PUBLIC DISCOURSE BETWEEN COUNTERFACTUAL IDEALISATIONS AND PRACTICAL REALISATION IN PUBLIC SPHERE

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Abstract

The article explores different approaches to the theoretical grounding of public use of reason developed by Habermas, Kant and Rawls. It is focused on Habermas's idea of communicative rationality and the public sphere, and then this approach is related to Kantian practical reason and Rawls's idea of public reason. The article highlights liberal and republican elements in Habermas's concept of public sphere, and emphasises that liberal concepts of democracy require public reason as a device of justification of constitutional norms, while the republican idea of popular sovereignty opens up the popular public sphere. The second part of the article describes the tension between the counterfactual nature of Habermas's discourse ethics and its practical realisation in deliberative politics in institutions of the state.

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Introduction

In the article we explore Habermas's concept of public discourse as the public use of reason. Public discourse is argumentation on relevant issues of general interest in the political public sphere. We start the article with Habermas's early conception of the liberal public sphere. The liberal conception of democracy is not grounded on external authority; it is based on the idea of the constitution as a social contract founded on basic rights and liberties, so it has to rationally justify these rights and liberties as universal norms that are acceptable to all citizens. Since his early writings, Habermas has followed Kant's idea of practical discourse that linked the principles of freedom, autonomy and moral reasoning. In his mature philosophy, Habermas developed his own version of the so-called "discourse ethics" that is constructed to a large extent on the image of Kantian deontological ethics. Habermas's motive for developing discursive ethics is his insight that political reasoning in the public sphere refers primarily to legal and constitutional norms, because the political system operates in the "medium of law"; in other words, political decisions have a "legal form." In addition to parallels with Kant, we compare Habermas's ideas with the philosophy of John Rawls, one of the most influential political philosophers from the end of the 20th century, who calls his approach "Kantian constructivism." All three philosophers are developing the idea of public reason as a device capable of justifying universal norms that provide the normative core to a well-ordered political society. The article highlights the counterfactual nature of public reason, i.e., presupposed idealisations that have to be made by those who are engaged in public reasoning in order to secure its rationality and justice, but these idealisations are usually not empirically true. If *prima facie* counterfactuals seem to be implausible, more thorough investigation shows that they are absolutely necessary for a theoretical construction of public reason and that have real effects on empirical reality, although they might be just part of thought experiment, as in Rawls's case, or are empirically only partially realised, as in Habermas's case. We start the article with a short review of liberal and republican aspects of Habermas's early conception of the public sphere, then proceed with indicating basic principles of Kant's ethics; in the second part, the article offers a comparison between Rawls's and Habermas's ideas of public use of reason, and at the end it shows how Habermas connects his counterfactual idealisations with the empirical reality of political system.

Early Version of Liberal Public Sphere

Habermas in the *Structural Transformation of Public Sphere* (1989), his first book originally published in 1962, reconstructs the emergence of the public sphere in a complex historical process of economic, legal, political, social, cultural and philosophical developments that between 16th and 19th century transformed a feudal monarchy into a modern liberal democracy. He describes the formation of market economy in newly established nation states, enlightenment requests for the free and autonomous use of reason, and the constitution of modern republics, based on human rights and rule of law. He analyses how first democratic constitutions radically restructured the very idea about the relation between the state and the society and emphasises that between the state and the society public sphere emerged

as an exclusive sphere of interaction, communication and mediation of interests. He calls the early modern conception of public sphere the liberal model of public sphere and defines it in the following passage:

> *In the first modern constitutions the catalogues of fundamental rights were a perfect image of the liberal model of the public sphere: they guaranteed the society as a sphere of private autonomy and the restriction of public authority to a few functions. Between these two spheres, the constitutions further insured the existence of a realm of private individuals assembled into a public body who as citizens transmit the needs of bourgeois society to the state, in order, ideally, to transform political into 'rational' authority within the medium of this public sphere* (Habermas 1974, 52-53).[1]

Habermas reconstructs the model of the liberal public sphere on the basis of the human rights written into preambles of early democratic constitutions. In this normative model we have on the one hand the democratic state, designated as a public authority because it has to operate in public interest of all citizens, and on the other hand a relatively autonomous civil society (*Bürgerliche Gesellschaft*) in the context of which private citizens, with constitutional guarantee of private autonomy, pursue their own private interests, and at the same time participate in the formation of public opinion and general will. Habermas's central claim is that the public sphere, in the context of which private citizens publicly discuss their interests in a rational manner, should be the sphere of mediation between citizens' interests and the state.

