Jürgen Habermas on Law and Morality: Some Critical Comments

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I would like to touch on four themes in my paper: your moral theory, your legal theory, the relationship between law and morality from the viewpoint of law and the relationship between law and morality from the viewpoint of morality.

Morality and Morals

In your essay 'Diskursethik – Notizen zu einem Begründungsprogramm' (Discourse Ethics – Notes on a Foundation Programme), you write that the realm of practical questions in the post-conventional stage of moral consciousness is differentiated into two parts: morality (*Moralität*) and morals (*Sittlichkeit*) (Habermas, 1983a). Moral questions can in principle be decided rationally under the aspect of the universalizability of interests or that of justice. Evaluative questions on the other hand appear under the most general aspect as questions of the good life (or of self-realization), and are accessible to a rational discussion only within the unproblematic horizon of a historically concrete form of life or of an individual conduct of life (Habermas, 1983a: 118). One can also characterize this difference as the difference between norms of action and value orientations.

You point out that this division leads to problems, because the connection between the two realms is lost and a mediation becomes necessary. Such a mediation can, however, only come about if the forms of life in the concrete lifeworld are sufficiently rationalized.

In this connection I would like to mention the recent neo-Aristotelian turn in the Anglo-Saxon world. This turn is a reaction to a one-sided 'computational rational morality', to the predominant consequentialist moral theories and above all, to utilitarianism. In

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my opinion one can understand this reaction as a renewed emphasis on concrete morals against a consequentialist moral theory taken to extremes – and perhaps one-sidedly rationalized.

My question now is how you view this development and, especially, whether it can be fitted into your Kohlbergian theory of stages. The development I am speaking of could on the one hand be a reactionary tendency, reaching back to traditional norms and values and attempting in this way to tame modern rationality from the insufficiently rationalized lifeworld. Here one could think of Stuart Hampshire (1983: 99), who ascribes moral force to prohibitions connected with a 'way of life' because 'it has in history appeared natural and on the whole still feels natural'.

On the other hand, we could be dealing with a hopeful tendency, with a sort of catching up in the realm of morals. One could then understand the turn to a virtue ethics as an autonomous rationalization process of morals, as an approach to the rational working out of forms of life. Here one could think of theories such as those of G.J. Warnock (1971) or Bernard Williams (1985), even if Warnock is not a neo-Aristotelian in the strict sense, and Williams is more pessimistic about the possibility of the rationalization under discussion here.

If such a rational theory of morals had once been developed – in the form of a rational theory of virtue, for instance – then it could be connected to your discourse ethics forming a more general normative theory of action. It does not seem a priori impossible to integrate questions of justice and questions of the good life once again into a broader action-theoretical perspective. But does that fit your theory? To summarize: How do you view the latest neo-Aristotelian turn and how do you unite it with your moral theory?

Law and Juridification

My second theme is law and the thesis of juridification (*Verrechtlichung*). I have the impression that your theory of law is not quite consistent and partially incorrect, because you too often have a too positivistic and too system-functionalistic image of law. On the one hand, theoretical considerations of law occur in the first part of your *Theory of Communicative Action* and in some recent essays and lectures, in which you draw a quite positive picture of law (Habermas, 1988). On the other hand, in the second part of your *Theory of Communicative Action* we encounter a very gloomy

image. Perhaps for the sake of the conclusiveness of the argumentation, this image is overly simplified, so that juridification can be analysed as an apt example of colonializing tendencies.

Thus an ambiguous image of law results: the law is an institution, but it is also a result-oriented (*orientiertes*) control medium, which is jointly responsible for the colonization of the lifeworld. I would like to maintain in contrast, that even as a medium law remains primarily an agreement-oriented (*an Verständigung orientiertes*) medium and thus belongs to the same group within your dualism of media as influence and value commitment. I would like to cite four reasons for this assertion. Firstly, law is linguistic, and comprehensive agreement is inherent to language as an immanent *telos*. Secondly, law is characterized by the principles of legality, and in particular, principles such as generality, clarity, promulgation and freedom from contradiction have as a result that validity claims of law are subject to critical examination and discussion (cf. Fuller, 1978). Thirdly, law is capable of incorporating certain normative principles of democratic government as legal principles, and thus has an immanent resistance to encroachment on principles of this type (cf. Dworkin, 1978, 1985). Fourthly, law has developed recently in many cases into a more responsive and reflexive law, and these two legal types have at least a greater openness for the lifeworld and for democratic discussion in common (Nonet and Selznick, 1978; Teubner, 1983).

For those reasons I reach the conclusion that it is not completely impossible, but nevertheless quite improbable that law would become a completely result-oriented control medium colonializing or participating in the colonialization of the lifeworld. This conclusion also has consequences for the entire juridification debate.

If we view law as a medium which is immanently oriented toward communication or even as an institution, then the expression 'juridification' acquires a different — and less negative — ring. Then we can distinguish four types of juridification, of which only one is negative.

A first type is the juridification of those realms of the lifeworld in which the media of power and money indisputably play a role: parental authority, the power of professors, the mass media. If a certain amount of juridification occurs here, then that appears only positive to me.

A second type is the juridification of those areas of the lifeworld which still rest on uncritically transmitted prejudices. Where for

instance in the family sphere certain conceptions of the roles of men and women still dominate, then one should in my opinion assent to their replacement by a rationalized law – such as a modern divorce law.

A third type is the juridification of an already rationalized part of the lifeworld by a less rational law. For instance, teaching and research at Netherlands universities are adapted to economic needs by one centralized decree after the other. Your theory seems to refer only to this type of juridification, and only here do there appear to be negative consequences.

