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## **THE CHALLENGE OF IDENTITY AND THE FOUNDATION OF NORMS: A PLEA IN FAVOUR OF COMMUNICATIONAL MODERNISM**

### **1. INTRODUCTION**

How must we rise to the challenge of identity? How is it possible to respect this quest for identity, in itself so characteristic of our modern times? Can we do so in a way which may contribute in a positive fashion to legal and political modernism?

This much should be established as a given: abstract universality is being abandoned, reserved only for moments of human moral catastrophe, as seen with the events presently taking place in Somalia and the former Yugoslavia. Beyond these moral cataclysms, it is rather the individual that captures our attention with his or her definition of what he or she considers or would have considered his or her identity: manhood, womanhood, first-nation or immigrant status. This phenomenon is characteristic of our times, as is the fact that recognition of this identity often clashes with claims founded on particularisms.

In this paper we wish to defend that only discursive proceduralism as put forward by Habermas adequately grasps the challenge of identity. Discursive ethics and the radical democracy they defend offer the opportunity to examine cultural identities under a new light. Indeed, this ethic considers that the identity of words embrace cultural identities in dialogues with others. In our opinion, discursive ethics as developed by Habermas can thus promote universalism discursively open to actual, concrete man, and thus rise to the challenge of identity.

To demonstrate this, we will concentrate our efforts on the question of the founding of valid norms. Indeed, the question of foundation reveals the conception of identity that a theory embraces. In order to establish the pertinence and originality of Habermas' discursive identity, we will first examine the

question of identity as put forward by the modern abstract universalist school, as well as by the concrete communitarians. We will then point to the weaknesses of each school of thought. Finally, Habermas' view of the founding of valid norms, and of the identities involved therein will be examined. The importance of this theory in the quest for identity shall thus be submitted.

As a last reflexion, we shall examine the concept of democracy in the discursive ethic.

## 2. Abstract Universalism vs. Concrete Communitarianism

Our intent is to compare the theories of John Rawls and of Micheal Sandel as to the founding of norms, and more specifically the concept of identity retained by each for the process. Let us submit that we consider these thinkers to be representative of the modern abstract universalist and concrete communitarian schools, respectively.

Rawls' **Theory of Justice**, and his idea of justice as fairness, is not a simple repetition of classic social contract theory<sup>1</sup>. There is in effect in Rawls' work a sense of "social democratic" or "social liberal" sentiment, directing his reflection towards ideas of social justice. This question cannot be resolved without providing a place for concrete man in the hypothetical social contract. Rawls thus observes that our modern and pluralistic societies embody a plurality of ways to pursue a personal conception of the good life.

This "fact of pluralism" thus discerned, since it is made up of any number of particular identities, will be employed towards resolving the enigma of identity. Rawls can demonstrate this by inviting each person, on the basis of his or her concrete particularism, to participate in the conclusion of the hypothetical social contract. Thus the challenge of identity is met.

The premises on which Rawls' theory is built do not change this conclusion. However, although the theory is founded on Reason, and on the very reasonableness of those very premises, in the purest Kantian tradition, the real problem appears at the logical, or arithmetical, moment at which these premises will become concrete; that is the moment described by Rawls as the "Veil of ignorance". The meaning of this veil in Rawls' social contract ultimately denies any participation of identity in the process of norm foundation.

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1. John Rawls, *Théorie de la justice*, Paris, Seuil, 1987. We shall take for granted that this book represents the essence of Rawls' work. The theoretical problems caused by this displacement of his normative premisses in recent years will therefore not be examined in this paper. On Rawls, see Otfried Hoffe, *L'État et la justice. Les problèmes éthiques et politiques dans la philosophie anglo-saxonne: John Rawls et Robert Nozick*, Paris, Vrin, 1988.

Indeed, the meaning of this logical moment known as the "Veil of ignorance" implies that the contracting parties renounce to any reference to their particular identities. These individuals must forget who they are, and they must do so to avoid the influence that their natural, social and historical advantages will have at the moment of concluding the contract meant to provide social justice.