Habermas uses Rousseau's idea of democracy, articulated in *The Social Contract*, as a political system in which decision-making in political institutions of the state has to enact the general will of the people. However, as Rousseau argued that the general will results from unity of hearts not arguments, Habermas complemented the idea of general will with Kant's appeal, made in his famous article, *What is Enlightenment?* (Kant 1999b), that people should make the "public use of reason," i.e., that people should reason publicly about matters of general interest. The crucial question is how the general will of people comes about. Habermas's central claim, which marks his social and political philosophy from his early writings to the present day, is that if public discussions about competing interests are made in a form of rational argumentation, the particularism of private interests can be transformed into a rationally articulated general interest of citizens. "Public debate was supposed to transform *voluntas* into a *ratio* that in the public competition of private arguments came into being as the consensus about what was practically necessary in the interest of all" (Habermas 1962/1989, 83). According to Habermas, public debates are supposed to lead to the consensus of opinion that is rational, and simultaneously represents the embodiment of the democratic will of private citizens acting publicly, in a sense of transforming the particularism of interests into the universal agreement of what is good and necessary for a society as a whole.

Republican and Liberal Visions of Democracy

Habermas's analysis in the *Structural Transformations of Public Sphere* shows in the kernel the collision of a republican and liberal vision of democracy, that he in his later work tries to integrate into his own version of discourse model of the public

sphere. The republican idea of democracy is historically prior, as it is related to the ancient Athenian democracy, the Roman Republic and city states in the Italian Renaissance, and is associated with writings of Aristotle, Cicero, Machiavelli and Rousseau. As an idea of participatory democracy, it starts with the idea of citizens' active participation in governance, with the rule of the people, what is called the principle of "popular sovereignty." The principle of positive freedom is expressed in people's direct participation in political decision-making. Habermas calls it the principle of public autonomy (Habermas 1998, 67). A political order is legitimate if it is an embodiment of the general will of the people. For republicanism the people are above an individual. The conflict between particular interests is resolved because citizens participate in the enactment of a collective "vision of the good life," i.e., in a traditional system of values and beliefs on which community is based. In the *Structural Transformations of Public Sphere* Habermas detects this republican idea in various aspects of the public sphere, especially in the Rousseau's concept of the general will and in the public (*das Publikum*) as a "body of citizens," united as social macrosubject, as "the bearer of public opinion."

In contrast, liberalism is a modern political philosophy of representative democracy, associated with Locke, Kant, Bentham and J.S. Mill. It is based on ideas of freedom, human rights, rule of law and constitution as a basic social contract that defines rights as basic constitutional norms. It is grounded in the concept of the individual and her freedom that should be granted to her to the largest possible degree, limited only with the equal freedom of other individuals. This is the concept of negative freedom, i.e. freedom from external coercion and interventions. Habermas associates it with the private autonomy of individuals (Habermas 1998, 72). The second key concept of liberalism is equality of all citizens before the law. The realisation of both principles is possible only if the constitution grants and protects basic human rights and liberties. In contrast with republicanism, which is grounded in substantial ethical values that emerge from particular traditions of the community, liberalism emphasises ethical neutrality of the legal and political order. Visions of good life that impart substantial ethical norms and ways of life are the matter of private moral autonomy, specifically, of freedom of conscience. Political, administrative and judicial institutions are supposed to value neutrally in relation to private worldviews of its citizens. Legitimate are those decisions and actions of the institutions of the state that follow legally prescribed procedures. Citizens are free and equal before the law, so the operations of the institutions of the state have to treat them with impartiality, irrespective of their particular worldviews or specific ways of life. In the *Structural Transformations of Public Sphere* the liberal model of public sphere, based on rights and liberties, plays the central role in Habermas's definition.

In contrast to the republican model of democracy, based on external authority of traditional forms of life and collective beliefs, liberalism has a problem how to justify particular rights and liberties that have to be neutral in relation to traditional beliefs. The question is what are the norms that represent "constitutional essentials," and other important laws and regulations and how are they justified. In order to solve this problem, thinkers associated with a liberal political tradition introduced the idea of the public use of reason. As we indicated above, Kant famously requested that people get rid of the tutelage by external authorities and find courage to use

their reason autonomously. The central idea of the *Structural Transformations of Public Sphere* is that the public discourse is a discourse of argumentative public debate on important issues of general interest. Commenting on Rousseau's republican and Kant's liberal vision of public sphere, Habermas concludes: "the principle of popular sovereignty could be realised only under the precondition of a public use of reason" (Habermas 1989, 107). Public argumentation as a mechanism for producing and testing norms that regulate a political order is the central topic not only of his idea of public sphere, both the early and later versions, but of his social and political theory in general. In the following we will present Habermas's idea of communicative rationality and then compare it with Kant's idea of practical reason and Rawls's idea of public reason.

