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## EDITORIAL

### THE STRENGTHS OF DEMOCRACY: ABOUT THE INTERNAL RELATIONSHIPS BETWEEN DEMOCRACY AND THE RULE OF LAW

In response to a question about the value of the principles of democracy and the rule of law that complex societies are experiencing in the environment of "democratic" countries, that is, those in which their Constitutions establish intrinsic values to the democratic regime and human rights, Habermas argues that it is necessary to make attempts to reaffirm those principles from the legitimacy of democratic performance, a question that he affirms is only possible through the implementation of political agreements related to democracy as a political institution, which he insistently adjectives as "radical". This implies not only enforcing the democratic principle, which is very important in the theory of dialogical law and which makes the interception of the Theory of discourse to the contours and interiorities of the rule of law, which he interprets as a way of responding to demands for the legitimation of political action by both the government and the State; but also he values the performance of this type of political regimes as a result of the legitimacy of the discourses that support the same legal status of the State together with the strive democracy, established under these remiss through valid rules self-imposed procedimentally by the political community .

In view of this, considering the skeptical observation shown about the poor democratic performance and the absence of formality,

necessary in any State of law if it aspires to justice as an intrinsic value for citizen emancipation, this author takes a position to affirm that in the moment when the elements of normativity and formality of democracy evaporate, the law becomes a mere instrument of control of citizen behavior, and "democracy" as a mere "spectacle of deception" and "self-deception", without consequences for reaffirmation of the rule of law as guarantor of democracy; even, especially when the "electors" lose all faith that their election can influence the policy of the acting government: the vote loses in this way political efficiency and citizen interest.

Well, that response with predictive features about future political events (the answer is given by the German philosopher in an interview published in 1995) referring to the establishment of justice and equity regimes only at the formal level; that is, with the sole declaration in the Constitution of fundamental legal values but diminishing or extinguishing the good democratic performance of the government action; It makes us think of events very close to the Latin American political experience, because, I agree with the author, the mere mention is not enough to categorize a political regime as legitimate, at least to understand the democracy that nowadays emerges in the world as one of the political values that strives to prevail in these times also as market empire on the global citizen life (that is, against the so-called post-democracy, which is nothing else than a democracy without deliberative content). Of course, this perspective places democracy, as can be seen from recent political experience, in an "essential tension", as Thomas Khun would say with

reference to scientific revolutions, with which, among other arguments, Habermas reconstructs his moral theory and politics, at the beginning of the nineties, just after the fall of the Berlin Wall, redefining in that context a concept of democracy not only formal but also, and most important to my way of thinking, empirical; that is, he understands the political system capable of enabling citizen welfare as a democracy for performance.

However, it must be said that the philosopher's special attention to discourse about the form and content of democracy not only refers to it as a political concept in his/her work as a hermeneutist of society, but it is also worked assuming different humanistic perspectives: philosophical, political, legal, scientific and finally, sociological and anthropological ones; in particular, he/she studies the subject from the determining relationship with the philosophy of law as a political and moral category. Certainly, the political events of the last twenty-five years mark a dividing line on the subject of democracy since the publication in German of the most important work of the author on the subject, thus giving clear idea about how successful the philosopher could have been in relation to the details dimensioned in that famous text, which is complemented successively with other works of lesser scope, although certainly not without the characteristic rigor of his writings and research projects.

In the work where these arguments are recorded (*Fact and Validity*, 1998), the author proposes the task of taking a deep and disturbing look at the topics of political philosophy, emphasizing in revealing the intricacies of the action through a complex analysis of

what it means in times of political conflict, the human being living in society, turning his gaze towards those societies called by him complex societies. It is clear that his purpose is none other than to delineate the philosophical and conceptual foundations of the rule of law in terms of his already strained theory of discourse, a question that he does through a look at the confines of the Modern State from the watchtower rebuilt by the continental Europe, which at that time has exceeded for the time of publication of the text the foundations of so-called real socialism, instantaneously installed political regimes based on the postulates of the democratic state in all those loopholes where there was domination of Marxist-Leninist-based communism Stalinist that history knows.

The analytical task that the author manages to demonstrate, as always, is not unproductive to understand some problems of political everyday life, especially if one judges the origin of the philosopher from his neo-Marxist roots, especially having migrated from thoughts and ideas with occasion of the philosophical reconstruction of discourse and communicative rationality, which permeate the work carried out a moral and political conception since the publication of another of his monumental works, *Theory of communicative action* (1981); nevertheless, it is necessary to emphasize that the postulates that conform these works were delineated by the author in previous works and even complemented later<sup>1</sup>.

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<sup>1</sup> The list is long enough to be able to enunciate these works in the present space, but the trilogy that gave him fame as a scholar of rigor before the community of colleagues who saw him grow as an intellectual and philosopher of great projection: *Knowledge and Interest* (1962), *Science and technology as ideology* (1962) and *Logic of the social sciences* (1982).

