

## A Dilemma of Republican Theories of Justice and an Emergentic Reinterpretation

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This paper deals with a difficulty, which republican theories of justice (Rawls', Habermas') face when they are applied in normatively in-egalitarian (hierarchical) social contexts. Republican theories of justice are characterised by the following principle:

(R) No-one should have to be subject to a coercive normative order to which s/he could not have given his/her assent.

In contrast to non-republican theories of justice (utilitarian theories for example), republican theories cannot be expanded from one context to another unless they can count on the consent of those to be governed by their principles. This leads to a predicament in contexts where the social, cultural and psychological conditions for such consent cannot be presupposed. My argument is that in such cases the extension of the theory justice has to wait for such conditions to historically *emerge* out of autonomous processes of social change from within these social and cultural contexts. I am arguing that such an *emergentic* theory of justice is implicit in Habermas' discourse ethics.

### *Rawls*

(R) is a premise made by republican theories of justice in the tradition of Kant. In his "Theory of Public Right" (*öffentliches Recht*), Kant speaks of the "lawful *freedom* [of the citizen] to obey no law other than that to which he has given his consent". In this vein, neo-Kantian theories like Rawls' *Theory of Justice* demand that society reach an agreement about the basic normative presuppositions that go into the justification of the "original position" through a "full reflective equilibrium". These *normative* presuppositions are grounded in an *empirical* reflective equilibrium regarding the value of equality, which can be presumed to obtain only in societies of a certain type ("liberal peoples" according to Rawls, "post-conventional" societies according to Habermas). Therefore Rawls qualifies his earlier Universalist claim and considers his theory extendable only to those societies where the value of equality has become a "fixed point" in the moral intuitions of their members.

Hierarchical societies that do not consider equality as a fixed point are grouped into two categories, decent and non-decent. Since the basic normative presupposition of human beings as fundamentally equal is empirically not shared by normatively in-egalitarian (hierarchical) societies, Rawls' theory of justice cannot be extended to these contexts without further additions. Without such theoretical extensions, Rawls cannot explain how in such contexts the addressees of his theory would be *motivated* to engage in the thought experiment offered by the idea of the original position. Rawls himself does not provide any clue as to how such motivation is to historically emerge in such hierarchical contexts. For this, Rawls lacks an appropriate theory of social and historical change.

### *Habermas*

The problem for any neo-Kantian theory of justice is this: How can principles of justice be based on moral norms, which are necessarily abstract and far removed from ethical life, and at the same time mediate between abstract moral and concrete social norms, which historically govern a particular life-world. This was the question originally raised by Hegel against Kant. Habermas is taking up this challenge in a lecture, which is unfortunately not available in English.

Like Rawls, Habermas can also be grouped into the category of republican theories of justice. Habermas' *principle of universalization* demands that valid moral norms must satisfy the condition that "All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests." This leads to Habermas' *principle of discourse ethics*, which states "that only those norms can be considered valid that could meet with the approval of all affected as participants in a practical discourse". A necessary precondition for such a practical discourse is "that in principle all affected *freely* participate as *equals* in a cooperative search for the truth." Habermas' principle of discourse ethics is founded on this "fact of universal pragmatics": "only moral rules that could win the assent of all affected as participants in a practical discourse can claim validity."

Thus in both instances of republican theories of justice, Rawls' and Habermas', the empirical condition and normative presupposition is that all affected can participate freely as equals in the practical discourse that leads to the justification of the normative order that governs their society. As both agree, these preconditions do not obtain everywhere and at all times. Unlike

Rawls, however, Habermas does not relinquish his claim to universality. He concedes, however, that prior and subsequent to the establishment of a universal norm:

“Universalist morality depends on *accommodating* life worlds; it relies on a certain amount of conformity with practices of socialization and education ... on a certain degree of conformity with political and social institutions which already epitomise post-conventional ideas of morality and law.”