Public Reason as Counterfactual Idea of Communicative Rationality

In order to solve the question of public debates as a social mechanism capable of producing rationally justified norms, Habermas developed in subsequent decades a series of complex theories that cover various aspects of public communication, opinion formation and political system. He developed the theory of communicative action (Habermas 1984), situated it in the context of social theory based on the distinction between system and lifeworld (Habermas 1987), then proceeded to construct the theory of discourse ethics as a theory of practical discourse (1990; 1994) and finally he constructed the model of discourse democracy as his take on political and legal theory (1996; 1998). One of his contemporary critics admits that his theory is "far more ambitious than any other present-day Western philosophy and might well merit Habermas the title of being the last system-builder in Western philosophy" (Steinhoff 2009, vii).

The central element of Habermas's social and political theory is his concept of communicative action.[2] It provides the model of discursive dialogue as a process of reaching understanding among participants. Let me briefly present the version of communicative action that Habermas calls "formal pragmatics." Namely, this version articulates his most important ideas of argumentative interaction oriented towards reaching rational consensus among the participants.[3] It is a model of communication as *pro et contra* argumentation in a case that participants of interaction reject one or more statements as invalid. According to Habermas, in dialogue, each speaker with her speech acts poses to her interlocutors implicit claims to recognise the validity of her statements. Other participants can perceive her statements as unproblematic and as implicitly valid or, on the contrary, as invalid and reject one or more of them. If the statement is rejected, the process of argumentation can be set in motion that tests if the statement in question is grounded by sufficient reasons. In dialogic argumentation process, each participant offers warrants for her statements, and, in conditions of "ideal speech situation," the force of better argument prevails. In other words, if participants respect the force of better argument, they are motivated to rationally accept the best argument, so under ideal conditions the process ends with rational consensus and mutual recognition.

Habermas interprets this interactive nature of communication as the "validity basis of speech," namely that the speech acts in dialogue are meaningful if and only if they are recognised as valid by interlocutors (Habermas 1979, 31-33). According

to Habermas, the validity of statements can be tested in relation to truth, moral correctness and sincerity. Speakers can make three types of "validity claims": truth claims, when the statements relate to the facts (objective world); moral rightness claims, when the statement refers to relations with others and to socially valid norms that regulate social relations (social world); sincerity claim, when the statement is an expression of intentions, opinions or other mental states (subjective world). On the basis of three types of claims Habermas distinguishes between theoretical discourse (science), practical discourse (morality) and, in relation to the third claim, aesthetic criticism (authenticity) or therapeutic discourse (sincerity). If in argumentative dialogue the validity of statements is tested and recognised on the basis of better argument, communicative interaction embodies communicative rationality.

> *The concept of communicative rationality carries with it connotations based ultimately on the central experience of the unconstrained, unifying consensus bringing force of argumentative speech, in which different participants overcome their merely subjective views and, owing to the mutuality of rationally motivated conviction, assure themselves of both the unity of the objective world and the intersubjectivity of their lifeworld* (Habermas 1984, 10).

But there is an important counterfactual provision: communicative rationality requires conditions of unconstrained argumentative speech based on the force of better argument. An *"ideal speech situation"* presupposes[4] symmetry and impartiality among the participants of interaction, unlimited access to the debate, equal opportunity to make a contribution, unlimited amount of time to discuss the issues and that all participants are treated as equals, irrespective of their social status. Only under these conditions communicative rationality can be manifested. Habermas admits that the ideal speech situation is counterfactual, although he claims that the real speech situation can approximate the ideal conditions and that the participants have to presuppose the existence of sufficient conditions if they want to present the results of their debate as rationally grounded. This counterfactual status of communicative rationality will be one of the central topics of the rest of the article. In order to elucidate the problem, we will make a brief comparison with Kant's ethics and Rawls's idea of public reason.

Kant's Practical Reason, Universal Norms and Moral Autonomy

Immanuel Kant was the first who tried to solve the liberal dilemma of how to justify basic rights and liberties without reference to external authority or tradition. He linked the ideas of practical reason, self-legislation and modern moral autonomy. His deontological ethics is based on freedom of the autonomous subject, on equal and reciprocal relations between the subjects and on the idea of practical reason. The reciprocity of relations has been from the ancient times often defined by the Golden Rule, articulated in many variations, e.g. "do unto others as you would have them do unto you," or negatively, "do not do to others what you would not wish them to do to you" (Honderich 2005, 348).[5] In Kant's view, individuals are free, but individual freedom is limited by equal freedom of other individuals. Kant's concept of freedom is not voluntaristic in the sense of absolute free choice

(*Willkür*) of the individual; Kant understands freedom as actions of individuals in accordance with her will (*Wille*) that is bound by judgments of practical reason. Practical reason is the capacity to recognise which actions are moral and just and which are not. So defined, practical reason enables free self-rule of autonomous subjects. Moral autonomy makes people in principle independent external authorities and traditional moral values. "At the core of moral philosophy of Immanuel Kant is the claim that morality centres on the law that human beings impose on themselves, necessarily providing themselves, in doing so, with a motive to obey. Kant speaks of agents who are morally self-governed in this way as autonomous" (Schneewind 1998, 483).