A fourth type is the juridification of politics and the economy. To me this type also appears positive, because it replaces media not at all oriented toward comprehensive agreement with one that is at least partially so oriented. That means the realm of the lifeworld enlarges. This does not happen by the media of power and money being completely replaced, but by the subordination of their effects to certain marginal conditions, through which the worst damage to the lifeworld can be avoided.

In this way a decidedly more positive image of law and juridification results than that which you draw in the second part of your *Theory of Communicative Action*. This more positive analysis also seems more compatible with the first part of your *Theory of Communicative Action* and your recent essays.

Law and Morality from the Legal Perspective

Thus I have reached my third theme: the relationship between law and morality, as seen from the law. I would like to confine this topic to an important complex of moral and legal problems: the area of bioethics, in connection with which we have had now for several years our Centre for Bioethics and Health Law here in Utrecht. I am thinking here of issues such as euthanasia, AIDS or animal experimentation. In the area of bioethics there exists a considerable entanglement of legal and moral problems. Law and morality are not yet always sharply differentiated.

That is exactly the reason one can bring this area into relation with your legal theory, because this theory maintains: law is differentiated, but it must always remain connected to morality, and a considerable part of the sources of legitimation for law lies in the feedback to a proceduralistically conceived morality.

In this connection, I would like to raise two questions. Firstly, are bioethical questions actually questions which can and should

be answered solely from a universalist moral point of view, or are they questions which ought to be reckoned with morals, because answering them is very much connected with personal life projects, with ways of life and concrete social situations. Even if we assume that one can arrive at satisfactory and relatively clear solutions in an *ideal* discourse situation, does it not still become impossible to reach good results in *concrete, real* situations, because of the fundamental contrafacticity of the ideal situation, if these results are based only on a proceduralistic morality. Are we not therefore compelled to appeal to concrete morals, if possible to a rationalized concrete morality? Put a bit more fundamentally: is the previously suggested synthesis of ethics and morality — the synthesis in a richer normative theory of action —not virtually inescapable for questions of this kind?

Secondly: is the circumstance that law, ethics and politics are so tightly entangled in this area an indication that they are insufficiently rationalized, a symptom of backwardness, or is the entanglement instead the harbinger of a reflexive law, a legal system in which fundamental questions are solved as much as possible in discursive procedures between the parties or their representatives? Put another way: is it necessary to divide law, morality and politics more clearly in order to solve these problems, or should we consider it positive that they are so tightly entwined?

Law and Morality from the Moral Perspective

In conclusion the fourth theme, the relationship between law and morality, as seen from the moral point of view, more precisely: the questions of political obligation and civil disobedience. In several essays you have dealt with the 'hot autumn', the protest actions in 1983 against the stationing of the new generation of nuclear weapons in the Federal Republic, the so-called 'theater nuclear modernization', which can now be eliminated (Habermas, 1983b). It is striking that you appeal there to the Rawlsian theory. It is doubtful to me that this quite narrow conception of civil disobedience fits well into your theory.

The theory of John Rawls is rooted after all in the analysis of a nearly ideal society and in the idea of a social contract. In your essay you also advance an argument for basing the duty of obedience not on a social contract, but on universalist principles. With that, you have in part already left Rawls's theory behind.

My main question here relates to your analysis of the current

problems that bring about civil disobedience. You say quite right that one is not concerned only with protests against concrete measure but with a deep-seated protest against the predominant technologic high capitalist form of life. What is at stake is thus a confrontati of different forms of life. You reach the conclusion that in such case essential functional and validity conditions of the majori principle are violated. But you do not offer a real solution to th conflict, and I have the impression that you cannot offer one with the bounds of your theory. Must morality and law, if they are bas solely on universalist principles, not of necessity remain insufficie in questions of this type because they leave no space for moral Or in Ronald Dworkin's (1985: 107) words: does a universal morality offer the possibility of justifying or criticizing 'integrit based civil disobedience', a disobedience founded on individual social integrity? To the extent of my knowledge, it is necessary th your moral theory – and perhaps your legal theory also – expanded, so that morals can play a more important part in it.

Translated by Mark Ritter

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References

Dworkin, R. (1978) *Taking Rights Seriously*. Cambridge, MA: Harvard Univers Press.

Dworkin, R. (1985) *A Matter of Principle*. Cambridge, MA: Harvard University Pre

Fuller, Lon L. (1978) *The Morality of Law*. New Haven, CT: Yale University Pre

Habermas, J. (1983a) *Moralbewusstsein und kommunikatives Handeln*. Frankfu Suhrkamp.

Habermas, J. (1983b) 'Ziviler Ungehorsam – Testfall für den demokratisch Rechtsstaat. Wider den autoritären Legalismus in der Bundesrepublik' (Ci Disobedience – Test Case for the Democratic Constitutional State), in P. Gl (ed.) *Ziviler Ungehorsam im Rechtsstaat*. Frankfurt: Suhrkamp.

Habermas, J. (1988) *The Tanner Lectures on Human Values*, Volume 8. Salt La City, UT: University of Utah Press.

Hampshire, Stuart (1983) 'Morality and Pessimism', in *Morality and Conflict*. Oxfo Blackwell.

Nonet, Philippe and Selznick, Philip (1978) *Law and Society in Transition: Towar Responsive Law*. New York: Harper and Row.

Teubner, Gunther (1983) 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review* 17(2): 239–85.
Warnock, G.J. (1971) *The Object of Morality*. London: Methuen.
Williams, Bernard (1985) *Ethics and the Limits of Philosophy*. London: Fontana.

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