To be sure, Meillassoux’s critique of antirealism fails to account for causation, chance, and necessity in natural phenomena, as his mathematical-ontological presuppositions remain in need of justification, although claiming to wholly abandon the principle of sufficient reason. In other words, it is not enough to assume that things are just like mathematical objects are accounted for (say, in set theory), without relapsing into some form of correlational circle. In effect, it seems that both language (as it was assumed in the very beginnings of analytic philosophy) and subjectivity (as it has been the case with continental philosophy since Kant) remain bound up with any tentative account of ontology. To my mind, this is precisely what makes the Husserlian semantic correlation (*Bedeutungskorrelation*), in light of Husserl’s intuitive noematic-noetic differentiation between *Gegenstand* and *Objekt*, so important for a better grasp of the conception of *Lebenswelt*, avoiding thus a post-Hegelian historicized correlation of alterity (being-other) and objectification (being its other) of *Geist* vis-à-vis *Natur* or the natural becoming of beings overall. As I have tried to show elsewhere, both Habermas and Honneth sought to go beyond the noetic-noematic correlation inherent in Heidegger’s takes on reification and formal indication, precisely to rescue the normative grounds of sociality that were missing in the latter (Oliveira, 2012a, 2012b). I sought then to explore such a semantic correlation in social and political philosophy, as social, political ontology inevitably refers back to subjectivity (moral or social agency, hence intersubjectivity) and language (articulation of meaning, social grammar, language games, shared beliefs and practices). Following Foucault, Apel, and Habermas, three paradigm shifts of ontology, subjectivity, and language (e.g. in natural law, positive rights, and legal hermeneutics, respectively), can be shown to be co-constitutive and

interdependent, insofar as they account for the problem of the social reproduction of the modern, rationalized lifeworld through the differentiated models of a sociological descriptive phenomenology, of a hermeneutics of subjectivation, and of a formal-pragmatic discourse theory. Just as a Kantian-inspired “transcendental semantics” accounts for the articulation of meaning (“*Sinn und Bedeutung*,” in Kant’s own terms) in the sensification (*Versinnlichung*) of concepts and ideas as they either refer us back to intuitions in their givenness (*Gegebenheit*) of sense or are said to be “realizable” (*realisierbar*) as an objective reality (since ideas and ideals refer, of course, to no sensible intuition), a formal-pragmatic correlation recasts, by analogy, the phenomenological-hermeneutical signifying correlation (*Bedeutungskorrelation*) between ontology, subjectivity, and language without presupposing any transcendental signified, ontological dualism (*Zweiweltenthese*), or fundamental relationship between subject and object, theory and praxis. And yet the very irreducibility of the hermeneutic circle, together with the incompleteness of its reductions inherent in such a systemic-lifeworldly correlation, seems to betray a quasi-transcendental, perspectival network of signifiers and language games. Habermas’ wager is that his reconstructive communicative paradigm succeeds in overcoming the transcendental-empirical aporias and avoids the pitfalls of a naturalist objectivism and a normativist subjectivism through a “linguistically generated intersubjectivity” (Habermas, 1987, 297). It would be certainly misleading and awkward to oppose “ontology” to “language” and “subjectivity” as if these were “regional” ontologies or mere subfields of the former. Both Husserlian and Quinean models face meta-ontological problems that remain as unaccounted for as per their ontological commitments and axiomatic presuppositions (Hofweber, 2013).

2. Since August 2012, I have been committed to pursuing interdisciplinary research in the philosophy of neuroscience, neuroethics, and social neurophilosophy, especially focusing on the relation between naturalism and normativity, so as to avoid the reduction of either to the other, by stressing the inevitability of bringing in the two other poles of the semantic correlation whenever dealing with ontology, language, and subjectivity. As Prinz’s takes on transformation naturalism and concept empiricism allow for an interesting rapprochement between social epistemology and critical theory, his critical views of both *natur-*

*ism* (i.e., reducing the nature-nurture pickle to the former's standpoint) and *nurturism* (conversely reducing it to the latter) not only successfully avoid the extremes and reductionisms of (cognitivist) rationalism and (noncognitivist) culturalism – such as logical positivism and postmodernism – but they turn out to offer a better, more defensible account of social epistemic features and social pathologies than most social epistemologists (Goldman et al.) and critical theorists (Habermas, Honneth et al.) have achieved thus far (Prinz, 2012, 840–842). After all, one cannot speak of naturalist normativity or normative naturalism without a certain embarrassment. And yet, as over against traditional conceptions that regard naturalism as merely descriptive, as opposed to prescriptive accounts of normativity, it has become more and more common nowadays to challenge such a clear-cut division of labor, as naturalists like Millikan (1989) assign normative force to the biological concept of function while normativists like Korsgaard tend to assume that human psychology is naturally normative: “whatever confers a normative status on our actions – whatever makes them right or wrong – must also be what motivates us to do or avoid them accordingly, without any intervening mechanism” (Korsgaard, 2010, 16). To be sure, both views could be regarded as simply recasting the externalist-internalist debate over the problems of teleology, intentionality, motivation, and carrying out an action supposed to be moral. Still, inflationary and deflationary views of both naturalism and normativity are to be contrasted with stricter, conservative views, such as the ones espoused by Derek Parfit's non-naturalist cognitivism and correlated irreducibly normative truths: “Words, concepts, and claims may be either normative or naturalistic. Some fact is natural if such facts are investigated by people who are working in the natural or social sciences. According to Analytical Naturalists, all normative claims can be restated in naturalistic terms, and such claims, when they are true, state natural facts. According to Non-Analytical Naturalists, though some claims are irreducibly normative, such claims, when they are true, state natural facts. According to Non-Naturalist Cognitivists, such claims state irreducibly *normative facts*” (Parfit, 2011, 10). Having been deeply influenced by Davidson's anomalous monism, as Hornsby was, other critics of naturalism and of Quine's Naturalized Epistemology program have argued that one cannot conceive of belief without some appeal to normative epistemic notions such as justification or rationality, assuming that all beliefs are

susceptible to being rationally assessed or, in Kantian terms, to being reflexively judged (*beurteilen*). The upshot of this account is that mental events are not identical to physical events precisely because they are instantiations of mental properties, but are realized by them. Jaegwon Kim (2004) goes as far as to argue that “the concept of belief is an essentially normative one” so as to inflate normative claims in beliefs and especially within a certain conception of epistemic normativity. We can realize that classical epistemology has come under attack on two fronts, namely, in naturalist criticisms raised against *a priori* assumptions and in normative claims that led to the emergence of social epistemology, as the collective dimension of cognitive processes and interpersonal relations – already anticipated by Habermas’ discourse ethics – could provide conditions for normative justification within a given community or social lifeworld, so as to accommodate naturalist inputs for social evolution. Furthermore, Habermas’ theoretical and practical approaches to normativity and objectivity are subtly combined within a research program of Kantian pragmatism that remains somehow susceptible to dualist interpretations. All in all, Habermas’ weak naturalism holds that nature and culture are continuous with one another, hence an upshot of his conception of social evolution is that societies evolve to a higher level only when learning occurs with respect to their normative structures. According to Habermas, “in questions of epistemic validity the consensus of a given linguistic community does not have the last word. As far as the truth of statements is concerned, every individual has to clarify the matter for himself in the knowledge that everyone can make mistakes” (Habermas, 2003, p. 142). Accordingly, epistemic agreement or disagreement among peers does not solve the problem as in traditional, correspondence theories of truth: in Quinean terms, all beliefs and intuitions can be constantly revised in light of empirical findings, evidence, and observation. As opposed to scientist, positivist dogmas, mitigated versions of naturalism meet halfway – to paraphrase Habermas – with mitigated conceptions of normativity in weak social constructivism, insofar as social evolutionary processes are guided by normative claims, in both reflexive and social terms, with a view to realizing universalizable, valid claims that are justified from the normative standpoint precisely because they are fit for the survival and preservation of the species. I have thus proposed that Habermas’ pragmatism could embrace Prinz’s transformation naturalism (“a view about how we

change our views”) and its cultural relativism without adopting moral relativism as long as the universalist, moral premises of its formal pragmatics are ultimately understood as part of ethical learning processes. Habermas (and Honneth, for that matter) never ceased to stress a certain commitment to moral realism, but the pragmatist turn adopted by discourse ethics and critical theory (as well as in Honneth’s theory of recognition) embrace a mitigated version inherent in their normative, reconstructive approaches to history, materialism, and human social psychology. We can then make a case for a neuroscientific and neurophilosophical research program that revisits Quinean naturalism, just like Churchland and Putnam did, and goes further in a mitigated version like the ones independently espoused by Searle, Damasio, and Prinz, as they respond to the phenomenological, normative challenges (esp. when dealing with intentionality and consciousness in social life) that avoids trivial conceptions of normativity. Indeed, a programmatic definition of naturalism might trivialize the sense of normativity, as in Jennifer Hornsby’s (1997) conception of Naive Naturalism, according to which in order to avoid both physicalist and Cartesian claims about the mind-body problem, we ought to return to common sense and folk psychology as they implicitly endorse normative and first-personish beliefs. The semantic-ontological correlation comes thus full circle *vis à vis* its networking with language and subjectivity. As Prinz felicitously put it in his neoempiricist, reconstructive theory of emotions: “Moral psychology entails facts about moral ontology, and a sentimental psychology can entail a subjectivist ontology” (Prinz, 2007, 8).

3. Human beings have evolved throughout the times within the complex evolutionary, biological processes that took place on this planet. Social evolution and whichever pertaining moral “progress” are to be understood within psychology and biology, so that their specifically cultural, historical underpinnings should not dissociate intersubjective, subjective, and linguistic traits from their ontological *milieux*. It seems that normativity itself must follow this same kind of correlational rationale, as ethical-moral normativity ultimately fails to be taken for the most fundamental among other forms of normativity – legal, linguistic-semantic, economic, epistemic etc. Unless one assumes from the outset that ethical-moral normativity is prescriptive in a way that radically differs from “weaker” forms of normativity which can be some-

what reduced to descriptive or constative statements. As Prinz put it in Kantian-like terms, “morality is a normative domain. It concerns how the world ought to be, not how it is. The investigation of morality seems to require a methodology that differs from the methods used in the sciences. At least, that seems to be the case if the investigator has normative ambitions. If the investigator wants to proscribe, it is not enough to describe.” (Prinz, 2007, 1) And Prinz goes on to propose that “descriptive truths about morality bear on the prescriptive,” so that “normative ethics can be approached as a social science” and can also – at least to a certain extent – be “fruitfully pursued empirically” (Prinz, 2007, 1f.). This means that moral norms are also social norms, and these emerge out of neurobiological configurations which do not allow for oversimplifying reductionisms. Hence, when a social scientist observes the behavior of, say, Brazilian drivers failing to stop at a STOP sign, she may speculate about different “reasons” why most drivers simply ignore that traffic sign (the intersection is quite slow, there is no cop around, it seems ok to simply slow down and keep going, there is a risk of getting mugged, nobody stops here anyway) – but all forms of rationalization and self-deceptive conditioning fall short of accounting for the legal, moral normativity implicit in the normative expectation that all drivers ought to stop at STOP signs. At any rate, conjectures on reasons for behaving in such and such way are different from a normative account of the meaning of the sign itself, namely, what does “P-A-R-E” stand for? Answer: “Stop”! If drivers are supposed to stop (and they know what that sign stands for) why on earth do most drivers in this country fail to stop at the STOP sign? To be sure, practical rationality is very tricky precisely because it cannot be merely reduced to a theory (to be put in practice), or at least there is no ethical theory that satisfactorily justifies how people ought to behave or act without taking into account that people actually might fail to do so. In this sense, philosophers have traditionally grouped together ethical-moral, legal-juridical, and social-political norms within the same sub-field of so-called practical rationality, as opposed to theoretical rationality and aesthetic rationality. Authors like Husserl and Habermas tried to conceive of normative grounds in different areas of inquiry or regional ontologies. Besides the trivial division of labor between the observation of actual, social behavior and its empirical underpinnings, on the one hand, and the normative claims and expectations about

some idealized, desirable behavior, on the other, we are faced with the Humean-inspired problem of justifying the relationship between the descriptive and prescriptive thrust of both camps. In post-Humean terms, saying that there is a normative expectation that water will boil at 100° C means for a naturalist that the laws of nature, in given circumstances, allow for such an expectation just like effects that are normally observed in a causality-structured universe, in which the boiling point of H<sub>2</sub>O molecules happens to be 100 degrees Celsius or 212 degrees Fahrenheit at sea level etc. Many philosophers, following Popper's post-Humean approach to induction and Frege's concept-use and rules of logical reasoning, would stick to the classical nature-nurture opposition in order to distinguish empirical, natural laws from legal, moral, or social norms regarded as conventions, as the latter could be challenged or broken without losing their normative status, while any violation or exception to the former results in a falsification of the law. And yet all these apparently clear-cut distinctions have come under attack in both philosophy of science and theories of normativity – unless of course one is content to start from axioms or presupposed assumptions, even by invoking such hypotheses for the sake of terminology. Now, prior to assuming, like Korsgaard and normativists do, that ethical-moral normativity (N<sub>1</sub>) is to be regarded as the paradigm of the philosophical problem of normativity *par excellence*, we may try experiencing with different accounts such as legal, economic, epistemic, and semantic.

N<sub>2</sub> : (Legal Normativity) Normativity comes down to what we are obligated to do, act, or behave in given circumstances. We might think of legal normativity in the binding force and prescriptive dimension of everyday rule-following practices such as the example above of stopping at STOP signs or red lights, following traffic rules, or handing a prescription to the pharmacist to buy medicine in a drugstore. Whatever is regarded as prescriptive is said to be normative in a regulative, law-like common sense of anything prescribed in regulatory environments of lifeworldly, everyday practices (taking a medication and attending to traffic signs). This meaning of normative is also socially construed, hence its legal, institutional sense. Already in the beginning of the last century, as they set out to investigate what legitimizes and justifies one's ordinary practice of holding people responsible and its institutional implications in legal codifications, legal theorists such as Kelsen and Hart sought to avoid traditional contractualist and positiv-

ist dogmas by viewing Law as a set of procedural standards imposed by the State and governmental, administrative institutions, through rules, basic principles, and laws. According to Hart, Law can only be justified in the practical-normative terms that define the institutional arrangements themselves and the sources of obligations, duties, rights, privileges, and responsibilities of social relations in a constitutional State (Hart, 1994). By rejecting the traditional conception of law as divine or as absolute commandment to legitimize coercion, Hart offered a sociological critique of traditional conceptions of legal normativity, such as they had been already advanced by Kelsen and Austin. Whether legal and political conceptions of legitimacy, sovereignty and authority come down to secularized theological concepts or not, legal normativity quite naturally exerts its prescriptive, social function of binding force that demands respect and obligation of applicable laws. Certainly, the problem of “normativism” (namely, that rules always refer us to other more basic norms) had been introduced by Kelsen much earlier as he made the intriguing remark that Law can be taken both in a descriptive sense (positive norms, for example, in different legal codifications of the constitution and legislation) and in a prescriptive sense, which ideally would inevitably take us back to a primordial, basic norm (*Grundnorm*), focusing solely on the formal aspect of rule-following (Kelsen, 2009).

N<sub>3</sub>: (Economic Normativity) Value judgments (normative judgments) can be particularly articulated in terms of economic fairness, what the economy ought to be like or what goals of public policy ought to be. As Amartya Sen pointed out, speaking of economic behavior and moral sentiments, “the impoverishment of welfare economics related to its distancing from ethics affects both welfare economics (narrowing its reach and relevance) and predictive economics (weakening its behavioral foundations)” (Sen, 1998, 28). Commenting on this text, Hilary Putnam – who shares in with Habermas that sameness of reference turns out to be a formal pragmatic presupposition of communication (Habermas sought, must be said *en passant*, to repair the misleading reception of a discursive or consensus theory of truth, but remains unconvinced about Putnam’s critique of Kant’s deontological view of normativity, as opposed to objectivity in the natural sciences) – remarks that judgments of reasonableness can be objective and they have all of the typical properties of value judgments so that “knowledge of facts presupposes knowledge of values” (Putnam, 2002, 134). Putnam is ul-



timately seeking to blur the division of labor between naturalism and normativity by pointing to this tricky ambiguity in economic normativity, as economic values can be as descriptive as prescriptive.

$N_4$  : (Epistemic Normativity) Epistemic normativity is “a status by having which a true belief constitutes knowledge.” According to Sosa, epistemic normativity is “a kind of normative status that a belief attains independently of pragmatic concerns such as those of the athlete or hospital patient.” Hence, we “must distinguish the normative status of knowledge as knowledge from the normative status that a bit of knowledge may have by being useful, or deeply explanatory, and so on” (Sosa, 2010, 27). From epistemic normativity we may as well infer that epistemic logic, as it has been proposed by Alchourron and Bulygin, explores the possibility of a logic of norms, which is to be distinguished from the logic of normative propositions. Roughly, the distinction is that the former are prescriptive whereas the latter are descriptive. In the second sense, the sentence “it is obligatory to keep right on the streets” is a description of the fact that a certain normative system (say, of social norms) contains an obligation to keep right on the streets. In the first sense, this statement is the obligation of traffic law itself (Alchourron and Bulygin, 1981, 179).

$N_5$  : (Linguistic Normativity) “Normative” in a linguistic, semantic sense pertains to the binding sense of patterns or standards of grammar (linguistics) or meaning (semantics and pragmatics), inevitably allowing for a structural opposition between what is (said, written, displayed in a sign) and what ought to be effectively inferred, understood, meant or constructed as an acceptable meaningful word, phrase, sentence or expression. Both Husserl and Quine provided us with some of the first insights into a theory of meaning intertwined with semantic, linguistic normativity. When dealing with “phonetic rules” in his seminal text against the logical-positivists’ normative epistemology, Quine inaugurated a naturalist program that does justice to what actually happens when we use words to refer to states of affairs. So when someone utters the word “red,” there is a linguistic-semantic normativity that allows, in everyday practices of conversation and communication, a certain determination of the intended meaning, despite indeterminacies or variations of what is sensuously perceived, spoken and heard in terms of pronunciation, accent or sounds, regardless of analyticity and meaning (1960, p. 85). Both Habermas and Robert Brandom conceive of

inferences as social practices, as they embrace pragmatism as a third way between the empiricist, objectivist linguistic turn of analytic philosophy and the phenomenological, hermeneutic turn of continental philosophy. According to Habermas, “the most salient and striking difference between the hermeneutic and the analytic tradition” is that the latter does not engage in cultural critique *vis à vis* “looser and larger issues of a diagnostics of an era” (Habermas, 2007, 79). In the opening paragraph of the third chapter, Habermas goes on to assert that “Brandom’s *Making It Explicit* is a milestone in theoretical philosophy just as Rawls’s *A Theory of Justice* was a milestone in practical philosophy in the early 1970s” (2007, 131). To make a very long story short, Habermas and Brandom succeeded in renewing the theory-praxis problematic that was recast by Kant’s semantic turn, and the contemporary analytic and continental approaches to the linguistic turn, especially by revisiting traditional understandings of practical normativity as giving reasons for acting. In Brandom’s case, “inferring is to be distinguished as a certain kind of move in the game of giving and asking for reasons” (Brandom, 1994, 157). Brandom’s normative, inferentialist pragmatism is evoked here just to signal the holistic attempt to take seriously the late Wittgenstein’s contention that the meaning of an expression is its use, and furthermore this meaning is fixed by how it is used in inferences, in contrast with regulist, intellectualist rule-following (Brandom, 1994, 15-23). As opposed to sentience – which *we* humans share with nonverbal animals – our linguistic, sapience capacities allow us to reflexively master “proprieties of theoretical and practical inference” so as to “identify ourselves as rational” and ultimately effect a “complete and explicit interpretive equilibrium exhibited by a community whose members adopt the explicit discursive stance toward one another [as] social self-consciousness” (Brandom, 1994, 643). As the most important representative of Conceptual Role Semantics, Brandom is regarded, like Habermas, as a meaning normativist, as opposed to naturalists (like Block, Harman and Horwich), insofar as “norms do not merely follow from but are rather determinative of its meaning” (Whiting, 2009). Like Habermas’ normative reconstructive appropriation of speech act theories, Brandom’s pragmatist inferentialism set out to reconstruct “the way *implicit* scorekeeping attitudes of *attribution* of performances and statuses [that] can be made *explicit* as *ascriptions*” (Brandom, 1994, 543, 643). As over against Platonism, Brandom defines pragmatism as

the view that discursive intentionality (sapience) is a species of practical intentionality: “that knowing-that (things are thus-and-so) is a kind of knowing-how (to do something)” (Brandom, 135f.). According to Brandom, “One way of putting together a social normative pragmatics and an inferential semantics for discursive intentionality is to think of linguistic practices in terms of *deontic scorekeeping*. Normative statuses show up as social statuses” (Brandom, 183f.). According to inferentialism, rule-following must adopt a normative attitude that transcends the individual, psychological or subjective mental states, in that it takes into account all social, institutional dimensions of her own language and community of speakers. This semantic-pragmatic meaning was appropriated by Brandom and Habermas, independently, in their respective conceptions of pragmatist inferentialism and formal pragmatics. I myself remain quite convinced that such semantic, pragmatic versions of a normative theory of meaning do address most of the problems raised by the different levels of normativity, especially when combined with an ontological correlate. Even as we go back to normativist claims such as the ones proposed by Korsgaard, as she revisits the later Wittgenstein, on a classic passage:

- “1. Meaning is a normative notion.
  2. Hence, linguistic meaning presupposes correctness conditions.
  3. The correctness conditions must be independent of a particular speaker’s utterances.
  4. Hence, correctness conditions must be established by the usage conventions of a community of speakers.
  5. Hence, a private language is not possible.”
- (Korsgaard, 1997, p. 136–138)

With Korsgaard, we come full circle in our quest for normative justification, keeping in mind that most moral philosophers and normativists overall assume that ethical-moral normativity ( $N_1$ ) must be regarded as the paradigm of the philosophical problem of normativity *par excellence*. On this view, “moral standards are normative. They do not merely describe a way in which we in fact regulate our conduct. They make claims on us: they command, oblige, recommend, or guide. Or at least, when we invoke them, we make claims on one another. When I say that an action is right I am saying that you ought to do it; when

I say that something is good I am recommending it as worthy of your choice” (Korsgaard, 1996, 22). Ethical-moral normativity ( $N_1$ ) and theological normativity ( $N_0$ ) have been, more often than not, formulated as complementary variants of absolute normativity or of some divine command theory, as if they claimed to provide the “ground zero” for all foundationalist theories. Classical and modern realist theories (esp. Platonic, Neo-Platonic, Thomist and some versions of Aristotelian and Kantian ethical theories) have indeed betrayed some form of theological realism, as attested by different versions of philosophical anthropology and philosophy of history. At the end of the day, however, these “Patterns of Normativity” show the aporetic situation of foundationalist theories of normativity that end up falling back into absolutist dogmas of normativity, such as those of religious principles established by the standpoint of God’s eye view, preserving an aporetic stance as a self-defeating hypothesis inevitably obtains:

$$(N_1 \vee N_2 \vee N_3 \vee N_4 \vee N_5) \rightarrow N_0 \\ \sim N_0 . \text{ Hence, } \sim (N_1 \vee N_2 \vee N_3 \vee N_4 \vee N_5) \text{ [modus tollens]}$$

It would be thus useless to seek to replace  $N_0$  with any of the imaginable candidates, say, to assume that ethical normativity or semantic-linguistic normativity is the most fundamental way of establishing the normative force of rationality. It seems equally aporetic to replace  $N_0$  with any idea of nature or any imaginable form of “natural” normativity. On the other hand, it seems plausible that, as Rawlsian reflective equilibrium and subsequent accounts of the biological, social evolution of game-theoretic equilibria and fairness norms have shown, an antifoundationalist, coherence theory of normativity can be fairly combined with naturalized versions of ethics, law, language, epistemology, economics etc. By recasting a weak social constructionist correlate to a mitigated naturalism, it is reasonable to recognize that, although socially constructed, moral values, practices, devices and institutions such as family, money, society and government cannot be reduced to physical or natural properties but cannot function or make sense without them.