Moral judgments' of practical reason are in Kant's ethics regulated by the *categorical imperative*.[6] It requires that an individual acts always in accordance with norms that can be universalised. The categorical imperative is specified by the formula: "act only according to that maxim through which you can at the same time will that it become a universal law" (Kant 2011, 71). Universality of norms implies reciprocity, because they are equally acceptable for everyone. Reciprocity is further defined by the second formula of the categorical imperative which states that "persons are to be treated always as ends and never merely as means" (Kant 2011, 85). Practical reasoning of each enables her to judge which norms are in each case universal, so she autonomously constructs moral norms that she is obliged to follow. The norms that pass the categorical imperative test, i.e. that are recognised as universal, are moral and embody justice.

For Kant, Habermas and Rawls moral norms that passed the test of the categorical imperative have priority over the good, which means that universal norms have priority over values that emerge from cultural tradition.[7] This is Kant's definition of a free and autonomous individual, liberated from any kind of external authority, especially traditional worldviews, and at the same time absolutely bound to moral norms provided by judgment of her own practical reason. In this context Kant develops his Universal Principle of Right that forms the basis of all his political and legal philosophy: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Kant 1999a, 387).

Kant's categorical imperative is a procedure that enables us to judge validity and rational acceptability of moral norms. It is characteristic of proceduralism in ethics and political philosophy that it prescribes procedures of reasoning and judgment without offering substantial moral norms. Habermas and Rawls are proceduralists as well: each develops his model of the procedure for testing the validity of norms, which derives strongly from Kant prototype. But there is a difference. Kant's procedure is monological self-reflection of transcendental subject while Habermas and Rawls attempt to build their models on the idea of dialogue. On the ground of the principles of practical reason, Kant deduced that each one of us in her own moral judgment comes to the identical conclusion, so he saw no need for dialog.[8] But Kant's ethics is part of his transcendental idealism that is very much part of his own time and culture of enlightened absolutism at the end of the 18th century. The culture of liberal democracies at the end of the 20th century, immersed in deep crisis of Western rationalism, requires a different approach. Habermas developed a

strong version of dialogism associated with his idea of communicative action, Rawls a weak version embodied in his idea of original position and public reason. Both Habermas and Rawls have in common a strong "Kantian constructivism," based on individual liberty, moral autonomy, constitutional rights and a counterfactual mechanism for providing valid norms. First I will briefly present Rawls's model of original position and his take on public reason, then I will elaborate on Habermas's discursive ethics and discourse theory of democracy and public sphere.

Rawls's Original Position and the Idea of Public Reason

John Rawls developed his idea of "*justice as fairness*" in the context of his in 1971 first published *A Theory of Justice* (Rawls 1999). It has been designated as egalitarian liberalism (Nagel 2003, 62) with a strong social concern for the part of the society that is worst off. As a liberal political philosopher he advanced the idea of justice as fairness that grants "each person equal basic liberties" and "fair equality of opportunity," and, with the so-called "difference principle," diverges from strict equality and grants the "greatest benefit to the least-advantaged members of society" (Rawls 2001, 42). This is the so-called distributive justice as political philosophy of welfare state liberalism. Rawls situates his theory in the tradition of social contract theory that includes Hobbes, Locke, Rousseau and Kant (Hampton 1995): social contract theories start with the counterfactual hypothesis that people emerged from a pre-political natural state that, by composing a contract, introduced political order which transformed them into citizens. The introduction of social contract is conceived as an act of rational agreement on basic normative rules that constitute a just and well-ordered society (Kymlicka 2002, 60-61).

From our perspective, the most interesting part of Rawls's theory of justice is how the members of society reach a reasonable agreement on principles of justice. He calls this counterfactual thought experiment the "original position." It is conceived as a counterfactual "device" that makes possible autonomous self-legislation in such a way as to enable people to reach a reasonable agreement on universal norms that represent the best possible social contract. The key element of the device is the so-called "*veil of ignorance*": the citizens discussing in a rational and cooperative manner about basic norms for regulating social order, have, like the goddess of justice, their eyes covered in order to temporarily suspend their knowledge of their particular social position and real life circumstances (Rawls 1999, 102-170; Freeman 2007, 141-197). The veil of ignorance should ensure impartial and non-selfish judgment on norms that are truly universal; it is supposed to establish unbiased reasoning on the universal validity of norms. Rawls claims that the veil of ignorance is implicit in Kant's categorical imperative (Rawls 1999, 118, 122). The suspension of knowledge about social status, professional and other social roles, religion, ideology etc. should exclude egoistic self-interests and value-laden worldviews that cause disagreements. It is supposed to motivate the participants to be impartial, reasonable and to respect the principle of reciprocity. Rawls claims that in the original position rational participants would come to the conclusion that his principles of justice as fairness are exactly the best solution. Since the participants lack the knowledge about their position in life and cannot be sure on what kind of position they will find themselves, they grant every member of society the maximum degree of freedom and equality as well as reasonable social conditions for

those that are the worst off. But the dialog in the original position is weak because the outcome of the debate is known in advance.