With “post-conventional consciousness” Habermas refers to Lawrence Kohlberg’s stage theory of moral development. According to Kohlberg, on the post-conventional level of moral consciousness, moral judgement is detached from the local conventions and historical hues of a particular life-form. In modern societies moral consciousness reaches a level where moral agents are able to control their conduct based on highly abstract moral principles and rationally motivated convictions that they have internalised. They are therefore able to control their actions independently from external pressures that traditional social order with its ethical life exerts on the individual. Evidently, such post-conventional personalities are nurtured only in very specific milieus, specifically modern milieus, which permit identity formation above and beyond the socially prescribed roles of traditional society.

Habermas describes the development of these social and psychological conditions as originating with modernity in the West but in a historical process of several hundred years expanding across the world. They are flanked, according to Habermas, by the development of more and more universal and far-reaching institutional guarantees for personal and collective autonomy:

“In fact, Rousseau’s and Kant’s moral Universalism emerged in societies that were already characterised by such corresponding traits. Today, luckily, we live in western societies where in the last two-three hundred years a fallible, sometimes backfiring and rebounding, but nevertheless *unidirectional* process prevailed, leading to the realisation of fundamental rights, a process, let us say, of a less and less selective interpretation of the Universalist content of fundamental rights norms.”

Thus, prior to the establishment of a practical discourse that could lead to a universally accepted norm; participants need to be inculcated with the necessary ideas, and trained to

have the necessary dispositions, that make them suitable for Habermas' practical discourse. Habermas emphasises that the "[practical] discourse itself cannot produce the conditions necessary to empower all affected to properly participate." Participants need to be able and willing to transcend their traditional morality, which effectively amounts to the acceptance of the equal worth of all affected. The participants "must make a pragmatic presupposition to the effect that all affected can in principle *freely* participate as *equals* in a cooperative search for the truth in which the forceless force of the better argument alone can influence the outcome." Moreover, with the empirical preconditions that need to obtain for Habermas' discourse ethics to get off the ground, the mutual entanglement of abstract moral universalism and concrete ethical life does not end. Even subsequent to the hypothetical establishment of a universally accepted norm, its application again depends on functioning institutions. Habermas points out that the "discursive justification of a norm cannot simultaneously ensure the realisation of the corresponding moral insights."

We have seen that Habermas is fully aware of the historical contingencies on which depends his procedural account of moral universalism. For the procedure (practical discourse) to even get going, certain historical conditions have to obtain and for its results to become effective in a society yet another set of conditions needs to be in place. But what if they don't?

Habermas claims that there is probably no human life-form to be found on this planet without at least some elements out of which the necessary preconditions for practical discourse could not be developed. Whoever grew up in a halfway undisturbed family situation, whoever has experienced circumstances which guarantee mutual recognition and some symmetry in expectations and perspectives, circumstances that are not completely disrupted by systematically distorted communication, would have attained the required moral intuition necessary for an engagement in Habermas' practical discourse. But this may not be enough. Oppressive social circumstances may be too overpowering for such sprouts to grow anywhere near a reform of society. In the contrary, oppressive social circumstances can seriously interfere with interpersonal and family relations so as distort their predisposition for mutuality.

As a factual presupposition, republican theories of justice like Rawls' and Habermas' need to take as fact the *effective* recognition of the equal dignity of all human beings *as human beings*. With 'effective' I mean that as a minimal condition they be recognised by those parts of society whose discourse exerts *hegemony* over the rest of society. This is at the same time an

empirical as well as a meta-ethical condition. It alone lends plausibility to the assumption that all concerned by a certain social order would be likely to engage in counterfactual thought experiments along the lines of Rawls or Habermas, which produce conditions of reciprocity and equality among empirically inequitably and unequally positioned individuals. These thought experiments lead to a normative order where social and juridical norms pertain to all individuals alike.