4. In conclusion, we may recall that moral decisions, broadly conceived, can be defined as those to be sorted by rational agents, that is, according to the most reasonable criteria for such persons, under certain con-

ditions (to be more useful, more efficient, leading to the best way of life, or simply out of duty as some kind of categorical imperative). Certainly, there is no agreement among philosophers as to what would be “good” or “better”, even as to what we call “moral intuitions”, which could be constantly subjected to a “reflective equilibrium”, in that judgments and intuitions can be revised. Thus, a major challenge to normative theory in ethics, law, and politics nowadays is to articulate a justification that meets rational criteria, both in ontological-semantic and pragmatic terms, taking into account not only issues of reasoning but also interpretation, self-understanding, historicity and language features inherent in a social ethos. In phenomenological or hermeneutic terms, it is said that normativity must be historically and linguistically situated in a concrete context of meaning, inevitably bound to constraints, prejudices and one or more communitarian traditions, receptions and interpretations of traditions. The ongoing dialogues between neurosciences and different traditions of moral philosophy allow thus for a greater rapprochement between analytical and so-called continental philosophy (esp. phenomenology and hermeneutics). Now it is against such a broad, normative background that we have outlined our quest for “patterns of normativity.” Moral, ethical, and legal questions relating to normative justification find some of their best practical test in their applicability in social, political philosophy. As Pettit aptly pointed out, contemporary analytical political philosophy has been caught up in a naturalist-normative *cul de sac*, following the logical positivist dismissal of metaphysics and noncognitivist criticisms of value theories. On the one hand, “since there are few *a priori* truths on offer in the political arena, its only task in politics can be to explicate the feelings or emotions we are disposed to express in our normative political judgments.” On the other hand, there remains the question of “how unquestioned values like liberty and equality should be weighed against each other” (Pettit, 2007, 8f.). Although most analytical thinkers saw that question as “theoretically irresolvable,” the publication of John Rawls’s *A Theory of Justice* in 1971 inaugurated a renewed interest in reconciling *a priori* claims that “may be relatively costly to revise” with the dense, changing flow of human experience, reminiscent of the practical-theoretical bridging pursued by the normative, emancipatory claims of Critical Theory, beyond positivist and instrumentalist approaches to social reality. In effect, Rawls conceived of an original position (ide-

al theory) as an attempt to model the considerations that determine the principles of justice for a well-ordered society, in which public criteria for judging the feasible, basic structure of society would be publicly recognized and accepted by all (nonideal theory). Hence the procedural device of rules or public criteria which parties in the original position would endorse prudentially is to be constructed from behind a veil of ignorance, so that the parties know nothing specific about the particular persons they are supposed to represent. Beyond the essentialist views of natural law and contractualist traditions, Rawls' normative conception of the person accounted for the ingenious strategy of resorting to a reflective equilibrium, conceived as a procedural device between a nonideal theory (where we find ourselves, citizens with considered judgments or common sense intuitions) and an ideal theory, in which a public conception of justice refers to free and equal persons with two moral powers (sense of justice and conception of the good). Reflective equilibrium thus belongs together with the original position and the well-ordered society, so as to carry out the thought-experiment of an ideal theory of justice which ultimately meets nonideal needs and capacities. To be sure, Rawls' original conception of "justice as fairness," following the Dewey Lectures, was recast into a "political liberalism" which resorted to a wide reflective equilibrium as a constructivist methodology of substantive justification, whose goal was certainly not to account for metaethical problems inherent in the ideas of justice and equal liberty, but to justify specific principles as a reasonable basis for public agreement in particular areas of social life. Baynes (2013, 489f.) has shown that Habermas' program of "normative reconstruction" in political philosophy explicitly refers to the Rawlsian idea of reflective equilibrium and his procedural conception for two reasons: "First, he [Habermas] claims that the fundamental ideal that forms the 'dogmatic core' of his theory is not itself simply one value among others, but reflects a basic norm implicit in the very idea of communicative action. Second, he claims that this ideal can in turn be used to describe a set of (ideal) democratic procedures. It is because the procedures sufficiently mirror this basic ideal, however, that we are entitled to confer a presumption of reasonableness or fairness upon them." According to Habermas, the normative grounds for reconstruction are implicit practices or cognitive schemas – and not unconscious experiences to be revealed by a reflective method (like psychoanalysis) – whose recon-

struction refers back to system-based rules as a general reference for all subjects in the process of identity formation and whose intuitive systems of knowledge and competencies depend on previous reconstructions (in empirical sciences like linguistics and cognitive psychology). It has been argued that John Dewey's conception of reconstruction in moral and political philosophy (Dewey, 2004), as it has been critically appropriated by Rawls, Habermas, and Honneth, not only serves to account for the affinities between reflective equilibrium and normative reconstruction among pragmatists, but may also be brought in with a view to better understanding why proceduralist versions of political constructivism remain a reasonable response to the ongoing challenges of cultural relativism and ever-changing pluralist, globalized societies (Benhabib 1986, 1992). Insofar as they both preserve the idea of objectivity in terms of a cognitivist view of moral normativity without falling back into intuitionist realism and reductionist versions of naturalism, I argue that nature and culture are continuous with one another, hence an upshot of such a reconstructive conception of social evolution is that societies evolve to a higher level only when learning occurs with respect to their normative structures. Weak naturalism allows thus for social evolutionary processes guided by normative claims, in both reflexive and social terms, with a view to realizing universalizable, normative claims that are justified from the moral standpoint, always generated through reflective equilibrium, broadly conceived, and naturalized in a democratic ethos in the making. Like Rawls and Habermas, Benhabib and Honneth also resort to reflexive, reconstructive conceptions of critical theory, but by radicalizing the pragmatist turn *vis à vis* first and second generations of the Frankfurt School, they also succeed in unveiling thick-thin problematizations within the very sought-after normativity in social, concrete experiences of freedom, recognition, and claims of cultural, political identities. Normative claims in cultural identities share in the same justificatory difficulty that can be found in other claims, say, theoretical, if we are to avoid any facile resort to religious dogma or reductionist naturalism. Normative reconstruction has also been appropriated by Honneth to comprise the reconstruction of the legal and moral legitimacy of liberal, democratic institutions. Normative reconstruction comes down to an in-depth analysis of the social reality of liberal democracies, as their institutionalized conditions of normativity come under scrutiny. Some of these premises are to be

found in Habermas' insights into the social evolution and the social reproduction of a society as determined by their shared universal values, in a post-traditional conception of *Sittlichkeit*. As opposed to the scientific models of reflective criticism (like psychoanalysis), Habermas thought of logic, linguistics, moral and cognitive psychology as reconstructive sciences whose practical activities implicitly set rules and regulations that were basic to ongoing practices of everyday activities, such as reasoning, speaking, and feeling. Linguistic systems are thus conceived as rules, accordingly, as necessary preconditions that enable rational discussion and can be made explicit upon reflection. The most important features of such a "reconstructive science" lie in their comparison with the "critical sciences," as Habermas outlines three of their distinguishing aspects: (1) the foundations of reconstruction are implicit practices or cognitive schemas, and not unconscious experiences revealing the pseudo-objectivity of a reflective method; (2) the reconstruction regards the anonymous system-based rules as a general reference for all subjects and not as individual and particular subjects in the process of identity formation; (3) the explicit reconstruction of intuitive systems of knowledge and competencies has no practical consequences, while reflection seeks to make conscious the unconscious structures in order to escape false consciousness (Habermas, 1971; 1979, p. 130-177; Voirol, 2012).

According to Benhabib (1994), one might recall the immanent critique of existing legal and social arrangements, the reconstructive imagination of different ethical values, relationships and institutions, and the design of political strategies which seek to change current legal-institutional arrangements as integrating the same pragmatist research program in critical theory, leading all the way to the critical, immanent reconstruction of Honneth's normative reactualization of an intersubjective, Hegelian-inspired anthropology of recognition, as self-realization and self-determination can only be realized and fulfilled in intersubjective, relational experiences of social life, the *locus par excellence* of normative expectations (sociality being ultimately the basis of both individual well-being and suffering). This is a subtle, radical shift away from a propositional understanding of language and semantics, for instance, even when one asserts that "it ought not to be the case that p and not-p" (say, to exemplify the principle of non-contradiction or that contradictory statements cannot both be true in the same sense



at the same time), there is a certain “normative surplus of practice” as the assertion could be taken in an ontological, a psychological or a semantic sense – or all of them – as pointed out by Ernst Tugendhat (1986), and in favor of both Habermas’ and Brandom’s takes on semantic externalism. After all, intentional content does depend on how the world is objectively and first-personish accounts may (be complemented by and) give way to third-person stances (as in Brandom’s pragmatic, inferentialist approach): “Norms come into the story at three different places: the commitments and entitlements community members are taken to be attributing to each other; the implicit practical proprieties of scorekeeping with attitudes, which institute those deontic statuses; and the issue of when it is appropriate or correct to interpret a community as exhibiting original intentionality, by attributing particular discursive practices of scorekeeping and attributing deontic statuses. It is normative stances all the way down” (Brandom, 1994, 637f.).

And yet, as Habermas would point out, normative pragmatics must be compatible with nonreductive, weak naturalism (and materialism), as long as the social, public dimension of consent or agreement can be shown to be decisive for moral normativity in a conventional or non-natural sense. For this reason, Habermas thinks that Brandom overlooks the intersubjective interpretation of objective validity and proposes thus to identify the normative thrust of epistemic and moral beliefs with validity claims. What I have dubbed “the phenomenological deficit of critical theory” (*das phänomenologische Defizit der Kritischen Theorie*), inherent in the Frankfurt School’s attempt at a dialectic of enlightenment that breaks away from the demonization of the technological, instrumental domination of nature, consists thus in recasting an immanent, reconstructive critique of society with a view to unveiling lifeworldly practices that resist systemic domination, without reducing the former to self-referential stances of normativity or the latter to reified, naturalist machineries of social control. If the problematic relationship between systems and lifeworld lies at the bottom of the normative grounds of social criticism, a self-understanding of our modern condition turns out to be an interesting instance of a normative reconstruction of systemic-lifeworldly technologies that resist reifying normalization as they contribute to accounting for meaning through a linguistically generated intersubjectivity.

# Our Deontological-Utilitarian Minds

Cinara Naha



Marc Hauser provides an interesting example of how little people have access to the principles underlying their moral judgements, even when they think they do (Hauser, 2009). He asks his father, a physicist, to give his answer to some of the trolley dilemmas. His father says he judged that it is permissible for someone to flip a switch diverting a trolley and save 5 people at the cost of not saving 1. He also judged that it was permissible to push a large person onto the tracks of a train with the same purpose and he justified this by saying that the cases were both the same, as they reduce the number of people being killed. Hauser, then, asked his father if it would be permissible for a doctor to take the life of an innocent person who walked into a hospital, using 5 organs from this person in order to save the lives of 5 different people in the hospital who would die unless they had their organs transplanted. Hauser's father judged this act as being impermissible (Hauser, 2009)<sup>1</sup>. Then, realizing that his justification for the earlier cases (it saves more lives) didn't hold up, he said that the previous cases were all artificial.

This is a good example, showing that not only people do not have access to the moral principles that they use when making moral judgements, but also, it illustrates my point in this article, that when people make moral judgements they actually use (without having access to them) a system of judgments that combines utilitarian and deontological considerations, a system that is primarily deontological, but allows people to breach the deontological rules for utilitarian considerations. There is, however, a limit for this, and this limit is set, again, by deontological considerations that can be overridden, over again, by utilitarian considerations only in very special cases. However, even in these special cases these utilitarian considerations can also be overridden once more by deontological considerations under certain circumstances.

What happens when people make judgements about the permissibility of killing other human beings in moral dilemmas seems to follow the model below:

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<sup>1</sup> See also Harris, 1975.

- (i) People in general judge that killing innocent people is wrong (first deontological constraint).
- (ii) However, they are willing to breach this rule in order to maximize the number of people saved (first utilitarian consideration) (Greene *et al.*, 2001; Greene *et al.*, 2004; Koenigs *et al.*, 2007; Nichols and Mallon, 2006).<sup>2</sup>
- (iii) Not everything, however, is morally allowed to be done in order to save more lives (a deontological constraint again). What we are actually morally allowed to do in order to save more lives will depend on personal considerations and personal variations. In general, when the killing involves some kind of physical contact or proximity with the person who will be killed, people tend to judge deontologically again<sup>3</sup>.
- (iv) In a few special cases, for utilitarian reasons, we are allowed to violate these deontological constraints. These reasons could be (a) the inevitability of deaths, i.e., when the person will die anyway; in these situations people tend to make utilitarian judgements again, and/or (b) when the cost/benefit of overcoming the deontological constraint is very high, with many lives being saved.<sup>4</sup>

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<sup>2</sup> All these articles present findings on people's judgements when they are presented with the choice of whether or not to sacrifice one person's life to save the lives of others, as in the trolley dilemma where a train is heading directly to kill 5 people on the track, and they will be killed unless you press a switch that diverts the trolley onto an alternate set of tracks killing only one person. In this case, people typically say that they would press the switch. But in the footbridge dilemma where there is (as in the other dilemma) a trolley heading directly towards 5 people but now the only way to save these people is by pushing a stranger off the bridge onto the tracks, killing the stranger to save the 5 lives, people typically answer that they would not push the stranger (although in the study of Koenigs and others it is shown that in scenarios like the footbridge dilemma people with damage in the ventromedial prefrontal cortex VPMC are more likely to endorse the proposed action than other groups).

<sup>3</sup> For an account on the effect of personal force in people's judgement on the morality of sacrificing one person's life in order to save other lives, see Greene *et al.* (2009); Cushman *et al.* (2006).

<sup>4</sup> For the influence of the inevitability of death on people's moral judgement, see Moore *et al.* (2008), and for an account of the catastrophe effect where a huge number of people will be lost unless someone or a smaller group of people is killed, see Nichols and Mallon (2006).

- (v) We become deontological again if the killing has to be done to satisfy, say for example, the outrageous requirements of a perceived evil person who blackmails you, threatening to kill more people if you refuse to comply and demands that you actively carry out the killing. Here we have a conjunction of two factors: (a) blackmail from a perceived evil person and (b) the killing involves an act (you have to carry out the killing), not an omission (you are not required to leave the person to be killed, you are required to kill the person, shooting her/him or even pressing a button)<sup>5</sup>.

Through the supplementary materials for Greene's "Cognitive Load Selectively Interferes with Utilitarian Moral Judgment" (Greene *et al.*, 2008b), we will have some important clues on how people make their moral judgements. Here when interviewees are asked to answer the question if it is appropriated for people to kill their despicable boss who makes everyone's lives a misery (*the architect* example) only 1% of the people interviewed said that yes, it was appropriated. It was also only 5% of people who answered that it was appropriated for a pregnant 15 years girl to kill her newborn child in order to move on with her life. The very low percentage figure of people who answered that it is wrong to kill these people (the boss and the baby) suggests that the greater majority of us really abide by the rule that to kill innocent people is generally wrong (let us call this rule 1).

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<sup>5</sup> Foot (2002) writes: "Suppose, for example that some tyrant should threaten to torture five men if we ourselves would not torture one. Would it be our duty to do so, supposing we believed him, because this would be no different from choosing to rescue five men from his torturers rather than one? If so, anyone who wants us to do something we think wrong has only to threaten that otherwise he himself will do something we think worse". Foot (2002, p. 28) continues stating that "In the examples involving the torturing of one man or five men the principle seems to be the same as for the last pair. If we are bringing aid we must obviously rescue the larger than the smaller group. It does not follow however that we would be justified in inflicting the injury or getting a third person to do so, in order to save the five. We may therefore refuse to be forced into action by the threats of bad men". Foot's conclusion is that the distinction between direct and oblique intention plays only a quite subsidiary role in determining what we say in these cases, while the distinction between avoiding injury and bringing aid is very important. See also Jim dilemma (Williams, 1973) and the *modified safari dilemma* (Greene *et al.*, 2008b).

However, people are willing to make exceptions to this rule under certain circumstances, for example, when in order to avoid the death of a larger number of people you do something that will cause the death of a smaller number. The typical example of this is the famous *trolley* case (already quoted) in which 85% of people said it was permissible to flip the switch diverting the trolley saving 5 people at the cost of saving 1.<sup>6</sup> The percentage is also high (76%), of people who gave the utilitarian answer in the *standard fumes* dilemma in which you hit a switch in order to divert fumes killing one patient in a hospital instead of three (Greene *et al.*, 2008b)<sup>7</sup>.

But not everybody judges that even these kinds of exceptions should be allowed (think back to the 15% of people who answered that it is wrong to divert the train or the 24% of people who think that it is wrong to divert the fumes). The conditions under which people make exceptions or not for this deontological constraint (we shall not kill!) will vary from person to person. However, it does seem that there is a pattern for the way that the majority of people will judge. It appears that the majority of us will make exceptions in order to save the most possible number of lives (we can verify this by the *trolley dilemma* and also by the *standard fumes*) but stick with deontology again when killing implies that they may have to have some kind of physical contact or proximity with the person to be killed as we can see in the *footbridge dilemma* in which people are asked to answer if it is appropriate to push

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<sup>6</sup> According to Hauser *et al.* (2007), voluntary visitors to the Moral Sense Test website (<http://www.moral.wjh.harvard.edu>) from September 2003 to January 2004 answer that it is morally permissible for someone to divert the train (85%) and that it is not permissible to push the man from the bridge (12%). In Greene *et al.* (2008b) in the *standard trolley* dilemma the reported percentage of those who gave the utilitarian answer decreases to 82%.

<sup>7</sup> The *standard fumes* dilemma is the following: you are a late-night watchman in a hospital and due to an accident in the building next door, there are deadly fumes rising up through the hospital's ventilation system. In a certain room of the hospital there are three patients. In another room there is a single patient. If you do nothing the fumes will rise up into the room containing the three patients and cause their deaths. The only way to avoid the deaths of these patients is to press a switch, which will cause the fumes to bypass the room containing the three patients. As a result of doing this the fumes will enter the room containing the single patient, causing his death. Is it appropriate for you to hit the switch in order to avoid the deaths of the three patients?

a man off a bridge in order to save 5 people, and only 12% of people give the utilitarian answer in the figures provided by Hauser *et al.* (2007). In Greene's figures (Greene *et al.*, 2008b) it rises to 21%. Nevertheless, it seems that when deaths are inevitable (i.e., when some people in the group or everyone will die anyway) and in order to maximize the number of people saved someone has to be sacrificed, people tend to make utilitarian judgements again. Here the percentage is very high (91%) of people who answered that it is appropriated for a captain to kill the injured people in order to provide enough oxygen for the majority to survive, in the *submarine* dilemma (Greene *et al.*, 2008b). We can also see here that there is a high percentage of utilitarian answers (71%) in the modified *lifeboat* dilemma (Greene *et al.*, 2008b), in which you throw into the water someone who will not survive anyway in order to save everyone's lives, 60% in the *crying baby* dilemma (Greene *et al.*, 2008b) in which you would have to smother your children in order to avoid the enemies' soldiers killing the whole group of people including your children and even 62% of utilitarian judgements in *Sophie's choice* (Greene *et al.*, 2008b).

It seems that people tend to make utilitarian judgements not only when the death is inevitable but also when the cost/benefits in relation to saving lives is high, as in the *catastrophe case* dilemma proposed by Nichols and Mallon (2006). In this dilemma, a train is transporting an extremely dangerous artificially produced virus to a safe disposal site. The virus is profoundly contagious and nearly always leads to the death of the victim within a matter of weeks. If the virus were to be released into the atmosphere, billions of people would die from it, and there is even a chance that it would kill more than half of the human population. In Nichols' dilemma, Jonas sees that there is a bomb planted on the tracks and the only way to prevent it from exploding is to stop the train, pushing a stranger onto the rails. Nichols then found that 68% of the people who were asked to respond to this dilemma said that Jonas broke a moral rule, but only 24% said that the action was, after all things considered, the wrong thing to do.

Nichols explains what is going on. His hypothesis is that even if an action is thought to violate a rule, it might also be regarded as acceptable, all things considered. To judge that an action has violated a rule will be called judgments of "weak impermissibility". To judge that an action was wrong, all things considered, will be called judgments



of “all-in impermissibility”. According to Nichols and Mallon (2006), the findings reinforce the familiar problem posed by catastrophe cases: they indicate that most people are not absolutist deontologists. People think that sometimes it is all-in permissible to do something that violates a moral rule, including the rule that forbids killing innocent people. Nichols also states:

The results also support the idea that there are two partly independent mechanisms underlying moral judgment. On the one hand, people have a general capacity to reason about how to minimize bad outcomes. On the other hand, people have a body of rules proscribing certain actions. This body of rules cannot be subsumed under the capacity to reason about how to minimize bad outcomes (Nichols and Mallon, 2006, p.539).

Nichols proposes that the assessment of all-in impermissibility implicates three factors: cost/benefit analysis, checking for rule violations, and emotional activations. For him in the cases of personal and impersonal trolleys, the judgement of all-in impermissibility depends on both the presence of an emotion and the judgement that a rule has been violated, but in the absence of emotion the cost-benefit analysis typically wins. Emotional activation and thinking that a rule has been violated does not, however, necessitate a judgement that an action is all-in impermissible, since when the cost-benefit ratio is sufficiently high, people tend not to judge the action as all-in impermissible, as was shown in the *catastrophe dilemma*.

Nichols gives an excellent account on how people make moral judgments, but the whole story has still to be completed. I suggest that not only is it the high number of people to be saved (the cost-benefit ratio), but also the inevitability of death which are the two main reasons why people alternate between the deontological reasoning that it is wrong to kill innocents' lives in a personal way (requiring some kind of proximity or body contact), to a utilitarian one that admits the killing even in that more personal way. However, we become deontological once again when asked to personally kill a person in order to satisfy a requirement of someone that you perceive as being evil. We do not have access to an experiment designed to test a proper *catastrophic* dilemma versus what I will call here the *blackmail dilemma*. However, the *modified safari dilem-*

*ma* (Greene *et al.*, 2008b)<sup>8</sup>, in which a group of terrorists promises to save your life and the lives of the children if you personally kill one of the hostages who is being held with you, suggests that the cost-benefit utilitarian reasoning can still be overcome, at least in *semi-catastrophic* cases, by deontological considerations. It means that stage 4 (which we have mentioned in our model above) can still be overcome by deontological considerations as hypothesized in 5, i.e., if this killing has to be done to satisfy the outrageous requirement of a perceived evil person who blackmails you, threatening to kill a larger number of people if you refuse to carry out the killing, and not only this, requires your action (not merely omission). Nevertheless, why would some people still be willing to overcome the utilitarian cost/benefit analyses favoring a deontological norm, overcoming stage 4? A possible answer can be given if we admit that we have a sense of dignity that makes us react emotionally to unfairness, rejecting it<sup>9</sup>. If this is the case, offers to save the lives of a group of people made by someone evil at the cost of a third innocent person being forced to carry out the killing to avoid the worse outcome would trigger powerful emotional responses that would make people reject the offer. In this case, the response would not be as strong if they were not asked to personally kill the innocent person (which makes the majority of people still give the utilitarian answer in the *Sophie's choice* dilemma [62%]), (Greene *et al.*, 2008b) but in combination with the demand that the killing has to be carried out by the person who perceives the offer as outrageous, it would make people give the deontological response to the dilemma, saying that it is wrong to carry out the killing, exactly as it happens in the *modified safari* dilemma in which the percentage of utilitarian judgments is only 22% (Greene *et al.*, 2008b).

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<sup>8</sup> In this dilemma, a group of terrorists promises to save your life and the lives of children if you kill one of the hostages who are being kept with you. The percentage of utilitarian answers in the *modified safari* is only 22%, according to Greene's figures.

<sup>9</sup> There is no experiment to test catastrophic versus blackmail dilemmas, but fiction could give us some important clues about how people would react in these cases. In the film "Batman: The Dark Knight" the Joker put people in two different boats with two detonators, and asked each group to detonate the bomb in the other boat, saying the first group to do this would have their lives saved. The main criminals in Gordon City were in one of the groups, but even this group refused the Joker's offer.

But not everybody judges as the majority of people do, so it will be important to understand and classify the various psychological/moral types according to how far they are in this chain, namely, how much they are willing to accept utilitarian reasons to overcome deontological constraints<sup>10</sup>. The majority of us are probably situated somewhere in the middle. The pure deontological type, are those who, for example, think that we are not allowed even to flip the switch diverting the trolley. The other extreme is the pure utilitarian types, probably be the 2% quoted by Hauser who answered that in a plane crash – the plane crash dilemma – it is appropriated for you and another man to sacrifice the life of a wounded boy that you conclude has no chance of survival in order to eat him and survive (Greene *et al.*, 2008b). In between these two pure deontological and utilitarian types we have all the other psychological/moral types. I have to stress that this is at the moment an entirely hypothetical philosophical model, and further work must be carried out by moral psychologists and neuroscientists in order to test and refine this model, as well as to establish exactly the different moral types.

### Greene's dual process theory of moral judgement

In order to try to understand the mechanisms underlying moral judgements in moral dilemmas involving life and death, we could benefit from the Studies of Greene. Greene and his collaborators developed a dual-process theory of moral judgement (Greene *et al.*, 2001; Greene *et al.*, 2004; Greene, 2007; Greene *et al.*, 2008 a; Greene, 2009). In this

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<sup>10</sup> I propose to set up the bases for a scale in terms of judging in a deontological or utilitarian way, a scale that ranges from +N to -N, being that the psychological/moral type scoring highest in the positive side is entirely deontological (not accepting any exceptions for the rule one should not kill) and the psychological type scoring lowest in the negative side is entirely utilitarian, accepting that when lives are at stake we should always and in any circumstances save the highest possible number of people, even if you have to kill some people to reach this result. The more a person is willing to abide by the rule that we should not kill and the more a person is not willing to accept any special cases where it is permissible to kill someone to save more people, the higher he/she will score as the deontological type, and the more she/he is willing to consider utilitarian reasons to break this rule, the higher he/she scores as the utilitarian type.

model, deontological judgements are driven by automatic emotional responses, while characteristically utilitarian judgments are driven by controlled cognitive processes.

According to Greene (2005, p.350):

Multiple sources of evidence point toward the existence of at least two relatively independent systems that contribute to moral judgment: (i) an affective system that (a) has its roots in primate social emotion and behavior; (b) is selectively damaged in psychopaths and certain patients with frontal brain lesions; and (c) is selectively triggered by personal moral violations, perceived unfairness, and, more generally, socially significant behaviors that existed in our ancestral environment. (ii) a “cognitive” system that (a) is far more developed in humans than in other animals; (b) is selectively preserved in the aforementioned lesion patients and psychopaths; and (c) is not triggered in a stereotyped way by social stimuli.

For Greene (2008), “cognitive” representations are inherently neutral representations, ones that do not automatically trigger particular behavioral responses or dispositions, whilst “emotional” representations do have such automatic effects. Emotion tends to be associated with parts of the brain, such as the amygdale and the medial surfaces of the frontal and parietal lobes. On the other hand, “cognitive” processes are especially important for reasoning, planning, manipulating information in the working memory, controlling impulses, and “higher executive functions” more generally. These cognitive functions tend to be associated with certain parts of the brain, primarily the dorsolateral surfaces of the prefrontal cortex and parietal lobes (Greene, 2008). Borg defines emotion and reason in a similar way (Borg *et al.*, 2006). For him “emotions” are immediate valenced reactions that may or may not be conscious. In contrast, “reason” is neither valenced nor immediate insofar as reasoning need not incline us toward any specific feeling and combines prior information with new beliefs or conclusions and usually comes in the form of cognitive manipulations (such as evaluating alternatives) that require working memory. He points out that emotion might still affect, or even be necessary for, reasoning, but emotion and reasoning remain distinct components in an overall process of decision making.

Greene puts forward the personal/impersonal distinction (Greene *et al.*, 2001; Greene *et al.*, 2004). A personal moral violation is one in which (a) the violation must be likely to cause serious bodily harm, (b) this harm must befall a particular person or a set of persons and (c) the harm must not result from the deflection of an existing threat onto a different party. Dilemmas that fail to meet these three criteria are classified as impersonal. For Greene, dilemmas such as the *standard trolley* dilemma are impersonal, whilst the *footbridge* dilemma is personal. Even if we do not accept the personal/impersonal distinction<sup>11</sup> suggested by Greene, the fMRI data in his research shows, at least, that there is a crucial difference between the trolley dilemma and the footbridge dilemma, the main difference being that the footbridge dilemma engages people's emotions in a way that the trolley does not. Greene proposed that the thought of pushing someone to his death is more emotionally salient than the thought of hitting a switch that will produce similar consequences. As was observed through brain images (Greene *et al.*, 2001), the contemplation of personal moral dilemmas like the *footbridge* case produces increased neural activity in brain regions associated with emotional response and social cognition (typically the posterior cingulate cortex, the medial prefrontal cortex and the amygdale, as well as the superior temporal sulcus), whilst the contemplation of impersonal moral dilemmas such as the *trolley* case produces relatively greater activity in brain regions associated with "higher cognition" (as the dorso-lateral prefrontal cortex and the inferior parietal lobe) (Greene, 2005).

