

The meaning of a discourse theory of law and democracy for Jürgen Habermas' critical theory

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1. Introduction

Over the course of more than 60 years of uninterrupted theoretical production, Jürgen Habermas' work has become so extended that there is hardly a region of social and human sciences that has not been subjected to his incomparable critical examination. The secondary literature that such work has produced is, of course, equally plentiful, so any of his structural elements is today unknown to the specialized literature. Yet despite this task, some intratheoretical relations have still not been sufficiently analyzed. Among them, the relation between critical theory as a theory of communicative action on the one hand, and the discourse theory of law and democracy on the other hand, is of particular interest. More specifically, the implications of such a discourse theory of law and democracy for a theory of society based on the dichotomy "system/lifeworld" are far from certain. The aim of this communication is to contribute to explain this issue by defending the following thesis: developing a legal-political philosophy in discourse theory terms, carried out mainly in *Faktizität und Geltung* [1992], can be understood as an attempt to correct the undue dichotomization between "system" and "lifeworld" maintained in *Theorie des Kommunikativen Handelns* [1981].

To support this interpretation, I first present the meaning of critical theory as a theory of communicative action by focusing on the dichotomy "system/lifeworld", on the thesis about internal colonization, and on some problems related to such a scheme. Second, I reconstruct the main elements of the discourse theory of law and deliberative politics. Lastly, I show that such a theory allows Habermas to overcome some problems that derive from his earlier critical theory of society.

2. The thesis of internal colonization and its problems

Based on both his previous theory of social evolution (Habermas, 1976; 1979a) and his "universal pragmatic" (Habermas, 1979b), Habermas published in 1981 what is his most important work: *The Theory of Communicative Action*. The aim of this book

was to inform about a broad concept of rationality, namely communicative rationality, which could serve as a normative criterion from which to criticize the pathological process of rationalization. Habermas differentiates between teleological rationality, whose aim is to modify something in the external world, and communicative rationality, which aims to achieve a linguistic understanding between at least two individuals. Both these forms of rationality correspond to forms of social action: strategic action and communicative action. Social actions can be distinguished according to their respective medium for coordination: through either interlinked interests or understandings (*Einverständnis*).

This program of theory of action can only be linked to the aims of theory of society by making explicit the relation between the forms of action/rationality and the structural spheres of action which, in Habermas's view, make up society, namely system and lifeworld. On the one hand, communicative action operates within the lifeworld; on the other hand, strategic action operates within the system.

Communicative action consisted of a cooperative process of interpretation in which, through a "discursive redemption" (*diskursive Einlösung*) of validity claims, at least two individuals agreed on a problematic situation relating to the objective, social or subjective world. In this cooperation however, subjects implicitly refer to a frame of common interpretations which they cannot get rid of. Such a frame of self-evidences is what Habermas calls "lifeworld" (*Lebenswelt*). When a fragment of this frame is thematized by a participant, it loses its unquestioned character to become a fact or a norm whose validity, that has been temporarily called into question, may only be returned by achieving a new understanding (Habermas, 1987: 605). Although *cultural* evidences are thematized against the lifeworld background, it itself is not composed of only such cultural evidences. In Habermas's model, lifeworld is composed of three structural elements: culture (science, law, moral and art), society (socially accepted practices, accredited forms of solidarity) and personality (individual skills and competences). From this perspective, symbolic reproduction of society as a lifeworld is divided into three parallel processes: cultural reproduction, social integration, and socialization.

Lifeworld is nevertheless just one of the *two* structural elements of Habermas's theory of society. According to Habermas, society should be understood at the same

time from the perspective of an “observer” of a system. Research into the structures and rationalization process of the system has to be done therefore from the point of view of a functionalist system theory. Within this functionalist frame, “system” is defined as «an ordered set of elements that tended to maintain existing structures» (Habermas, 1987: 225). Unlike the action coordination within the lifeworld, action coordination within the system do not operates by the mechanism of mutual understanding and the harmonization of the action orientations of participants, but through a «functional intermeshing of action consequences that remain latent; that is, they can go beyond participants’ horizon of orientation» (Habermas, 1987: 202). Within the system, Habermas differentiates between an economic and an administrative subsystem. Money and power are the two “steering media” operating respectively in the capitalist market and modern state administration.