But even in life-forms where the value of different liberties and the consequences for the breach of norms vary due to differences in gender, status, and station, as in the erstwhile feudal societies, islands of equality exist from which processes of social change can begin. In such societies, hierarchical representations of social order exert hegemony over egalitarian representations. Nevertheless, egalitarian principles may prevail in insular form for example among individuals within the same caste, age and gender. Ernst Tugendhat has pointed to the fact that these islands of equality never seem in need of justification. He concludes that the onus of proof is therefore on the defenders of inequality, which offers at least a slight argumentative advantage to the defenders of equality.

How are we then to extend Rawls' or Habermas' ideas to such societies? Not by imposing egalitarian values, as this would produce resistance and thus prevent free consent. Forceful measures are anyway ruled out by a republican theory's own standard (R). Instead, Habermas reminds us that "The incremental incorporation of moral principles in concrete life-forms ... is chiefly owed to the collective efforts and sacrifices of social and political movements" – from within these societies themselves, as we might add. In Situations where hierarchy prevails over equality, we have to wait for social and political movements to bring about conditions suitable enough for Kohlberg's post-conventional consciousness to arise on a broad social scale. Only then can we engage in a wide-ranging social discourse about justice which may lead to the emergence of universal moral principles. The diagnosis of a possible asynchrony (*Ungleichzeitigkeit*) within the same life-form, global or regional, is what makes these reflections relevant for questions of global justice.

Social and political movements have various strategies at their disposal to bring about social change. In the remainder of this paper, I shall explore the role of *critique* in social movements, which are geared towards bringing about the hegemony of egalitarian over hierarchical ideas of social order. For an immanent critique of existing life-forms, social and political

movements systematically use existing islands of equality and submerged egalitarian traditions from within the nested and interlaced bundles of social practices that make up a complex life-form, a culture or a society.

### *Jaeggi*

I am drawing here on Rahel Jaeggi's conception of an "immanent critique" of life-forms. Life-forms, according to Jaeggi, are "bundles of social practices with habitual character and normative expectation." They include "habitualised attitudes and behaviours of a normative nature," which relate to ethical life, although they are "not strictly codified or institutionalised". Most importantly, they are not objective facts but intersubjective. The identity conditions of life-forms are neither independent from human subjectivity nor arbitrary. They are dependent on subjective acts of interpretation but the social character of these interpretations makes life-forms non-arbitrary from the perspective of the individual.

Normally we inhabit our life-forms in a way that we take the social order that they represent for granted. We have formed our identities in congruence with society's expectations and we have internalised the rules governing social behaviour to the extent that they have become second nature to us. If asked, we may be able to explicate these rules but normally we are not conscious of them. The ethical life of our community has become our habitus; it is ingrained in our personality and even in our body. Now, like Habermas, drawing on the American pragmatist tradition, especially G. H. Mead, Jaeggi points to moments of crisis when established practices meet with unexpected obstacles and routine behaviour comes to a halt. It is in these moments of *crisis* that we reflect on what we are doing and begin to search for new ways. This is the moment when established norms and practises are questioned and can be critiqued.

Jaeggi distinguishes three forms of critique, *external*, *internal* and *immanent*. *External* critique evaluates a given life-form with reference to demands that go beyond the principles inherent in this life-form or which question the life-form altogether. The external critique does not share with the participants of a life-form their commitment to its inherent norms. *Internal* critique, by contrast, uses demands and norms already inherent in a life-form to criticise an eventual lack of compliance. Internal critique does not aim for the reform or fundamental change of a life-form or for the establishment of a new social order. Instead it aims at the

recovery or re-establishment of those already accepted norms that it perceives as having come into misuse or oblivion.