Greene proposes then that the tension between the deontological and utilitarian perspectives in moral philosophy reflects a more fundamental tension arising from the structure of the human brain (Greene *et al.*, 2004). For him, the social-emotional responses that we have inherited from our primate ancestors, shaped and refined by culture,

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<sup>11</sup> McGuire reanalysed the RT data from the Greene research and claimed a) that there is no reason to assume that emotionally salient moral decisions are processed in a qualitatively different way to those dilemmas that are not emotionally salient and b) that there is no evidence here to support the theory that there are two competing moral systems at work (McGuire *et al.*, 2009). Greene (2009) replies to the objection emphasizing that the dual-process theory is independent of the personal/impersonal distinction. The basic idea of the reply is that even if the distinction personal/impersonal does not hold up, the dual-process theory does.

underpin the deontological absolute prohibitions whilst the “moral calculus” that defines utilitarianism is made possible by more recently evolved structures in the frontal lobes that support abstract thinking and high-level cognitive control. He supports his claim by showing that there is evidence of increasing emotional-social processing in cases in which deontological intuitions are prominent and greater activity in brain regions associated with cognitive control where utilitarian judgements prevail. There was further support for this claim when it was found (Greene, 2008) that cognitive load selectively increased RT (response time) for utilitarian judgment, yielding the predicted interaction between load and judgment type. According to him, in the full sample, load increased the average RT for utilitarian judgments by three quarters of a second, but did not increase average RT for non-utilitarian judgments at all and the predicted RT effects were observed in participants who tend to lean toward utilitarian judgment as well as those who do not. These results, concluded Greene, provided direct evidence for the hypothesized asymmetry between utilitarian and non-utilitarian judgments, with the former driven by controlled cognitive processes and the latter driven by more automatic processes.

On the other hand, the fMRI data obtained by Borg *et al.* (2006) suggests that some deontological responses can be mediated by reason, where other deontological responses can be mediated by emotion. They point out that the individual will use varying combinations of cognitive and emotive facilities to address moral challenges, but, overall, certain types of moral scenarios are likely to be processed in characteristic ways.

Only further research will give the definitive answer on up to which point deontological judgements are essentially emotionally driven and utilitarian judgements are essentially cognitively driven. Putting aside for further discussion how these interactions emotion/cognition operate in the brain, it is reasonable to suppose that there is a typical way of processing and solving moral dilemmas involving killing which involves a combination of deontological prohibitions and utilitarian calculus, although people are not conscious of how they operate (Hauser *et al.*, 2007). It is not clear whether or not people can switch on and off their deontological and utilitarian ways of thinking, switching also on and off their emotional and cognitive systems and whether or not their deontological and utilitarian responses always match the deontological/emotional and utilitarian/cognitive system. There are some

indications, however, that people reason in a deontological/utilitarian way when responding to these dilemmas, and some typical conditions (as the possibility of saving more lives, personal force/proximity, cost/benefit, inevitability of death, or even outrage and integrity as we will see now) are able to trigger the final deontological or utilitarian response.

### Integrity, fairness, and the ultimatum-game

The ultimatum game is a designed experiment to test, among other things, how people react to unfairness. In this game, the proponent (first player) is given a sum of money and he is asked to share the sum with the second player. He can choose the amount of money that he will offer to the second player, but if the second player refuses the offer, none of them will earn anything. It seems correct to deduce from this that if people are interested only in obtaining economic benefits, the second player would accept all the offers, as something is always better than nothing. However, what generally happens is that offers of less than 20% of the total amount are frequently rejected (Heinrich, 2000)<sup>12</sup>. So what can we infer from this result? Basically, we can deduce that human beings have a sense of fairness so strong that even in situations where we know that we have nothing to lose, we are not willing to put up with unfairness. The ultimatum game seems to show that to a higher or lesser degree human beings are not absolutely determined by the desire of obtaining advantages at any cost.

This behavior suggesting inequality aversion, in some rudimental forms, seems to be shared with other primates as shown by the behavior of female capuchins (De Waal and Brosnan, 2003). In an experiment, De Waal showed that when these female capuchins received cucumber whilst the other female participants received grapes (grapes being a much more favored food than cucumber for capuchins), they refused to cooperate or even to eat the food. De Waal found that the presence of high-value

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<sup>12</sup> According to Heinrich (2000). The Machiguenga of the Peruvian Amazon are an exception to the rule of typically rejecting offers lower than 20%, as they typically accept even very low offers.

rewards (grapes) reduced the tendency to exchange for low-value rewards (cucumber) being the strongest increase of refusal to occur if another capuchin received better rewards without any effort (De Waal and Brosnan, 2003). De Waal's hypothesis is that even non-human primates are guided by species-typical expectations about the way in which one (or others) should be treated and how resources should be divided.

The results of the ultimatum game, together with Waal's experiments, might be a strong indication that human beings have evolved to have dignity, and this would account for some deontological lines that we are not willing to cross, despite the price we have to pay for it. This could explain the ultimate deontological barrier, specified in step 5 of our model where people refuse to accept being blackmailed, and could also explain why we have such a low percentage (22%) of utilitarian answers to the *modified safari* dilemma (Greene *et al.*, 2008b). Here, personally killing an innocent person in order to satisfy the outrageous demands of an evil being is perceived as absolutely prohibited, triggering our deontological buttons despite the minimization of negative consequences that it would bring about (less deaths). Accepting the offer would violate our sense of dignity to such an extent that the majority of people prefer to decline the offer. There is a clear similarity here with the rejection of unfair offers in the ultimatum game. The offer is so clearly perceived as outrageous that despite all utilitarian considerations (save as many lives as you can) people prefer to say no.

Bernard Williams has already proposed a similar dilemma (the Jim Dilemma) in order to object to utilitarianism (Williams, 1973). In Williams' example Jim got lost whilst on a botanical expedition and found himself in a small town where a row of twenty Indians were tied up against the wall and in front of them there were several armed men in uniform. The captain in charge (Pedro) explained to Jim that the Indians were a random group of inhabitants who, after a recent protest against the government, were just about to be killed as a reminder to other protesters of why they should not protest. The captain then offers to Jim the privilege of killing one of the Indians himself. If Jim accepts the captain will release all the others, but if Jim refuses Pedro (the captain) will carry out what he was about to do before Jim arrived, and will kill all of the Indians. Williams uses this example to criticize the strong notion of negative responsibility that he thinks is attached to consequentialism: if I know that if I do X, O1 will eventuate, and if



I refrain from doing X, O2 will, and that O2 is worse than O1, then I am responsible for O2 (Williams, 1973). In the case of Jim, if he refuses to accept the offer and kill only one Indian it will make him responsible for all the other deaths. For Williams, this is not a good interpretation of what is happening. He also uses this example to claim that utilitarianism does not leave room for personal integrity.

Williams argues that it is misleading to focus on Jim. The person undoubtedly responsible for what happens is Pedro and so we should be thinking about the effect of Pedro's project on Jim's decision. For Williams, the utilitarian approach to the question "makes Jim a channel between the input of everyone's projects, including his own, and an output of optimistic decision; but this is to neglect the extent to which *his* actions and *his* decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity" (Williams, 1973, p.116).

The view of Williams that somehow Jim's integrity is being attacked in this dilemma echoes a common feeling that people have, and it can be confirmed in the modified safari dilemma (Greene *et al.*, 2008b). It seems that, somehow, common sense captures the idea of an attack on our integrity in people being used in someone's malign projects. The majority of us refuses to be used by others to carry out *their* evil projects, actively killing innocent people, even if this refusal does not fit into a cost/benefit model. There are some acts that attack our dignity so strongly that people still refuse to carry them out even knowing that the act will cause the least damaging outcome in certain circumstances. The only way to explain why we refuse to carry out these acts is appealing for deontological notions of integrity and dignity. Here, going beyond Williams, Kant's considerations on morality, dignity and integrity seem to be able to teach us something.

### Vindicating Kant

Hauser (2009) sustains that much of our knowledge of morality is intuitive and based on inaccessible principles that guide our judgements and not based on a conscious reflection on these principles. Given the

apparent incapacity of the average person to supply the reasons for their moral judgements, these would go totally against what Kant theorizes. But could it really be that, in fact, the studies of Hauser, Haidt (2001), and others really contradict Kant's moral theory? If really these studies challenge it, where is the point of collision?

The studies showing that people make moral decisions without consciously reasoning via moral principles does not refute what Kant affirms about the way people make their moral judgements. In fact, Kant explicitly tells us that to act morally, in other words, to act "from the motive of duty" requires that people act under reflection, applying the Categorical Imperative: "Hence nothing other than the representation of the law in itself, which can of course occur only in a rational being, insofar as it and not the hoped-for effect is the determining ground of the will, can constitute the preeminent good we call moral, which is already present in the person himself who acts in accordance with this representation and need not wait upon the effect of his action" (Kant, 1997, p. 14). However, Kant admits that many of the human actions are made "in conformity with duty", i.e., they coincide with the duty but they are not carried out from the representation and application of the categorical imperative, in other words, they are not "from duty". Kant tells us that moral actions must be those of the second type, but he has always appeared skeptical about the effective existence of these actions, having demonstrated their possibility but never their existence. According to Kant "there is, however, something so strange in this idea of the absolute worth of a mere will, in the estimation of which no allowance is made for any usefulness, that, despite all the agreement even of common understanding with this idea, a suspicion must yet arise that its covert basis is perhaps mere high-flown fantasy and that we may have misunderstood the purpose of nature in assigning reason to our will as its governor. Therefore, we shall put this idea to the test from this point of view" (Kant, 1997, p.8). Kant puts the idea of good will at stake and at no point demonstrates that the pure reason determines the will, which means he does not prove that moral actions exist. Kant believes that it is absolutely impossible by means of experience to make out with complete certainty a single case in which the maxim of an action otherwise in conformity with duty rested simply on moral grounds and on the representation of one's duty. What Kant actually shows us is that pure reason *can* determine our actions, in other words,

that we *can* act morally. He shows that we can act based only on the representation of the Categorical Imperative, but at no time does he prove that we actually act based on the representation of the Categorical Imperative, that we act “from duty” (Kant, 1997), that we act morally.

So, the conclusion seems clear: if Kant does not affirm that people in fact act from duty, namely for pure and simple representation of the categorical imperative, then studies which conclude that people do not judge morally from a conscious reflection on principles would not affect Kant’s moral view. These studies would simply point to the fact that most people do not act “from duty”, something that Kant had already suspected. On the other side, there is another sense, a non-trivial sense in which Kant’s moral philosophy might be questioned. In this non-trivial sense, the moral philosophy of Kant might be questioned from the evidences that the moral judgements made by the majority of people would not correspond even to what Kant calls “in conformity with duty”. Bearing this in mind and returning to the *trolley problem*, what would really threaten Kant’s theory is the observation that 85% of people think that it is right to divert the train, killing one person instead of five (Hauser *et al.*, 2007). If that is the case, the basic intuitions of people about what is right or wrong would not corroborate, at least not in this case, what the categorical imperative prescribes to us, i.e., that people must always be treated as an end and never as a means. Killing one person to save five, even being a consequence of a double effect, would be seen as immoral when we apply the categorical imperative. The fact that 85% of the people do not agree with this would suggest that the agreement between the common sense and the moral theory of Kant<sup>13</sup> might be questioned. Kant’s philosophy, then, would be open to question not because people do not make moral judgements based on principles, but because people’s ordinary moral judgements about what is right or wrong does not coincide with what the categorical imperative prescribes as being right or wrong.

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<sup>13</sup> In the first section of *GM* Kant (1997) establishes that the layman, without any philosophical education, knows already what is right or wrong. There is, then, an agreement between the categorical imperative and common reason, there is an agreement between the ordinary moral knowledge and philosophical knowledge.

So what are the elements (or element) in the common judgement that are not present in Kant's theory? My hypothesis here is that it is the utilitarian element. In certain situations, people think that they are allowed to violate deontological prohibitions usually using utilitarian criteria to do so. It seems that we humans are willing to maximize welfare and willing to save as many lives as possible. Nevertheless, there is a limit up to which we are prepared to go. If, as it seems to be, there is a deontological-utilitarian way in which our minds work when we have to judge and make our moral decisions, it would be worthwhile to follow this path to investigate it further. If people use, in general, deontological criteria to make moral judgements but replace these deontological criteria for utilitarian ones in some circumstances and vice-versa, it would be very promising to establish a better dialogue between deontology and utilitarianism, between Kant and Mill, in order to decipher our deontological-utilitarian minds.



Conflicts Between Basic Rights and Balancing:  
Why Should Judges Abandon  
the Deontological Stance?

Marina Velasco



The notion that the application of basic rights requires “balancing” is widely and increasingly accepted. Balancing judgments are ever more frequently used in judicial decisions, particularly in constitutional courts and especially in contemporary supra-national human-rights courts. If we overlook some local doctrine details, it is easy to endorse the statement: “We all live in the age of constitutional balancing.”<sup>1</sup>

Many jurists – as opposed to philosophers, among whom skepticism is more common – deem that balancing judgment would not only be the most appropriate method to solve conflicts between basic rights, but the only possible method to arrive to a rational decision – not just in cases of conflict between rights but also in those that involve conflicts between basic rights and common goods.

Along this line, Robert Alexy, the most influential philosopher of law advocating balancing, believes that seeing basic rights as principles implies understanding them as “optimization requirements” and, for that very reason, as only applicable by means of a balancing judgment. Seen under that light, principles – as opposed to rules – are norms that do not exactly determine what ought to be done but order “that something should be done to the greatest extent possible, given the legal and factual possibilities”. In order to establish the reach of “to the greatest extent possible” the principle at stake should be confronted with the demands posed by opposing principles.<sup>2</sup>

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<sup>1</sup> Gardbaum, 2010; Aleinikoff, 1987; Kumm, 2004. Interesting critics to balancing are: Cali, 2007 Tsakyrakis, 2009.

<sup>2</sup> A balancing judgment is a comparative value judgment. The degree of importance of satisfying one principle is compared to the degree of detriment to or non-satisfaction of the competing principle. Although it does not use figures, it has the structure of a cost-benefit judgment. The aim is to establish whether the advantages of satisfying one principle compensate the losses caused by interfering with the competing one. Balancing judgments spell a demand to optimize the values at stake in the conflict thus minimizing all interference with basic rights. It must be noted that any form of interference is deemed negative, regardless of the reasons for implementing it.



Evidently, the need to balance ensues from the specific conception of principles backed by Alexy. He states that there is a “logical connection” between rights and balancing. This does not follow from understanding that basic rights do not have the character of rules but of “principles”; it follows from understanding that all principles have the character of optimization requirements. His theory would be valid if balancing were always necessary in order to justify a decision in cases of conflict between principles. But that is not the case.

It is worth noting that although the issue of conflicts between principles has only recently come up as a major concern in philosophy of law,<sup>3</sup> it has long been discussed in moral philosophy. In fact, such is generally the structure of moral conflicts. And, as is the case with moral conflicts, the way conflicts are solved will depend on the underlying conception of practical reasoning.

In what follows I shall describe the two basic patterns that practical reasoning may follow in situations of conflict between moral principles in general, and I will argue against the idea that balancing is the most appropriate procedure to cope with the conflict between practical principles, either in general terms or in juridical argumentation in particular.



Moral conflicts are clear examples of the kind of normative clash that we wish to examine. It is sometimes termed an “external”, “situational”, or “contingent” collision because it does not appear in the abstract relations between norms but only in concrete situations: two valid norms lead to two specific judgments on duties that are incompatible and overlapping, two obligations that cannot possibly be simultaneously honored.

Let us take the example most commonly used to discuss the matter – it has become the paradigmatic example since its introduction

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<sup>3</sup> Over the last decades, codes – made up by norms with the character of rules – have progressively lost weight in juridical argumentation within constitutional democracies. In all stages and branches of law, conflicts tend to be displayed in terms of basic rights – norms with the character of principles. This fact – characterized as de-codification or constitutionalization of law, according to the perspective chosen about the process – is undisputable.

by David Ross (Ross, 2002). I promised a friend that I would attend his party but another friend is ill and needs me. My normative system rules two simultaneous obligations: promises must be honored and friends must be helped when they are in need. In the abstract, there is no contradiction between both norms. They are perfectly compatible. In particular cases, however, they can collide. Since the conflict cannot be solved by determining that one of the norms is not valid, we must decide which of them will be given priority in the actual circumstances.

This kind of normative conflict proves particularly difficult because it cannot be solved by appealing to some criterion that will allow norms to be listed in lexicographic order. That is precisely why the issue has witnessed intense discussion in philosophy of law in recent years. Traditionally applied criteria to solve antinomies in the field of law (hierarchical, chronological, and specialization criteria) cannot be applied in these cases. We are dealing with a conflict between two valid norms that are still valid after we have come to a decision. It is impossible to define the contradiction on an abstract level, or accurately foretell the situations when norms will collide. On the other hand, the norm that has been given priority in a particular situation may not be identical to the one chosen in a different situation where the same two norms collide again. That is why – so the reasoning goes – it is necessary to balance. Certainly, we must ponder and justify our decision in view of the various demands set by the situation, and that means considering and assessing of the importance of the relevant reasons. I think, however, that the idea of “balancing” may end up masking the true working of reasons.

The idea of balancing (or weighing; *Abwägung*, in German) usually brings to mind a strong metaphor which is at least as old as the idea of justice: the metaphor of weight and, consequently, that of scales weighing things. It is an irresistible metaphor, but a metaphor nonetheless and, as such, requires interpretation. A rational decision implies justification of the decision based on reasons; but reasons are linguistic statements, and linguistic statements have no weight. How can we gauge the weight of reasons?

In principle, there is no objection to call “balancing” the procedure whereby we assess the relevance (“the weight”) of the colliding reasons. We must give a name to what we do when we must decide upon an action and we evaluate various sorts of reasons to justify our choice. With-

in this context, nothing seems more natural than to distinguish among, say, *prima facie* valid reasons in favor of carrying out an action and “balanced” reasons. The relevant point that must be discussed is how we do that; namely, what form of practical reasoning is used in these cases.

In my opinion, we can basically distinguish two types of reasoning: teleological and deontological. While in the first case the aim is to reach a decision weighing goods or values, the purpose of the second is to produce a satisfactory argument that will prove that the decision “is fitting” to the case in view of the presupposed normative system. In the first case, the decision is consequentialist and follows the “logic of the good”. Its point is to find the best solution, the optimal. In the second case, the aim is to find the correct solution: reasoning follows the “logic of duty”.

It was David Ross, a deontologist, who introduced the idea of *prima facie* duties, as opposed to definite duties, precisely with the explicit intention of accounting for conflict situations more satisfactorily than does the consequentialist perspective. On the example we mentioned above, Ross says:

[...] when I think it right to do the latter [relieving distress, MV] at the cost of not doing the former [fulfilling the promise, MV], it is not because I think I shall produce more good thereby but because I think it the duty which is in the circumstances more of a duty. (Ross, 2002, 18)

Even if Ross’ understanding of *prima facie* obligations is not entirely clear, for the purpose of our discussion it is worth noting that the definite obligation ensues from a non-consequentialist assessment of reasons, from a form of “balancing” (if we wish to call it that) that is not the result of weighing the values at stake in the situation. It is grounded on describing a situation and determining a decision, understood as the correct action in that given situation.

Let us examine the normative conflict from a different deontological perspective: that of Kantian thought. It may sound paradoxical to ask how Kant conceives of a normative conflict situation since – strictly speaking – in the sole case in his entire work where he mentions a conflict of duties, he actually denies its possible existence. There may be no conflict of duties, Kant says, because conflict does not objec-

tively exist. Conflict is in the subject and it is a conflict between the reasons of obligation (the reasons whereby the agent is obliged: *Verpflichtungsgründe*). Actual obligation – the judgment of definite duty – only emerges in deliberation; it does not exist prior to deliberation. That is why in Kant’s view, strictly speaking, there can be no conflict of duties:

Es können aber gar wohl zwei Gründe der Verbindlichkeit (rationes obligandi) deren einer aber oder der andere zur Verpflichtung nicht zureichend ist (rationes obligandi non obligantes), in einem Subjekt und der Regel, die es sich vorschreibt, verbunden sein, da dann der eine nicht Pflicht ist. – Wenn zwei solcher Gründe einander widerstreiten, so sagt die praktische Philosophie nicht: daß die stärkere Verbindlichkeit die Oberhand behalte (fortior obligatio vincit) sondern der stärkere Verpflichtungsgrund behält den Platz (fortior obligandi ratio vincit). (Kant, Ak. VI, 224)

In Kant’s view, there is no conflict between obligations but between reasons of obligation. Should the conflict be between independent obligations, it should be solved by means of weighing or balancing that would attribute a different weight to each. In conflicts falling under that characterization, “the strongest obligation prevails”. Additionally, once the decision has been reached, the obligation that was not honored would somehow continue to weigh in the field and might consequently require compensation. On the other hand, in the case of a conflict between reasons for obligations, “the strongest reason does not prevail in the same way”. Kant says that it “dominates over the playing field.” The metaphor suggests that in no way can the weaker reason occupy the playing field. It lacks effective weight in the situation; it does not even have a minor weight. The obligation that ensues from deliberation is a decisive reason to act and it cancels opposing reasons.

To be sure, the Kantian agent has a principle of deliberation at his disposal: the categorical imperative that operates as a test to assess whether a potential action is morally correct or not. What I wish to underscore here, however, is that from a Kantian perspective we can picture the deliberative situation as an attempt to find a type of action that will better fulfill the many requirements and principles that appear to be relevant in the situation, and not as balancing among independent principles (O’Neill, 2000).

On the contrary, the agent that works exclusively according to teleological reasoning finds a completely different setup. When faced with a conflict between two obligations, he will have to “weigh” independent reasons and judge which the best or worst course of action is. Doing the right thing will be choosing the best course of action: maximizing the realization of alternatives. In such cases, the non-satisfied obligation tends to have a residual effect.<sup>4</sup> It was one of the conflicting values and still holds its weight. A metaphor from economics comes to mind. The obligation that was not honored – which in this setting was a genuine obligation and not a reason for an obligation – must receive some kind of compensation since the agent failed to honor it. There was an omission; consequently, there is a debt to be paid. A responsible agent must “balance things out”. In this scenario, the rational justification of a decision can always vary in degree. There will be a more or less, a higher or lower approximation to an end and, eventually, a compensation of a minor harm for a higher good.

We have characterized the two basic forms that practical reasoning can assume in cases of conflict between moral principles. The reasons why I consider that the deontological perspective provides a more appropriate account of normative conflicts are based both on the conception of the agent and on the conception of the moral world. The deontological perspective favors a view of the moral world as a coherent normative system, and a conception of a unified agent that retains narrative coherence. The teleological perspective, on the contrary, presumes a moral world composed of a constellation of values that, because of their very meaning, do not need to constitute a coherent whole. In that constellation of values, there is no need for the agent to attest narrative consistency, and it seems more difficult for him to hold it when, on principle, a constellation of values need not constitute a coherent whole.

Needless to say, the reader may have doubts about the plausibility that these considerations on the differences between the teleological and deontological perspectives in the face of normative conflicts may suffice to defend a given conception of argumentation in morals. I do believe that they are strong enough to advocate for a plausible con-

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<sup>4</sup> Herman, 1993, 173, refers to this as the problem of the “three R”: remorse, restitution, and remainders.

ception of argumentation in law; namely, a conception that favors a coherent view of the normative system and a unified and consistent view of the decisions that the agent makes within it.

Balancing is not inevitable, and it is not necessarily the most appropriate procedure to cope with conflicts of practical principles in general. Within the context of law it is more appropriate to adopt the deontological perspective. Why should judges in cases of conflicts of basic rights abandon the deontological stance that they must adopt everywhere in judicial decisions?



VI

Justice in World Conflicts and Cyberwar





Towards Justice in the World War  
Moral, Political, and Legal Disputes

Marek Hrubec



## (1) Introduction

Global conflicts, be they economic, political, legal, moral, or military ones, are big challenges in the age of global interactions. In this paper, from the points of view of moral, political and legal theory, and philosophy, I will concentrate on conflicts and dangers of hegemony and authoritarianism which can lead to a world war, in connection to the future possible global state.

From a long-term historical perspective, a gradual global integration has been taking place, continuously expanding territorial conflicts and integration as part of the developing technical (i)rrationality of human civilization (Horkheimer, Adorno 2007), covering communication, transport, economic, political, legal, and other interactions. The territory of tribes gradually expanded to state territories, then to the larger territories of empires, then to the extent of empires with colonies and thence to macro-regions and finally to the nascent planetary, i.e. global integration (Chase-Dunn and Lerro 2013). However, expanding global integration does not occur in a linear fashion in history. A wave of globalization is usually followed by partial deglobalization, after which a further, larger global integration takes place. At the same time, deglobalization causes not only the administrative fragmentation of states or empires, but usually also economic crises and wars. This cycle is also repeated at a higher level, when the collapse of certain empires or entire cultures has meant more steps backwards, following which global integration has then again been revitalized on a still greater scale. From the overall long-term perspective then, over the course of the history of human civilization and through this dynamic, there occurs an ever-increasing territorial integration with rises and falls with upward waves resulting in a planetary global integration.

It is important to map how global interactions and territorial integration take place through a variety of conflicts (Robinson 2014; 2003; Sklair 2001; Robinson and Harris 2000; Harris 2008). I try to capture to the greatest possible extent these integrating trends, not only in order to clarify their shape over the recent past decades, but also to show the thematic areas of the global integration processes which can be implemented after deglobalizing corrections.

The conflicts and dangers of the global state are linked to both the new technological developments of transport, communication, con-

trol, and warfare on the one side, and unresolved economic, political, military, and cultural struggles against misrecognition on the other. Specifying these problems is a prerequisite for a normative concept of a more just and harmonious renewal of post-conflict (post-war or merely fragmented) society. Hopefully, in the future, people will live in more local communities where they will be able to develop participatory producer-consumer organizations based on mutual recognition, equality, justice, and principles of subsidiarity (Sklair 2009a; 2009b; Scheurman 2012a; Delanty 2009; Linklater 2007). Nevertheless, the agents of a global system try to develop their system as much as possible. This can lead to a global state, with its conflicts and dangers of possible world war. And this is the theme of this paper.