Only by using a concept of society articulated at these two levels, can Habermas rightly understand the *kind* of problems that arise from the interaction between social integration and system integration. That is, only now does his theory of society take the form of a *critical* theory of society charged with diagnosing the pathological processes that derive from rationalization. Such a theory is developed as a new version of Lukacs’s theory of reification. The paradoxical Western rationalization, which Adorno and Horkheimer had diagnosed through their dialectic of Enlightenment, is now reformulated in the famous thesis of the colonization of lifeworld by systemic imperatives. With the development of capitalist societies, the non pathological mediatization between system and lifeworld becomes a colonization of the lifeworld (Habermas, 1987: 196). The result of this colonization is to substitute understanding for money and power as ways of action coordination *within* the lifeworld. This colonization of lifeworld is embodied in the phenomena described as “social pathologies” of bureaucratization, monetarization and juridification of social relationships.

In spite of the vast explanatory power of this thesis, the scheme “system/lifeworld” has posed Habermas significant challenges. On the one hand, and as Axel Honneth noted, with the hypostasis of the concepts “system” and “lifeworld”, that theory of communicative action is presented as real social spheres in which only one type of rationality operates, Habermas incurs in two complementary fictions. First, the fiction which, within economic and administrative subsystems, defined as “norm-free subsystems”, communicative action coordination cannot exist (Cortina, 1993; Conill,

2013; García-Marzá, 2013; Honneth, 2015; Baxter, 1987: 69; Baxter, 2002). Second, fiction in which a symbolic reproduction of lifeworld remains oblivious to strategy and domination (Honneth, 1991: ch. 9). On the other hand, this shift from a methodological distinction between two perspectives to a substantive or ontological distinction between two independent institutional spheres seems to contradict Habermas's emancipatory spirit because with his scheme, it would be impossible to introduce communicative action, and its critical potential, into the system (Honneth, 1991; García-Granero & Ortega-Esquembre, 2019; Romero-Cuevas, 2011).

I will argue that deliberative politics and the discourse theory of law are Habermas's attempt to (partially) overcome the challenges that arise from such ontological dichotomization. To do so, we first need to understand the profound significance of these new elements of Habermasian thought.

3. Discursive theory of law and deliberative politics

Based on his differentiation of formal world concepts and validity claims, in the 1970s, 1980s and 1990s Habermas embodied his theory of discourse in a consensual theory of truth (Habermas, 1973; 1998), a discourse ethics (Habermas, 1990a), and a political-legal philosophy or deliberative politics (Habermas, 1996). Although in Habermas's view the institutionalization of legal norms performs the function of compensating the cognitive, organizational and motivational burdens that postconventional moralities place upon individuals, the very legal norms, such is the main thesis, are liable to a discourse justification that operates by an analogy with discourse ethics. Such a thing can only be defended from the perspective of a normative theory of democracy, which has been referred to as "deliberative democracy".

The main thesis of Habermas's legal-political philosophy is anticipated in the preface of *Between Facts and Norms*, where Habermas maintains that the constitutional state cannot be maintained without radical democracy. The enjoyment of equal subjective freedom by private legal subjects can only be guaranteed if those subjects are, at the same time, regarded as citizens who configure, as authors with political autonomy, those legal norms assumed as addresses. Habermas defines this complex relation between private and political autonomy as the «internal tension (within the legal norm) between facticity and validity». Positive legal regulations are, at the same time, restrictions to freedom of action of *legal addresses* and promises of legitimacy of

legal actors. Such a normative understanding of the legal system should be based on a normative understanding of political power because in the constitutional state, such is Habermas's thesis, legitimacy of law depends on the process of shaping political will.