*Immanent* critique contrasts with both, external and internal critique. Unlike external critique, it “localises the normativity of social practices within the conditions of their execution itself. But immanent critique assumes that the contexts from which it derives its standards are contradictory in themselves. Therefore, it is no accident that these standards are not realised for they are marred with a systematic problem.” According to Jaeggi, the systematic problem inherent in an established practice reveals itself only through theoretic reflection. The internal contradictions of a life-form in crisis need to be analysed and understood by the critique using only those resources that are available with the ‘material’ provided within the life-form itself. Immanent critique thereby gains an exemplary role for the participants of a life-form in crisis. It demonstrates how any such participants can move from A to B without requiring resources other than those available to all.

Furthermore, the analysis of the crisis as rooted in an internal contradiction of a life-form needs to point out the *constitutive character* of this contradiction for the life-form in question. Mutually incompatible demands or norms are not by chance integrated in the same life-form and cause its tension; – this tension plays an instrumental role in the constitution of the life-form. Here Jaeggi draws on Hegel for whom modern life is marred by the contradiction of emphasising individual autonomy and setting the individual free from traditional communal bindings while at the same time increasing its dependency on an ever more tightly integrated society for its survival. For Hegel, and later Marx, the constitutive character of this fundamental contradiction of modern life-forms lay in its propensity to dynamise the labour market and thereby early capitalist society. While the individual gained freedom from bonded labour, it also ‘gained’ the freedom to starve to death if it could not find a job on the ‘free’ labour market. Hegel attributes a tragic character to the contradictions of modern life. The trope of a tragic entrapment, where all sides want only well, but produce only disaster, may not be a suitable template to follow in *every* analysis of life-form in crisis. But immanent critique may not only be limited to this type of analysis. Important features to retain from Jaeggi’s conception of *immanent critique* are (1) its normative innovativeness and (2) its conscious limitation to only those cultural resources that are available to the participants in the life-form in crisis.

*Negative Universalism*

Jaeggi as well as Habermas dismiss the notion of historical determinism. Social change, whether local or global, remains an open ended process for them. In particular, it remains open whether local processes of change combine to yield a unified global tendency or whether the trend would lead to a globalisation of local particularisms. However, Habermas' and Jaeggi's conception of life-form is malleable enough to permit the overlapping and intersection of life-forms.

The horizon of every form of life is fluid, its boundaries permeable. There is no absolute barrier to the 'desire for as much intersubjective agreement as possible.' Practical knowledge can all the more readily claim to be knowledge the more radically we open ourselves to others and expand our local knowledge and ethnocentric outlook – indeed, extend our community in a virtual manner such that our discourse ultimately includes *all* subjects capable of speech and action.

A complex life-form therefore can share in global and in local life simultaneously. If we submit that local processes of change combined to yield a global tendency favourable to egalitarian conceptions of social order, then this would have produced the necessary conditions for a global practical discourse to get off the ground. The result of such a discourse would be moral principles with a global reach. These in turn could legitimise a global theory of justice. Habermas speaks of universal moral principles. But it seems that Habermas' universalism is somewhat less universal than Kant's. Habermas' approach potentially includes 'all subjects capable of speech and action'. It therefore remains internal to the globalised human perspective. Unlike Kant, Habermas does not reach out to rational beings as such, human or non-human, planetary or extra-planetary. His perspective remains internal to our human world. It is cosmopolitan more than it is universal, and it is historically indeterminate: the shrine of universal moral values remains empty, the concept of universal moral norm vacuous, until humanity has reached its potential to form a global practical discourse community. Until this time, philosophy can only argue in the negative, leaving the positive determination of the content of moral universalism to the future global discourse community. We may not know now what is positively just but we may be able to say what is positively unjust even now, namely anything that prevents a global discourse community from emerging, anything that fragments humanity and divides it into those to whom we owe a



justification of our action and those to whom we think we don't, into citizens and non-citizens, into believers and non-believers or into human and sub-human. It is by way of this negative argument that we can justify an *external* critique of inegalitarian life forms. This external critique may be inaccessible or, if accessible, counterproductive for egalitarian social movements acting from within a given hierarchical life form. But it may help to connect across life forms different social movements struggling for equality each within their own contexts.

