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## **Social Injustice and the Pragmatics of Universal Justification**

Albena Azmanova

### Summary:

By articulating the pragmatics of justification in cases of conflicts among basic rights, this paper endeavors to solve the tension between the seeming political vacuity of abstract moral universalism and the seeming parochialism of theories sensitive to cultural context. This solution emerges within a discourse-theoretic model of political judgment - what I name “critical deliberative judgment”. Its parameters are elaborated first in a reconstitution of Critical Theory (as a tradition of social philosophy) that focuses attention on the emancipatory, rather than the conciliatory dimensions of judgment. The model is further elaborated by way of replacing the reliance on ideal theory of justice with a pragmatist political epistemology. The latter accounts for the way specific experiences of injustice affect publics' identification of what counts as relevant issues in debates over conflicting rights. Finally, the model is completed with an account of the critical and emancipatory work that democratic practices of open dialogue are able to perform, ultimately relating local sensitivities to universal demands of justice by disclosing the structural (rather than agent-specific or culture-specific) sources of social evil.

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Panel “The Validity of Human Rights: Conflict, Judgment, and Political Contexts”:

09/04: 8:00 am, Convention Center 204.

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“The executioner always wears a mask: the mask of justice”

Stanisław Jerzy Lec

## **Introduction**

Political judgment and human rights draw their force from apparently opposite sources: human rights – from the appeal to universal justice; political judgment – from the urgency with which immediate and local experiences of injustice trigger demands for adjudication and political action. The tension between context-specific considerations and demands for normative rigor is intrinsic to political judgment – the judgment over the fair terms of social cooperation, over the right normative order of society.

In what follows, I will advance a solution to this tension in the form of a discourse-theoretic concept of political judgment, or what I call a “critical deliberative judgment”. This model develops not by spelling out procedural and substantive principles of justice, but by exploring the pragmatics of justification, and highlighting the interplay between interest-related and morality-related considerations lying therein. My point of departure is the tension that emerges, in cases of conflicts among rights, between societal conceptions of justice and conceptions of fairness: a tension that calls for the exercise of political judgment. The parameters of the model of political judgment I advance first evolve from a particular reconstruction of the normative concerns of Critical Theory (as a tradition of social philosophy) that enables focusing attention on the emancipatory, rather than on the conciliatory (consensus-building) dimension of rights. I further develop this model by

conceptualizing the way specific experiences of injustice affect a public's identification of what counts as relevant issues in debates over conflicting rights – thus shaping societal notions of fairness. Finally, I will address the critical and emancipatory work that democratic practices of open dialogue are able to perform, ultimately relating local sensitivities to universal demands of justice by disclosing the structural (rather than agent-specific or culture-specific) sources of injustice.

### **1. Justice versus Fairness**

Whenever power feels compelled to speak the language of rights, it is most often to endow a course of policy action with the secure foundation that only universal validity can grant. Thus, when in September 2010 the United Nations Human Rights Council established the legal responsibility of governments to provide water and sanitation to their citizens, it vested this responsibility as a new ‘human right to clean water and sanitation’ - a right deemed integral to the right to life and human dignity.<sup>1</sup> Earlier that year the Finnish government bound itself to ensure internet access to all its citizens, codified as a legal right, itself justified in terms of a ‘fundamental right to communicate’.<sup>2</sup> Finally, at the start of the same year, the United States Supreme Court increased corporations’ political influence by lifting the ban on

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<sup>1</sup> UN Resolution “Human rights and access to safe drinking water and sanitation” A/HRC/15/L.14; 30 Sept 2010.

<sup>2</sup> According to a poll conducted by GlobeScan for the BBC World Service, almost four out of five people around the world believe that access to the Internet is a fundamental right, an integral part of free speech. (Reported on 8 March at <http://news.bbc.co.uk/2/hi/technology/8548190.stm>)

corporate funding of political broadcasts, on the grounds of corporations' right to free speech.<sup>3</sup>

