On the Intrinsic Correlation Between Public Legitimation of Democratic Law and Discursive Competencies of Citizens

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Abstract: The article discusses inter-correlations between conditions of democratic legitimation of modern law and discursive competencies of citizens as also individuals. The basic premises, on which the claim to the democratic legitimation of modern law is erected, are synthetically elaborated. On this basis discursive competencies are listed in short and their significance articulated with regard to so called weak – and strong public spheres. Crucially, the most fundamental change of basic premises on which democratic legitimation of modern law is contemporary thought of is clearly indicated.

Keywords: democratic legitimation of modern law, discursive competencies

Introduction

I direct my investigations towards processes and procedures of legitimation of a legal system on the one hand and towards an understanding of a structure of discursive operations enabling formulation of public reasons and correlated with them competencies of citizens on the other hand. The main theme is here the postconventional—modern—stage

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of a development of law, which consist in recognition that such a positive legal system of law is in need of *reasonable*—not merely rational—legitimation that requires a conformity of legal principles with moral principles which rests on 'the assumption that moral and civic autonomy are co-original and can be explained with the help of parsimonious discourse principle that merely expresses the meaning of postconventional requirements of justification'.[1]

The discourse principle[2] actually occurs to be parsimonious because it introduces the next but hidden requirement to the structure of reasonable legitimation of a legal system: a law-giver (or a norm-giver) should be first of all discursively competent otherwise his incapacity to participate in a practical discourse and to construct public reasons in favour or against certain common action norms turns to be the incapacity to act as an autonomous citizen either as an autonomous person. In this postconventional model of legitimation of a legal system the mere rationality of a law-giver (or norm-giver) is seconded, because the reasonableness—and implied by this discursive cooperation in doing justice to the conformity of legal principles with moral principles—trumps the meagre rationality.

[1] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, The MIT Press, Cambridge, Massachusetts, 1999, p. 107. Thus, Massimo La Torre names this view (and includes Robert Alexy's discursive stance on legal law) the 'inclusive natural law' doctrine; Massimo La Torre, *Constitutionalism and Legal Reasoning*, Springer, Dordrecht 2007, p. 147. Habermas, however, responds that 'the discourse-theoretic concept of law steers between the twin pitfalls of legal positivism and natural law', Jürgen Habermas, "Postscript to *Between Facts and Norms*", in: Mathieu Deflen (ed.), *Habermas, Modernity and Law*, SAGE Publications, London, Thousand Oaks, New Delhi 1996, p. 140.

[1] Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt, Shierry Weber Nicholsen, The MIT Press, Cambridge, Massachusetts 1999, p. 66: (D)—'Only those norms can claim to be valid that meet (or could meet) with the approval of *all* affected in their capacity as *participants* in a practical discourse'.

I. Fundamental premise

In the very famous article *Constitutional Democracy. A Paradoxical Union of Contradictory Principles?* Jürgen Habermas makes the comparison between political self-legislation and moral self-legislation *via* appropriate principles inscribed in these processes, namely the rule of law and categorical imperative. The comparison is founded on the principle of the autonomy of will. If the principle of autonomy is met, which means that if the very principle stands as the basis for a reflexive shaping of maxims, then the maxims as norms formulated with regard to their content (normative meaning) must on the other hand, due to their *form*, meet the requirement of *representing* the moral law which is a *universal* one. The intended meaning of the procedure is that if the maxims are shaped just with reference to the principle of autonomy, then the will reveals itself as commonly law-giving. This accomplishment of required universal form—of the maxims—results from Kantian *decisive assumption*, that what is in need of reflexive elaboration is *a construction of such conditions of action*, that if met, then the autonomy of will is granted.[3] In the practical philosophy of the famous thinker from Königsberg, it is precisely these conditions that the categorical imperative delivers, elaborated precisely for this goal. Therefore, the very goal of the categorical imperative is the formal *conformity* of a maxim of action to the moral law. The said conformity justifies rightness of moral norms (maxims).

In case of Habermasian practical philosophy the focal issue plays *a construction of such conditions of action* under which—if they are met—the individual autonomy as well as the public autonomy are granted. And when they are granted, then the legitimacy of law is justified. The construction of abovementioned conditions of action is founded on the co-originality thesis, that is co-originality of *the rule of law* and *the principium of popular sovereignty*, so in a result 'in normative terms, there is no such thing as a constitutional state without democracy'.[4]

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[3]   Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, Werke in sechs Bänden, Könemann 1995, p. 184 [396].