Thus, in order to establish political or legal norms, people must forget any personal interest, as well as all history, context, and ultimately any particularity. They must show themselves in the light of Protestant eschatology, as newborn children, and on this basis attempt to achieve a normative foundation on which they can build to solve the problem of legal action. Legal norms thus founded purport to universality based on the sole foothold of Reason, notwithstanding and independently of any context, general or particular.

Rawls' idea of universality is thus no longer a strictly semantic question, as it was for Kant, but is rather a grouping of universal premisses to be found in Reason whose reasonableness must permit concrete man to establish valid norms through an abstract procedure.

Hence, the original position constitutes a heuristic position of equality and freedom that must allow participants to choose valid norms within the procedure of their creation.

What, however, is to be done with the question of identity? Rawls can certainly be accused of sending a disincarnate person to negotiate a social contract, thereby stripping him of any particular identity he may have had. The net result is that abstract neutrality proscribes any resort to the social, political or cultural identities of individuals. Consequently, it is no longer possible within this doctrine to address the issue of collective rights, since any claim to them is necessarily based on a non-neutral emphasis of identity. This is precisely the problem underlying present first-nations rights claims.

We will now consider the founding of norms in the communitarian school, represented by Micheal J. Sandel. While aware that communitarian theorists Sandel, MacIntyre, Waltzer and Charles Taylor make up a heterogenous group, they nonetheless have in common the position that the founding of legal and political norms is of concern to the community. Thus, norms must be founded on the basis of communities made up of concrete beings, and justifiable by suppositions of community identity. This is particularly clear in Sandel's work<sup>2</sup>.

According to Sandel, any reference to "justice" necessarily implies, firstly, an individual, capable of making justice the horizon of his choices. Consequently, Rawls' decision to found norms on a hypothetical choice, is, in Sandel's idea, a theoretical faux pas. Indeed, for Sandel, people must have

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2. Micheal J. Sandel, *Liberalism and the limits of justice*, Cambridge, Cambridge University Press, 1982.

an independent existence prior to the choice, and the reasons motivating them to make the choice must be independent of the consequences that it may ultimately have. In other words, Sandel assumes that people possess an identity that provides them with the capacity to make choices.

For Communitarians, norms are founded as a result of a process in which socialized and personalized individuals create norms of their choosing. Where Rawls would have introduced a theoretical premise for foundation, Sandel presents a practical creation.

To grasp the process described in Sandel's work, one must begin with the individual. This individual knows that he is a part of a context that he has not chosen, and realizes that this will be of consequence when making choices. As a self-interpretive individual, he or she is capable of self-reflection, in that it is possible to put distance between oneself and context. This distance, however, always remains both tentative and fragile. The individual knows that he is within a given context even in his self-reflection. The self-reflective process brings Sandel to the question of "who I am", which must be confronted to the question of "who I wish to be". The parameters of Sandel's perspective are thus displaced from a situation of founding toward the process of foundation.

Indeed, I share "who I am" and "who I wish to be" with those who are like me. This is why Sandel illustrates this process by explaining that one may consult a friend. Friends know us as well, indeed sometimes better, than we know ourselves. This example then demonstrates that self-knowledge can be shared by the community. As the freedom of each person is limited by the aspirations and ties that a person cannot sever, so does justice find its limit in types of communities that the identities and interests of the participants have bred.

The process of founding legal norms expressed by this model is self-comprehensive. Those participating in the process specify their fundamental identities and interests with reference to their community. Is there anything in the said community that could sustain and legitimate normative renewal? From the standpoint of legal philosophy, norm creation thus becomes a question of a community's internal self-understanding.

Sandel deserves criticism in that the perspective of universality is overshadowed if not lost in his theory. There is indeed somewhat of a confusion between the public and private spheres, and Sandel is unable to differentiate the political public good and the public good as an expression of individual identities. By not clearly distinguishing these two ideas, the concept of common good becomes muddled, and the status of particular identities are left in limbo. Political and legal norms become dependant of a particular idea of good, and universality gives way to particularism.

To summarize, we submit that neither position is able to rise to the challenge of identity. The first would have us renounce to our identity, after having recognized it, whereas the other would have us sacrifice universality for the sake of particularism. Neither theory can thus adequately grasp political

and legal modernism.