That political causes, even when openly interest-driven, are fought on the territory of rights is unsurprising, and even uncontroversial. It is in the essence of right that it overrides considerations of pros and cons: there can be no discussion of the benefits of the exercise of a 'right to life', or the costs of its provision. That is why rights, as Ronald Dworkin has famously observed, have the capacity to trump interests: that which is general overpowers what is partial and parochial. This power of rights derives from the range of their scope of validity: the wider the scope, the higher the claim to validity, the stronger the appeal to political responsibility and the more irresistible the call for political action. Basic rights issue a universal claim to validity, and therefore have the strongest political pull. Unsurprisingly, governments in liberal democracies, as much as in autocracies, have in recent years violated the basic rights to freedom of speech and privacy in the name of security and safety (for instance, by increasing wholesale surveillance measures), by invoking that most general of rights – the right to life and the state's corresponding obligation to safeguard it. It is in this sense that politics' taste for rights is uncontroversial, and not necessarily confined to western liberal democracies. But the power of rights over interests is also unsurprising: philosophical argument has been corroborated by socio-psychological research revealing that even quite young children are able to distinguish between an outcome that is favorable to them and one that is fair.<sup>4</sup> By force of being

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<sup>3</sup> *Citizens United v Federal Election Commission*, 130 U.S. 876 (2010), decision issued on 21 January 2010. (Available at: <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>)

<sup>4</sup> M.J. Lerner, "The Justice Motive: 'Equity' and 'Parity' Among Children", *Journal of Personality and Social Psychology*, 29: 539-550.

an element of the human condition, the sense of justice is also a parameter in the mundane operation of power.

Dealing with rights becomes controversial not when rights come into conflict with *interests*, but when the enforcement of rights that are otherwise recognized as valid and are codified as legally binding, clashes with society's notion of *fairness* – most often in instances of conflict among rights. Thus, it is society's common sense notion of fairness that Justice Stevens invoked in his dissenting opinion in the Supreme Court's judgment of corporate electoral funding:

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules... At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.<sup>5</sup>

In the case at hand, the sense of unfairness which Judge Stevens' opinion evokes is triggered by a clash among basic rights constitutive of American society's overarching conception of justice: a clash between the right to free speech, and the right to self-government. The conflict among rights within a general conception of justice is a phenomenon often articulated in the categories of unfairness – a phenomenon born out in the tension between 'having the right to' and 'being right about', between 'having rights' and 'being right'. This tension has become tangible in the public debate on the building of an Islamic community center and mosque near Ground Zero in New York (dubbed "Park51"). While the project's supporters defend

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<sup>5</sup> *Citizens United v Federal Election Commission*; Opinion of J. Stevens, p. 90.

it on the grounds of religious freedom, which is guaranteed as a basic right in the U.S. Constitution, not only its opponents but also many of its supporters deem that the project is “inappropriate”, “insensitive”, or “not right”.<sup>6</sup> Thus, the controversy around Park 51 is not generated by the public’s being divided along the fault lines of support and rejection of religious freedom; it is generated by the tension between the rights we embrace as binding and the notion of fairness that guides our judgment in the application of these rights.



A rally about the planned Islamic community center and mosque (“Park 51”) near Ground Zero in New York, 22 August 2010.<sup>7</sup>

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<sup>6</sup> According to an opinion poll conducted among New Yorkers and published in the New York Time on September 2<sup>nd</sup> 2010 , the majority of those surveyed believe that, based on freedom of religion, the developers have the right to build Park 51. However, some 50 per cent of respondents oppose the project on grounds that it is inappropriate in view of prevailing sensitivities after the Sept. 11 terrorist attacks when two aircraft hijacked by Muslim extremists on September 11, 2001, crashed into the World Trade Center's twin towers, causing them to collapse.  
(<http://www.nytimes.com/2010/09/03/nyregion/03poll.html>)

<sup>7</sup> Ed Payne, “Faith groups divided over New York Islamic Center”, CNN, November 9, 2010. Available at: <http://religion.blogs.cnn.com/2010/11/09/faith-groups-divided-over-new-york-islamic-center>

A similar contrast between a conception of fairness and a rights-based conception of justice has recently emerged at the trans-national level via the debate over corporate remuneration and taxation. Global corporations that are finding legal routes to reducing their tax payments (ultimately grounded on the basic right to property) have been accused of incurring losses of human lives. Thus, the international development charity Christian Aid has blamed the deaths of 1000 children a day in developing countries on “transnational corporations’ wielding their enormous power to avoid the attention of the taxman.”<sup>8</sup> This tension between the right to life, on the one hand and, on the other, the right to private property and the rule of law, which together constitute the grounds on which corporation’s tax avoidance is justified, actuates an emerging global sense of fairness surpassing codified norms of justice.