[4]   Jürgen Habermas, *The Inclusion of the Other. Studies in Political Theory*, Ciaran Cronin, Pablo De Greiff (eds.), Polity Press / Blackwell 2002, p. 215.

II. Construction of conditions of democratic legitimation of law

Construction of abovementioned conditions, under which the legal system of positive law is legitimised, is rooted in the theory of communicative action, or more precisely, in its further development, namely, in the discourse theory that differentiates the two principles: the principle of universalisation (U) from the principle of discourse (D).

The construction is, in short, following. Institutionalisation of discourse rules forms a legal code in which become expressed such understandings at which citizens may reach *vía* undertaking three kinds of argumentations that are held in public spheres: related to interests, related to interpretations of the good and accordingly to the good life, and at least related to a political justice and hence to moral issues in general. Because the principle of discourse (D) is focused on meeting the requirement of autonomy (as well private as public one) basically, and that is not a sufficient requirement for discursive solving *moral* issues because 'impartiality in judging cannot be *replaced* by autonomy in will formation'[5] otherwise consensus recognising the worthiness of normative claims would be equivocated with fair compromise, so in this situation discourse rules must be supplemented by the argumentative principium of universalisation (U) that precisely meets the requirement of impartiality as it tests norms-candidates whether they 'can count on universal assent because they perceptibility embody an interest common to all affected'[6] or not. From it follows that institutionalisation of discourse rules which are later on saturated by procedurally elaborated understandings of collective interests, collective self-understanding and understanding of a political justice must always stay in compliance with basic moral insights and therefore questions of justice 'trump' all other ones.

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[5] Jürgen Habermas, *Moral Consciousness and Communicative Action*, op. cit., p. 72.

[6] Ibidem, p. 65.

III. Discursive construction—on required knowledge, skills and competencies

The discourse—founded in discourse principle (D)—which is complemented by 'the principle of universalization (U) as a bridging principle that makes agreement in moral argumentation possible'[7] as it is oriented at the impartiality of normative claims, this is a specific kind of communicative action in which it is rooted, 'it reveals itself to be a reflective form of action oriented toward reaching an understanding.[8] The most important moments of this reflexivity are:

A) Distinction between generalisability and abstraction. Abstraction is characteristic specifically for normative (moral) claims testing which is oriented at justice; interests candidate for generalisations and the same evaluative expressions do as they 'present themselves at the most general level as issues of the *good life* (or of self-realization)'[9], that is, as always only particular values because characteristic for a certain historical form of life.

B) From this distinction follow—in analogy to Kantian three imperatives—three kinds of arguments to be used: moral ones, politico-ethical ones and arguments from (generalizable) interests[10].

C) In case of testing moral (hypothetical) norms-candidates, there the triple Kantian abstraction comes into play. I think here of:

(i) The abstraction from (*a posteriori*) motives of action, namely those related to the considered situation, (ii) 'abstraction from the particular situation', (iii) 'abstraction

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[7]   Ibidem, p. 57.

[8]   Ibidem, p. 100. And further he develops it as follows: "Discourse ethics is compatible with this [Kohlberg's] constructivist notion of learning [as "creative reorganization of an existing cognitive inventory that is inadequate to the task of handling certain persistent problems"] in that it conceives discursive will formation (and argumentation in general) as a reflective form of communicative action and also in that it postulates *a change of attitude* for the transition from action to discourse."; ibidem, p. 125.

[9]   Ibidem, p. 108.

[10]   Elaborated by Jürgen Habermas in Chapter IV, in his *Between Facts and Norms*, op. cit.

from existing institutions and forms of life'[11] (of the one who asks about how s/he should act in a given situation). What is specifically meant here are the following reflective operations: (a) abstraction and individualization as the distinction between autonomy and heteronomy, (b) reflection as understanding and applying reflective norms or principles, (c) generalization[12]. These operations are needed in order to formulate best reasons in favour of—or against—one of competing norms.

D) The participants take a hypothetical attitude when the discourse is being held;

E) Finally, 'a *decentred understanding of the world*'[13] can be assigned or attributed to the participants.