It seems, in effect, that we must look elsewhere to find answers, and we submit that Habermas' discursive model may provide some very valuable insights.

### 3. Habermas and the discursive foundation of norms

Jurgen Habermas, in his recent work, has been preoccupied by the question of the founding of political and legal norms.<sup>3</sup> He has expressed a desire to find a middle ground somewhere between Rawls' abstract universalism and concrete communitarianism. From a strictly philosophical standpoint, the idea seeks to obtain the best from both the worlds of Kant and Hegel. From the standpoint of legal philosophy, the idea seeks to reconcile legal modernism with itself. In order to succeed, this ambitious project must rise to the challenge of identity. In this process, norms will be validated by a discursive test conciliating both individual particularism and the need for universality in political and legal modernism.

Habermas validates norms in the following manner. He establishes to begin with that abstract and concrete man are dissolved in the perspective of linguistic communication, giving way to a new concept, that of practical communication. This concept is founded on the idea that man is his discourse, his communication. This "dissolution of man", which in no way implies the death of the subject, is rather the "entirely dissipated sovereignty" of the forms of discursive communication. For Habermas, discursive communication holds the necessary potential to establish social validity.

However, practical discussion does not produce valid social norms but rather tests their validity<sup>4</sup>. The actual production of norms lies outside the sphere of discourse, either in the real world or in systems<sup>5</sup>, which characteristically execute this task.

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3. J.Habermas, *Théorie de l'agir communicationnel*, Paris, Fayard, 1987, 2. vol.; *Morale et communication: conscience morale et activité communicationnelle*, Paris, Cerf, 1985; *Écrits politiques. Culture, droit, histoire*, Paris, Cerf, 1990; *De l'éthique de la discussion. Que signifie le terme "Diskursethik"?*, Paris, Cerf, 1992. See B.Melkevik, "Le modèle communicationnel en science juridique: Habermas et le droit", in (1990) 31 *Les Cahiers de droits*, p. 901-915; "Transformation du droit: le point de vue du modèle communicationnel" in (1992) 33 *Les Cahiers de droits*, p. 115-139.

4. J. Habermas, *Morale et communication: conscience morale et activité communicationnelle*, op. cit., p. 125. See also J.Habermas, *De l'éthique de la discussion. Que signifie le terme "Diskursethik"?*, op. cit.

5. For a definition of the terms "real world" and "system", see B. Melkevik, "Transformation du droit: le point de vue du modèle communicationnel", op.cit., pp. 119-122.

In the real world, norm creation is a consequence of plurality, and plays an integral part in the socialisation and personification process. These norms are in constant evolution, and provide the very pulse of the state of the real world. In systems, norm creation tends towards autonomous technicity so as to preserve itself. Norms thus produced, whether by the real world or by systems, can only exist in somewhat of a rough state, and await potential social validation. This expression is one of normative pluralism, in which Habermas provides the perfect counterpart to Rawls' factual pluralism.

Only linguistic discourse can ascribe social validity to norms. And as language is produced by the real world, it follows that the real world must legitimate norms. According to Habermas, intersubjective recognition socially validates, and consequently legitimates norms. Indeed, intersubjective recognition is a process of validation, which may be understood as a foundational discourse. The criteria for measuring validity are produced by reciprocal-reflexive communication, in itself a dialogue between the demands of reason and the demands of concreteness. The moving force behind discourse, that is the capacity to obtain consensus and agreement as to the validity of proposed norms without coercion, is taken in charge by rationality. Universality by discourse is reached inasmuch as we reach concrete validation of a norm when we respect the best argument submitted.

We shall now examine two validation processes, that we can call the interest test and the universality test. Habermas tells us:

" Any valid norm must satisfy the condition by which consequences and side-effects that (foreseeably) stem from universal observation of a norm with the intent of satisfying each and everyone may be accepted by all ( and preferred to repercussions of any other known method of resolution<sup>6</sup>"

The criteria of universality to which Habermas refers no longer has the same meaning as in the Kantian heritage. No longer a pure incarnation of abstract reason, universality is to be seen in the perspective of dialogue, in that to be universal, a norm must be acceptable to those who seek to adopt it.