### *Coming back to Hegel*

For conventional and post-conventional forms of life, Hegel's idea of the dialectical relation between individual and society is the key to understand social and cultural change. To create and maintain an awareness of these dynamics is the key contribution that philosophy can offer to help social movements question the hierarchies of traditional society. It helps conventional society to gain an awareness of the man-made character of its normative order and it protects post-conventional society from the vainglorious idea of a self-contained individualism.

The mentalist concept of a bounded, self-contained subjectivity is the main target of Hegel's attacks in his Jena lectures. Hegel's aim is to ... free the essentially practical spontaneity of the transcendental subject from the prison of self-enclosed interiority of an ego narcissistically aware of its own operations. Hegel instead describes the subject as involved in processes and embedded in contexts that anticipate the possibilities of, and provide the links for, any actual subject-object-relation. The subject finds itself already connected with an environment and functioning as a part of it. Hegel flatly denies that the knowing, speaking or acting subject has to *bridge* an original gap between itself and the 'other' ... Speakers and actors find themselves in the course of established performances and practices, while their perceptions and judgements are shaped by conceptual networks in advance. A subject cannot be with itself before being with an other, so that self-awareness emerges only from encounters with others."

While the individual as part of a community forms its identity as a person dependent on the community's 'established performances and practices' and 'conceptual networks', Hegel is also the first to emphasise the importance of the individual not only as a token of a certain

type (person) but as an unmistakable being that distinguishes itself from all other persons through the self-attribution of a life-history. Individuals

“can present themselves with reference to a life-project of their own, and can raise the claim to be recognized by others – as this individual ... communities essentially exist in the form of networks of mutual recognition among members”

While in traditional societies the recognition of the individual depends on its performance of well circumscribed social roles, post-conventional societies tend to leave it to the individual to negotiate its role with the relevant group. This difference, however, is one only in degree. Even in post-conventional societies, identity formation depends on recognition by others and is limited their prefigured ideas of what constitutes a possible role for an individual. The range of possible roles, the spectrum of ‘accepted practices’ and ‘conceptual networks’, is what Hegel has termed the ‘objective spirit’ and what Habermas identifies as the realm of the intersubjective. “It is this intersubjective structure of communities that informs Hegel’s logical conception of totality as a ‘concrete universal’.” The individual participates in the reproduction (and perpetual change) of this intersubjective structure through the media of “language, work and mutual recognition”. Hegel presents language

“as the medium through which theoretical consciousness develops ... The knowing subject moves from the start within a horizon of possible experience that is disclosed for it by language.”

Language organises not only the perceptions of individuals but also individual and collective memories: “only the collective memory of a people, in the form of shared traditions, keeps and transmits the knowledge and the view of the world gathered by individual minds.”

For Hegel, “work as purposive intervention in the world by which actors realize their ends and satisfy their needs” is the second medium of intersubjectivity, “the medium through which practical intelligence develops”. Countering the Cartesian dualism of contemplating subject vs. sense-afflicting object, Hegel points out that

“[a] subject engaged in working does not first gaze at an object with which she then has to get into contact. An actor who wishes to cope with reality assumes a performative attitude towards what happens to her in the world.”

The two media, language and work, and the corresponding ‘conceptual networks’ and technologies form the intersubjective frame of reference that guides the constitution of subject and object – in epistemological relations – and *agens* and *patiens* in practical relations. This reference frame contains the accumulated knowledge and practical experiencing of individuals over a period of time.

“Language can assume communicative functions ... only within a community of speakers. And only within a cooperating society ... can technology assume its proper role. In virtue of their contributions to a shared view of the world and a common form of life, both become parts of what Hegel calls objective spirit or ‘Volksgeist’.”