The system of rights guarantees that its contents appear at the same time as the *objects* imposed upon people as legal subjects, and as *products* of people as citizens. Basic individual rights, and the legislative procedure based on the principle of popular sovereignty, are thus "co-original". The key of this model is a democratic principle for the foundation of legal norms that acts similarly to the principle of discourse ethics. This democratic principle, which aims to provide a «procedure for legitimate lawmaking», states that «only those laws may claim legitimacy that can meet the assent of all citizens during a discursive process of legislation that, in turn, has been legally constituted» (Habermas, 1996: 110).

Until now, Habermas has showed that the legitimacy of legal norms rests on discourse processes of lawmaking which are institutionalized as political autonomy. However, Habermas has not yet explained in which sense an order of *political* domination can vindicate itself as legitimacy. Such a claim can only be guaranteed if the state and its institutions are, in turn, articulated through the code "law" (Baxter, 2002: 263). This self-referential process defines the core of the constitutional state (*Rechtsstaat*). Within the framework of a discourse theory of constitutional state, the source of the legitimacy of a political domination refer to its connection with certain legal norms that has been previously made legitimately; that is, democratically. Habermas distinguishes "political power" between "communicative power" and "administrative power". Political power, as a way of legitimate lawmaking, refers to the kind of communicative power that Hannah Arendt defined as «the potential of a common will formed in non coercive communication» (Habermas, 1996: 147; Habermas, 1983). Administrative power refers to what Habermas called in *The Theory of Communicative Action* "power as a steering medium" of a self-regulation administrative system.

From this perspective, it is easy to see the connection between communicative power and the legitimate lawmaking process, a process which, in turn, legitimizes exercising administrative power as political domination. Law is in charge of transforming communicative power into administrative power. On the one hand, citizens' communicative power is the source of legitimate law and, on the other hand,

administrative power should remain “tied” to that lawmaking power. The process of discourse political will-formation concludes in resolutions about policies and legal norms that must be formulated “in the language of law”, and that must also be consistent with a given juridical order. Only in this sense may communicative power result in an administrative power with the ability to make binding decisions. If, as we have seen, law is not only the media to organize political domination, but is also the source of legitimacy of such domination at the same time, then administrative power has to remain connected with «discursively generated communicative power» (Habermas, 1996). How such a connection happens in democratic life of societies is something that is not up to legal philosophy, but to the theory of democracy.

Habermas locates a new tension between facticity and validity in the relation connecting a procedural conception of legal norms production and “the facticity of politics”, which is usually understood in the realistic terms of a struggle for political power (Schumpeter, 1962). The discourse theory of democracy or “deliberative politics” (Bohman & Rehg, 1997; Cortina, 2009; García-Marzá, 2016) seeks to dialectically overcome liberal and republican models of democracy through a procedural model based on ideal deliberation. This side of abstract rights in which liberalism insists, but beyond the ethical life of a concrete community in which republicanism insists, can practical rationality be found in the discourse rules and modes of argumentation that take their normative content from the «basis of validity of action oriented to understating» (Habermas, 1996). However, and this is the core of the Habermasian model, the emphasis of the procedures of public opinion and political will-formation is not placed only on parliamentary deliberative practices, but also on the informal public space of civil society.

The flow of communication between public opinion and political will-formation, on the one hand, and binding legislative decisions, on the other hand, guarantee the correct transformation mediated by the code “law” of communicative power –which operates in both spheres– in administrative power –which operates only in the institutional sphere. Whereas within parliamentary procedures, a will-formation process appears that aims to solve practical issues by including negotiation of commitments, the communicative procedures of civil society are about thematizing those issues that are of concern to citizens. Through independent public spaces, civil society gets the necessary strength to transfer peripheral trouble to the political subsystem. Habermas clearly

defines the political public sphere as a «warning system with sensors that, albeit unspecialized, are sensitive throughout society» (Habermas, 1996: 359).