Universality is no longer, as was with Kant, discovered by reason, but concretely created by those concerned. Since the norm must take into account the interests of all, it thus acquires the characteristic of universality, inasmuch as those concerned by it are prepared to adhere to it.

As concerns the interest test, suffice it to say that norms should express the interests of all concerned. Thus respect of particular conceptions of the good life is necessary to found a norm. This respect will

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6. J.Habermas, *Morale et communication*, op.cit.p. 86-87; see also *De l'éthique de la discussion*, op.cit., p. 123. Habermas is referring here to William Rehg.

"Discourse and the Moral Point of View: Deriving a Dialogical Principle of Universalization", in *Inquiry*, 34, 1991, p. 27-48, for a detailed proposition on how to achieve this foundation.

materialize in the terms of political power, since facts participate in the creation of norms. It is in this vital sense that those persons or groups of people that feel disadvantaged by any given normative proposition possess the right to veto it.

It is in this way that Habermas attempts to reconcile the two flanks of political and legal modernism. On the one hand, the public space, inhabited by power struggles and interest clashes, finds a legitimacy that liberalist theory has never been able to provide. On the other hand the "common good" is redefined as a normative measure respecting pluralism, but a far more radical pluralism than that which has heretofore been defined by liberalists.

Habermas affirms, through the procedure of discourse in norm creation, the priority of the just over the good, inasmuch as there is free and equal access for all participants in the process.

Cultural identities are thus confirmed, as the individual is no longer stripped of his ties to context, but rather seen as a being who shares the symbolic reservoir of the real world with others. Since this real world embodies both factual and normative pluralism, the very fact that norms will be socially validated, by persons in a concrete setting, possessing concrete interests, implies that the idea of cultural identity is far more radical than in liberal thought. This finding will direct us toward the radical conception of democracy that underlies Habermas' idea.

#### **4. A radical conception of democracy**

Habermas expresses a radical conception of democracy. This can be seen by summarizing three main points addressed earlier:

1. The hypothesis of an egalitarian, pluralistic and democratic "public place" with a normative character, in which individuals can express both the universal and particular aspects of their identity.
2. An open horizon of dialogue, within which one can understand oneself and others, or more specifically others as one discovers oneself through dialogue in which each person is both who he or she is and who he or she would like to be.
3. Openness toward the realisation that everyone's life-story concerns us. What is thus told is the story of "us", materialized at point 2., politicized (argumentatively) at point 1.

Examining these points more closely, we can observe that the first point is a radical reformulation of

the Rawlsian project, whereas the second point constitutes a rationalization of the communitarian projet. This radical conception of democracy begs us to reconceive our ideas about legal and political legitimacy.

We may do so by adopting Habermas' theory of entirely dissolved sovereignty:

"Entirely disseminated sovereignty does not materialize in the heads of the associate members, but- if we can still speak of some form of incarnation- in these forms of discursive communication that are opinion and reason so that their fallible results may be presumed to be practical reason. Popular sovereignty, without subjects and anonymous, intersubjectively dissolved (.....) Sovereignty liquified by communication will act in the power of public discourse (....)<sup>7</sup>"

Or still:

"It is within this sovereignty, having become fluid as a result of communication that the necessary potential for reflexion is to be found, as long as it can be heard through the proposed themes, arguments and solutions, as they appear, freely throughout the public debate. However, it must also take shape within the resolutions adopted by democratically constituted institutions, and responsibility must be taken for the heavy consequences of these practical decisions. Power brought about by communication, can, in absence of a desire for conquest, acts on the premisses of the evaluation and decision procedure in public administration, since it must argue normative demands in the only language understood by the fortress thus besieged: the management of a fund of arguments that the administrative power has a right to use instrumentally, but not- inasmuch as the structure corresponds to a rule of law- ignore."<sup>8</sup>