In this paper, I will explain the bases for a critical theory of recognition of the global arrangement connected with the global state with the ambivalences of technological development (Hrubec 2011). My main focus will be on negative and positive possibilities of the global arrangement. Since historical development does not unfold evenly, there is a need to deal with potential global reversals in the form of planetary hegemonization and supranational authoritarian tendencies which can lead to a world war, and to formulate possible normative solutions of a just and peaceful arrangement to these.

## (2) The Bases of a Critical Theory of Recognition of the Global Justice

I focus on the dystopian topic of potential turbulent global trends which opens up considerations of development risks and the normative means of managing these. It would not be enough to analyze only the past and current development trends and their impact on the foreseeable future; it is necessary to indicate the potential outcome of these trends over a more distant timescale. It is also necessary to update and develop, in a significant way, considerations on difficult future civilizational trends. This means overcoming the inadequacy of the contemporary concept of the international order. It requires a concept of supranational interactions at the level of the whole planet in a substantially stronger integration than that of the global multi-level arrangement, specifically

the outcome of integration in a global state. Transnational changes in economic, political and security risks of global system bring with them the need to react transnationally and to create not only macro-regional but also global institutional structures which would be capable of eliminating these risks. Global governance, to which no small amount of attention has been devoted in recent decades (Held/Koenig-Archibugi 2005; Held 1995; Held/McGrew 2003), may be only an insufficient weak version of the possibility of a full development into a global state. And this must be dealt with on a theoretical level.

The real development of an emerging transnational state and various global interactions has advanced to the stage where various forms of a just supranational and global order can be realized. However, with the criticism and demands of many groups of people, the trends have not advanced so far that we can consider the legitimate establishment of a global state (Wendt 1999; 2003; Shaw 2000; Lutz-Bachmann/Bohman 2002; Linklater 2010).

I will focus on the global conflicts and their dangers in the form of the global state from the perspective of a critical theory of a global system, based on a concept of the struggle for recognition (Hrubeč 2012). While critical theorists of recognition Axel Honneth and Alexander Wendt developed a philosophical basis of social recognition among people in community (Honneth 1995; 2011) and a concept of the global state respectively (Wendt 2003), their analyses have to be reformulated and developed in order to reflect problems of the global system, articulated by Leslie Sklair and others (Sklair 2001; Harris 2008; Robinson 2014).

Whereas Axel Honneth works with relatively modest normative future opportunities of the current development, and thereby reveals a small emancipatory potential in the development of social recognition patterns, I presuppose a more demanding normative potential which maps a stronger appropriate critique of the social status quo and the options for a further appropriate future development of recognition. However, on the other side, some authors anticipate such a widespread development of the normative potential of recognition that they may face the opposite eventual problem: the less proven relationship to the development of the social reality and its social criticism. This can be the case of a theory of recognition developed by Alexander Wendt, specifically his concept of the global state (Wendt 1999; 2003).

A comparison of Honneth's and Wendt's theories of recognition requires in particular a specification of the concept of diachronous development, since their reflections on this point lead to quite different conclusions. In contrast to Honneth, Wendt defends the stronger historical principle of intentional teleology which gives development a more rapid dynamic, namely the establishment of a world state. At the same time, Wendt believes that efforts at security – either by individuals or by whole states – can, after reformulation, be included in the struggle for recognition category. He maintains that contemporary states may seem in themselves to be relatively stable, but that in a global era and in view of their mutual links that is not the case in reality. The current international order of national states is not sustainable, and it is therefore necessary to consider what kind of system will replace it. From this perspective, the dynamics of the current development lead to a world state: "I argue that a world of territorial states is not stable in the long run. They may be local equilibria, but they inhabit a world system that is in disequilibrium, the resolution of which leads to a world state. The mechanism that generates this end-directedness is an interaction between 'struggles for recognition' at the micro-level and 'cultures of anarchy' at the macro" (Wendt 2003: 25). Like Honneth, Wendt understands the struggle for recognition as an attempt to mold individual and group interests, this means attempts focused on ideas but mediated by means of material competition.

### (3) A Transition to Conflicts of the Global State

Now let us look in more detail at this issue. Wendt first poses the question of whether a global state could be achieved through the mere completion of the internationalization of political authority that is already occurring in the system, or by reform of the United Nations, the European Union, the International Criminal Court, the World Trade Organization, and other institutions. This would mean no institution would have a global monopoly on the use of force. His answer is that, from the perspective of the concept of the state in the form of the Kantian pacific federation, such a state would mean only a transitional form, since the system would eventually lead to the monopoliza-

tion of force at a global level (Higgott/Braslet 2004; Higgott/Ougaard 2002).

Here the fundamental argument is that the transformation of the present form of the state into a global state will require three major changes (Wendt 2003: 22, 23). First, a world state will require the emergence of a “universal security community” (Wendt 2003: 22). A community of this kind means that the community is based on peaceful and not primarily military resolution of disputes, which presumes that individual states must be able to give up the idea of other states as existential threats. Secondly, the idea of a universal security community is linked to “universal collective security” (Wendt 2003: 22) which is not possible without members of the security community treating threats as applying to all, and also sharing in arranging such security. Thirdly, a world state requires a “universal supranational authority” (Wendt 2003: 23) which would be based on securing a procedure legitimate in the eyes of world society for making decisions about organized violence, which means that states must surrender their absolute sovereignty in this domain.

However, this three-point concept of the transformation of the current form of the state into a global state consists in essence of two points. The first and second points, i.e. a universal security community and the exercise of universal collective security together in effect create a “global common power” (Wendt 2003: 23). The understanding of a global state in its entirety at a fundamental security level is here based on the monopoly on the use of organized violence within a society and recognition of all its members. However, since this is not a transition to an entirely new form of organization, but merely to a new version of organization, the main emphasis must be put on the issue of the *new level of the state*. That is on its global characteristic, and also on the *transition* from the national and macro-regional levels to the global level. If, within this framework, we focus on the shape of the global state, there is no need to consider its most developed variants (Haigh 2003; Jones 1999; Nielsen 1987). It is enough to outline a realistically achievable form. A global state may have a decentralized form and be made up of elements arising from the transformation of the current form of the state and its international integration. The existence of a political framework for a universal security community does not require the end of shared autonomy for its individual local units, i.e. states or



other entities; indeed they may continue together to develop the existence of the global community. Autonomous local politics and culture can continue to develop even in the event that there will no longer be organized violence under the administration of the local community. Secondly, in principle, the armies of local communities may remain the same, since there is no need to create a global army. Armed interventions by the global community would occur as the pre-determined joint interventions of individual country armies or parts of these, as is already the case at the regional and macro-regional level today. However, fundamental here would be the subsidiarity of these individual armies to a global intervention based on the global monopoly on organized violence. This does not mean that a global government entirely analogous to national governments would have to exist. Thirdly, a global government would not have leadership under a single person, as at the national level. It could have a more complex collective structure with discussion fora within the global public sphere.

Deudney's argument on the trend towards a global state, the basis for which is a thesis on the *scope* of securing the security of the state, is an inspiration for theoreticians of the global state, Wendt included (Deudney 2000; 1995). Deudney mentions that while earlier states could exist within a limited territory, the development of enforcement technologies has led to a situation in which states are no longer able to ensure their own security. The level of destructiveness of these technologies has achieved such an extent that individual states are no longer able to keep it in check. Generally speaking, if the scope for the use of violence exceeds the previous border of a state, thus increasing long-term conflicts between states, it becomes essential for the state also to increase the extent of its territory, either by joining up with another state or by absorbing it. One can currently focus in on this thesis using Deudney's concepts of a single nuclear world or "nuclear one-worldism" (Deudney 1999; 2000). Nuclear weapons and ballistic rockets have created the prerequisites for the extension of the territorial scope of the state. Just as in the Middle Ages, some states expanded territorially as a result of the invention and application of gunpowder and its associated implementations, now the scope of current enforcement technologies allows and requires exceeding the former territorial extent of the state.

This theoretical interpretation makes new technologies a precondition for the possibility of territorial integration, while historical techno-

logical development in general here plays the role of a driving principle stimulating an integrating telos. Nevertheless, this remains merely an external possibility and does not explain the internal conditions with its dynamic of the integrating development of society which depends on struggles for social, economic and political recognition of various social groups. We will find these in Wendt's analysis where he considers two aspects of his teleological clarification of the development of the world state: the first is at the micro level, the second at the macro. An aspect which acts on movement from below to above here has the form of a self-organizing process of the struggle for social recognition which is being implemented as a result of technological changes. An aspect which acts downwards from above is created primarily by chaos in recognition in the international space which is so far only partially organized politically and is being institutionalized in legal terms. These two aspects form the internal telos of the security dynamic of development (Wendt 2003: 4).

This exposition can be interpreted as the struggle for social recognition of various social groups within the conflicts of global capitalism against the background of a particular stage in technological development being played out in relatively institutionalized local and national contexts, and in transnational and global conditions which are not for the time being sufficiently institutionalized. Since, in this new period, individual territorial units are no longer capable of confronting the military threat from new technologies, able to strike over a wider range of territory than previously, and these units are not able to guarantee the security of their own territory, they must redefine their boundaries in favor of greater global integration.

#### (4) The Ambivalent Technological Development

Wendt's concept implicitly accepts the negative aspects of technological development analyzed by Horkheimer and Adorno in their classical work *Dialectic of Enlightenment* (Horkheimer/Adorno 2007). However, in contrast to them, Wendt does not go down the road of refusing historical technological development, but on the contrary attempts to develop its positive aspects. Nevertheless, it is not clear from his inter-

pretation why it is necessary to accept dubious technological development. A number of interpretations may be considered.

For the purposes of comparison, one can mention that in his theory Honneth does not incline towards any of these scenarios. Although writing about monitoring the pathological moments in historical development, he does not deal with long-term civilization technological development, but only with the development of models of social recognition in the modern era, in which he deals mainly with the promotion of positive models of recognition. In recent decades of the development of Western society, Honneth has found ambivalent development, which he calls paradoxes of capitalist modernization (Honneth 2002). In his interpretation, therefore, this is positive or ambivalent social development and not negative development affecting the technology line directly.

From Wendt's formulations, it may be inferred that he implicitly advocates a thesis on ambivalent technological development, since although critically evaluating both past and possibly dangerous future social developments, nevertheless, he expresses hope for a global state with positive characteristics. Nor need this hope be at odds with the last type of explanation which interprets development as negative. In the 1940s, Horkheimer and Adorno may have, in the *Dialectic of Enlightenment*, taken a position of civilizational pessimism (Horkheimer, Adorno 2007), but this analysis was nevertheless focused on interpreting only one negative aspect of their analysis of reason within history. In spite of this being an aspect to which they ascribed major significance, they did not shut off analyses, albeit fragmentary, of the positive aspects.

In view of the fact that up to now people have not been able to reverse the negative civilizational course of development, it would indeed be a surprise if it were otherwise in the case of the trend towards a global state. But in the knowledge that the options for avoiding further development of the negative aspects of technology are not particularly realistic, one may consider attempts to promote in parallel as many of the positive fragments of reality as possible, and to develop them in a form which would at least avoid some of the current negative aspects, as Bill Scheuerman shows (Scheuerman 2011). Following him partly, I take the view that in this sense one may convincingly cultivate a possibly futile, but potentially self-preservational hope of a positively conceived global state as a last resort. However, this does require that we identify possible risks and the solutions.

## (5) Global Hegemony

Which negative characteristics of a global state might be considered difficult and what might be the normative alternatives to these? First, one must recall the objections of the transnational capitalist state which has been established over the last two or three decades by means of corporations and international commercial and financial institutions. Behind the principal problems, which I will now deal with in relation to the degree of danger they represent (hegemonization, authoritarianism, war), stand economic interests, although we must naturally also take into account political, cultural, social, and other problems.

First, the global state can be called into question in view of the potential *hegemonization* of the global community. The danger here arises from the need or necessity of centralizing access to the various component communities of which the global community is comprised. Cultural and political diversity is subordinated to a unifying process striving for ease of administration. The result can be the ideological limitation of cultural and political plurality in the interests of the dominant economic forces. Of course, it is not a smooth process but a process which full of economic, political, and other conflicts.

A counter argument might be the response that a global state will rely only on neutral procedural rules which will not require any specific inclination to the particular cultural and political orientations. However, as it is well known from a critique of political proceduralism, this counter argument is not convincing. A certain minimum jointly shared political culture and relative economic equality between citizens are necessary prerequisites for citizens to identify with rules that they are to respect and to act in accordance with them. Thus, a global state requires not only basic legal rules or a constitutional framework, but also their establishment in political culture and economics. All these prerequisites may lead to dangerous hegemonizing tendencies and to the suppression of the economic autonomy of individual communities and cultural and political identities. These risks should not be underestimated; a look at the previous history of integrational institutionalizations shows us that it is likely that these dangers can arise to a greater or lesser extent (Wallerstein 2006; 2003).

Just as at the national level, there is a subsidiary co-existence of institutions of the national state and institutions at a more local level. In

parallel with these the specifics of national and local levels, a global state may, through a federative or co-federative arrangement, exist alongside macro-regional, national and local institutions. A global community may be founded on a multi-level “glocal” arrangement, based on individual local, national, and macro-regional institutions, while retaining individual component cultural and political identities with their particular features in an economically equal environment. Adopting this arrangement means giving up the older idea of the absolute sovereignty of individual nation states or of those macro-regional units today identified as national states. Emphasis must be put on the idea of shared sovereignty, which has for that matter been implemented in practice in the majority of states, whether they acknowledge it officially or not, since the transnational economic and political pressures in a period of global interactions does not allow most states to act in isolation. If they should attempt to act in such a manner, they run into existential problems. The only possible exception to this are certain contemporary macro-regional states in the world, for example the USA and the BRIC countries. In addition, certain other strong older countries, for example from Western Europe, in spite of being powers in their own right, are often not able to act in isolation and are forced to act at least partly in concert and to accept elements of shared sovereignty. If, within a global state, there was respect for jointly share minimum legal institutionalization of recognition models, and if these recognition models were anchored in various cultural and political values, there would be the global guarantee and possibility that a variety of models can exist at lower levels from the macro-regional to the local.

However, the digital space is a global one and a local one at the same time. Collection and analyses of the big data are – as a “cyber conflict” – one of the main aspects of the contemporary hegemonizing tendencies as well. In his book *Metamorphosis of the World*, Ulrich Beck explains a danger of our digital age by saying that the real catastrophe would be a global hegemonic control of information. The particular paradox of this digital risk is that the closer we face the catastrophe, the further it seems to be (Beck 2016: 142). The digital risk has an opposite characteristic than the ecological risk, for example. While Chernobyl or Fukushima made the environmental risk visible, the everyday collection of data is not visible. It became visible, to give an example, just because of one individual person, particularly the private subcontractor

of the CIA Edward Snowden, who brought up the illegal activities of the US administration and other agents in other countries. Beck identifies the sources of the risk when he mentions an “anonymous digital central power” related to the private sphere behind the democratic façade, which is a part of the metamorphosis of democracy into authoritarian regimes (Beck 2016: 144 and 146). He talks about attempts to exercise a totalizing control by the coalition containing corporations and states, the private and the public: the National Security Agency (NSA) and the Google Corporation, for example. They create “global policies and policies of global institutions” which can be considered nascent structures of the global state (Beck 2016: 147).

While one of the relevant problems of eliminating dangers of the digital age is an attempt of risk agents to trump risk by another risk, specifically by trumping a violation of digital freedoms by the media discourse of a higher card of terrorism, it is still possible to resist hegemonization. Ulrich Beck uses the term “emancipatory catastrophism” which is defined as positive aspects of negative sides of the risks, and refers to a “new transnational digital class” relying on digital cosmopolitan possibilities as a tool to resist a growing approach to the data “collect it all”, to change the world in the positive way (Beck 2016: 146-147), before the risk leads from cyberwar to physical war.

## (6) Global Authoritarianism

Secondly, a further and greater danger is the potentially *authoritarian* nature of a global state. The problem here is not only hegemonizing unification as in the case of the first danger, but the introduction of tyrannical, despotic, or even totalitarian elements. Immanuel Kant and Hannah Arendt have pointed out this risk already (Kant 1997; Arendt 1972). The first stage might be the elimination of politics as understood by Carl Schmitt and his successors (Schmitt 2007). Under this interpretation, the centralization of power in the hands of a global state would bring about a situation in which no political enemies would exist. According to this interpretation, without any scope for the difference between friend and foe, politics would cease to exist. A greater danger arises from a highly centralized version of the global

state and assumes the use of police and military forces in the name of a dictatorship, since the politicians of a global state respond to the real or possible danger of chaos or dictatorship by a group or groups by strengthening the powers of the state. Practices introduced frequently or permanently, such as increased surveillance, the limitation of freedoms, or the declaration of a state of emergency would here be justified as an appropriate reaction. Then, a global Leviathan would allegedly be a necessary and needed result.

The risks mentioned are possible and some of them are indeed likely. However, Schmitt's questioning of the global state assumes politics only in the categories of a hostile struggle against enemies and ignores the positive possibility of cultivated debates and disputes over recognition between citizens. Schmitt's concept of the political may indeed be progressively reformulated to retain the idea of conflicts which are necessary to politics, but in the case of the global state, one should rather look at the original version of his concept as a pathological departure from the political and as a repressive attempt to present irreconcilable and violent clashes between foes as the only possible politics.

The objection to the danger of authoritarianism remains, for other reasons. A global state might indeed be the way out of an anti-civic repressive dictatorship which would be suppressed in the name of citizens using authoritarian powers.<sup>1</sup> A global dictatorship in the name of citizens would be a way out of a transnational or even global *repressive* dictatorship. However, in a situation without the threat of repressive dictatorship and in the absence of a federative or co-federative arrangement with the subsidiarity principle, individual local, national, and macro-regional units would be marginalized for no reason. If a global state achieved a strong position, there would be nowhere to run to from its police and military forces, as Arendt points out. The persecution of various groups by the Nazis during the Second World War was not successful largely because Nazism failed to achieve world domination.

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<sup>1</sup> Compare: "If we are to avoid mass-suicide, we must have our worldstate quickly and this probably means that we must have it in a non-democratic form to begin with. We will have to start building a world-state now on the best design that is practicable at the moment." Toynbee, 1962.

Cooperation and competition between states and macro-regions are a source of movement and bring about a desirable disturbance of attempts to concentrate power in the hands of the few. However, neither a federative nor confederative nature for a global state with elements of subsidiarity of themselves automatically mean the elimination of authoritarianism. It can only be achieved by the participatory involvement and decision-making of members of the political community. Only their involvement in the various levels of decision-making from the local to the global can eliminate authoritarianism. Participation need not represent the entire system of democratic order, since not all societies on the planet (for example various aboriginal groups such as the Amazonian Indians or the Inuit) prefer this system, nevertheless involvement permits decision-making through a consultative system using the votes of a large number of members of a community, giving legitimacy to the decisions in question. Some current major injustices would be hard to eliminate without global participation. For example, eliminating poverty cannot be achieved without the participation of those affected and without their will, or even against it.

However, such a system must be founded on historically long-term and global establishment of cultural, political, social, economic and other recognition standards based on long-term historical recognition debates. Their basic form would be formulated in a legal framework, in the case of a global state in a constitutional order, which could limit any authoritarian extremes which might arise from the pressures from various population groups.

## (7) Global War

Thirdly, the most serious danger of a global state is that it results in *war*. This argument consists of the thesis that any attempt to establish a global police force and/or armed forces must sooner or later result in war, since the likelihood of an absolute consensual establishment of forces of law and order is minimal and certain groups will resist sooner or later (Schmitt 2007). Not only groups of people, but also some territorial units which will not submit to this planetary enforcement force,



will resist and will respond with violence to the organized violence of the global state. Such reactions may lead either to limited local and regional wars, or to a world war.

This argument, pointing out a revolt against attempts to establish a global police force and armed forces, is based on the assumption that these forces of law and order are introduced in a manner analogous to the present nation state which claims a monopoly on violence on its own territory. However, through its federative or confederative order, the global state may be so arranged that it uses, as Wendt proposes, parts of the police and military forces of the individual states, and retains only relatively small executive powers which will be made up of people who come from a wide variety of nations. Although we must consider such a future arrangement realistically and be aware of the possible risks of global armed forces, the current state of affairs where one superpower has a leading role and several other major powers have a major influence in the UN Security Council is worse than a possible global arrangement with a significantly greater multi-polarity. Whereas today the superpower finances a disproportional part of the world's expenditure on weapons and forces, in the future the situation would be more balanced thanks to a more equal distribution of armed forces across individual territorial units.

The military danger associated with a global state arises also from the way it is set up – gradually, or by revolution. Gradually occurring global challenges could lead to a non-violent gradual establishment – either positively or negatively – of a global state, including police and armed forces. However, if a global state was established by a quick violent change and was built on the current authoritarian elements of an already developing transnational capitalist state, resistance to it would naturally be stronger. Nevertheless, if a global state arose only as a just reaction to escalating aggressive conflicts, or even to aggressive local or extended wars, the use of violence might be considered an appropriate reaction by those involved in the establishment of the global state. This assumption has its basis in human history. Habermas calls this “learning from disasters” (*aus Katastrofen lernen*) (Habermas 1998b). He builds on the idea that normally people do not learn the lesson of history or theory, but only after experiencing a disaster are they able and willing to react in a practical way to the challenges of their time.

Only the horrors of the First World War led to a reflection on heightened international tendencies and to the establishment of the League of Nations. Some countries never joined, however, and others withdrew after a period. Its powers were weak; it proved unable to abolish the colonial rule of many countries, nor was it able to prevent World War II. Only the results of World War II, preceded by the Great Depression, forced representatives of the individual countries to set up the United Nations with its greater powers.

One may pose the question of whether there are reasons to believe that humankind will proceed in any way differently than in the past and avoid armed conflict indefinitely. With today's technology, this would mean military conflict on a global scale. Are there any reasons to assume that the United Nations can prevent another global conflict? If we disregard the worst-case war scenario, we may similarly ask whether there are any reasons why humanity at the global level should not come to hegemonization and authoritarianism before positive scenarios. It is difficult to respond to these questions and to give convincing reasons. But as in the case of our approach to negative technological development, this should not mean giving up the search or attempts to prevent the negative scenarios, or at least reduce their impact. Even a small hope is still a hope.

## (8) The Complex Concept of the Global Arrangement

The global state, which can be a framework of a global arrangement, is a complex concept with many dimensions. Specifying a global peaceful order requires that we clarify the historical development of the crystallization of transnational and global critiques of misrecognition and the institutionalization of recognition. In addition to the historical dimension, we must also take into account economic, social, political, legal, and cultural dimensions. At the same time, it is right to analyze from the assumption that a global state presupposes a global community, but it cannot be limited to a security community. The aforementioned concept of a global state is focused to the great extent only on global security risks, and the principal legitimacy for the rise of

a global state is tied to the resolution of these. It includes a comment on the necessary specification of the political and economic identity of the new territorial unit so that the new larger territorial unit, in this case the global state, has its own identity and is not composed only of the separate identities of the previous subjects. This presumes that the citizens of individual states progressively become citizens of the world, cosmopolitans, and that they gradually establish the identity of the global peaceful arrangement. But here one should specify what further dimensions such a global order presupposes. This applies not just to the concept of a global state from the standpoint of recognition theory, but to all theories of a global order which attempt to determine positive peaceful aspects of such an order. The formulation of at least some kind of hope within these positive aspects from the perspective of the aforementioned negative and ambivalent global developments requires an articulation of multiple dimensions of the global state in its negative and potentially positive characteristics (Fine 2007; Beck 2006).

A state which is global only in its extent, but not in its other dimensions (social, economic, cultural, political, legal, etc.) can survive only in a global conflict from whose logic it is conceived. Various versions of wartime order, be they war capitalism, war communism, or some other wartime model, can be implemented in period of tense conflict. But after the guns fall silent they are either systematically replaced by peaceful civilian forms of administration, or they attempt to persist. However, after a time they are inevitably removed under the pressure of the introduction of civilian criteria, or they simply implode. The idea of a global state based only on security presumes a too-rapid and problem-free development of global integrational tendencies and the sustainability of these. The concept of development, i.e. the transition from an international order to a transnational and global arrangement, must be enhanced with an analysis of conflict development and peaceful alternative, more refined analysis of the complex historical tendencies of recognition development in its various dimensions. A more detailed working of this analysis and other similarly directed research of international, transnational, supranational and global development trends could be the route to marking out the complex and mutually inseparable strong and weak aspects of the global state. This on the one hand

is a potential threat where it ends in hegemonization, authoritarianism, and war, and on the other hand is also a way to eliminate these varying new global dangers. Thus paradoxically, the global state remains both a threat and a hope for justice for dealing with these threats, i.e. a potential of both war and peace. Of course, what particular territorial conflicts might specifically bring about these threats remains a matter of future historical development with randomness to it.



The Supreme Emergency.  
On the Normative Dilemmas in Just War

Josef Velek



Normative arguments about just and unjust wars have been an organic part of Western practical philosophy from its beginnings to the present day. From a systematic point of view, this is the concretisation of a very specific “applied ethics” which in general deals with the possible moral justification of self-defence against an unjustified attack. In a politically organised civil society, this argument serves as a moral justification or critique of specific facts within criminal law. Where it concerns relations between political societies and within individual political societies, this argument generally addresses the possible moral justifications of the use of violence for its own self-defence within a political struggle. This applied ethics is often referred to as “military ethics”. It contains moral, legal and political affairs which are usually referred to as the problems of a “just” and “unjust” warfare.

In contemporary Western political philosophy, a “standard” (“orthodox” or “traditional”) concept of a just war has evolved and still predominates, characterised by a number of interconnected concepts and ideas that are justified in a variety of ways. This concept is based on the general assumption that the use of violence can only be justified in the event that it is a tool for self-defence against an ongoing attack, while legitimate self-defence itself has to meet a number of strict conditions which are formulated in the “*ius ad bellum*” principles. The use of violence in just or unjust warfare must be limited by strict principles formulated in the “*ius in bello*” principles, and the use of violence must end in a fair manner, that is, in accordance with the principles that are formulated in the principles of “*ius post bellum*”. The very manner of waging warfare must be based on two basic and inviolable principles that form the building blocks of any standard theory of a just war.