In the nineties Rawls restated his theory of justice as political liberalism (Rawls 1996). He developed the "the idea of public reason" that is another formulation of the device that aims to provide at least minimal agreement on "constitutional essential and other matters of basic justice." Let me briefly present those elements of Rawls's idea of public debates that are significant for Habermas's theory of public reasoning. First, Rawls allows only "*reasonable people"* to participate in the debates, the ones that will be "ready to propose principles and standards as fair terms of cooperation and to abide by them willingly" (Rawls 1996, 49). This is another way of conveying what Habermas introduces with the "ideal speech situation," namely that a rational public debate does require a series of counterfactual presuppositions like respect for the force of better argument etc.

Second, for Rawls the only appropriate topics of public reason are the so-called "*constitutional essentials and matters of basic justice*" which limits the topics of public discussions. In addition, Rawls introduces "*nonpublic reasons*" of civil society that belong to what he calls "background culture": in relation to nonpublic reasons, he mentions "churches, universities and many other associations of civil society" (Rawls 1996, 2013). This exclusion refers especially to the so-called "*comprehensive doctrines*": Rawls strictly excludes religious or metaphysical doctrines from public argumentation, because they are experienced as all-encompassing sets of beliefs and personal convictions that cannot be reasonable discussed:

> *…basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions. Citizens realise that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake* (Rawls 1996, 573-74).

Third, in order to mitigate these restrictions, Rawls introduces a weak version of rational agreement that he calls "*overlapping consensus*." It allows a public agreement to be reached on the basis of different reasons by different consenting parties. Since a reasonable agreement is so difficult to reach, it doesn't matter what kind of reasons motivate different parties to accept it.

As we will see, Habermas take up a rational agreement about social norms is different in at least last two respects. First, Habermas allows "comprehensive doctrines" to enter into public discussions with the provision that "the right has priority over the good," or in Habermas's vocabulary we used above, universal moral norms have priority over ethical values that are part of particular cultural traditions. And secondly, Habermas rejects the idea of overlapping consensus with the argument that consensus over norms has to be made for the same reasons, otherwise public debates would lose their cognitive dimension. For Habermas, deontological ethics is "cognitive ethics" that can help us realise which norms and actions are universal, and can be generalised as laws in a legislative process. So he argues for a stronger version of rational agreement, based exclusively on better arguments.[9]

Discourse Ethics and Typology of Public Discourses

The core idea of communicative action was further developed in the most consequential manner in discourse ethics. Its aim is to develop discourse theory of morality, politics and law. It is Habermas's extension of Kant's concept of practical reason. With his dialogic approach, Habermas translates Kant's practical reason into his concept of practical discourse. It is a "reconstruction of Immanuel Kant's idea of practical reason that turns on a reformulation of his categorical imperative: Rather than prescribing to others as valid norms that I can will to be universal laws, I must submit norms to others for purposes of discursively testing their putative universality" (McCarthy 2006, 91).

He develops a series of principles that regulate various types of discourses in order to define discursive testing of validity of norms in public communication, primarily in legislative, administrative and legal processes. The basis of discourse ethics is the *discourse principle* (D): "Only those norms are valid to which all affected persons could agree as participants in rational discourses" (Habermas 1996, 107). Habermas positions the discourse principle as principle of impartial justification for various types of practical discourse that depends on the type of questions debated and on who are affected by those questions. According to Habermas, there are various types of discourse principles that can be applied to different types of discourse. Universal validity is present only in a very limited number of public discourses, primarily in moral and legal discourses. Habermas derives from the discourse dialogical *principle of universalisation* (U): "A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion" (Habermas 1998, 42). This general rule of discourse ethics, which applies to all types of norms, does not necessarily possess the universal validity claim, e.g. "ethical values" are valid only for a particular community that observes them. Moral norms, and laws, have to fulfil the universal validity claim.