While society’s shared conception of justice is composed by the unity of basic values (including those codified as rights) which it holds to be valid in themselves, the conflict among rights that often emerges in the course of rights’ application brings about a tension between society’s conception of justice and its conception of fairness.<sup>9</sup> Thus, it was the tension between the right to life and the right to privacy (and free moral choice within that zone of privacy) that unsettled American society’s

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<sup>8</sup> Reported in *The Financial Times*, November 9, 2010, p.12.

<sup>9</sup> In line with Rawls, I consider here justice only as a virtue of social institutions, not of persons or actions; I also endorse his argument about the need to distinguish between the concept of justice and that of fairness. However, unlike Rawls, who develops his own concept of justice around the notion of fairness in his theory ‘justice as fairness’ in which justice becomes synonymous with a fair system of cooperation (thus collapsing the initial distinction between justice and fairness), I believe that it is analytically important to maintain the difference between the two concepts. For the earliest formulation see John Rawls, “Justice as Fairness”, *The Journal of Philosophy* 54/22 (1957): 653-662. Throughout later reformulations of his position, Rawls does not revise the relationship he articulates here between the notion of justice and that of fairness.



conception of fairness in the abortion debate of the 1970s; it was the tension between the abstract principle of equality, as codified in the ‘separate-but-equal’ doctrine, and that of individual dignity that, by mobilizing society’s conception of fairness, gave valiance to the Supreme Court’s move to outlaw segregation in 1954. By unsettling society’s conception of fairness, the tension among codified rights puts into question society’s normative order. This in turn issues a call for political action for resolving the conflict of rights, and thus stabilizing society’s normative order. The process of judgment necessary for resolving the conflict of rights in line with society’s conception of fairness is properly political judgment.<sup>10</sup> How should political judgment be guided in reconciling context-dependent notions of fairness with the rules of universal justice, spelled out in codified norms of basic rights?

## **2. Justice, Judgment, Justification**

A strict and stringent enforcement of codified norms of human rights would not go far neither in arbitrating among conflicting rights, nor in securing compliance, even though it might nominally create a legal obligation. What a narrowly legalistic and highly formal notion of human rights excludes is the congruence between law and underlying social practice that underpins legitimacy and ensures the practical enforceability of law. By failing to take into consideration the situatedness of rights -- the way rights are invoked in dealing with particular grievances related to specific social practices, or the way participating in law’s construction and interpretation within inherited traditions contributes to legitimacy and obligation, such an approach aggravates the problem, instead of providing a solution. Yet, embracing the view of

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<sup>10</sup> To anticipate my argument, I do not perceive the societal notion of fairness in the terms of community’s ethical life (Sittlichkeit). More on this in section 4 below.

soft and customary law as basis for solving conflicts among codified rights is hardly a viable alternative. Proponents of this perspective have argued that it is customary law, rather than human rights as a codified peremptory norm (*jus cogens*) that has allowed for the operation of human rights law internationally, despite the lack of a mechanism of compulsory jurisdiction.<sup>11</sup> Indeed, the International Court of Justice has followed this approach to promoting greater bindingness by offering less precision. Admittedly, the power of imprecise legal norms might go a long way in enabling context-pertinent interpretation of rigid norms. However, this comes at the price of a dangerously broad margin of political discretion when deciding on the correct right interpretation of rights in light of customary law.<sup>12</sup> The difficulty in finding an alternative comes from the diametrically opposed natures of human rights and politics: the a-political nature of human rights (whose source is human nature, rather than political authority) and the deeply political nature of the situations in which rights are invoked as guidelines for decision and action. This results in the tension between the necessarily abstract moral universalism of human rights and the urgency of immediate and local grievances that trigger demands for political judgment.

The tension between a universal appeal to justice and contextual notions of fairness has been recently resolved via a shift of attention from ideal models of justice to the process of justification itself, or what Alessandro Ferrara has described as an emergent ‘judgment paradigm’ in contemporary political philosophy. This consists in the waning of the early modern model of generalizing universalism based on the

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<sup>11</sup> Martha Finnemore and Stephen Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics,” *International Organization* 55 (2001): 743-758.

<sup>12</sup> Take, for instance, Islamic codifications of human rights, such as the *Universal Islamic Declaration of Human Rights* of 1981, or the *Cairo Declaration on Human Rights in Islam* of 1990. While effectively adapting the notion of human rights to local context, these documents establish the political authority of Islam, curtail religious freedom, and assert the superiority of men over women.

power of principles, laws, norms and rules to transcend the particularity of contexts, and its replacement by a vision of normative validity based on ‘reflective judgment’.