The first of these building blocks is the idea of the universal equality of soldiers in combat. It follows that soldiers have an equal right to threaten or even to kill enemy soldiers, regardless of whether they are fighting a just or unjust war. The second building block is the idea of the universal equality of “innocent” civilians who may not be deliberately attacked or, worse, killed regardless of whether they are members



of certain political societies (a state, nation or people) whose soldiers are fighting a just or unjust war. An organic element of this standard concept is at the same time the idea of a strict division of responsibility between political leaders, military commanders and ordinary soldiers. Political leaders bear on their shoulders the highest degree of responsibility, because they are responsible for whether their political society is waging a just or unjust war, whether it wages this war in a just or unjust manner, and whether it ends it justly or unjustly. Military commanders are responsible both for the successful conduct of the war, regardless of whether it is just or unjust, and for the soldiers they command fighting in accordance with the principles of *ius in bello*. Rank-and-file soldiers must obey the orders of their commanders, but in the fulfilment of their combat duties they may not violate the principles of *ius in bello*.

All these principles have a long historical tradition. Gradually they became war conventions, which in some cases were respected for a wide variety of pragmatic-political and even moral reasons. Since the second half of the 19<sup>th</sup> century, they have gradually become the key principles of the emerging positive (“humanitarian”) international law, which is based on the contractual agreement of an ever increasing number of states. In the middle of the last century, they were transformed into an organic part of the newly emerging “post-Westphalian” world that was born through the creation of a global inclusive political society of states within the ambivalent UN system.

According to the UN Charter, this political society is based on the mutual recognition of the “sovereign equality” of all states (Art. 2) and its main objective is to guarantee the security of each state by securing international peace, which in the newly system of global governance is entrusted to the Security Council with the help of all other states. This leads to a limitation of the external sovereignty of each state, since it is likely that the traditional sovereign right to declare a state of war is supposed to be definitively cancelled, and aggression is seen as an international crime. At the same time, however, the “natural right to individual and collective self-defence” of all states is preserved “until the Security Council has taken measures necessary to maintain international peace and security” (Article 51). Legitimate use of violence becomes legal police action, which is however in reality nothing other than legal war, since political leaders, police commanders and rank-and-file members of the global police are fighting the “criminals”

who still have the legal right to kill, and in their police work they may not deliberately threaten or, worse, kill enemy civilians.

A necessary consequence of this standard concept of just and unjust war is an internal tension between the principles of *ius ad bellum* and *ius in bello*. A political society that uses violence for its own self-defence is subject to the same constraints as a political society that acts aggressively. The criminal aggressor may have caused all those affected to be exposed through no fault of their own to the horrors of war, yet he has the same martial rights as his innocent victim. The basic problem is that on this basis, it is sometimes very difficult to confront the aggressor and achieve the just goals of a war. The tension arising from this problem is greatly aggravated when the victim of aggression has a markedly weaker military force than an aggressor, when the war itself loses the nature of a conventional war as variously understood, and when the defeat of a victim of aggression can be a fundamental threat to the existence of a political society and its individual members.

In this situation, the responsibility of political leaders for the survival of their own political society, and in the same time for confronting criminal aggression in accordance with the principles of *ius in bello*, is exacerbated. In these unique, intensified historical situations, political leaders demonstrate through their actions whether they are capable of fulfilling their mission and whether they are real statesmen or mere politicians.

In one of his treatises, John Rawls rightly states that the statesman is an “ideal”, just like the ideal of a “truthful or virtuous individual” (Rawls, 1999e, 97). This is a political leader who leads his state, nation, or people in turbulent and dangerous times and becomes a “great leader” by seeing “further and deeper than most others”. An ordinary politician becomes a great leader if he meets three conditions. On the one hand, he must be sufficiently wise to be able to recognize the obligations and duties arising from his mission, as well as the moral, legal, and political obligations and duties of his own state, nation, or people. He must also be sufficiently prudent and level-headed as to be able to recognise what is required to be done on the basis of these obligations and duties in certain tense historical situations. Finally, he must be sufficiently courageous and determined to be able to defend and enforce his decisions in his own political society. In the context of a just war, this means that the political leader has a triple task: he has

a political duty to do everything necessary and essential for victory; at the same time, he has the responsibility for a just war to be conducted in a just manner in accordance with the moral and legal principles of *ius in bello*; equally he has the duty to end it in a way that will lead to the creation of a just peace.

The way in which a just war is waged, as well as the way it is ended, becomes part of the historical memory of individual political societies and of the historical memories of mankind. In these different and at the same time interconnected contexts, it is not just about the character of certain political leaders but above all about the nature of diverse political societies and the principles on which the interrelationships between them should be based.

Due to its character and its course, World War II became a unique and at the same time a truly textbook example of the internal tension between the principles of *ius ad bellum* and *ius in bello*. With the exception of the views of some extreme revisionists, current political philosophy and social science literature shares the consensus that on the part of the Allies this was a paradigmatic example of a just war (or rather: of a whole series of diverse interconnected wars). The normative problem, however, brings up the undeniable historical fact that Allied leaders during this just war opted for the systematic, mass murder of enemy civilians by bombarding clearly civilian targets.

The strategy of using bomber forces has been the subject of disputes from the outset.<sup>1</sup> These disputes came to a head especially in World War II, after the defeat of France by Nazi Germany. At that time, the United Kingdom with its entire empire was losing on all fronts and had to confront the danger of a German invasion in aerial clashes over the islands, which was taken to be the preparatory phase of the upcoming frontal assault. It was in this context that endless disputes continued about the strategy of warfare and the role of bomber forces, which were part of the continual conflicts of command between the commanders of the various types of troops, even though the British government had decided definitively on a general strategy. An important change occurred in the character of the air battle over Britain in August 1940,

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<sup>1</sup> See, for example, the historical and systematic accounts in: Pape, 1996 and Olsen, 2010.

when German bombers accidentally bombed residential areas of London. After this attack, a revenge attack was made on Berlin in retaliation by British bombers. From September 1940, systematic German air bombing of British cities began, which continued en masse until mid-1941 and then sporadically until the end of the war. According to official data, 30,000 civilians were killed and 50,000 injured.

The British strategy of using bomber aircraft had been concentrated since the beginning of the war on legitimate military targets, and the bomber force played a significant role in preventing the invasion. However, from autumn 1940 onwards, it also began to focus on the systematic bombing of German cities. In 1940 and 1941, this campaign was not very successful, particularly due to significant deficiencies in navigation and targeting technologies, and was accompanied by great losses even though bombing took place only at night. Only at the beginning of 1942, when A. Harris became Head of Bomber Command, did the Royal Air Force begin to focus primarily on the destruction of German cities.

This effort was more and more successful thanks to significant technological innovations and the massive deployment of new types of aircraft. The campaign itself escalated steadily, culminating in the early months of 1945 and ending at the end of April in the same year. According to official data (which are of course fundamentally contested), 305,000 civilians died and 780,000 people were injured in this bombing, at least 20 per cent of the country's accommodation capacity was destroyed and the civilisational and cultural infrastructure of seventy German cities was destroyed.

America's strategy was somewhat different at the time. From the beginning of 1944, US Air Force bombers systematically participated in a bombing campaign against Germany, but focusing primarily on legitimate military targets and flying by day. Only in the war against Japan did US Bomber Command fully accept the British strategy. From November 1944, the US Air Force, under the command of C. LeMay, led raids on legitimate military targets along with raids on Japanese cities. From March 1945, it concentrated on the systematic destruction of Japanese cities, culminating in the dropping of atomic bombs on Hiroshima and Nagasaki, which occurred on 6 and 9 August 1945. Although this short campaign lasted only nine months, it was very successful due to the de facto destruction of the Japanese Air Force and the

defensive ground anti-aircraft system. According to official data (which are, of course, also questionable in this case), 330,000 civilians died and 460,000 people were injured. At the same time, the civilisational and cultural infrastructure of sixty-six Japanese cities was destroyed. This use of bombers can be considered as a textbook example of state terrorism. The explicit aim of the systematic and mass murder of Japanese civilians was the destruction of the morale of the local civilian population, to force the enemy to surrender. A shortening of the war was also to reduce the loss of human life.<sup>2</sup>

However, seemingly unquestionable historical facts can be evaluated in a very diverse way, depending on how we interpret the already mentioned internal tension between the principles of *ius ad bellum* and the principles of *ius in bello*. Against this backdrop, several very different standpoints can be formulated. The *first* is based on the general assumption that adherence to existing principles is merely a generally useful convention. In reality, however, the principles of a just way of waging war depend on whether we are fighting in a just or in an unjust war. The very principles of *ius in bello* then fall apart from the point of view of the moral weight of the *ius ad bellum* principles, while the rights of those who fight in a just war are strengthened and the rights of those who engage in an unjust war are weakened. The rights of civilians are thus to be formulated in concepts that are based on some form of “*slippery slope*”, when the one who has justice on his side has at the same time more rights.

John Rawls was probably supportive of this attitude in his *A Theory of Justice* in the 1970s, although he had only very briefly dealt with the issue of just and unjust war in the 58th paragraph entitled *The Justification of Conscientious Refusal*, which was only a marginal part of the resolution of the wider issue of civil disobedience. Here he argued that “where a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe. Acts permissible in a war of legitimate self-defence, when these are necessary, may be flatly excluded in a more doubtful situation”.

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<sup>2</sup> See some of the significant historical explanations: Grayling, 2006; Friedrich, 2006; Walker, 2005; Hasegawa, 2005.

However, calling into question the universal immunity of innocent civilians, depending on the justice of the war itself, may take on two different forms. The *first* case may be called a *moderate opinion based on the slippery slope* theory. This is Rawls's position when he maintained that "Even in a just war certain forms of violence are strictly inadmissible" (Rawls, 1971, 379 - although it is not clear what forms of violence are meant here). This opinion would mean that the greater the justice of the cause of a state that fights a just war, the more rules it may breach for this cause, even though certain rules may not be violated under any circumstances. However, the same argument can also be used with regard to the likely results of a just war. The greater the injustice arising from the probable defeat of a state fighting a just war, the more rules it may breach to avoid such a defeat, even though certain rules may not never be broken. Generally speaking, a slippery slope allows political leaders (as well as military commanders and rank-and-file soldiers) to develop a diverse, consequentialist calculation of multiple strategies for military action, in which the rights of enemy civilians act as variable factors, whether from a position of morally justifiable self-defence or a justified attempt at victory.

Besides this first opinion, there is also a *second*, a kind of *extreme variant of the slippery slope*, which fundamentally casts doubt on the claim that in a just war there are some forms of the use of violence that are totally unacceptable. Political leaders (as well as military commanders and rank soldiers) whose state fights a just war may do anything that is useful in their just struggle and helps to avert unjustifiable aggression and to achieve victory. This position completely abolishes the universally valid equal rights of innocent civilians, which are meant to protect their lives. War is a terrible hell created by those who started it. In war itself, there are no rules that would limit legitimate self-defence by a victim of aggression who may use whatever means for his own defence or any approaches leading to the earliest possible ending of war horrors.

However, the standard concept of just and unjust war is clearly based on a *third opinion which fundamentally rejects any version of the idea of a slippery slope*. This opinion is based on a diverse way of justifying the assumption that the rights of innocent civilians are absolutely equal, since they are based on universally valid moral principles which in various ways justify the indisputable fact that innocent people must never be deliberately threatened or, worse, murdered. The rules of a just means

of waging war thus include a series of categorical and unconditional prohibitions that may never be broken either due to justifiable self-defence or due to defeat of the aggressor. We must always obey these orders, no matter what the consequences might be for the conduct of our just war. This basic characteristic feature of moral absolutism was well expressed by Rawls when referring to the Christian natural law theory of a just war, which encourages us “that we must have faith and adhere to God’s command” (Rawls, 1999e, 105), regardless of any possible consequences that may be brought about.

In the context of this standard concept of just and unjust war, however, a *fourth concept* emerges at the same time as the most disputed, since it is the most interesting and at the same time the most provocative. This concept is also based on the fact that the rights of innocent civilians are equal, but at the same time attempts to justify that, in certain quite rare and exceptional situations, these rights may be overlooked or violated. Overlooking or violating valid universal rights can be justified or excused only when a political society that is rightfully defending itself against aggression gets into a situation that M. Walzer has identified as, following on from Winston Churchill’s formulation from the beginning of World War II, a state of “supreme emergency”.<sup>3</sup>

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<sup>3</sup> Walzer’s concept of the supreme emergency was in fact born in stages. It originated in the discussions that took place at the beginning of the 1970s in the newly established *Philosophy and Public Affairs* journal and related to the general normative questions of the theory of a just war and the possible application of this theory to the events of World War II and the ongoing Vietnam war. Walzer began to deal with these matters in two interrelated articles. The first was “World War II: Why Was This War Different?” (Walzer, 1971) and was accompanied by a brief follow-up discussion between Walzer and R.H. Whealey (Walzer and Whealey, 1972). The second was called “Political Action: The Problem of Dirty Hands” (Walzer, 1973). He then worked on this problem in the 16<sup>th</sup> chapter of his book on just and unjust wars from 1977 (see Walzer, 1992, 251–268) and included it systematically in an article entitled “Emergency Ethics” from 1988 (in: Walzer, 2004, 33–51). However, it is important to point out that Walzer immediately follows T. Nagel and his reflections in his important essay entitled *War and Massacre*. In this text, Nagel analyses in a very general way the tension between the absolutist and the utilitarian approaches to the rules of war and in conclusion deals with the so-called “pessimistic alternative,” which he calls the “moral blind alley”. This is a specific type of moral dilemma, where a morally innocent person knows that there are certain “results” of behaviour that must in all circumstances be avoided and that there are at the same time certain “costs” of behaviour that he can never justifiably pay. Nagel argues that we have to deal with the

The concept of the supreme emergency arose at the beginning of the 1970s, and Rawls also advocates it.<sup>4</sup> B. Orend, who was instrumental after thirty years of opening a new round of discussion on this concept, rightly claims that all of the basic arguments were formulated by Walzer: “Churchill merely inspires it, and Rawls merely apes it.”<sup>5</sup> At the beginning of the 21<sup>st</sup> century, however, the entire context of the subject has changed fundamentally. In the 1970s, the debate took place in the specific historical context of the Cold War and was immediately triggered and concerned with the still-living experience of the Second World War, which some of the actors had taken direct part in. The debate at the beginning of the 21<sup>st</sup> century, on the other hand, is taking place in a completely changed historical context following the end of the Cold War. The concept of the supreme emergency becomes only one of the motives of a general interest in the normative issues of terrorism and issues related to the Second World War retreat into the background.<sup>6</sup>

Notwithstanding these significant changes in the historical context, it remains true that all authors continue to draw on Walzer’s argumentation and deal with his key arguments. In the text which follows, I am concerned with introducing this complex issue within a whole range

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possibility that these two moral intuitions can never be combined in one coherent moral system, and that at the same time we sometimes cannot act honestly without being free of guilt or of responsibility for evil. “We have always known that the world is a bad place. It appears that it may be an evil place as well.” The entire structure of Walzer’s argument of the supreme emergency can be understood as a concretisation of these very general considerations of Nagel’s. See Nagel, 1972, 144.

<sup>4</sup> In the original text of *The Law of Peoples*, 1993, Rawls did not deal with the questions of a just war. See Rawls, 1999, 529–563. In the 1995 article “Fifty Years after Hiroshima”, which dealt with the moral legitimacy of the American bombing of Japanese cities and the use of atomic bombs, he worked with the term “extreme crisis,” although his basic characteristics matched Walzer’s concept of the supreme emergency. See Rawls, 1999a, 565–572. In *The Law of Peoples*, 1999, with reference to Walzer he now uses the term of the supreme emergency instead of extreme crisis. See Rawls, 1999e, 149.

<sup>5</sup> Orend, 2005, 134. This article is an unmodified version of the fifth chapter of Orend’s book *The Morality of War* (Orend, 2006, 140–159). The chapter is called “Supreme Emergencies”.

<sup>6</sup> See some of the most important texts of contemporary authors: Bellamy, 2008; Bellamy, 2004; Benbaji, 2010; Coady, 2004; Cook, 2007; Neu, 2014; Parkin, 2014; Primoratz, 2008; Roberts, 2011; Schwenkenbecher, 2009; Statman, 2006b; Statman, 2006a; Toner, 2005.



of contexts. I will not knowingly deal with questions concerning the application of the concept of the supreme emergency to the Second World War, since this issue requires detailed exposition and a separate interpretation. First, I will attempt an exposition of Walzer's term of the concept of the supreme emergency, for without this exposition one cannot understand the most important context of the debates and disputes which follow. The problem, however, is that the argumentation of this great narrator is, as always, dark, unclear and contradictory. For this reason, I will reconstruct the basic logical structures of his problematic argumentation, which will allow us to distinguish his contradictory key arguments from his unimportant ambivalent formulations that often lead to serious misunderstandings. This reconstruction should allow us to understand what a status supreme emergency actually means and at the same time to illuminate the background of the normative dilemmas faced by political leaders in this situation. (1) Then I will reconstruct Walzer's interesting and clear term of the "dirty hands" concept, which will allow us to explain several possible interpretations of these dilemmas. (2) In the third part of the text, I will summarize the results of the previous discussions on the concept of the supreme emergency in the standard theory of a just war. I will try to show that, at present, there are basically three fundamental ways of assessing the legitimacy of targeting or killing innocent civilians during a supreme emergency. Finally, I will try to justify that this morally and legally unjustifiable murder can only be excused under certain exceptional circumstances. However, this excuse can be justified only if the concept of dirty hands is combined with the concept of civil disobedience within the concept of a supreme emergency and on the background of some conception of global justice, global constitutionalism and *global governance*. (3)

## 1

Supporters of the concept of supreme emergency share the position of the "moral absolutists" already referred to, that the human rights of civilians are absolute and define the boundaries within which various consequentialist calculations can be made of the utility of a given war strategy. According to Walzer, the long history of organized human

violence has taken place and takes place within borders which are defined by morally justified rights of civilians. The immunity of enemy civilians may not be violated, even when the consequence of defeat in a just war will be the subsequent occupation of one's own territory, the inhabitants will be forced to pay unjust reparations, a puppet regime will be formed, a satellite state will emerge, some groups will be forced to go into exile, and so on.

In all usual cases of conventional war, we assume that a nation or people whose army is defeated in a just war survives physically and morally, and then we expect and, as far as possible support, its resistance against the occupiers within the altered internal and international state of affairs. In all these usual cases of conventional war, it is imperative to require compliance with the principles of a just way of waging war, and to reject their disintegration based on some idea of a slippery slope. In general, human rights can never be disintegrated or lowered, because nothing reduces them. Human rights are in fact internalised external constraints that lead to people generally feeling resistance towards criminal behaviour. However, the question arises as to whether they should maintain this resistance when the consequences of their just dealing will literally be disastrous.

Moral absolutists usually refuse to think about this possibility, which, after the historical experiences of the 20<sup>th</sup> century, does not sound entirely convincing. "How can we, with our principles and prohibitions, stand by and watch the destruction of the moral world in which those principles and prohibitions have their hold? How can we, the opponents of murder, fail to resist the practice of mass murder", even if that resistance requires us to "get our hands dirty" and "become murderers ourselves?" (Walzer, 2004, 37) However, if we question the absolute validity of the equal rights of innocent civilians and allow for exceptions to the moral rules, then from the viewpoint of such an escalated and quite extreme disaster, we are opening up the space for consequentialist calculations.

Walzer's concept of the supreme emergency attempts to combine the incompatible deontological and utilitarian concepts of war rules and the immunity of civilians from a point of view he describes as "utilitarianism of extremity". (Walzer, 2004, 40) From the point of view of utilitarianism, we should aim to achieve the maximum good for as many people as possible, and every person should be evaluated in an

equal manner. At the same time, utilitarianism presupposes a high degree of solidarity among strangers, and the innocence of civilians is understood only as one of the many values that are taken into account in the utilitarian calculation.<sup>7</sup>

However, in the event of an extreme situation, this mutual solidarity of strangers disintegrates, and the utilitarian calculation becomes a zero-sum game since only a negative value is attributed to the utility of our enemies. A negative rating spreads to the entire population and ultimately no life of the enemy has a positive value, for even the systematic mass murder of children can cause pain and grief to adults and thus undermine the enemy's fighting morale. The concept of the supreme emergency thus concerns those isolated moments when "the negative value that we assign ... to the disaster that looms before us devalues morality itself and leaves us free to do whatever is militarily necessary to avoid disaster..." (Walzer, 2004, 40). The point is that no political leader can expose the lives of his own political society and all its members to a fundamental risk if there is a possibility of immoral action that would allow him to reduce this risk in some fundamental way or even to avoid it.

At the same time, Walzer is very well aware that this argument is in itself problematic. From a moral point of view, in general, even if a person is threatened by a murderous attack, he may not purposefully endanger the life of some other innocent person in order to save his own life. The same applies to ordinary soldiers in combat, from whose individual point of view war is nothing more than a permanent state of supreme emergency. In spite of this, we do not allow individual soldiers to deliberately threaten or, worse, murder innocent enemy civilians. This means that in civilian life, just as in war, there are obvious limits to what individuals can do in self-defence, even in a totally extreme situation. But if individuals have no right to save their lives by deliberately threatening or murdering innocent people, neither at the same time may they empower their own political leaders to do it for them. Individuals cannot pass on rights that they do not have, so political leaders may not do more for them than they can do for themselves.

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<sup>7</sup> Brand, 1972; Hare, 1972.

From this obvious fact, Walzer concludes that in the case of the supreme emergency, the argument based on representation must be linked to an argument based on the “value of the community” (Walzer, 2004, 42). Not only are individuals represented, but also a specific collective entity that individuals create, from which they concurrently derive their practices, convictions and character. Individuals strive to take over and improve the way of life their predecessors have bequeathed to them, and at the same time they hope for recognition from their successors, who will take over and improve their way of life. This commitment, respecting continuity between generations, is embodied in the community and forms a very powerful feature of human life. If the “ongoingness” of a community is threatened, then this is the risk of a loss far greater than any other imaginable loss, except for the destruction of humanity itself. This is the risk of “moral as well as physical extinction”, the end of a certain way of life and, at the same time, the sum of particular lives, the extinction of a certain kind of people.<sup>8</sup>

Walzer believes that if the “political community” were only a neutral framework in which individuals seek only their own versions of good life, then the concept of the supreme emergency would have no meaning at all. However, the “state” is only an instrument of the community: it is a structure that allows the organisation of collective action, which can always be replaced by a different structure. If only “the size of the territory, the structure of governance, or even just prestige or honour,” is threatened in the defence against aggression, then there is no supreme emergency. A supreme emergency is a situation where a particular community consisting of men, women and children living a particular way of life is replaced in a manner that means the morally unacceptable “elimination of the people or coercive transformation if their way of life.” It is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are sometimes massacred is “literally unbearable”. The “physical and moral” survival

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<sup>8</sup> Walzer literally writes that the state of the supreme emergency does not exist when “anything less than the ongoingness of the community is at stake” or where the danger we are facing is “anything less than communal death.” This is an ambivalent formula. From the logical structure of his argumentation, it follows that the threat of the death of any community is a threat of the end of its existence. Walzer, 2004, 46.

of human communities are the highest values of international society, and if these values are truly threatened, then we come to a state of the simple necessity which stems from the struggle for survival.<sup>9</sup>

The concept of the supreme emergency thus justifies or excuses the deliberate threatening or murder of innocent enemy civilians if a “political society” faces aggression, and in the event of defeat it is threatened with systematic and mass murder or enslavement of its own population. However, this threatening or murder of innocents can be justified or excused only when it is the only possible means of averting this inescapable threat. The conduct of political leaders in a supreme emergency must therefore satisfy the basic criteria that are more or less explicitly contained in Walzer’s opulent narrative. Above all, it must meet the requirement of right intention: violating the immunity of enemy civilians can only be justified in the event of the real threat of an imminent disaster. In addition, they must satisfy the requirement for last resort: violation of the immunity of enemy civilians may only oc-

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<sup>9</sup> Walzer, 1992, 254. Walzer writes that “a world in which entire nations are enslaved or massacred is literally unbearable. For the survival and freedom of political communities... are the highest values of international society.” Here again, this is an ambivalent formula that does not explicitly distinguish between “survival” and “freedom” and can give rise to the unjustified idea that, in the case of resistance to such enslavement or killing, the primary and immediate concern is the preservation of freedom. From the logical structure of Walzer’s argumentation it follows that in the case of the supreme emergency, it is the survival of a political community that is an elemental precondition for the possibility of its free life. Based on this ambivalent formula, I. Primoratz, for example, argues that Walzer does not distinguish and at the same time confuses two different cases. The first concerns the threat of losing “political independence,” which is at most a “political disaster” and does not involve the supreme emergency. The second concerns “genocide, expulsion, or enslavement”, when this is a “moral disaster” that defines the state of the supreme emergency. A. Schwenkenbecher reiterates these arguments, and considers that this mistaken confusion is generally the result of Walzer’s communitarian position. In a previous reconstruction of the logical structure of his argumentation I have attempted to emphasise that it is precisely this communitarian view that establishes a possible distinction between “political” and “moral” disasters. A far more serious misunderstanding, however, is brought about by another motif. Both authors hold to the standard theory of a just war, and at the same time believe that in the event of a “moral disaster” threat, a moral justification can be made for the killing of enemy civilians as legitimate killing. Obviously, the prerequisite for this justification must be a very strong communitarian standpoint. I will deal with this in the third part of the text. See Primoratz, 2013; Primoratz, 2007b, 49; Primoratz, 2008, 592–593. Schwenkenbecher, 2009, 111.

cur when all legitimate means available to avert an imminent disaster are exhausted. In addition, they must meet the vaguely worded proportionality requirement whereby the averting of an imminent disaster must not cause an even greater disaster. Finally, they must meet the requirement of a reasonably foreseeable hope of success, where it can reasonably be assumed that a military strategy that fundamentally violates the immunity of enemy civilians will actually lead to the aversion of an imminent disaster (Walzer, 1992, 255).

In a supreme emergency, political society needs morally strong and at the same time determined political leaders who are able to recognise the evil that their own political society faces, as well as the evil they have to commit for their own survival, and, if possible, to stand up against both. In the case of a political leader, this is a person “who understands why it is wrong to kill the innocent and refuses to do so, refuses again and again, until the heavens are about to fall.” This person knows that “he can’t do what he has to do - and finally does”, and thus becomes a “moral criminal” (Walzer, 2004, 45). The role of a politician consists of not putting the life of his own political society and all its members at risk, if there is a possibility of an act, even an immoral one, that could lead to such risk being avoided. This does not however mean that his decision is literally unavoidable. It is that the sense of moral commitment to one’s own nation or people is so “overwhelming” that another result can hardly be imagined.