Here, Habermas expresses a radical conception of democracy, closer in many ways to anarchist theory than to the social-democracy he holds dear<sup>9</sup>. Nothing less than the dissolution of modern theoretical sovereignty is proposed. Indeed, as we have found, discursive communication implies the intersubjectivity of subjects, so that analysis is displaced toward a communication that tends to promote reciprocal recognition of valid norms. Hence, we are no longer examining some sort of abstract reason, as did Kant, Fichte or Hegel, nor do we stop at the subjectivity of the subject as with Locke and the liberal tradition, we do not even postulate the sort of collective subject put forward by Bodin or Hobbes, but rather, we now look to language as a social or socializing force, affirming

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7. J.Habermas, "La souveraineté populaire comme procédure. Un concept normatif d'espace public", dans *Lignes*, Paris, no. 7, 1989, p. 52.

8. J.Habermas, *Écrits politiques. Culture, Droit, Histoire*, op. cit., p. 158

9. J.Habermas, "La souveraineté populaire comme procédure", op. cit., p. 42-48.

itself in an infinite process of acts of language which go to the very constitution of real worlds. That is towards the differentiation that each and every individual can and does make of culture, society and personality.

The real worlds represent the potential horizon of understanding, which in turn allows one to answer by yes or by no to any candidate to validity that is presented. The subjects (that is the individual) have not died as in structuralism and in french post-structuralism, but are quite present as speakers and listeners in a communication, without, however, occupying the place of choice, which is assigned to the normative meaning of the communication in which the participants are involved. This normative meaning, as we pointed out before, seeks to coordinate the shapes of the communicational act so that they might be reasonable for all. We agree with Habermas when he claims that the modern theories of sovereignty have dissolved into language, since the communicational sovereignty that is language is really nothing more than the normative force of dialogue.

This radical conception of democracy also defends an idea of law, one in which the rights of political participation become its underlying principle. We are the argumentative authors of rights between one another. Hence, the principle of law cannot be discovered, and does not belong to any majority or minority power or authority. Indeed, the intersubjective paradigm as the basic principal of a communicational conception of law provides us with the parameters with which we may evaluate the validity of existing norms or those about to be created. We now observe the creation of law from the standpoint of democracy, and can evaluate as well as judge the real and symbolic situation expressed by concrete identities.

This radical conception of democracy has some particular consequences for law, the bullseye of modernism, on which we will stop a few moments to elaborate.

Let us begin by stating that consensus can only be obtained for a rather small number of norms, thus a permanent dialogue between the majority and minorities, cultural and otherwise, becomes necessary. The result is a dialogue within which the minimalist choice that will be retained through consensus will normatively open the public space to expressions of identities and cultures **in law**. Hence, the communicational concept of law is apt to recognize law in a normative fashion, so that, to use a metaphor, "the stranger may remain a stranger" to us. Indeed, respect for factual pluralism, as defended by liberalism is thus supplanted by normative (as well as factual) pluralism from a legal standpoint.

We can then recognize that society's project is intrinsically tied to ideological debates and power struggles. Far from trying to establish a theory of justice, whether it be Rawls' or Sandel's, this model, based on democracy, law and norm creation, ascribes legitimacy to debate and power struggles. Habermas recognizes that the welfare-state has hit a dead end, and he gives rights to individual and collective social actors, with one restriction: if a normative solution is sought, one must submit oneself to the very logic of that normativity. The idea is to resolve conflicts without resorting to violence or short-sighted strategy.

Perhaps our heads are now spinning slightly, as we realize that we have come face to face with anarchy, albeit a specific version, that owes practically nothing to anarchism. Indeed, what we confront are personalized and socialized individuals making social goals their own. This is a concept in which we can readily sense the influence of such troublemakers of legal and political modernism from Vico to Marx, and finally, Habermas himself.

## **Conclusion**

We will now restate the more important elements of our analysis.

We have seen that the challenge of identity is a major problem that contemporary legal and political philosophy must address. We have also seen that the ways of both abstract universalism and concrete communitarianism seem highly inappropriate avenues of resolution. Only Habermas seems to offer promising inroads towards a new communicational modernism. This very modernism, once attained, should bear the dimensions of concrete man, sharing history, culture and horizons of meaning in the quest for reconciliation with the universalist perspective.

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