Habermas defines public discourse as the process of rational "*opinion- and will-formation.*" Namely, society is confronted with various social, economic and political problems that have to be solved by various social subsystems. Problems are often initiated and discussed in a wide-ranging public sphere of civil society, opinion is formed and social subsystems act if a particular problem falls within their field of relevance, competence and jurisdiction. In the following we will limit our analysis primarily on operations of a political subsystem. As Habermas emphasises, the political system acts in the "medium of law," i.e., political decisions have a "legal form" of laws, administrative decisions and the like. Habermas operationalises his concept of "practical discourse" in typology of public discourses that represent various forms in genesis of law. In the practical discourse of political public sphere there are, according to Habermas, the following types of discourse: pragmatic, ethical-political, moral and legal discourse; as a special case he adds bargaining as well (Habermas 1996, 157-168). *Pragmatic discourse* is the most common and widespread discourse, and it concerns pragmatic questions of effective collective actions. Habermas adopts Parson's idea of a political system aimed at making decisions that enable effective pursuit of collective goals. The questions of pragmatic discourse concern the formation of collective will in solving practi-

cal problems in pursuit of collective goals, especially the questions of means to achieve collective goals. For example, the ways and means in building efficient social transport infrastructure is a question of pragmatic discourse. *Ethical-political discourse* refers to particular traditional worldviews and lifestyles that concern social groups in the form of religions, ideologies as well as professional, ethnic, racial and gender identities. These traditions are associated with special collective "forms of life" and substantial values. Ethical-political discourse overlaps with Rawls's "comprehensive doctrines." This type of discourse is manifested if the speaker appeals to the audience that consists of particular social groups in the first person plural, for example, with phrases like "we Christians," or "we scientists," or "we social democrats," or "we modern women," or "we Germans." Ethical-political discourse provides values that are part of a particular social identity and can help define collective goals. In contemporary multi-cultural societies there can be collision between different ethical-political discourses of different traditions and ways of life, for example the practice of female circumcision, that have to be resolved with reference to moral discourse. In case that public debate refers to the issue of human rights of a particular minority, then *moral discourse* has priority over other types of discourse. For example, reproductive rights of women and their choice concerning their progeny cannot be subordinated to ethical-political discourse or pragmatic discourse; it cannot be argued that female freedom of choice concerning progeny should be curtailed because it collides with values of a particular religion or because it would be economically more expedient to prohibit certain medical procedures. As Habermas puts it, *the right has priority over the good*, or as Rawls puts it, *justice has priority over the good*.

Moral discourse represents the highest ranking device for testing the validity of norms. "For the justification of moral norms, the discourse principle takes the form of an universalisation principle. To this extent, the moral principle functions as a rule of argumentation" (Habermas1996, 109). Moral discourse is concerned with universal moral questions and with the highest constitutional norms that have to be just; other legislation can incorporate other, pragmatic or ethnic-political interests as well, but these interests cannot collide with constitutional norms or moral norms that have priority over all other interests. All legal norms as well as political and judicial decisions and procedures have to be consistent with the constitution and with the universal principles of justice. *Legal discourse* is discourse of courts of law and is the highest test of legality and legitimacy of all formally accepted laws and regulations. It is concerned with the questions of coherence of legal norms in general and especially with the consistency of all legal norms with constitutional norms. Higher courts supervise judgments and procedures of lower courts, and the highest constitutional court has the role of supervision that ensures coherence of all legal norms with the constitution. Legal discourse has to embody justice, so it has to be tested by moral discourse. Coherence of laws with the constitution requires universalisation. The problem we will address next is the problem of disagreement.

In political procedures in institutions of the state rational consensus is attainable only in exceptional cases. In order to solve the problem of lack of agreement, Habermas adds to his description of democratic procedures two classical mechanisms of conflict resolution, bargaining and voting. He introduces a "*procedurally regulated bargaining*" as a mechanism of fair negotiation and achievement of compromise in

conflicts of interests (Habermas 1996, 108). The mechanism of *majority vote* enables to resolve the lack of agreement in political institutions. With the help of these two mechanisms *"communicative power"* of unconstrained public debate is translated into *"administrative power"* and, correspondingly, practical discourse into legal discourse (Baxter 2011, 95). But the inclusion of these two mechanisms does not mean that political procedures can be reduced to bargaining and voting. It requires, prior to the decision-making, a wide-ranging debate in the public sphere and in institutions of the state. And the formal political decision does not close the issue forever, but represents only a temporary interruption of the debate on the issue: if the party that lost the vote strongly disagrees with the decision made, it can formally reopen the issue at the first opportunity. "Habermas's idea of democracy, then, involves much more than formal governmental institutions and periodic voting rituals. It requires broad, active, and ongoing participation by the citizenry" (Baxter 2011, 85).

From Counterfactual Principles to Practical Realisation of Discourse in Public Sphere

Habermas further defines political procedures aimed at solving social problems. Debates in institutions of the state have to come to a close in effective decision-making in a legislative, administrative or judicial process. In order to describe political processes, Habermas translates his discourse principle into the principle of democracy: "Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996, 110). Legitimacy is defined by rational assent of all those citizens that are affected by political decisions. But it is evident that rarely, if ever, all affected citizens assent to a particular legislation or decisions of the state. Even if citizens deny their rational assent to particular legal norms and regulations, those norms and regulations are still legally valid if they were made in a legally correct procedure. Norms can have contested legitimacy, but they are in this case still legally valid.