There is nothing more emblematic for the discussion of the topics dealt with, in my view, than the fact of the author of reconstructing the ideals of the Rule of Law in terms of discourse theory, and to link his master lines with the dialogical conception of the life in society based on the communicative aspects that characterize human action; this question logically escapes the ideals and postulates of Marxism as an ideology that imposes thought from the domain not only ideological but by the use of force<sup>2</sup>, very criticized by the author, to impose it structurally from the absence of principles non-democratic based on non-deliberative policies regarding the use of power.

It is for this reason that today it is essential to reflect on this essential aspect in the political life of any modern society, in the sense of the need to link the most important concepts in the work of the author highlight, which are intercepted in Fact and Validity as fundamental pillars of the complex life that is lived today in the modern world: democracy and the rule of law. Therefore, we briefly review the concept of democracy and then understand how the author links it to the rule of law.

The perspective that Habermas assumes about the subject in the aforementioned book is related to the principles that, dialogically reconstructed, emerge from the discussion in any modern legal

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<sup>2</sup> The concept of revolution that is found within the framework of the proletariat's dictatorship embodies the idea of forcibly imposing the ideals of Marxism as political and economic theory, that is, as a theory of the State, with the results that history knows.

community, conformed by a network of tensions that each one struggle to impose its meaning and scope in complex societies. These tensions are guided in their totality by a normative principle about the concept that tries to legitimize itself, that is, the concept of democracy dimensioned by its deliberative nature. What we want to express with this idea in the indicated text is that modern political theory seems to have made democracy more than an empirical concept, a normative construct; and this is a central point in the concept in Habermas. The objective that is proposed is to justly highlight the idea that there are two political meanings of the concept of democracy: an empirical one, which is assumed as an object of study by both science and political philosophy; and another normative, which deals not only with the law and philosophy of law, but with jurisprudence itself; the latter introduces an incentive to alleviate the tensions that in the democratic game are fueled by hegemonic attempts to exercise power, although sometimes the experience of such practice directs society towards another sense of legal experience, as Habermas himself recognizes, reproducing a political environment that gives the citizen a legitimizing power, despite the domination of the will at stake.

The philosopher states that "... the legitimacy of the State is measured by the factual recognition that it is the object of those subjected to domination ..." (1998: 366). It can be seen then in this fragment that politics imposes itself as domination, that is, every politics embodies the dominant-dominated duality; nevertheless, in the dialogical conception of power, the empirical situation in which the dominated ones are found, that is, those to whom the exercise of

political power is directed, leads to the formation of a state of connection between political power, and exercise of power in terms of rational acceptability, which ultimately translates into the contents of democracy as a link in politics in view of the circumstantial acceptance of forms of domination. From this affirmation he also expresses that legitimacy is the measure of stability. But these criteria, in spite of their legal implications, can also be assumed by a dictatorship, according to what we are told, because if what is involved is to legitimize in order to stabilize, the dictatorial regimes perfectly comply with this premise.

Then it is the question directed towards the search of answers for the redefinition of the political regime that can fulfill the demands of the citizen in terms of the Aristotelian beneficial life; that is, in terms of practical rationality within the framework of the reconstruction of the world of life: If what is involved is to reconstruct a political regime that allows to satisfy the manifest interests in complex societies, I wonder how the political nature of democracy can be understood in times when legitimacy is not reached by simple domination, because the social dynamic demands agreements to resolve conflicts of interest around not only the satisfaction of needs but the exercise of power itself. The answer that Habermas could give to this question is the need to establish in these complex societies a political regime capable of alleviating the tensions that occur within it through the exercise of democracy but redefining it in dialogical terms. Consequently, this broadens our range of doubts, because we ask



ourselves what is deliberative democracy and its scope. Let us see some ideas about it.

In the first place, we must understand that for Habermas, democracy is not only an idea of organization in which political parties and civil society, together with the party or political parties in power, articulate to carry out the ideal of democracy. the legal community derived from the communication community (1981); that is, through the noble idea of satisfying the interests of the participants in the democratic game; democracy is also a way to achieve the goals of both the state and the citizen, trying to seek harmony from the practice of free discussion about what each citizen aspires to in the democratic political order. But this necessarily goes hand in hand with the exercise of legitimate political power; that is, through the fulfillment of the postulates and principles that the political community gives itself through the free discussion of procedural norms for the establishment of democracy, thereby establishing a deliberative legal community.

Thus he tells us in 1998 that the discursive concept of democracy, which separates itself from the traditional ideas of a politically constituted society, is in advance compatible with the form and mode of operation of functionally differentiated societies. These forms of operation of functionally differentiated societies are referred to the formation of a legal community that regulates its procedures not only through the legal establishment of its procedural rules, but it does so through the legitimacy of which it is impregnated: discursive democracy goes the way of a political regime that deliberates its own rules and norms of procedure, not only through the so-called

"institutional discourses", as would be the parliament or the courts of justice, but by those "not institutional" discourses, that is, those generated within the very heart of society that seeks to achieve democratic legitimization (Universities, Churches, NGOs, Civil Society, among others); This is at the same time that the political regime is deliberated in a discursive sense, which translates into political deliberation in all those instances that allow the imposition of norms by a legitimate subject in turn. And this is precisely the core of the deliberative issue in modern societies.