Walzer thus comes to the conclusion that the “utilitarianism of extremity” resulting from the response to a supreme emergency is “paradoxical”. The “paradox” itself is that “moral communities make great immoralities morally possible” (Walzer, 2004, 50) and the immoral murder of innocent peoples is at the same time “morally defensible” (Walzer, 2004, 34). Political leaders are morally obliged to act prudently and deliberately since they act in the name of others, so they can be morally obliged to do what is morally wrong, and they *have to dirty their own hands*. But if these “moral criminals” are the real leaders of their nation or people, then they must be able and willing, after the end of the state of the supreme emergency, to reaffirm the values and principles upon which their society is founded and which they have been forced to transgress temporarily by their actions.

## 2

The problem of “dirty hands” is one of the traditional themes of political philosophy (as well as of literature), essentially it is a political specification of a general ethical problem that concerns moral dilemmas of human action.<sup>10</sup> In this context, Walzer offers an interesting, clear interpretation of the problem of dirty hands that will allow us better to elucidate the normative dilemmas and the moral character of that “moral criminal” who comes to terms with the supreme emergency. According to Walzer, the problem of dirty hands can be dealt with in three different ways which are linked to different concepts of morality and politics.

(a) The first way is formulated in the “*neoclassical*” standpoint, whose leading exponent was Niccolo Machiavelli (Walzer, 1973, 175–176) who, in a crucial and provocative way, questions the classical Christian and humanist tradition, especially in Chapter 15 (and in the following chapters) of *The Prince* (Machiavelli, 1988). Walzer works from the probably justified assumption that Machiavelli’s moral judgements are still absolutist, while his political judgments are consequentialist.<sup>11</sup>

The result of this approach is a tension between morality and politics. A good man who wants to do important acts in politics sometimes has to do terrible things: “not depart from good, when possible”, but at the same time “acting against faith, against charity, against humanity, against religion” (Machiavelli, 1988, 70). Machiavelli tries to convince a good man not to be good if he wants to carry out politically significant actions. However, this does not mean that morally wrong acts are justified by their good political results; in such a case, it would not be necessary to teach the good man how not to be good, but only how to be good a new and more difficult way. The politically significant results of the actions of a good man who has dirtied his hands in political activities, however, excuse him, and Machiavelli presents power and glory to such people as the highest of political rewards. At the same time, however, he stresses that a good man is not excused and rewarded only for his willingness to dirty his hands, but he must do these bad things well. Political behaviour is thus organically associated

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<sup>10</sup> See Rynard, P.; Shugarman, D. P., 2000 or Primoratz, 2007a.

<sup>11</sup> See detailed explanations in: Skinner, 2000, 23–54 and Viroli, 1998, 11–73.

with accepting the risk of possible failure, and only when the politician succeeds does he become a hero, with his eternal fame the highest reward for not being good.

According to Walzer, the problem with this opinion is not that politicians under certain circumstances are required to dirty their hands, but that it does not deal at all with the state of the mind of a good man with dirty hands. Personal goodness is not at risk, Machiavelli simply puts it aside. His hero has no inner life and we do not know what he thinks of himself. In general, it can be assumed that he basks in the light of his newly acquired and legitimate fame, but then it is difficult to understand why he was so reluctant to learn how not to be good. Thus, the main objection relates to the fact that the crimes of this successful politician are judged only from a consequentialist point of view, that is, in respect of the results of his conduct.

(b) The problem of the internal stance of a politician with dirty hands is, on the contrary, the core of a second approach, which Walzer calls the “*Protestant*” position (Walzer, 1973, 177–178). In it, the only acceptable excuse for the criminal behaviour are personal doubts and concerns. This position was formulated brilliantly by M. Weber at the end of his essay *Politics as a Vocation* in which he dealt with the tension between the ethics of conviction and the ethics of responsibility (Weber, 2004). In politics a good person wants to do what “Christian servants” always wanted to do: promote goodness in the world and at the same time save their own soul. However, these two objectives are in sharp contrast: the politician lives “in an inner tension with the God of love as well as with the Christian God”, that “can erupt at any time into an insoluble conflict.” (Ibid, 90) The reason for this possible irreconcilable conflict is that in politics he must necessarily enter into “relations with the satanic powers that lurk in every act of violence” (ibid.) but was not called to this by God, who therefore cannot be used to justify it. His vocation is exclusively his own choice, which can only be satisfied when he becomes a tragic hero: when he uses a sword without divine legitimation in a political world that is organically linked to violence, he deliberately performs bad actions for good political results, deliberately takes full responsibility for the consequences of his actions and, if necessary, consciously violates moral commands, thereby sacrificing his own soul. This tragic hero is a “suffering servant” who, with a heavy heart, does the terrible and fateful things he must do, and Weber describes



him with passionate pride as “the authentic human being who *is capable* of having a ‘vocation for politics’.” (Ibid, 92. Emphasis M. Weber.)

According to Walzer, however, the problem with this position lies in the fact that the issue of dirty hands is resolved exclusively at the level of the individual conscience, and the suffering servant can ultimately only be a “hypocrite” or “masochist”. The crimes of this tragic hero are limited only by his ability to suffer, and there is no explicit backward reference to the moral code that has been pushed aside. According to Walzer, however, it is not possible and not even desirable to address the problem of dirty hands only within this limited framework. Awareness of ourselves and our own inner life may be a great value in the case of a tragic hero of this type, but heroic suffering should at the same time be expressed socially, since only thus is our understanding that certain acts are wrong confirmed and strengthened. In addition, it should be socially limited, because we do not want people who have lost their own souls to rule over us. Even a politician with dirty hands needs to keep his own soul, and it is best for every political society if he has the hope of personal salvation. This is how the problem of dirty hands is formulated in the third, “*Catholic*” position (Walzer, 1973, 178–180).

(c) In this position, even if a person commits moral wrongdoing because of some political good, he does not devote himself to satanic powers forever. The person concerned has committed a crime for which he should pay a certain punishment and his own repentance, and on that basis he can cleanse his dirty hands and maintain the hope of saving his own soul. This position is interpreted by Walzer on the basis of an ambiguous reference to A. Camus and the problematic characters of his play *Just Assassins* (Camus, 1958). The key hero of this drama is Ivan Kalajev, who at the beginning of 1905 assassinated Grand Duke Sergei, Commander of the Moscow military district. According to Walzer, this hero is a “just assassin” (Walzer, 2004, 15) who resembles the “moral criminal” in a supreme emergency.

At first sight, it may seem that this moral criminal has nothing to do with the moral criminal in the case of a supreme emergency. Kalajev committed a successful assassination, but he only succeeded at the second attempt. He withdrew from the first attempted assassination, as he would have killed the two children accompanying the Grand Duke in the carriage. But by doing this he put his comrades in great danger. Kalajev justified the rejection of his first attempt by the fact that kill-

ing must be based on certain rules, and not even in the fight against a tyrannical regime may an innocent person may be murdered

For us, however, it is the second main motif of this drama which is key: Kalajev from the outset maintains that in the case of the Grand Duke Sergei, he is assassinating a person who is the embodiment of a tyrannical regime and is responsible for his crimes. For this reason, he believes that the killing of this person is justified not only politically but also morally. At the same time, however, he insists that he is a good person who refuses to kill people, and maintains that the assassination was actually forced on him by the very existence of the tyrannical regime. So we can say that, according to both Camus and Walzer, an organic part of a tyrannical regime is that it forces a good man to break the absolute moral rule of "Thou shalt not kill". However, in this context Kalajev is very well aware that by the assassination he is only "imitating his enemies".

After the successful assassination, Kalajev is captured and sentenced to death. He will not accept the offered pardon and refuses to repent before the official and religious authorities of the tyrannical regime. He accepts his execution as justified punishment for killing a man and for redemption of his own guilt. His execution is thus the organic culmination of the entire assassination, and Kalajev becomes the tragic hero who legitimately kills a representative of a tyrannical regime, albeit at the same time violating the absolute rule of "Thou shalt not kill" and sacrificing his own soul. Accepting his own execution as the due punishment for violating a moral rule at the same time means re-affirming its absolute validity. That is why Kalajev also claims he "has laid down his life twice over". If he had not been executed, he would have been a mere murderer. But when he dies on the scaffold, he does not have to apologise for his murder, since the execution itself is his own redemption. He agrees that he is a criminal, but at the same time no one can reproach him with anything.

It is for this reason that Walzer rightly maintains that Kalajev's execution is "not so much a punishment as self-punishment and expiation" (Walzer, 1973, 170). His dirty hands are cleansed on the scaffold, and due to this redemption of his own guilt he allegedly becomes a "just murderer" or "innocent criminal". It is only on this basis that one can understand at the same time why this hero is called a just suicide assassin by Walzer, although he is not actually a suicide assassin. Walzer

admits that such an interpretation of the “Catholic” position is “a little bizarre” (*ibid.*), but he illustrates its key motifs. It is this third position that is the most important of all the aforementioned approaches, because it allows us to illuminate when a politician who becomes a moral criminal in a supreme emergency can at the same time become a real statesman who confirms the values and principles of his own political society by being able and willing to accept the punishment for his own crimes, thereby simultaneously opening up the opportunity for forgiveness and reconciliation.

### 3

In conclusion, we have to ask the more general question of whether the deliberate threatening or, worse, the murder of innocent hostile civilians can in some exceptional case really be justified or excused, and whether the concept of a supreme emergency should be part of the standardized concept of just and unjust war. In the course of ongoing disputes over the resolution of this issue, three basic stances have gradually emerged.

(a) Within these three basic positions, there is a clear predominance of authors who strongly reject the entire concept of the supreme emergency and claim that it should not be part of the standard concept of just and unjust war. Within this, individual authors make use of a variety of arguments that often overlap. Firstly, they maintain that the immunity of innocent civilians (together with the principle of double effect) is a fundamental and indisputable building block of any standard theory of just war and of international law. The murder of innocent people cannot be justified or excused even in a supreme emergency.<sup>12</sup>

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<sup>12</sup> In this context, for example, C. Toner maintains there are things that are so bad that it is better to die than to do them. “We and the world will perish anyway, sooner or later; we cannot change that. But we can at least, in so far as is in our power, let justice be done while we live.” The “culture and the morality of a people that so strikingly ended would not be forgotten”, and that it has ceased prematurely and at the same time “in good form” we should not see it as a “failure” or even a disaster. Toner, 2005, p. 561. This may be a secularised version of the above mentioned observance of God’s commandments and a belief in God’s mercy and salvation, regardless of the consequences.

They further maintain that in the history of human wars, probably no supreme emergency has ever existed. If one had ever existed, then the only prudent and considered way to avert this threat would be the defeat of the enemy's military forces, not the murder of innocent civilians, which would in reality exhaust our own military resources in an inefficient manner.<sup>13</sup> Another argument brought forward is that the very description of a supreme emergency is so vague and imprecise that justifying or excusing the murder of innocent civilians in situations of a supreme emergency unconditionally opens the space to a slippery slope, so that eventually all warring parties could invoke this exception (Coady, 2008b, 283–300). The problem is even supposed to be any effort to develop some precise and strict normative rules that would define this unique and exceptional situation, since the final result will be only that these restrictions or permissions will be applied in contexts that had not occurred to anyone (Cook, 2007, 140). All of these arguments can be supported at the same time by the rationale that no one has ever thought of considering the legal codification of laws that would legitimise in any way at all the morally justifiable murder of innocent civilians.

(b) The second position is supported by several authors who believe that the murder of innocent civilians can be justified in the most exceptional and extreme state of supreme emergency.<sup>14</sup> In their view, however, this state of affairs is to be defined precisely as a situation of “supreme moral emergency”, concerning the imminent threat of genocide or the expulsion of a nation or people facing ongoing aggression. The murder of innocent enemy civilians can be legitimate only if the extremely demanding criteria are met that always need to be contextually applied to a particular war situation and which must only be very difficult to meet. The most demanding criterion in this context is that of the reasonable probability of success (Primoratz) or the proportionality (Schwenkenbecher) of this war strategy to prevent some of the aforementioned moral disasters.

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<sup>13</sup> Both arguments can be found in: Bellamy, 2008b, 46–65; and Bellamy, 2004, 829–850.

<sup>14</sup> Primoratz, 2013, p. 19. Primoratz, 2007, 49. Primoratz, 2008, 592–593. Schwenkenbecher, 2009, p. 117–118.

If these conditions are met, then the political leaders whose political society is facing aggression face a choice between the legitimate killing of a limited number of innocents and the real threat of a moral disaster. If we look at this issue from a moral standpoint, then they should choose the first alternative, because if someone has a moral duty to act in a certain way, his actions are at the same time justified. From this very strong communitarian viewpoint it follows that if this behaviour is truly morally justified, then in such a case it cannot be murder of innocent persons, but their legitimate killing, which should logically become a specified evidentiary fact in international law.

(c) Finally, there is a third position which, in my view, is the most interesting, because it is the most comprehensive. It is based on the fact that, in the case of the real threat of one of the aforementioned moral disasters, it is permitted to threaten the lives of innocent foreign civilians for one's own self-defence. In this case, however, this is not the morally justifiable killing of innocent people, but their deliberate assault or murder, which can be excused because of this specific moral situation. It seems that this position is currently explicitly advocated only by B. Orend, who attempts an original and original interpretation of the supreme emergency, which is, however, in my view problematic.

Orend thinks that a supreme emergency must be interpreted from a "double perspective": from the point of view of the moral and consequentialist view point of the prudence or discretion of the chosen military strategy. From a moral point of view, the supreme emergency is a moral tragedy. Political leaders get into a moral dead-end, and no matter what action they choose, they can never be morally justified. They are "damned" when they do something, because by murdering enemy innocents they violate moral rules. And they are "damned" even when they do nothing, because they do not protect the innocent in their own political society from murder. So whatever they choose, it is always an evil act. This dilemma concerns the fact that we do not have the right to commit evil acts nor do we have the duty to violate this obligation. When we perform evil deeds, they are simply evil. From a consequentialist point of view, however, the supreme emergency is a struggle for survival, in which "we step out of the moral world", and enter a world in which mere necessity rules. From this perspective, the political leader of an endangered nation or people must do everything

necessary to survive and must follow the rules of rational choice that can help achieve this goal.

The victim of aggression is forced to murder innocent foreign civilians for its own survival. This killing can never be justified, but it can be excused by the bare need to fight for survival. According to Orend, however, part of this excusing should always be that, after the presumed successful salvation, the “victim” country should “render a public account” to its citizens and the international community of what they have done and why. After “rendering this account”, all those involved in these terrible acts should be absolved and not be subject to any form of moral, legal or political punishment (no disgrace or vilification, and certainly no post-war criminal tribunal). After the end of the war, the international community should also “give an explanation” as to why it did not effectively intervene and permitted such a terrible situation (Orend, 2005, 148-150).

Walzer briefly responds to Orend’s conception of supreme emergency, pointing out that it does not really differ from his own interpretation, since he merely repeats and confirms the very paradox in the conduct of political leaders with dirty hands, although he does it in a somewhat different and less provocative manner (Walzer, 2007, 168).<sup>15</sup> In reality, Orend simply claims that the wrong thing that must be done is wrong from a moral point of view. If we do this wrong thing, then our reasons must be prudent and considered, not moral. Walzer agrees and concludes that these reasons create what he himself called “a utilitarianism of extremity”. However, a moral paradox always opens up under an extremity, because political leaders are morally obliged to act prudently and deliberately, since they act in the name of others, so they can be morally obliged to do what is morally wrong.

These differing interpretations clearly show the key issues facing political leaders in a supreme emergency. If we take Orend’s interpretation literally, then it is problematic. The actions of political leaders cannot be interpreted from an incompatible “dual perspective” because even in this situation no one is able to step outside the moral world. However, a state of supreme emergency actually creates a tragic situation for political

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<sup>15</sup> Walzer responds here to Orend’s reflections by referring to M. Cook, who reproduces them in his article: Cook, 2007, 144-145.

leaders who are confronted with the threat of the demise of their own people or nation. Of course, this situation does not contain any moral paradox from a moral point of view. Walzer becomes entangled in this seeming paradox by interpreting the political leaders in a problematic way, and is unable to define precisely their diverse responsibilities and obligations. Therefore, in interpreting the nature of their obligations, he constantly fluctuates between heterogeneous variations with different moral meanings (“may”, “perhaps they should” or “must”), or even maintains that the conduct of political leaders is “morally defensible”.

This seeming paradox in fact grows out of the tension between the universal human right to life and the collective survival of a people or nation and its individual members, whose right to life is threatened. Political leaders must choose between devotion to universal moral principles and the extinction of their own societies or between the violation of universal moral principles and its survival. This choice reflects the conflict between different types of moral, political, legal and ethical commitments and obligations. If there is a tragic conflict between these different types of commitments and obligations, then political leaders have the political duty to give priority to their commitment to the innocent members of their own people or nation. If, however, they do so, they also bear a moral and legal responsibility for murdering innocents so that other innocents may survive. These are tragic heroes who have dirtied their hands in the interest of the survival of their own people or nation and of its individual members. From a moral point of view, these are criminals, because their conduct cannot in any way be morally justifiable.<sup>16</sup> At the same time, however, they may be “moral criminals”, whose actions can sometimes genuinely be excused. From this perspective, the concept of a supreme emergency is a communitarian doctrine. Actions which result in the murder of innocent people, however, can never be morally justified, only excused. For this reason, it is a concept based on a *moderate version of communitarianism*.

The question however arises as to how we should interpret and justify this moderate version of communitarianism. In this context Wal-

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<sup>16</sup> The supreme emergency exemption can't be based on the concept of “lesser evil”. See the positions of D. Statman or Y. Benbaji in: Statman, 2006a and Statman, 2006b, or Benbaji, 2010.

zer urgently needs some morally meaningful concept of “community,” because he believes that only on this basis is it possible to excuse the morally unjustifiable murder of innocent strangers. However, his concept of “community” is unclear, since he sometimes emphasizes the importance of specific “religious, political or cultural” communities. Most often he speaks of the “nation” or the “political community”, which differs from the state, which is a mere tool for the possible realisation of the communal life purposes of any political society. However, such an emphasis on the moral meaning of “community” is problematic, even if we were able to specify groups of people who are actually at risk in a supreme emergency. A supreme emergency arises if a group of persons is threatened with physical destruction through targeted genocide; if there is the threat of destruction of a culturally specific way of life of a group of people through their expulsion; or where there is threat of a governing regime being created in which the population of a defeated state or one of its groups would be deprived of the right to life. In all these cases, however, the defence of the physical or cultural survival of one’s own innocents cannot morally justify the murder of innocent strangers. In general, innocent strangers have the same right to life as our own innocents. From a moral point of view, the value of the life of some innocent persons cannot be overcome (“trumped”) by the values of some communal life of other innocent persons.

In a supreme emergency, a political leader bears the political responsibility for the life of the entire population (the “people”) of his state and of all its diverse groups (racial, ethnic, national, religious or social) that can be characterized by specific cultural forms and sometimes share an overarching cultural life form as a specific “nation”, having some generally shared and commonly recognized cultural characteristics. This political responsibility stems from his political commitment to his own people and is often closely intertwined with a dense network of ethical ties to his own nation. None of these political and ethical ties, commitments and responsibilities can morally justify the murder of innocent strangers. All of them taken together can, however, be the basis of an argument that could excuse this action in certain circumstances.

However, any excuse may only have moral or legal weight if all the strict criteria are met that justify such use of violence in its own self-defence (legitimate reason; right intention; last resort; proportionality; likely hope for success). These criteria should include a “public declaration of



intent”, which is of the utmost importance. A political leader facing a supreme emergency must publicly explain the catastrophic threat he is forced to face, as well as declare his horrific intention primarily to the enemy nation’s population which is to become the target of terrorist self-defence, and to its political leaders who are responsible for the situation which has arisen. This public declaration of intent should serve not only as a deterrent but at the same time should be addressed to all members of global political society with a request for help, a reminder of their own moral, legal and political commitments and obligations, together with an explicit call for them to be urgently met.

A totally unique and extraordinary supreme emergency may threaten us until such a system of global governance is established that will be based not only on the already existing global moral consensus on the human right to life but above all on the existence of a reliable institutional mechanism in which this moral right becomes an effectively enforced legal right. The key issue is, in fact, the tension between the moral, legal and political contexts of actions in a supreme emergency. Walzer maintains that the concept of a supreme emergency should not be a “permissive doctrine” and that its aim should be to make protection of the right to life “part of a wider moral world than it has been up to now” (Walzer, 2004, 49). The problem, however, is that Walzer is not able to provide sufficient justification for this praiseworthy demand. This fact is quite obvious when he interprets the already mentioned “Catholic” position on the very limited example of the “just assassin”. This assassin deliberately kills only an individual representative of the allegedly unjust governing regime and understands his own punishment only as a path to his personal salvation. His problematic act cannot therefore be understood as an organic part of a justifiable struggle for a fair transformation of the political and legal system of society, and its punishment cannot be understood as his own self-sacrifice in the cause of this common good. However, if the concept of a supreme emergency has any meaning at all, then it must be based on the internal connection of the two seemingly incompatible concepts of dirty hands and civil disobedience.

In general, the tragic dilemmas of heroes with dirty hands in a supreme emergency can be judged only against the backdrop of a historically specific relationship between morality, law, and politics in global society. In the present post-Westphalian world, the right to in-

ternal sovereignty is gradually being curtailed, which is complemented by the aforementioned restriction of the right to external sovereignty. The morally justifiable right to life is gradually becoming a globally enforceable universal legal right, to guarantee a global security system that has been created within the United Nations, in which diverse actors bear specified political responsibilities. The murder of innocents can never be morally defended, just as it cannot be legally justified in a system of international law by trying for some sophisticated specification and codification of the facts of a supreme emergency of a particular group of people in the event of violence between countries or within individual states (in the simplest model cases of civil war and national liberation warfare, which can sometimes overlap, even though in principle they are different cases).

In a supreme emergency, only an impartial International Criminal Court can be the key authority in assessing the nature and degree of legal guilt as well as the weighting of mitigating circumstances in dealing with the actions of various heroes (“moral criminals” or the usual murderous gangsters in political dress). This is also one of the key reasons why the decision-making of political leaders in a supreme emergency takes on such a tragic form, and why it can at the same time be seen as a specific form of civil disobedience within global society. Political leaders have no moral or legal right to order the murder of foreign innocent people for the survival of the innocent people in their own nation or people. If, however, for political or ethical reasons, they do, they have to live not only with “tragic remorse”<sup>17</sup> but also with the realisation that they were deciding in an extremely escalated existential situation, since they can never be sure whether they have met all the strict criteria that could excuse their terrible decision.

However, the important thing is that any political leader can only become a real statesman if he deliberately submits to the judgement and decision of the International Criminal Court. On its territory, he must explain all the circumstances of his tragic decision-making and try to justify himself by reasoning that he acted in good faith and on the basis of a reasoned belief that all the strict criteria that would have allowed his actions to be excused were met. At the same time, however,

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<sup>17</sup> See Wijze, 2004 and Wijze, 2007.

he must be consciously prepared to accept a possible punishment for this morally unjustifiable crime, although the punishment itself may be greatly alleviated by those mitigating circumstances. His defence should also include charges against representatives of global political society who have violated their own legal and political obligations by allowing the supreme emergency to arise, thereby breaching the fundamental principles on which the existence of a global society is based.

The conduct and decision-making of the criminal court should, however, be accompanied by moral judgements of the internally structured global public, which should express itself in particular on the political conduct of those global oligarchs who have permitted a tragic situation even though their political duty (which in the current situation cannot be legally enforced) was to prevent it, with the help of other states and their regional organizations. These diverse judgements of the global public should in particular be a stimulus for ongoing reform of the system of global governance, which ultimately should lead to no tragic situation of this type ever arising. It is precisely this process that has been tortuously proceeding at least since the end of the 20<sup>th</sup> century in the context of almost endless moral, legal and political disputes concerning the concepts of “humanitarian intervention” and “responsibility to protect”.<sup>18</sup>

The attractive and provocative concept of a supreme emergency deals with only one of the many component problems of the standard theory of just and unjust war. Nevertheless, it should remain part of this theory, notwithstanding that even in the bloody 20<sup>th</sup> century there was probably no threat of supreme emergency that could have been averted through the immoral and illegal murder of innocent enemy civilians that could be excused through meeting the strict criteria mentioned. From the foregoing reconstruction of the concept of a supreme emergency simultaneously, it follows that the very theory of just and unjust war (together with its individual concepts and terms) is only a part of the resolution of extremely difficult problems concerning the general issues of global justice, global constitutionalism and global governance. At the same time, this reconstruction perhaps adequately demonstrates

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<sup>18</sup> The course of this complicated and contradictory process is very well documented by, for example, Bellamy, 2006; Bellamy, 2008a, Bellamy, 2010; Bellamy, 2011.

that without this background, we are unable to explain and assess the diverse dilemmas of tragic heroes with dirty hands that result from the tension between the various types of their commitments and obligations. The same applies, at least at present, to all other specified areas of “applied ethics” and its own concepts and terms.



Justice in Cyberwar

Klaus-Gerd Giesen



## 1. Introduction

Over the last few years the world has obviously changed considerably. Among other things, new technology has deeply transformed our reality, our everyday life, our communications, and also the way war is waged. Smart phones, war drones, genetic therapy and cloning, and above all the spectacular rise of the Internet, to mention but a few, challenge our traditional views about justice and how to apply it to society.

Even more, the sudden appearance of new technologies has caused quite some confusion among people, resulting in a moral crisis (for instance in bioethics or as far as the use of drones in military operations is concerned), and in a crisis of intelligibility. The new technologies explode, so to speak, our traditional categories of thinking and the way we conceptualize the human being, communication between humans, and the relationship between humans and the machine as well as with the rest of the planet earth, the dichotomy war-peace.