In this case, however, the question can be what the use is of all these counterfactual principles for testing the validity of norms if there is no immediate practical effect in empirical reality. What does it mean to propose a whole series of counterfactual principles that are in contradiction with empirical reality? We strongly argue that these counterfactual principles can have an effect on empirical reality, but they require citizens that participate and actively argue in the public sphere. Counterfactual devices are heuristic methods that help us analyse existing normative structures and question them in a very practical manner, one piece of legislation after another, one political decision after another. If in a society under critical consideration, legal structures with questionable legitimacy have been detected that lack rational assent of citizens that violate human rights of citizens, they should be actively criticised by the citizens that participate in the public sphere.

In his discourse theory of law and democracy, Habermas extensively reworked his early idea of public sphere (Habermas 1996, 329-388). He situated it in the concept of political system constructed on the difference of the centre and the periphery: in the centre there are central institutions of the state, i.e. the legislative, executive and judicial government, and on the periphery there is civil society conceived as the source of popular sovereignty. In the intermediate zone there are various represen-

tative institutions for mediating various interests, nongovernmental organisations like unions, professional and industrial associations as well as cultural institutions like mass media, universities, theatres, galleries etc. The political system is metaphorically defined as a system of sluices that channels public communication from unconstrained and wild discussions on the periphery to more focused debates on decision making in central institutions of the state.

The communicative power of citizens, manifested in the strength and sharpness of their public arguments, can influence public opinion that have an effect on institutions of the states in the centre. The "process of discursive opinion- and will-formation" that is, metaphorically speaking, moving from the periphery to the centre and back again, is supposed to influence deliberations and decisions in central institutions of the state. Habermas distinguishes between the public sphere emerging from civil society, conceived as an open communicative network, and a narrow institutionalised political public sphere of state institutions (Habermas 1996, 307). A "*weak public*" (*Schwaches Publikum*) is wide and "wild" pluralistic public, emerging in the process of discursive opinion- and will-formation that freely evolves without being held back by formal procedures. It emanates from myriad episodic interactions in intersubjective networks of civil society, and from an "open and inclusive network of overlapping subcultural public spheres." Structures of wide public sphere emerge out of civil society spontaneously and self-referentially as "subjectless forms of communication," as communication flows, carrying information, comments and arguments on important social problems. Habermas designates the wide public sphere of civil society as the *"context of discovery"* of important issues that appear as problems in civil society; individuals and groups in civil society and representatives of intermediate institutions make these issues public with their debates triggering the process of opinion- and will-formation of the citizens. On the other hand, *"institutional public spheres"*(*veranstalteten Öffentlichkeiten*) are formed by public deliberations that inform formal procedures of decision-making in state institutions oriented towards the solution of social problems. Habermas calls institutional public spheres the *"context of justification"* because deliberations are geared towards decisions that have to be justified according to the constitutional and legal framework as well as to formal procedures regulating institutional decision-making.

The process of discursive opinion- and will-formation has to be seen in the context of "two-track concept of democracy." In the wide public sphere of civil society, issues are debated and public opinion is formed, and in the institutional public sphere they are deliberated upon in the process of political decision-making: "…binding decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts (and, if necessary, at the exit of the implementing administration as well)" (Habermas 1996, 356).

Conclusion

Habermas himself often shows a bit of scepticism on his counterfactual presuppositions. "These argumentative presuppositions obviously contain such strong idealisations that they raise the suspicion of a rather tendentious description of

argumentation. How should it be at all possible for participants in argumentation performatively to proceed from such obviously counterfactual assumptions?" (Habermas 2003, 107). If the counterfactual ideals about communicative rationality and legitimacy of the political order are taken seriously, many parts of the existing political systems become questionable. But, on the one hand, this should instigate citizens to actively participate in public debates and deliberative politics of the political system in order to reform the system for the better. On the other hand, Habermas emphasises that the order of liberal democracy, as he sees it, is worthy of "*constitutional patriotism*": he defines this concept by the political culture of citizens' identification with constitutional norms and the rule of law. He argues that liberal democracy is the system of self-legislation of citizens that is constitutionally arranged in such a way that citizens can exercise their private and public autonomy (Habermas 1998, 118). If citizens disagree with particular legal norms or regulations, and deny their rational assent, they should themselves engage into corrective political actions. In liberal democracy there is no one else but active citizens themselves that have to engage and lead the reforms of the social and political order in a desired way. In practical terms, institutions of liberal democracy allow citizens to engage in public debates in a wide-ranging public sphere of civil society as well as to participate in formal political processes by voting or active political actions in the public arena and formal political institutions.