In other words, these advanced operations, characteristic of the post-conventional level of individual moral development as well as societal moral development[14], are required in order to formulate the best reasons in favour of—or against—one of the competing norms. These reflective operations also reveal the mechanism, or procedures, within which the transformations of interests, value-orientations and normative convictions proceed. The activity of forming norms-candidates involves these operations, whereby the best available reasons are elaborated and the norm-candidate is supposed to do them justice. As an incredibly important consequence, if the activity of forming the norms-candidates does not follow these operations, then the best reasons are *not* available to the participants in a discourse.

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[11] Jürgen Habermas, *Justification and Application. Remarks on Discourse Ethics*, trans. C. P. Cronin, The MIT Press, Cambridge MA 2001, p. 118.

[12] Jürgen Habermas, 'Moral development and Ego Identity', in: *Communication and the Evolution of Society*, transl. Thomas McCarthy, Beacon Press: Boston, 1979, pp. 83-87.

[13] Jürgen Habermas, *Moral Consciousness and Communicative Action*, op. cit., p. 138.

[14] Naturally, I presume here the Kohlbergian approach to the concept of moral competencies, because both the theory of communicative action and the discourse ethics were developed in a certain way on the fundamental rethinking by Habermas Lawrence Kohlberg of moral development. For the most current interpretations of the theory see Boris Zizek, Detlef Garz, Ewa Nowak (eds.), *Kohlberg Revisited*, Sense Publishers, Rotterdam, Boston, Taipei 2015.

All indicated operations are advanced cognitive operations, which form part of the power of judgement[15]; they presume certain knowledge, skills and foremost discursive competencies. I shall indicate below a short list of them which aims solely to make the reader aware how complex, extensive and serious these operations are. In general, citizens, also as persons, shall have a sound cultural, social and political knowledge which conditions understanding of a particular historical form of life within which values—always understood, therefore, as particular although intersubjectively shared interpretations of needs[16]—are commonly constructed. They also have to deal with certain economic knowledge and in some way understand market rules which all condition comprehending generalised interests. Citizens, also as persons, shall have certain knowledge—at least a sound picture of—about moral and legal principles as well as norms, about possible understandings of their legitimation and differences between their validity and eventually about the differences between interests, values and norms—as well moral as legal. These are only kinds of knowledge mentioned. But skills are important too. Basic skills implied by these procedures refer to schemes of generalisation of interests and values—and the other way round, to the schemes of concretisation of general interests and values, because they condition translation of these general terms into ends and meanings of everyday conduct. The same refers to norms and understanding which actions are permissible and which are not due to certain formulations of norms.

Discursive competencies, however, reveal to be crucial for the (public) power of judgement. They are complex and foremost concern the competence to (i) reflect about everyday behaviour and its ends, meanings as well as patterns of conduct in general and/or abstract terms (distance-taking, taking a perspective of the other, taking a hypothetical attitude, keeping emotions under control though not getting

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[15] See more on that issue in Karolina M. Cern, „Questioning equality for self-reflexive societies", in: Bartosz Wojciechowski, Tomasz Bekrycht (eds.), *The Principle of Equality as a Fundamental Norm in Law and Political Philosophy*, Jurysprudencja 7, Łódź 2015 (forthcoming).

[16] Compare Karolina M. Cern, *The Counterfactual Yardstick. Normativity, Self-Constitutionalisation and the Public Sphere*, Peter Lang Edition, Frankfurt am Main 2014, Chapter III.

rid of emotional engagement into the issue in question, especially when distance-taking is required for solving conflicts of values[17]); to (ii) formulate a moral judgement, which means, among others operations, (ii_a) differentiating of three kinds of arguments (from interests, values and moral as well as legal norms) which may serve as reasons for or against decision making about certain common action norms and further evaluating issue in question: (ii_b) understanding and also appropriate articulating potential conflicts of interest, values or collisions o norms, moreover, then (ii_c) autonomously constructing reasons for action taking/abandoning, (ii_d) exchanging reasons with others in a respectful fashion, (ii_e) cooperatively constructing impartial norms and finally (iii) the application of impartial norms to lifeworlds, i.e. applying abstract norms to the everyday conduct in a critical fashion, which actually means *critical transformation* of everyday conduct due to cooperatively settled common action norms, what seems, in fact, the hardest harvest.