It can be concluded then that deliberative democracy is that which bases its regime on the discussion and promulgation of norms for the democratic exercise of power, in order to conform what the philosopher calls "political will": that which contributes to the formation of public opinion as of the same political will, leading to the establishment of the rule of law as a way of political life, since the policy expressed in this deliberative form establishes a relationship between formal and informal aspects of the formation of opinion and the will; that is to say, among the deliberations directed towards the decisions which are already regulated by democratic procedures, and the informal processes of formation of opinion in the public-political space (1998).

However, despite what has been said, Habermas adds that to the extent that these procedures are not restricted to the organization of votes to which only an informal formation of the will precedes, they also regulate the composition of the political organs destined for structuring of the daily work directed to "treat" matters in "assembly"

of those also organized from the parliamentary breast of the policy. There is a vision of deliberative democracy delineated in a sense not only empirical, but also normative, which allows to establish internal links with the legal forms of organization; the rule of law is thus oriented towards the protection not only of the citizen of the excesses of power, but of the very procedures that guarantee the democratic use of that power, establishing internal relations between the forms of democracy and the rule of law itself. For this reason, we need to delve into the idea of the rule of law as a regulatory principle of democracy, which, according to Habermas, is impregnated with the discursive principle.

The previous comments seem to be related in the political theory of Habermas with the understood right in a deliberative sense. Today, democracies are not conceived without their necessary link with the law, or with the law without its necessary legitimacy and legality, based on obedience to democratic procedures in order to be governed as such. This is why our author says that all domination is exercised in the form of law, but that legal arrangements can be made where political power has not been domesticated by law, that is, there are political regimes without the institutions of the State of right, although in fact there are States with a certain right but without democratic Constitutions; that is, they possess a certain Fundamental Charter where the organs of power are not permeated by the democratic Principle that derives from the dialogical conception of the rule of law.

The result of the above paragraph is that of the conception of the right of the State penetrated by the deliberative nature of the constitutional rules, which allow directing the instances of power along the paths of a democracy capable of stabilizing expectations through the foundation of institutions through of the law dialogically considered. Discourse as a rule to direct these institutionalizing instances of law must be characterized by the dialogical rationality of which all competent subjects are linguistically speaking; it is a State founded on the very fact of dialogue and discourse, governed by democratic rules reached by consensus among all those involved in that discourse. When it is said "linguistically competent", the author refers to those subjects capable of intervening in the dialogue that bases democratic rights, whose rules are self-imposed by the rationally reached consensus, which means "all those affected" by the norms under discussion. .

To achieve then the role of a democratic rule of law, it is necessary to establish those rules capable of resolving conflicts and meet expectations in the discursive work of mediating to achieve the desired political stability. The rule of law will then be that legal regime reached through democratic means that can stabilize complex societies, whose rules have been won by the consensus of the parties concerned in the discourses of both the foundation and application of fundamental rights, being the democratic Principle a right also in discussion. There is then no right without democracy, or democracy without right from this dialogical perspective of law, which leads us directly to conceive the law itself as a tool to achieve the freedom of

the individual and society, central issues to the Habermasian theory of law and the State: every right is for freedom. For that reason it affirms that: "The right, while we look at it under the aspect of its own function (...) is presented as a system of rights ..." (1998: 200).

Hence, any right is impregnated with the dialogical principle if it pretends to conform itself as a system of law, because this will be a guarantee for the fulfillment of democratic purposes, oriented towards legal equality within the framework of voluntary action only constrained by the claims of validity of each member of the legal community and of the consensually agreed restrictions of freedom: "The right to equal rights with regard to the status of members of the voluntary association that is the legal community, presupposes a collective delimited in the space and the time, with which its members identify themselves and to which they can impute their actions (of them) as parts of the same interaction context "(1998: 200). This directs the actions of the legal community towards the production of norms translated into fundamental rights capable of guaranteeing democratic participation, for which reason an internal connection between both categories is inferred, analyzed in this hermeneutical instance by the author; that is, between the State of law and democracy.

The preceding ideas allow us to necessarily think about the internal relationship between the rule of law and democracy. Although the author analyzes this link in detail in a later work in 1997, which is entitled as *The Internal Link between the State of Law and Democracy*, the text of 1992 and translated into Spanish in 1998 is devoted to

arguing about the rule of law from the democratic perspective under the two principles already mentioned and that are deduced from the relationship between both constructs: this is the democratic principle, mentioned above, and the discursive principle. From these two principles are based the conceptual and empirical relationships that give life to the democratic State of law, because, in no way, he argues, from a purely normative consideration a rule of law can be given without democracy; the empirical link is necessary if a radical democracy is to be implemented.

For this reason, for Habermas, although the empirical contents of the concept of deliberative democracy direct the gaze towards the peaceful coexistence of a society permeated by the principles of peaceful coexistence and satisfaction of needs, it is demonstrated in the author's investigation that these contents can give non-conflicting justification, although not without tension in the formation of political will based on the foundation of democracy as a fundamental right and as a right inherent in the very facticity of the democratic legal order. Hence, there can be no rule of law without democracy, nor can there be a democratic regime without a right. Political paternalism is thus blurred from political theory.

**Dr. José Vicente Villalobos Antúnez**  
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