In his early concept of the public sphere, Habermas launched his famous thesis on "*refeudalisation of modern public sphere.*" Several factors, most notably private lobbying of strong interest groups, interventions of the state into civil society and commercialisation of mass media, caused depolitisation of the public sphere in the middle of the 20th century. In his revisit and rearticulation of the public sphere theory in the nineties, he launched another thesis that seem especially relevant today, namely that a strong social crisis revives the structures of the public sphere and mobilises citizens to active participation. In a crisis citizens begin to question the status quo, inequalities, injustices, and develop a new vision of political society. As he wrote: "… in more or less power-ridden public spheres, the power relations shift as soon as the perception of relevant social problems evokes a *crisis consciousness* at the periphery. If actors from civil society then join together, formulate the relevant issue, and promote it in the public sphere, their efforts can be successful …" (Habermas 1996, 382). In the decade after the financial crash of 2008, the crisis has become substantial especially for the citizens of Europe and the United States. Deindustrialisation of developed countries, caused by outsourcing and robotisation as well as by continuous attempts by the moneyed class to lower wages and working conditions of labour, resulted in a permanent crisis in the developed world, especially among the young generation. If the new social movements are to emerge, we argue that Habermas's theory of public reason is a good heuristic tool for critical analysis of society and for active political engagement in the public sphere.

Notes:

1. Quoted from Habermas 1974, because it is slightly better formulation and translation than nearly identical passage in Habermas 1989, 222.

2. In various publications Habermas developed three intertwined, but distinct versions of communicative interaction: first, communicative action is conceived as a sociological theory of action aimed at coordinating individual actions into a collective action (Habermas 1979;

Habermas 1984, 273-337); second, universal pragmatics, later renamed formal pragmatics, uses the advanced philosophy of language in order to describe the process of validity testing of speech acts (ibid.); and third, discursive ethics uses the idea of dialogical argumentative testing as a mechanism for testing the validity of norms in "practical discourse" (Habermas 1990; 1994; 1996). The concept of communicative action as a sociological action theory is the most central and at the same time the weakest element of Habermas's theoretical edifice (Steinhoff 2009, 5-49; Ingram 2010, 83-95). We cannot go into critical analysis here, but let me put the problem of Habermas's action theory in a nutshell: first, every action is by definition goal-directed purposive behaviour, what Habermas somehow pejoratively designates instrumental/strategic action; secondly, there is no specific type of empirical actions (in a sense of observable regular pattern) that would be oriented exclusively towards reaching understanding, as Habermas defines communicative action. It follows that Habermas's idea of communicative action fails on conceptual and empirical levels as a sociological action theory. But we argue in this article that his idea of communicative action is plausible enough both as formal pragmatics and as discursive ethics. The difference between sociological action theory and the other two is that both formal pragmatics and discourse ethics can be plausibly interpreted on the counterfactual level.

3. Formal pragmatics (first called universal pragmatics) is Habermas's interpretation of Paul Grice and Michael Dummett philosophy of language and his appropriation of the theory of speech acts by John L. Austin and John Searle in order to articulate his vision of discursive interaction (Habermas 1979; 1984, 286-337). These topics have later become standard elements of philosophical and linguistic pragmatics.

4. Because of the importance of the concept, let me quote one of the first Habermas's formulations of the "ideal speech situation": "… my intention to reconstruct the general symmetry conditions that every competent speaker must presuppose are sufficiently satisfied … Participants in argumentation have to presuppose in general that the structure of their communication … excludes all force - whether it arises from within the process of reaching understanding itself or influences it from the outside - except the force of the better argument" (Habermas 1984, 25).

5. Kant's own ethical theory is prima facie close to the Golden Rule, so he notes (Kant 2011, 88n; Sullivan 1994, 77) that the Golden Rule is not specific enough, because it does not include relations to the self.

6. Besides categorical imperative there are also hypothetical imperatives, but they do not concern us here. This brief summary of some of the elements of Kant's ethics cannot be systematic; it serves as the stepping stone for understanding Habermas and Rawls. For a good overview of Kant's ethics see Sullivan 1989, Uleman 2010.

7. The "good life" or the "vision of good life" as defined in classical ethics of Aritstotle; his ethics and politics are closely connected, individual ethos is shaped by collective ethos, and vision of good life is understood as cultural tradition of the community that is the source of substantive moral values (Frede 2013). It corresponds to Hegel's idea of *Sittlichkeit* that refers to mores, i.e., to traditional ways of life of the community, to religion or to other collective worldviews that shape people's beliefs, habits, customs and social lifestyles (Rawls 2000, 349 f.).

8. Kant's transcendentalism is the object of Habermas's critique that attempts to detranscendentalise Kant's ethics, which in Habermas's interpretation starts with Hegel's critique of Kant's formalism and with Hegel's situating the problem of historical context. See Habermas, From Kant to Hegel and Back Again: The Move toward Detranscendentalisation, in Habermas 2003.

9. For discussion on similarities and differences between Habermas and Rawls, see Finlayson, Freyenhagen 2013.

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