IV. Discursive competencies—where and when are they needed?

In the deliberative democracy the term of communicative action refers basically to public spheres: to so-called weak publics where processes of opinion-formation take place and to strong publics, that is, political institutions where decisions are made. Weak publics, which are not politically institutionalised, have their 'foreheads'—as call them Habermas in *Between Facts and Norms*…—in wild circles of lifeworlds. The most consequential idea which stands behind

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[17] Neil Ferguson rightly underscores in this context that: 'when we explore the reality of reasoning within the democracy, we find that citizens are still bound to a style of moral reasoning which places ethno-nationalist, religious and/or familial grounds in a privileged position, undermining prior-to-society reasoning among the vast majority of the population in even the most sophisticated liberal democracies. However, we live in a global world, where we all face challenges (…) which will require us to decenter from reasoning which privileges 'us' over 'them', whether it be at the level of nation *vs.* religion or community *vs.* community'; Neil Ferguson, "The Universalization of Western Liberal Democracy and the End of Morality", in: Ewa Nowak, Dawn E. Schrader, Boris Zizek (eds.), *Educating Competencies for Democracy*, Peter Lang Edition, Frankfurt am Main 2013, p. 373.

that is that the public spheres generate, in short, legitima-
tion of law. If the deliberative democracy functioned well,
then the communicative will formation would start from its
basis, that is from lifeworlds as a massive context of unques-
tioned because unproblematized (in general, not in peculiar)
understanding, and then provide an outlet for political-insti-
tutional will-formation.

> The legitimation processes themselves move through var-
> ious levels of communication. Standing in contrast to the
> 'wild' circles of communication in the unorganized public
> sphere are the formally regulated deliberative and deci-
> sion-making processes of courts, parliaments, bureaucra-
> cies, and the like. The legal procedures and norms that
> govern institutionalized discourses should not be confused
> with the cognitive procedures and patterns of argumen-
> tation that guide the intrinsic course of discourse itself'.[18]

The problem is that the previous analyses concern-
ing the processes of saturating the legal code in the nor-
mative content and related to them analyses of advanced
reflective operations required for constructing publicly rec-
ognised reasons, even if 'should not be confused with the
cognitive procedures and patterns of argumentation that
guide the intrinsic course of discourse itself'—as it was quot-
ed above—still seem to overburden individuals, as citizens,
in discursive competencies. These discursive competencies
are already a fundamental prerequisite in lifeworlds, with-
in which (i) a communicative coordination of actions is pre-
sumed, (ii) but also the problematic issues often rise and
then either communicative solving of conflicts or referring
them further to discursive (institutional) settings is required
yet possible only due to previous competent explication of an
issue in question. Naturally, discursive competencies are
definitely required to handle with problematic—or simply
new—issues within the political, now formally regulated
deliberative system. If it would not be so, then the most con-
sequential idea, that the public spheres generate legitima-
tion of law, would have been easily questioned.

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[18] Jürgen Habermas, "Constitutional Democracy. A Paradoxical
Union of Contradictory Principles?", *Political Theory*, Vol. 29, No. 6,
December 2001, (pp. 766-781), here p. 773.

In other words, the idea of a rational individual (or of a rational citizen) is clearly replaced by Habermas—and most importantly, also by the most contemporary approaches to deliberative democracy—by the following inter-correlated assumptions of (i) processes of rationalisation of communication, including processes of institutionalisation of communicative action into its reflective form, namely discourse, (ii) acquiring competencies, or even educating competencies, by individuals as citizens, which are necessary to deliberatively participate in processes of reasonable as well opinion – as will-formation, (iii) and even more basically, I would say, of processes of reflexive transformations of the whole political system. As a presumption of a rational agent means, in general terms, ascription to her/him of a certain knowledge and certain (rational) skills, which allows in—practical philosophy—to construct a model of legitimised legal-political decision making, so a presumption of processes of rationalisation of communication and a presumption of a reflexive transformation of the whole political system indicate as their kernel appropriate competencies of action coordination as well as—even more importantly—acquiring certain competencies for legitimising decisions, whereby coordination of common actions proceeds.

Institutions of freedom, the functioning of which forms a very heart of the system of deliberative democracy, in order to function well shall be sustained by very competent citizens who may communicatively move upward towards more the institutionalised levels of formally organized political system or communicatively move downward towards the unorganised public sphere which delivers original inputs for social, political or legal change.

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