<sup>13</sup> Pioneered by John Rawls, Jürgen Habermas, Bruce Ackerman, Frank Michelman, Seyla Benhabib and Ronald Dworkin, this shift of inquiry from principles of justice to modes of judgment and justification has most recently been adopted by Amartya Sen<sup>14</sup>, and has culminated in the formulation of what Rainer Forst has defended as the ‘right to justification’ (also in this collection) - a right that underpins and enables the search for justice. As developed within the communicative turn in Critical Theory initiated by Habermas, the judgment paradigm takes the shape of a process of mutual reason-giving among participants which proceeds as the “unforced force of the better argument”. The shift of focus from pre-established normative guides to the very process of democratic opinion and will formation via collective reasoning is particularly distinct in Seyla Benhabib’s conceptualization of democratic iterations -- everyday ‘conversations of justification’ through which citizens become gradually convinced of the validity of universal moral norms.<sup>15</sup>

While entrusting democratic deliberations with the authority and capacity to generate rules of social cooperation, models of democratic deliberations advanced within the communicative turn in Critical Theory also minimize the danger of political arbitrariness by advancing compelling standards of normative validity. Within the model advanced by Habermas the validity of claims is tested in a

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<sup>13</sup> Alessandro Ferrara, “Introduction”, in *Justice and Judgment* (London: Sage, 1999), p.x. See also A. Ferrara, “Judgment as a Paradigm” *The Force of the Example* (New York: Columbia University Press 2008), pp. 16-41.

<sup>14</sup> In *The Idea of Justice* (Allen Lane, 2009), Amartya Sen defends the priority of public argument and debate over set principles of justice.

<sup>15</sup> Seyla Benhabib, “Democratic Iterations” in *Another Cosmopolitanism* (Oxford: Oxford University Press, 2008), pp. 44-80. See also her contribution in this collection.

counterfactual way: we judge whether actual outcomes fit the hypothetical outcomes of argumentation under conditions described as ‘an ideal speech situation’ – a situation in which reason-giving among participants is free of the power asymmetries that permeate actual social interactions.<sup>16</sup> Alternatively, Alessandro Ferrara has proposed to test the validity of normative claims by means of a reflective judgment about the self-congruity or authenticity of an individual or collective identity (also in this collection).<sup>17</sup> However, to the extent that models of justification rely on idealizing presuppositions (e.g., the ideal speech situation; authenticity of identity), it imposes its own limitations: it does not tell us how the actual process of reason-giving operates. We are still to provide an account of the mechanism through which deliberative political judgment serves the goals of universal justice in actual processes of argumentation and justification. To that end, I advance a process-centered account of political judgment, to complement the models of discursive validity already advanced within Critical Theory.

I therefore turn next to the pragmatics of justification (the actual process of meaning-formation in the course of reason-giving), which I prefer to approach within the analytical perspective of a political sociology of justification, rather than rely on a moral anthropology that stipulates an innate moral capacity of individuals. My turning away from idealizing presuppositions about what Philippa Foot has described as “the

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<sup>16</sup> In the ideal speech situation, participants in the deliberative exchange of arguments are constrained by the principles of communicative reciprocity expressed in speech: “[C]ommunicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations – for example, ascribe identical meanings to expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others.” Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, transl. William Rehg (Cambridge: MIT Press, 1996), p.4.

<sup>17</sup> Ferrara names this new universalism ‘exemplary’ universalism based on ‘oriented’ reflective judgment about the self-congruity or authenticity of an identity.

natural goodness of human will”<sup>18</sup>, or what Habermas has defended as the citizens’ capacity jointly to adopt a moral point of view independent of, and prior to, the various perspectives they individually adopt<sup>19</sup> is not due to my own skepticism about the natural goodness of the human will or the capacity of publics to access the moral point of view. My misgivings concern the reliability of such optimistic assumptions when it comes to analyzing contestations of society’s normative order and the justice of political rules. Instead of a moral anthropology that derives the moral point of view from intrinsically cooperative attitudes, it is safer to ground analysis on more realistic assumptions about human motivation in social interactions. To the extent that all public debates on justice imply a contestation of existing rules of social cooperation, all justificatory discourses are deeply political and thus ‘tainted’ by instrumental considerations pertaining to partial individual or collective perspectives. The real challenge of critical social theory is to account for the possibility of emancipation and justice not despite, but through, power-imbued processes of contestation.