Under changing circumstances, however, the practical knowledge encoded in the collective frame of reference of a life form may become obsolete. Here, in Habermas’ reading, Hegel anticipates Dewey’s and Jaeggi’s notion of ‘crisis’ and its productivity in processes of social change.

“As long as an established practice works, reality ‘goes along’ with it. If it fails, a resisting reality ‘objects to’ expectations from within our practice on conditions settled by our own engagement.”

In such moments of crisis, established knowledge and practical routines, conceptual networks and technical tools become cumbersome or useless and need to be modified or replaced by more timely concepts/tools. This is when societies set out to change. According to Hegel, processes of social change are necessarily agonistic. Since in the development of new conceptual frames to understand the changed reality individuals respond differently to the altered circumstances a “struggle for recognition” ensues about the right interpretation of reality and the appropriate conceptual and technological response to it. It is important to note here that for such disagreement to arise it is irrelevant whether ‘objectively’ there is any change at all or whether change is only in its perception. The latter is bound to occur even in times of minimal ‘objective’ change and would be sufficient to spark off the struggle for the right interpretation of reality among participants of a life form. The former would only add to an already existing dynamic of perpetual change. In any case,

“there will be problems of conciliating one individual’s claims with the conflicting claims of others ... Since the objective impersonal point of view cannot be discovered ... the agents themselves must construct a social point of view.”

What counts as knowledge or appropriate technology depends on standards that are “not just his or hers.” These standards need to be mutually recognised and intersubjectively binding. Of course such binding standards can only emerge from a collectivity of individuals joined in a practical discourse community and immersed in one common life form. Hence global standards of justice can only emerge from a globalised discourse community and from a humanity conjoined in a shared form of life. But of course

“from the viewpoint internal to any, even the most inclusive community, there remains, first, an unmediated difference between the world we intersubjectively share and the objective world we have to cope with; and there remains, secondly, an unresolved tension between our contestable view of what is rationally acceptable for us and the assumed impartial view of what is unconditionally valid ... While we can certainly engage in moves towards transcending our epistemic contexts from within, there is no context of all contexts that we would actually be able to survey ... Even the collective spirit of an ideally enlarged community including all human beings would be marked by the finite features and constraints of its intersubjective constitution”

Thus Habermas worries:

“Granted that there is no transcendental consciousness that can self-reflexively ... reveal invariant patterns of reason, we must admit a disquieting fact. Our standards of rationality [may be] just part of a particular form of life [of us] members of Western culture and of everybody who joins us in an inter-cultural discourse on the standards of rationality that have to come to prevail today on a global scale.”

Habermas hereby captures the eschatological hope connected with Western modernity that it may capture the minds of all of humanity not (only) by the forceful might of colonisation and imperialism but with “the forceless force of the better argument”.

Hegel himself would not rely on such wishful thinking. He reckons “with a spirit that surpasses the modern forms of life”, a spirit “not ours” but one which reaches “beyond the reflexive consciousness of present generations”, in short, an ‘absolute spirit’ that, even though it is tied to history, leads to the confluence of disparate rivulets of social change into one consolidated stream embracing all of humanity, with islands of concrete universality emerging in its estuary from the abstract ocean of the absolute. “We, who participate in our reflective practices of reason-giving, would be seized by a wave of conceptual change which carries us away,” writes Habermas. Human faculties of understanding would be too limited to grasp the full impact of this tsunami.

“With this move Hegel strips away from the concept of spirit the traces of origin in the intersubjective forms of objective spirit. Spirit, as it develops, essentially defines itself through its primacy over against nature, and this means ontologically: ‘*For us* spirit has nature as its precondition, but in fact it is the truth and the *absolute first* of nature’.”

Only a divine consciousness could grasp the true meaning of Hegel’s Absolute. Hegel takes us out of philosophy into theology, a move that most of us would not be willing to go along with. And those who did would possibly be disinclined to speak about it since they consider the limits of their language to be the limits of what they could legitimately talk about. But then who knows what History at the limit of World-History is like?