Philosophy is precisely the main academic field in which urgently needed new conceptualizations may take place. For sure, we have to continue to study the “classical dead white men” for the sake of understanding them. However, it seems also highly interesting, and actually more challenging, to try to carefully use their writings in order to better understand the problems and issues induced by technology, to make sense of our new realities. And that is what will be attempted in this text.<sup>1</sup>

As far as justice-related issues are concerned, two fundamental stances about “dangerous” new technologies can be adopted: either a fatalistic one, or a “responsible” one. The first stance has been proposed, among others, by Martin Heidegger. In his *Letter on Humanism* to Jean Beaufret, published in 1949, Heidegger wrote the following obscure sentence: “Technology is by its nature a destiny – within the history of Being – the truth of Being as it rests in the oblivion.” (Heidegger 1949, 32) Five years later, in *Die Frage nach der Technik* [*The Question of Technology*], he makes it more explicit: “The essence of modern technology is revealed in what we call the *Gestell* [frame].” (Heidegger 1954, 27) The *Gestell*,

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<sup>1</sup> The text is the revised version of the opening lecture of the International Symposium on Justice which took place in Porto Alegre, Brazil. I would like to thank the organizers and participants for their helpful comments and questions.



which is actually much wider a concept than simple technology, leads us to “the extreme edge of the abyss” (Heidegger 1954, 30). He declares: “The threat to the human being does not come first from machines and technical equipment [...]. The real threat has already reached the human being in its essence. The domination of the *Gestell* threatens us by its ability to deny human access to a more original revelation and hence to a more original truth. And therefore, where there is *Gestell*, there is *danger*, in its strongest meaning. However, where there is danger, also rises what can save us. Let us carefully take into consideration the words of Hölderlin. [...] Thus, it has to be [...] the true essence of technology which contains in itself the rise of what will save.” (Heidegger 1954, 32)

According to Heidegger, the rescue from the technological catastrophe can only be performed by non-philosophical thought (*Denken*) which gradually may discover the truth of Being when the danger of technology is increasing. The danger to mankind is bigger, and the closer it comes to the abyss, the greater are also its chances of being rescued by the revelation of the truth of Being. Hence, we can see a sort of automatism in Heidegger’s approach: technology, under the domination of *Gestell*, being more and more dangerous, will almost automatically bring us closer to the truth of Being and therefore dictate our conduct in relation to it, provided that one pays attention to it, particularly through art and poetry.

In other words, the *Gestell* challenges us by the development of modern technology. However, we notice the challenge only if we pay full attention to the gradual arrival of the truth of Being, beyond any ontology and any ethics. The technology will remain out of human control as long as mankind does not have access to the Being, and thus to the *Gestell* which “frames” technology. The progressive loss of control of technology is therefore programmed; for the time being it remains beyond the human will. We cannot reach – and therefore slow down or regulate – the development of technology and its dangers until the truth of the mysterious truth of being is revealed to us, and thus explained to us what is actually the *Gestell*.

Martin Heidegger’s approach is, politically and ethically speaking, demobilizing and leading to apathy, since philosophy, the social sciences, and even politics can’t contribute to “tame” technology. Only the arts and poetry can... once we get close enough to the abyss. It is, thus, sheer fatalism. Heidegger’s former student Hans Jonas has opposed this

stance in his book of 1979 *Das Prinzip Verantwortung [The Imperative of Responsibility]*, which carries the subtitle “An Ethic for the Technological Civilization”. Jonas pleads for an active ethics of technology limiting its possibly negative consequences. Instead of just fatalistically waiting and doing nothing until “something” saves us from Prometheus unchained, Jonas proposes a Kantian inspired categorical imperative which goes as follows: “Act in a way that the effects of your action are compatible with the permanence of genuine human life on earth.” (Jonas 1979, 36) It’s a future-oriented, normative approach of technology leading to a theory of justice for future generations.

In this text, the second stance is adopted. To let it just go (before “something” saves us) may ultimately lead either to the potential collapse of the biosphere (for instance through nuclear war, or genetics applied to humans, animals, and plants), or at least to immense human suffering, even if there were an ultimate heroic creature or event which saved us from total disaster. In addition, intuitively I simply lack the “faith” in the very possibility of such an event. Thus, let us better attempt to *regulate* the use of technology before it’s too late. In each case the main question is: how far can we go? How can we use new technologies to improve our life conditions (alleviate poverty, raise comfort, reduce stress, etc.)? And what should be *absolutely* prohibited (nuclear war? human reproductive cloning? state surveillance of private space?)? If, technically speaking, anything goes, there should still be moral limits imposed by theories of justice, and possibly enshrined in legal norms.

In the following I would like to explore justice in a technological realm which has emerged very recently: cyberwar. And I would like to apply the theory of justice of one dead white man – Immanuel Kant – in order to modestly give some hints about how to *regulate* the rapidly developing cyber warfare.

## 2. Why is cyberwar an important moral issue?

The philosophy of war has existed since Heraclitus. That is because the dichotomy of war and peace structures our lives. Almost all major philosophers have outlined a philosophy of war and peace, including the most recent: Levinas, Rawls, Derrida, Habermas. They outline attempts

to grasp the very nature of war and/or peace, as well as to define justice in relation to this domain.

I would like to argue that cyberwar is changing our understanding of what war (and peace) actually is, as well as the relationship between the human being and the machine. At the same time, it introduces a completely new military dimension for which the philosophers have the duty to establish an ethical framework (in the Jonasian perspective), as it otherwise remains a state of nature in which the strongest actor rules without limitation.

Cyber warfare is a new warfare domain; national and international norms have yet to be established. Globalization and the Internet have given individuals, organizations, and nations incredible new power based on constantly developing networking technology. For everyone – ordinary citizens, scholars, soldiers, spies, propagandists, hackers, and terrorists – information gathering, communications, fund-raising, and public relations have been digitized and revolutionized.

We are now in the beginning of the Information Revolution. The computer is the new steam engine, so to speak. It dramatically facilitates the acquisition and validation of knowledge and information through the rise of the “cyberspace”. Nowadays more than one billion computers are directly connected to the Internet, and there are over 1.5 billion Internet users on Earth. As a consequence, all political and military conflicts now have a cyber dimension, the size and impact of which are still difficult to grasp, and the battles fought in cyberspace can in the future be more important than events taking place in the physical world. In cyber conflict, the terrestrial distance between adversaries is almost irrelevant because everyone is a next-door neighbor in cyberspace: with optical fiber and satellite transmissions, computer signals travel almost at the speed of light. The most powerful weapons are not based on physical strength, but logic and innovation. Cyber warfare is definitely unlike traditional warfare, but it shares some characteristics with the historical role of aerial bombardment, submarine warfare, and special operations forces. Specifically, it can inflict painful, asymmetric damage on an adversary from a distance or by exploiting the element of surprise (Geers 2011). And cyberwar is comparatively very cheap.

The interconnectivity of the Internet poses an enormous threat to civilian infrastructure. Indeed, most military networks rely on civilian, mainly commercial, computer infrastructure, such as undersea fiber

optic cables, satellites, routers, or nodes; conversely, civilian vehicles, shipping, and air traffic controls are increasingly equipped with navigation systems relying on global positioning system (GPS) satellites, which are also used by the military. Thus, it is to a large extent impossible to differentiate between purely civilian and purely military computer infrastructure. This poses a serious challenge to the principle of distinction between military and civilian objects (see below). Interconnectivity means that the effects of an attack on a military target may not be confined to this target. Indeed, a cyber attack may have repercussions on various other systems, including civilian systems and networks, for instance by spreading malware (malicious software) such as viruses or worms, if these are uncontrollable (Droege 2012).

Therefore, because of its increasingly ubiquitous reliance on computer systems, civilian infrastructure is highly vulnerable to computer network attacks. In particular, a number of critical installations, such as power plants, nuclear plants, dams, water treatment and distribution systems, oil refineries, gas and oil pipelines, banking systems (including cash machines), stock exchanges and all the rest of the financial world, hospital systems, railroads, and air traffic control rely on information technology. These systems, which constitute the link between the digital and the physical worlds, are extremely vulnerable to outside interference by almost any attacker. That is what is labeled the *Internet of Things*, i.e. all objects directly connected to the Internet.

In May 2009, President Obama made a dramatic announcement: “Cyber intruders have probed our electrical grid ... in other countries, cyber attacks have plunged entire cities into darkness.” Investigative journalists subsequently concluded that these attacks took place in Brazil, affecting millions of civilians in the state of Espirito Santo in 2005 and in Rio de Janeiro in 2007, and that the source of the attacks is still unknown (The White House – Office of the Press Secretary 2009). Richard Clarke, the former special adviser to President George W. Bush on cybersecurity said later: “Given the degree of seriousness that the Obama administration is applying to cybersecurity and the smart grid, we can look forward to the kind of things happening here that happened to Brazil, where hackers successfully brought down the power” (Mylrea 2009). The claim has been dismissed by the Brazilian government. Whatever the truth may be, Brazil is still today one of the most cyber-attacked nations in the world.

National security planners should consider that electricity has no substitute, and all other infrastructures, including computer networks, depend on it. The manipulation of electrical grid management systems is probably the greatest threat at present (Mele 2010). In addition, distribution networks for food, water, money, goods (supply chain management) and energy rely on IT at every stage, as do transportation, health care, and financial services. Potentially catastrophic scenarios, such as collisions between aircrafts, the release of radiation from nuclear plants, the release of toxic chemicals from chemical plants, or the disruption of vital infrastructure and services such as electricity or water networks, cannot be discarded.

In 2010, the Stuxnet computer worm, likely an American-Israeli joint venture, accomplished what five years of United Nations Security Council resolutions could not: disrupt Iran's pursuit of a nuclear bomb. A half-megabyte of computer code quietly substituted for air strikes by the Israeli Air Force. Moreover, Stuxnet may have been more effective than a conventional military attack and may have avoided a major international crisis over (human) collateral damage. To some degree, the vulnerability – even without any direct connection to the Internet(!) – to such spectacular attacks will provide a strong temptation for nation-states to take advantage of computer hacking's perceived high return-on-investment.

Military forces are, of course, no exception. IT is used to manage military forces, especially for command and control and for logistics, for example. Already today, it is technically feasible that a foreign state would take full or partial control of its enemy's army IT infrastructure and manipulates it in order to fire weapons, such as missiles, including nuclear devices, at its *own* cities and population.

All things considered, the current balance of cyber power favors the attacker. This stands in contrast to our historical understanding of warfare, in which the defender has traditionally enjoyed a home field advantage. Therefore, many governments may conclude that, for the foreseeable future, the best cyber defense is a good offense.

Today, cyber attacks can target political leadership, military systems, and average citizens anywhere in the world, during peacetime or war, in many cases with the added benefit of attacker anonymity. In addition, the rapid proliferation of Internet technologies, including hacker tools and tactics, makes it impossible for any organization, including

national armies, to be familiar with all of them. Frequent software updates and network reconfiguration change the Internet geography unpredictably and without warning. Cyber attacks are more flexible than any other weapon system the world has ever seen. They can be used for propaganda, espionage, and the destruction of critical infrastructure as well as of large populations. For the time being, there are few moral inhibitions to cyber warfare because it relates primarily to the use and exploitation of information in the form of computer code and data packets; so far, there is little perceived human suffering (Geers 2011). But that may change rather soon.

### 3. How to conceptualize cyberwar?

From the (Jonasian) ethical viewpoint it is important to differentiate between an act of cyberwar and an act which may be wrong but does not fall under the category of war. Unlike many other authors (Einzinger, 2011; Micewski, 2011) it seems appropriate to plead for a rather restrictive definition in order not to overload the concept.<sup>2</sup> One of the problems lies in the fact that intrusions on the national territory are not done by soldiers or objects (tanks, aircrafts, etc.). In this respect, some misconceptions should be put into perspective.

Cyberwar as such can only take place directly between two or more states. However, contrary to what believes Sean Watts (2012), strict state affiliation should not be the sole criterion for combatant status, that is, the otherwise restrictive definition should also include non-state actors which are subordinated to the will of a state, as for instance non-governmental group of so-called “patriotic hackers” in Russia, China, Israel, and elsewhere, which work closely together with the national armies and which are actually controlled by them (Ventre, 2011). As Michael Schmitt emphasizes, the existing international law provides some interesting analogies to be applied (the Tadić case of the International Criminal for the Former Yugoslavia, the Iranian hostage crisis in 1979, the Hezbollah case in 2006, etc.) (Schmitt, 2011, p.579). The definition

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<sup>2</sup> Section 2 partially stems from Giesen 2013.

excludes also non-state territorial units, such as the Turkish Republic of Northern Cyprus, Palestine, and Transnistria.

Unlike Marie Stella (2003), it seems that the principle of territoriality, as an essential attribute of sovereignty, should be an integral part of the definition, despite the fact that, due to the decentralized nature of the Internet, any malware can actually cross many borders within a fraction of a second before finding its target (Hare 2009). What matters here are the *effects* of any cyberattack on a national territory.

The principle of *armed* aggression required to justify any entry into war (Art. 51 of the UN Charter) should be maintained, except that the meaning of what can legitimately be considered as a weapon must evolve. A targeted, powerful, and destructive computer worm can perfectly match the definition of a weapon (Delbasis 2009, 97). Here again, it all depends on the effect. After all, a plane can also be used to transport food or to bomb cities. Cyberwar requires information technologies to be used for destructive purposes.

The specialized literature celebrates the resurgence of asymmetric warfare in cyberspace (Schröfl 2011): facing a state with a powerful cyberarmy, such as the United States, Israel, China or Russia, all other countries may have, to different degrees, some offensive or defensive cybercapacities and may be tempted to harass them. However, the balance of power leaves for the moment no doubt about the outcome of such an asymmetric conflict. It must nevertheless be admitted that neither total victory nor total defeat are likely in cyberspace.

One of the peculiarities of cyberwarfare is the possibility of a *sub rosa* conflict. In this case, neither the attacker nor even the defender wishes to make public, including in the eyes of their own people, the existence of a cyberclash – either in order not to lose face in the event of defeat (for the attacked state), or out for fear of the international public opinion (for the aggressor state), or (for both) to avoid an escalating conflict by a spillover effect on other military spheres (conventional or nuclear warfare), or to avoid the panic of populations (Libicki 2009, 128–129). The *sub rosa* conflict poses the dilemma of democratic legitimacy of any major military decision versus technocratic efficiency by experts. It is clear that from the standpoint of international justice, the greatest possible transparency must be required. Thereby, waging a *sub rosa* cyberwar should at least be discussed and authorized behind closed doors by the relevant parliamentary defense committees.

Following these prerequisites, one can quickly dismiss:

- *Cybercrime*, even by non-state groups, such as the Russian mafia. The Council of Europe is the only international organization to have regulated cybercrime activities.
- *Cyberpropaganda* and *hacktivism*, even if they may include DDoS attacks against government websites.
- A one-time *cybersabotage* by a state: the Stuxnet virus remains thus significantly below the threshold which reasonably defines cyberwar.
- *Cyberespionage*: As a matter of fact, espionage through new technologies is as old as the relations between states. The hacking of government computers, or implants such as the Flame worm, or the theft of data, do not make any exception.
- *Cyberterrorism* and *cyberguerrilla* are the result of non-state groups against one or several states (some scholars believe that the attack on 21 October 2002 against the internet domain name root servers was perpetuated by Al-Qaeda), and therefore do not fall within the category of interstate conflict.

Thus, the dividing lines between different malicious activities taking place on the Internet are actually not so blurred.

#### 4. Towards a Kantian Theory of Just Cyberwar

We now can turn to the question of the proper basis for an *ethical* approach which could deal with the issue of cyberwar. My preference goes to the just war theory which historically stems from natural law, precisely because it is an old theory (from Cicero to Walzer). Gradually, over the centuries, the just war theory was able to adapt to all technological revolutions. In the 16<sup>th</sup> century, for instance, Vitoria introduced the important distinction between combatants and civilians, with the concomitant notion of collateral damage, as a result of the emergence of artillery technology on the battlefields. Also in the 1940s and 1950s, John Ford, Paul Ramsey, and James Turner Johnson, among others, discussed the highly relevant question of whether a defensive nuclear war can be just. The just war theory is thus very flexible – almost a casuistry – and adaptable to new technologies of warfare (Giesen 1992, 123–150, 267–277).



However, the classical just war theory will be amended here by reference to Immanuel Kant, in the sense that it seems logical to add to the traditional *jus ad bellum* and *jus in bello* a Kantian *jus post bellum* (Kant 1797, §§58–60). As I have tried to demonstrate elsewhere (Giesen 1997), Immanuel Kant was himself not only a philosopher of peace, reputed for his seminal writing on *Perpetual Peace*, but also a philosopher of war who, in the *Metaphysics of Morals*, developed a theory of just war, except that his ultimate philosophical foundation is provided by the subject and not by a metaphysical natural order (as in natural law).

As already in *Perpetual Peace*, but contrary to what he had noticed a few years earlier in his *Idee zu einer Geschichte in allgemeinen weltbürgerlicher Absicht*, Kant states in the *Doctrine of Law* that ultimately “perpetual peace [...] is obviously an impossible idea” (Kant 1797, §61), especially because the gradual extension of the *foedus pacificum* to the entire surface of the earth would lead to a (world) government failing to control the situation and, thus, to many civil wars. The problem of the moral status of war remains, therefore, unsolved, since it concerns the conflicting relations of states that are historically still outside the republican *foedus pacificum*, and of the republican states with one or more non-republican states. Paragraphs 56 to 60 of the *Doctrine of Law* are devoted to defining the criteria for determining the justice or injustice of any empirically given war.

From the outset, Kant distinguishes the doctrine of just war from its predecessors. Firstly by the structure of his argument: to the traditional *jus ad bellum* (§§ 56 and 57) and *jus in bello* (§ 57) he adds a surprising *jus post bellum* (§§ 58 and 60). And also by the content of the criteria developed. Here Kant goes back to the criteria used by Aquinas. Indeed, the four Thomistic *jus ad bellum* criteria are found, albeit grouped in a different order than in the *Summa Theologica*, in §§ 56 and 57, 1) The purpose of war is a more perfect peace (Thomas d’Aquino 1985, t.3, II-II, q29, Art.2, p. 219) (in the words of Kant’s §57: “...conduct war according to the principles that it is still possible to leave the state of nature of states [...] and to enter into a legal state”). 2) The formal declaration of war must be declared by the competent authority (Kant 1797, §55; Thomas d’Aquino, 280). 3) The war must have a just cause, i.e. “it is required that the attack on the enemy is due to some fault” (Thomas d’Aquino, 280) (Kant 1797, §56 specifies that it must be either following a first assault, or a threat, or an offense); 4) “The right

intention by those who make war” (Thomas d’Aquin, 280): for Kant, this precept refers to a formal prohibition of punitive wars and wars of extermination which may lead the prince to go to war for “impure” reasons (Kant 1797, §56). In Aquinas, as much as in Kant, the other three criteria of the usual catalog of *jus ad bellum* are missing; they had been added in between the two authors by Vitoria and Suarez, namely: 1) War must be the last resort to resolve a dispute; 2) There must be a reasonable prospect of success before declaring war; 3) There must be some proportionality in the relation of misconduct and punishment.<sup>3</sup>

I will now go through all seven *jus ad bellum* criteria (thus including the three Kant did not include) and try to apply them to cyberwar. The catalog is cumulative, which means that all *adopted* criteria must be met if a given cyberwar is to be considered as a just war.

## 5. Jus ad bellum

*The ultimate aim of war: a more perfect peace (than before the war)*<sup>4</sup>

This first criterion is difficult to fulfill, simply because cyberwars tend not to stop, but to continue almost endlessly, interspersed with more or less long intermissions, possibly at the *sub rosa* level. However, a war can be just only if there is an end to it, and if the plans for the post-war order correct some deficiencies properly identified prior to the conflict. This means that such a cyberwar can only be a response to a kinetic aggression or a cyberassault from another state, and only in the case when it is designed to eradicate the harmful potential of the opponent.

*The authority of the prince: the declaration of war*

Here we are faced with two challenges: time and attribution. Due to the high speed of cyberwar flows, the formal diplomatic declaration of war must be reduced to the minimum, that is to a computer signal sent a few moments before replying to the aggression, by analogy with the warning shot by an individual in an emergency situation.

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<sup>3</sup> On these missing criteria: Phillips 1984: 12-134.

<sup>4</sup> Several parts of section V have previously been published in Giesen 2013.

On the other hand, the problem of attribution lies in the fact that in cyberspace it is highly problematic to identify with certainty the attacker, particularly because of the possible presence of other actors in the virtual battlefield (Wheeler/Larsen 2007), and also because of the likely use of botnets (third-party servers), as was the case during the attack against Estonia with the diversion of at least one million computers. While absolute certainty is never possible in cyberspace, we can, however, *morally* require a very high probability of 99%. In other words: a probabilistic approach should prevail.

This criterion automatically excludes hackers and private contractors which are not submitted to state authority (for instance by sub-contracting), the *wannabe* states such as Puntland and Abkhazia, the cyberguerrilleros, and terrorist groups, unless they are protected by a state which has knowledge of their actions and does not intervene. Here comes into the picture the analogy with the invasion in November 2001 of Afghanistan by the United States and its allies: the Taliban were not aware of the preparation of the September 11 attacks, but subsequently refused to expel Al Qaeda from Afghanistan. Thus, a state which refuses to take action against aggressive non-state actors on its territory may itself become the legitimate target of a cyberresponse by the assaulted state, because it bears indirect responsibility (Tikk 2008, 22).

#### *A just cause*

Beyond self-defense against an armed attack (an ethical principle which is legally enshrined in Art. 51 of the UN Charter), which applies *a fortiori* in case of an attack by real-world objects (assuming a first response by cyberweapons against, for example, the occupation of part of the national territory), two other ethically acceptable scenarios seem to be possible: a humanitarian intervention (to be duly authorized by the UN Security Council), and a preemptive strike in case of a very serious threat from abroad which potentially endangers the survival of a country. In a not too far future the analogy is with Michael Walzer's concept of supreme emergency applied to the Israeli-Arab war which started on 5 June 1967 by a preemptive strike (Walzer 1977, chapter 16).

#### *A right intention*

One has to admit that his problem cannot be addressed correctly from a philosophical perspective, because especially in cyberspace any given

actor can easily disguise his evil intentions, partly because some actions are not immediately visible to everyone. As a result, we must insist on the greatest possible transparency, and remain attentive to the testimony of outside observers (NGO watchdogs, neutral states, etc.).

#### *The proportionality of fault and punishment*

Kant dismissed the criteria, because he wrote his piece at the beginning of the era of mass warfare through the introduction of general conscription (Giesen 1997). However, since cyberwar is exactly the opposite of mass warfare, the criteria will be kept here. It's actually the question of the threshold at which a cyber-response may start. Obviously, a simple DDoS is not enough. It is necessary that the cyberaggression causes human victims (through the Internet of Things) – for example from nuclear radiation or harmful emissions of chemical plants, or through malfunctions in hospitals – or targets *vital* key interests of the state (distribution of electricity and water, stock markets and financial systems, conventional or nuclear defense, social security, aviation system, etc.). In order to reach higher precision – which is not within the scope of this paper – it is very helpful to use the so-called “Schmitt analysis” in law, in which a qualitative one-to-ten scale is applied to seven criteria (Schmitt 1999; Michael 2003, 2; Wingfield 2004, 11–12).

The great advantage of cyberweapons lies in the precision with which the counterattack can be designed at different levels and in various fields (the opposite of mass warfare). Furthermore, since a pure cyberwar – without the involvement of other national armed forces – is rather unlikely above a certain level of aggression, the counterattack can also be made by using the multiplier effect from a close coordination between the cyberarmy and land, air and naval forces. In other words, a gradual build-up of war intensity is quite feasible through the phasing of the cyberattack with more traditional means of war (Sharma 2010, 63–67).

#### *War as last resort*

Immanuel Kant did not adopt this traditional *jus ad bellum* criteria, probably because he found it hypocritical. It doesn't make sense in cyberwar either. Indeed, after a cyberattack there is insufficient time for real diplomatic negotiations in due form. The moral minimum is, however, to ensure that the aggression did not happen by accident, for example by inadvertently spreading a virus that the attacker himself did

not notice. It is therefore necessary to carry out double checks. A first step in this direction was taken in 2011 with the installation, as in the good old days of the Cold War, of a hotline between Washington and Moscow to rule out any “cyber-misunderstanding”.

*A reasonable hope of success*

This last criteria was also dismissed by Kant, since it requires a considerable capacity of foresight analysis. In cyberwar, the temptation to conduct an asymmetric war – that is to say, a low-level and low frequency harassment – remains strong for weak states *vis-à-vis* one of the few cyberpowers. Here we can find a compromise between Kant and the late just war theorists: even if all other six criteria of the *jus ad bellum* are met, it requires the abandonment of any response if there is a high risk of failure, or of an even stronger counter-response with negative effects for the civilian population; or if it may contribute to an escalation involving superior kinetic forces of the enemy. Even in cyberspace is a minimum symmetry of forces therefore required. Thus, even if cyberattacked by, say, China, Vietnam has no interest whatsoever to respond. The same applies, for the time being, to Saudi Arabia against Israel. It is the precautionary principle: in these cases it rather seems morally required to bring the case before international organizations, such as the UN Security Council, and/or to ask for assistance and/or protection by a cyberpower.

## 6. Jus in bello

In the *Metaphysics of Morals*, Immanuel Kant seems to go back to Aquinas, i.e. to the days before Francisco de Vitoria, to formulate the *jus in bello*. First, he develops in §57 the Thomistic notion of permissive and non-permissive tricks: spies, ambush assassins, poisoners, snipers, and rumors are explicitly classified as illegal means, because they destroy the trust necessary for the development of a future (perpetual) peace (Thomas d’Aquino, 282–283). Second, there is a (weak) criteria of proportionality in the *jus in bello* that states – just as in Aquinas – that looting is prohibited.

However, the major issue in this parallel between Kant and Aqi-

nas lies in the “missing” element of the *jus in bello*: the discrimination between combatants and non-combatants, as well as the concomitant notion of collateral damage. Kant makes no mention of this criterion introduced by Vitoria, which underpins the assumption that he adopts a more traditional doctrine.

The absence of the criterion of discrimination between combatants and noncombatants and collateral damage clearly tells us that Kant had detected something in this concept which he deems inappropriate. Francisco de Vitoria introduced the new criterion in *De Indis*: “By accident, it is sometimes permissible to kill innocent people, even voluntarily, for example when you justly attack a fortress or a city, in which we know that there are many innocent people [...]?” (Vitoria, 140). The reason for the introduction lies in the technical change that occurred in the art of war between Aquinas and Vitoria: “...and when you can use war machines, sending projectiles or burn buildings without also hitting the innocent along with the guilty” (Vitoria, 140). He refers to the massive introduction of artillery on the battlefields of Asia Minor in the 14<sup>th</sup> and 15<sup>th</sup> centuries, particularly during the fall of Constantinople in 1453 by Mohammed II. This technology adds a new dimension to weapon systems since it requires the distancing of the hostile combatants from each other, as well as the absolute anonymity of the opponent, and since it has the inevitable effect of possibly reaching a large number of non-combatants (Johnson 1981, 175–176). Hence the need felt by Vitoria to clearly distinguish between combatants and non-combatants, while allowing to kill the latter by accident only (collateral damage).