This model of political philosophy, articulated as a “two-track” model of democracy, has had an incomparable influence on theory of democracy. It is not clear, however, in which sense such a model can be compatible with the theory of society defended by Habermas a decade earlier in theory of communicative action terms.

4. Law as the dissolution of dichotomy between system and lifeworld

Unlike other critical interpretations, which consider Habermas’s discourse theory of law and democracy to be a project that is wholly inconsistent with the theses defended in *The Theory of Communicative Action*, in my view such a project constitutes the successful attempt to solve some problems that derive from the ontological dichotomy between “system” and “lifeworld”. This solution means *dissolution*, through the media “law”, of such a dichotomy; that is, opening up the administrative system to the communicative action which was previously assigned to lifeworld.

Hugh Baxter formulated an interesting criticism to the intratheoretical relations between both elements of Habermas’ thought. In his view, Habermas’s system-theoretical concepts are incompatible with a normative theory of democracy. Based on the dichotomization between “system” and “lifeworld” on the one hand, and between “steering media” and “communicative understanding” on the other hand, lifeworld’s contributions to the administrative subsystem are reduced to “mass loyalty” of citizens and taxes payment. Baxter rightly notes the difference with *Between Facts and Norms*, where the lifeworld’s contribution to the administrative subsystem is the «communicative power of a normative consensus among citizens». Baxter concludes, consequently, that «the social-theoretical model Habermas develops toward the end of *Between Facts and Norms* is inconsistent with the system/lifeworld model» (Baxter, 2002: 271). Although I agree with Baxter that the normative theory of law and democracy developed in *Between Facts and Norms* «is normatively ambitious in a way that *Theory of Communicative Action* is not» (Baxter, 2002: 237), I believe that such a project can be understood only on the basis of the former. With the “dissolution” of the dichotomy between system and lifeworld, that is, with the introduction of lifeworld’s contribution in the very system through a translation of communicative power into administrative power, Habermas develops a normative theory of democracy that, despite

being inconsistent with the former model, is convincing in itself. This theory, however, can only be understood on the basis of the categories of the theory of communicative action and universal pragmatics. Among them, the idea of a discursive redemption of validity claims for the legitimacy of norms –in this case, legal norms– is obviously central.

As we have seen, in *Between Facts and Norms* Habermas includes in the administrative subsystem a form of action coordination that had been previously reserved exclusively to lifeworld: coordination through linguistic understanding. The introduction of this communicative power into the political subsystem occurs through its translation into administrative power. This translation operates, in turn, through the code “law”. Unlike moral, science and art, law is not only a form of the lifeworld’s own cultural knowledge. Nor does it exclusively form part of the societal element of lifeworld. Rather law operates *also* and *at the same time* as the system’s own code and as a «transformer in the communication circuits between system and lifeworld» (Habermas, 1990b).

From the perspective of this feedback between the code “law” and the steering media “power”, the former dichotomy between system and lifeworld seems to be called into question and, by the way, in favor of a greater democratization of the system. The development of a legal philosophy in discourse theory terms means, in my view, the attempt to extend communicative action and rationality, which were previously reserved only for lifeworld, *also* to the system. Now the *political* contents of the system are, in the same way as the structural elements of lifeworld –culture, society and personality–, the subjects of a communicative rationalization.

Although the new definition of power indeed conflicts with the former one, such a thing must not be understood, in my view, as an intratheoretical contradiction in Habermas’ thought; rather the transit toward a discourse theory of law and a normative theory of democracy constitutes Habermas’ attempt to overcome some problems that appeared early in his career. This solution, however, can only be understood based on the theory of communicative action categories. The fact that the new model reconstructs communicative rationality *also* in the administrative subsystem does not go against that normative intuition which Habermas systematized in the form of a theory of society, but simply moves in its favor.

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