In the *Doctrine of Law*, Kant makes no mention of this important criterion. Our hypothesis is that it does not see the relevance of making such a discrimination, because of a discontinuity in the art of war which he himself witnessed. Indeed, Immanuel Kant has been contemporary to the massification of war. He observes that in revolutionary France, as well as in Prussia in the late 18<sup>th</sup> century, the general mobilization of the population for military purposes was established (Corvisier 1995, 162–163). Thus, the philosopher of Königsberg understands that the nature of warfare has changed: it now embraces the entire social sphere. He draws – this is my hypothesis – an important conclusion: why keep the criterion of discrimination between combatants and non-combatants of the *jus in bello*, if the entire society is now involved, in one way or the other, in the war effort?

It seems that his silence on this traditionally significant criterion for Vitoria – and therefore his return to the Thomistic doctrine – can be interpreted as if Kant wanted to cancel the discrimination between combatants and non-combatants. Mass warfare makes such a differentiation impractical.

The three mentioned criteria will now be analyzed one after the other<sup>5</sup>:

*The authorization of ruses*

This is about deceiving the enemy by false appearances. It is already mentioned by Aquinas in his *Summa Theologica*. One could imagine that, in order to deter its enemy, a state, in a counter-attack, makes its enemy somehow believe that it has far reaching cybernetic abilities, which is not true. Such a behavior seems morally permissible as much as cyberpropaganda in times of cyberwarfare, for example by diverting media aggressor websites for spreading false information, or even cyberespionage.

*The proportionality of means*

In this context, an approach by successive levels is needed. It is important to first define them in a coherent doctrine. For instance, a cyberattack that causes hundreds of deaths by dysfunctioning the civil aviation systems should, of course, cause a less severe response than several nuclear explosions with important radiation effects on a large scale, requiring the evacuation of part of the territory for many years. This criterion is therefore in its structure almost utilitarian: a true calculation of consequences is essential.

*The discrimination between combatants and non-combatants*

It is even more difficult to operate this distinction in cyberspace than in the conventional battlefield. Fortunately, Vitoria gave us the mentioned casuistic concept *par excellence*: collateral damage, which is allowed unless directly intentioned. This means that the cyberforce general who supervises a response and perfectly knows that it will also affect civilian populations is morally “clean” if his action is first and foremost aimed

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<sup>5</sup> The remaining parts of sections VI and VII are revised and considerably enlarged versions of what has been sketched out in Giesen 2103.

at a military target, such as adverse computer servers or conventional military facilities (for example the communication systems between adverse army units).

This means that “only weaponry (cyber or kinetic) capable of discrimination (i.e., directed against legitimate targets) can be used: However, cyberstrategists should know that legitimate targets can include civilian objects – especially those having cyber aspects – that have dual military and civilian use” (McCright, Dunlap 2011, 89). The ethics of just war require both that targeteers “do everything possible” to ensure the target is a proper military objective. In practice, this seems – *for the time being* – to not be technically possible. Thus, the Kantian reservation *vis-à-vis* the concept of collateral damage is – *for the time being* – perfectly acceptable.

## 7. Jus post bellum

Just war *ethics* does not need to determine if the ethical norms should be implemented by codified legal norms or by the development of existing provisions of the law of armed conflict, as long as they *can* be implemented correctly. Therefore, new legal agreements are, ethically speaking, not compulsory. The vast legal literature over the last years has shown that *jus ad bellum* and *jus in bello* norms can be applied to the law of armed cyberconflict by drawing legal analogies from the UN Charter and from existing customary law.

However, it seems necessary to amend the traditional just war theory, which is limited to *jus in bello* and *jus ad bellum*, by adding the Kantian *jus post bellum*. And it will be demonstrated that the ethical *jus post bellum* norms must be implemented through a new international treaty.

As far as I know, nobody has yet tempted to adapt the Kantian *jus post bellum* to cyberwar. Most authors using the just war theory either do it in law (Denning 2007; Roscini 2010, Dipert 2010) and/or entirely ignore the Kantian *jus post bellum*. The very few authors who deal with it (DiMeggio 2005; Ohrend 2000; Ohrend 2005) actually get mixed up with two *jus ad bellum* provisions (the ultimate aim of war, and the proportionality of fault and punishment) which they mistakenly take for *jus post bellum* norms. They are exclusively concerned by the way war is



terminated and how the transition from war to peace is to be organized. Some even write mistakenly that “although he recognized the need to identify and discuss *jus post bellum*, Kant did not specify criteria for the category” (DiMeglio 2005, 133). Kant was not concerned with war termination or the transition from war to peace, except as prospective *jus ad bellum* provisions. Otherwise it was not his problem as a philosopher. His concern was rather on a more abstract level about the consequences of a particular war act for *all* or most countries of the international system of his time. We can draw two criteria:

Firstly, Kant is very much concerned by the “violation of [international] public agreements, which presumably are of interest to all peoples, since their freedom is threatened” (Kant 1797, §60). Applied to cyberspace, this disposition can be interpreted in the following way: the “bombing” and decommissioning of all thirteen root servers, meaning the implosion of the entire internet for at least some time, constitutes a breach of the agreement that connects all nations of the world to ICANN. Although the latter is formally a private firm in California, its role is to ensure the free movement of data through the constant and real-time update of the single global registry of domain names. The implosion of the internet (including the web and email), even for only a few days, would cause such economic and social damage that it seems justified to morally ban it.

Secondly, Kant provides us with a second *jus post bellum* norm: an unjust enemy is “one whose publicly expressed will [...] reflects a maxim according to which, if it were a universal rule, no peace is possible between peoples, while on the contrary the state of nature becomes eternal” (Kant 1797, §60). Here we recognize easily one form of the categorical imperative.

Such a return to the (political) state of nature seems possible in one case scenario: a malware which destroys, in a very short time and permanently, all or most artefacts connected to cyberspace: computers, mobile phones, tablets, servers, satellite systems, GPS, TV, digital radio, etc. with unimaginable consequences on the global economy, the relations between states, and the internal cohesion of societies. For sure, in Malawi or Kiribati the consequences would be relatively minor, but most developed states would experience shocks on an unprecedented scale, so that at least for a while no stable peace would be possible, and

a return to a sort of state of nature would appear as inevitable. Our societies have become just too dependent on cyberspace.

The two Kantian *jus post bellum* criteria of §60 of the *Metaphysics of Morals* may raise concern about a sort of virtual Armageddon in which the existing electromagnetic spectrum is used to destroy many parts of the cyberspace as such and many objects linked to the Internet of Things. Despite the fact that both are artefacts, they can nowadays be labeled as *global commons*. At least the most developed and emerging countries of the world heavily rely on them each single minute. The cyberspace and the Internet of Things have actually become the center of gravity for the globalized world (Schreier 2012, 13). By analogy with the biosphere one may call it the infosphere, and its almost total informational entropy can morally be considered to be the ultimate evil in cyberconflict (Taddeo 2011).

It is the common duty of all nations to prevent and to outlaw any actor who may try to interrupt the peaceful flow of data in the international system and to bring the world back to a pre-cyber age. It is especially the vulnerable developed countries that should fear such a debilitation equally. Unfortunately, it cannot be totally ruled out that a rogue state – such as North Korea – one day launches an attack against the entire cyberspace and/or the Internet of Things. In addition, transnational actors – such as jihadist groups – may acquire sufficient technical competence to destroy at least part of the Internet. We don't know what will be technically possible in, say, ten years.

Therefore, it seems of outmost ethical importance to demonstrate a common, universal (or almost universal) consensus on these issues. Experts of international law should be mandated, if possible by the UN Security Council, to find law provisions which clearly outlaw any attempt to destroy the cyberspace and the Internet of Things. Possibly they could qualify it even as a crime against humanity, because it targets one of the global commons as such. Any international treaty may be fostered against the will of the United States of America, who is reluctant because America has the most advanced cyberwar capability, and any new agreement or norm would likely oblige it “to accept deep constraints on its use of cyber weapons and techniques” (Gjeltén 2010).

## 8. Conclusion

In the foregoing, an attempt to superficially clear the ground has been made. All the different just war criteria deserve considerably deeper discussion. It was important to clarify several provisions, especially of the *jus ad bellum*, as some of them are frequently mixed up with the Kantian *jus post bellum*.

The main conclusions are: 1) The Kantian *jus post bellum* has, by far, not attracted enough attention as far as cyberwar is concerned; 2) While the Kantian *jus ad bellum* and *jus in bello* can be implemented by adopting and developing the existing UN Charter and customary law, this seems not to be possible for the *jus post bellum*. Here an international treaty is needed, for the simple reason that any other legal solution may only arrive when it is already much too late. It is morally required to implement, as soon as possible, an universal treaty banning once and for all any attempt to destroy entire parts of the cyberspace and of the Internet of Things.

# Cyberwar, Political Realism, and World State

Marcelo de Araujo



“Cyberwar” and “cyberattack” are terms that have become part of our political vocabulary. We use them to express our obsession with security and external threats in the age of information technology. Klaus-Gerd Giesen has advanced an in-depth philosophical account of cyberwar as a distinctly new form of warfare. Cyberwar is fought within the domain of “cyberspace” by means of “cyberweapons” which are then used to launch “cyberattacks” on enemies – and would-be enemies. One important philosophical question which both moral and political philosophers are expected to address here is the question relative to the circumstances of *justice* in the cyber space. Which forms of “cyber aggression” may be accepted as legitimate in the context of a cyberwar, and which forms of “cyber aggression” shall be rejected and condemned as instances of “cyberwar crimes”? These are, indeed, pressing questions. NATO, for instance, has already a Cooperative Cyber Defence Centre of Excellence, established in Estonia in the aftermath of a series of cyberattacks which nearly brought the country to a halt in 2007.<sup>1</sup> Fortunately, we do not have to concern ourselves here with the technical, political, and strategic questions with which NATO has to deal. Our question is, rather, of a philosophical nature, namely: can traditional just war theories be deployed in our understanding of the moral limits of cyberwar, or does cyberwar require a brand new just war theory? Giesen proposes an original attempt to employ Kant’s theory of justice in his own account of the moral limits of cyberwar.

I would like to put forth here two interconnected questions related to the proposal. The first question concerns the limits of Kant’s theory in the face of modern warfare; the second question concerns the very idea of a “cyberwar”. My point is that Kant’s theory of justice may, indeed, provide us with some general guidelines in the context of a discussion on the moral limits of war at large, including “cyberwar”. But the application of his theory may also, on the other hand, prevent us from comprehending the distinctive nature of modern international conflicts.

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<sup>1</sup> [www.ccdcoe.org](http://www.ccdcoe.org)

Kant may have witnessed major wars, but the idea of a *total war* was, it seems to me, alien to him. Kant certainly saw that states might be devastated in the course of a war, but he could not possibly have thought of a state of affairs in which mankind as such might be annihilated as the result of a war. This is, actually, the state of affairs in which we live now.

The kind of threat posed by cyberwar is not new. In the wake of the first successful tests with thermonuclear bombs, conducted by the United States and the former Soviet Union, Hans Morgenthau called attention to the “contrast” between the technological progress of our age and the limits of our “moral commitments” as one of the most disturbing dilemmas of our time. Writing as early as 1962, he affirms the following:

“The first dilemma consists in the contrast between the *technological unification of the world* and the parochial moral commitments and political institutions of the age. Moral commitments and political institutions, dating from an age which modern technology has left behind, have not kept pace with technological achievements and, hence, are incapable of controlling their destructive potentialities.”<sup>2</sup>

Morgenthau’s basic point here is that our “moral commitments” – and I assume he also means the traditional moral theories which have given support to our “moral commitments” – have not been able to adapt themselves to the circumstances of modern international politics.<sup>3</sup> Nuclear weapons of mass destruction have radically changed the geopolitics of the twentieth century. For decades, these weapons had been under the strict control of a few states. But over the years the technology for the development of nuclear weapons has also gradually leaked to other states, and even to private persons eager to sell this technology to weaker states or terrorist groups.<sup>4</sup> Moreover, unstable states such as,

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<sup>2</sup> Morgenthau, 1962, 174, emphasis added.

<sup>3</sup> Cf. Dipert, 2010, 406). “Finally, it is interesting that, as far as I can see, traditional ethical and political theories – utilitarianism, Kantian theory, natural rights theory, etc. – cast so little light on this new, and difficult domain.”

<sup>4</sup> Cf. e.g. Fitzpatrick, 2007; Kan, 2012; Ackerman & Potter, 2008, p. 419.

for instance, Pakistan and North Korea, which do already have nuclear weapons, may disintegrate in the future as a result of internal turmoil and it is uncertain whether a part of their nuclear arsenal might not fall in the hands of terrorist groups.<sup>5</sup> The danger of terrorism and nuclear conflict, therefore, is likely to increase, not to decrease in the future. The emergence of cyberwar now makes this scenario far more frightening and complex than Morgenthau could possibly have foreseen fifty years ago.

This problem is especially complex – and frightening – because it is not even clear whether, or to which extent, “cyberwar” may be comprehended as an authentic form of war, capable of being compromised by “principles of justice”. Of course we can use the word “war” in a broad sense, as when we speak of the “war” on corruption, or the “war” on drugs. The word “war” is clearly being used in a metaphorical sense in these cases. As Thomas Rid has recently noted, when people speak about “cyberwar” nowadays, the word “war” is being used, most frequently, in this rather broader sense.<sup>6</sup> One distinctive feature of a war, comprehended in a narrower sense, is that it is “public”. The public character of a war, in its narrower sense, becomes clear, for instance, when we see soldiers and officers wearing uniforms in the frontline. The use of uniforms by cyber soldiers, fighting within the cyber space, would be a waste of time, for one of the main features of cyberwar is the very fact that the operations are *not* public. As far as I am concerned, there has never been in the history of mankind a war where the main actors did not know each other; a war in which one state did not know which was other the state against which a war was being waged.

Two of the most debated cases of “cyberwar” in our own time can be referred to as “war” only in a broader sense of the word “war”. The first case is the American operation to dismantle Iran’s nuclear program in 2010; the other case is the attack against Estonia’s computer network in 2007. Both cases should be primarily described in terms of sabotage and espionage, rather than authentic operations of war.<sup>7</sup> As far as the

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<sup>5</sup> For a detailed discussion on the nuclear threats posed by terrorists, see Ackerman & Potter, 2008; Barnaby, 2005, p. 55; 103–107. See also Waltz, 2012, 8–9); Persson & Savulescu, 2012, 46–59); Persson & Savulescu, 2010, p. 663.

<sup>6</sup> Rid, 2012, 15; Rid, 2013, 9.

<sup>7</sup> Rid, 2012; Rid, 2013.



first case is concerned, the operation only became public because the computer worm known as STUXNET, used to damage the centrifuges in Iran, got loose on the Internet and spread across the globe. Its function was eventually disclosed by a team of specialists around the world and the affair then became public.<sup>8</sup> The Russian government, on the other hand, to this day denies its involvement in the attacks against the Estonian computer network. Thus, the attempt to articulate a theory of justice to fit “cyberwar” – at least in these cases – may be as misleading as the attempt to articulate a theory of justice to regulate acts of espionage or sabotage. During the cold war, espionage and sabotage loomed large, but as far as I know no one came out with the idea of proposing a philosophical “just war theory” in order to fit the specific constraints of a “cold war” so as to regulate the operations of espionage and sabotage.<sup>9</sup> Questions of justice were largely dismissed as out of place when the goals of security and survival were at stake.

Here, it is important to see that states, and individuals acting on behalf of states, usually act as they do in the of context international relations – not on the grounds of their unwillingness to abide by principles of justice, but because the structure of international relations often compels them to this kind of behavior.<sup>10</sup> And one distinguishing feature of the system of states is its “anarchical structure”, i.e. the lack of a central government analogous to the central government which exists in the context of domestic politics. This means that each individual state is the main one responsible for its own integrity and survival. In the absence of a superior authority, over and above the power of each sovereign state, political leaders and diplomats feel compelled to favor security over morality, even if, all other things being considered, they would be more inclined to trust and to cooperate with political leaders of other states.

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<sup>8</sup> Gross, 2013; Sanger, 2012.

<sup>9</sup> Cf. Dipert, 2010, 402–405; Gross, 2013, speaks of “silent war” between Iran and the USA.

<sup>10</sup> Cf. Mearsheimer, 2001, p. 18: “[...] anarchy forces security-seeking states to compete with each other for power, because power is the best means to survival. Whereas human nature is the deep cause of security competition in Morgenthau’s theory, anarchy plays the role in Waltz’s theory.”

Consider, for instance, the incident with a Norwegian weather rocket in January 1995. Russian radars detected a missile which was then suspected of being on its way to reach Moscow in five minutes. All levels of Russian military defense were immediately put on alert for a possible imminent attack and massive retaliation. It is reported that for the first time in history, a Russian president had before him, ready to be used, the “nuclear briefcase” from which the permission to launch nuclear weapons is issued. In the event, it was realized that the rocket was leaving Russian territory and Boris Yeltsin did not have to enter history books as the man who started the third world war by mistake.<sup>11</sup> But under the crushing pressure of having to decide in such a short time and on the basis of unreliable information whether or not to retaliate, even a well-intentioned Boris Yeltsin, willing to abide by principles of justice, might have given orders to launch a devastating nuclear response – doing so in spite of strong moral dispositions to the contrary.

Our greatest challenge nowadays, therefore, is not so much that of thinking of “principles of justice” to fit the age of internet and cyberattacks. Our greatest challenge is to think of an alternative to the structure of the system of states within which we currently live and which constrains us to resurrect old just war theories in the first place.

Once we have understood how the structure of the system of states often constrains actors operating within the structure from preferring war over peace, as well as conflict over cooperation and mistrust over trust, in situations in which each one would be better off by acting otherwise, we can also ask ourselves whether, given the goals of security and survival in a world in which weapons of mass destruction and information technology are becoming so readily available, we would not have reasons to radically change this structure, or perhaps even to get rid of it.

The idea I am proposing here is that the system of states should gradually give place to a “world state”.

My intention now is not to propose the blueprint for the implementation of this radical change in the structure of international politics, but simply to explain why this option is not incompatible with the realist approach of authors such as Morgenthau. The idea of a “world

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<sup>11</sup> Cirincione, 2008, p. 382; Pry, 1999; Hoffman, 1998. For other cases similar to the incident with the Norwegian weather rocket, see Schlosser, 2013.

state”, devoid of state borders and ruled by “supra-national institutions”, was perfectly in line with the original project of some early realists like Hans Morgenthau, though it eventually disappeared in the works of the so-called “neo-realists” like John Mearsheimer.

The suggestion that the system of states could one day be abolished might perhaps be objected to as an absurd idea and, indeed, as wholly incompatible with political realism itself. This objection is correct to the extent that political realism presupposes the very existence of the system of states. Should the system of states ever disappear, political realism itself would certainly fail to make any sense.

It is not entirely clear, however, whether political realism must necessarily be comprehended as a theory both *descriptive* and *prescriptive*. Although some realists do advocate political realism on both descriptive and prescriptive grounds, it seems to me that we can coherently retain only the descriptive aspect of the theory. Consider the following passage from Mearsheimer’s *The Tragedy of Great Power Politics*:

“It should be apparent from this discussion that offensive realism is mainly a descriptive theory. It explains how great powers have behaved in the past and how they are likely to behave in the future. But it is also a prescriptive theory. States should behave according to the dictates of offensive realism, because it outlines the best way to survive in a dangerous world.”<sup>12</sup>

Political realism describes the structure of the international relations in a world devoid of central government. The absence of an instance with the power to enforce laws for mutual benefit on a global scale means that the states can only count on self-help in the attempt to guarantee their own survival. This is, as Mearsheimer suggests, a “dangerous world.” But if the survival of mankind in the future becomes threatened in virtue of nuclear war or cyberwar (or perhaps both), then abolishing the system of states, rather than following the dictates of Mearsheimer’s “offensive realism”, may very well be the best prescription to follow in order to ensure our security and survival in this new “dangerous world”.

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<sup>12</sup> Cf. Mearsheimer, 2001, 11.

It is interesting to notice that, unlike neo-realists, early supporters of realism, such as for instance Morgenthau, did not always defend their own theories on normative grounds.<sup>13</sup> As early as 1962, Morgenthau understood that the greatest threat to the survival of mankind consisted in a “contrast” between our technological capability for mutual destruction on the one hand, and the poor “moral commitments” and “political institutions” of the present age on the other.<sup>14</sup> Our capacity for mutual destruction has been now enhanced by the possibility of a cyberwar. But Morgenthau’s proposed solution to the “survival of mankind” did not involve the attempt to resurrect the “just war theory” of an eighteenth-century philosopher, but, rather, in subverting the system of states which has constrained us to articulate just war theories in the first place.

Morgenthau realized that if the primary function of the state is to ensure the security and survival of its own citizens, then the state, conceived as a means to an end, had become “obsolete” by the time both the United States and the former Soviet Union had concluded their first thermonuclear tests. As Morgenthau put the problem in 1966, there is really no point in trying to protect oneself in the event of a major nuclear war, for all one can hope is to avoid such a war in the first place. The same applies now in the case of a grand scale cyberwar. Our obsession with security and survival can be only satisfied, Morgenthau assumed, by creating a “world state” operating within the framework of a “supra-national political order”.<sup>15</sup>

“Modern technology has rendered the nation state obsolete as a principle of political organization; for the nation state is no longer able to perform what is the elementary function of any political organization: to protect the lives of its members and their way of life. [...] Under the technological conditions of the pre-atomic age, the stronger nation states could, as it were, erect walls behind which their citizens could live in safety while the weaker

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<sup>13</sup> For an account of early realists who also supported the idea of a “world state” see Scheuerman, 2012b; Scheuerman, 2010; Scheuerman, 2007; Booth, 2008; Booth, 1991.

<sup>14</sup> Morgenthau, 1962, 174.

<sup>15</sup> Morgenthau, 1962a, 175; Morgenthau, 1962b, 284; Morgenthau, 1966, 10.

states were protected by the operation of the balance of power, which added the resources of the strong to those of the weak.

The *modern technologies of transportation, communications, and warfare*, and the resultant feasibility of all-out atomic war, have completely destroyed this protective function of the nation state. No nation state is capable of protecting its citizens and their way of life against an all-out atomic attack. Its safety rests solely in preventing such an attack from taking place.”<sup>16</sup>

Although a world state might not eliminate every form of violent conflict among competing groups, it would certainly end competition among states, which will be at the root of any possible grand scale cyberwar or nuclear war. True, Morgenthau’s idea of a “world state” has led some authors to call his theory “utopian realism” or “unconsidered idealism.”<sup>17</sup> There is, indeed, no reason to assume that the prospect for the emergence of a “world state” is less “utopian” today than it was fifty years ago. Yet, the urge to think of strategies in order to deal with possible threats to the future of humanity may be even stronger now than it was during the Cold War.

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<sup>16</sup> Morgenthau, 1966, 9. Emphasis added.

<sup>17</sup> Booth, 1991; 2008; Campbell, 2007, 202. Booth actually stresses the complexity of Morgenthau’s idea and does not use the label “utopian” in a negative sense. For criticism of Morgenthau’s idea of a “world state” see also Kaufman, 2006 and Speer, 1968.

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## List of Contributors

Josue Pereira da Silva, Professor of sociology at the State University of Campinas, Brazil.

Emil A. Sobottka, Professor of sociology at the Pontifical Catholic University in Porto Alegre, Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

Danilo R. Streck, Professor of education at the University of the Sinos Valley (Unisinos), Sao Leopoldo, Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

Marco Antônio Azevedo, Assistant professor of philosophy at the University of the Sinos Valley (Unisinos), Sao Leopoldo, Brazil.

André L. S. Coelho, Professor of philosophy at the University Center of the State of Para, Brazil.

Luiz Bernardo Araújo, Professor of philosophy at the State University of Rio de Janeiro, Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

Christoph Horn, Chair of Practical Philosophy and Ancient Philosophy at the Rheinische Friedrich-Wilhelms-Universität Bonn, Germany.

Fabricio Pontin, Capes postdoctoral researcher in the Department of Philosophy at the Pontifical Catholic University in Porto Alegre, Brazil.

Petr Agha, Director and Research Fellow of the Centre for Law and Public Affairs in the Institute of Law and State at the Czech Academy of Sciences in Prague.

Luiz Repa, Professor of philosophy at the University of São Paulo (USP), Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

Thadeu Weber, Professor of philosophy in the Department of Philosophy at the Pontifical Catholic University in Porto Alegre, Brazil.

Filipe Campello, Professor of philosophy at the Federal University of Pernambuco, Brazil.

Gustavo Hessmann Dalaqua, Doctoral student at the the University of São Paulo, Brazil.

Nythamar de Oliveira, Professor of philosophy in the Department of Philosophy at the Pontifical Catholic University in Porto Alegre, Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

Cinara Naha, Professor of philosophy at the Federal University of Rio Grande do Norte, Brazil.

Marina Velasco, Professor of philosophy at the Federal University of Rio de Janeiro, Brazil.

Marek Hrubec, Director and Senior Research Fellow of the Centre of Global Studies and the Department of Moral and Political Philosophy in the Institute of Philosophy at the Czech Academy of Sciences in Prague.

Josef Velek, Senior Research Fellow of the Department of Moral and Political Philosophy and the Centre of Global Studies in the Institute of Philosophy at the Czech Academy of Sciences in Prague.

Klaus-Gerd Giesen, Professor of Political Science at the Université Clermont Auvergne, in Clermont-Ferrand, France.

Marcelo de Araujo, Professor of philosophy at the Federal University of Rio de Janeiro, Brazil, and researcher of the Brazilian National Council of Research and Development (CNPq).

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The book contains critical analyses of injustice in connection to law and ethics, and develops normative alternatives linked to justice. It covers the current problems from social justice to cyber justice. The chapters address issues and concepts which guideline on social innovations, transformations inherent in democratizing processes, global conflicts and other interactions, including the ultimate danger of escalation to war conflicts, be they conventional wars or new cyberwars.

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