Therefore, my first methodological move will be to shed idealizing assumptions of two orders: those related to an instrumental, interest-driven and conflict-ridden nature of the political, and those related to communicative action free of strategic interests and oriented towards understanding (positions that serve as each other’s alibis). In their place, I would adopt a pragmatist orientation to social science

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<sup>18</sup> Philippa Foot has argued compellingly that human beings are “creatures with the power to recognize reasons for action and to act on them”, this power itself residing in the natural goodness of the human will. (Philippa Foot, *Natural Goodness*. Oxford University Press, 2001).

<sup>19</sup> Jürgen Habermas, “‘Reasonable’ versus ‘true,’ or the morality of worldviews”, *The Inclusion of the Other*, ed. C. Cronin and P. DeGreiff. Cambridge, MA: MIT Press, 1998; p. 77. Citizens are assumed capable of mutual attribution of a capacity for moral judgment, itself drawn from a conviction that social integration of everyday life depends largely on communicative practices oriented toward mutual understanding (ibid., pp. 79-80).

in the spirit of what Pierre Bourdieu has described as one in which a focus on the ‘economy of practices’ supersedes the two equally partial views of economism and semiologism, i.e. of reducing social exchanges to rational and strategically oriented action, on the one hand, and to phenomena of communication, on the other.<sup>20</sup> From such a position, the contestation of the normative order of society is to be seen as simultaneously enabled and constrained by existing relations of power. On this view, social interactions are processes of cooperation-within-conflict, processes whose *lex insita*, the principle underlying the immanent regularities of the social world, is that of the struggle over the norms regulating the distribution of life chances in any society – a struggle as much to perpetuate the normative framework of interactions as to change it. Any practice contains as much the reified rules that constitute it as a recognizable social practice and, to the extent that coordinated social life depends on continuous interactions for its reproduction, the possibility of challenging the rules and altering them in the very process of rule-application. If the dynamics of social interactions are simultaneously dynamics of cooperation and of conflict, of perpetuation and change, social relations are best described neither as intrinsically cooperative nor as intrinsically conflictual in nature, but as cooperation-within-conflict; conflictual cooperation that is the source of both the preservation of the social order and of its transformation.

Viewed from this perspective, the engagement in mutual argumentation does not need to hinge on an intersubjectively shared moral point of view. What Rainer Forst has conceptualized as the ‘right to justification’ could also be derived within the perspective of a social, rather than moral, anthropology of modern societies: here the

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<sup>20</sup> Pierre Bourdieu, "The Forms of Capital", In John Richardson, Ed. *Handbook of Theory and Research for the Sociology of Education*. New York: Greenwood Press, 1986; pp. 241-258.

reflex of justification is intrinsic to social interactions conceived as a process of conflict-within-cooperation. As social interactions are constitutive of actors' social identities, actors have a simultaneous interest in maintaining, as well as questioning and altering these relations. Thus, whether an actor wants to preserve a certain modus of a social relations or alter it, she, being a side to a relation that constitutes her as a social actor, can neither alter, nor preserve it, without justification to all those who are her counterparts within the given social relation. In the political realm this takes the form of the necessity of modern power to justify itself in order to perpetuate itself. If, as Hannah Arendt has contended, power corresponds not just to the human ability to act, but to act in concert, and the legitimacy of power (in democratic as well as autocratic regimes), is always ultimately anchored in 'the opinion upon which many are publicly in agreement'<sup>21</sup>, that is, in commonly held convictions – then the justification of political action is a socio-political impulse, endogenous to the very structure of power relations as relations enabling acting in concert (i.e., governance). That is why symbolic practices of justification (not only communicative ones), are used even by autocratic political regimes, especially in modern societies that cannot rely on social integration via a settled traditional ethos.

This understanding of justification as a socio-political impulse typical of modern societies has implications about the status of normative conflicts. Disputes about the justice of the normative order of society originate from clashes of views on the fair distribution of life chances within a given normative order, thus triggering political dynamics of conflict. These clashes, however, are unthinkable where social practices do not create a shared world of social cooperation: as John Dewey often asserted, the question of justice only arises in normative conflicts within shared

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<sup>21</sup> Hannah Arendt, *On Revolution* (New York, 1965), p. 71.

practices.<sup>22</sup> Appeals to justice always take place as others-oriented grievances about the unfairness of the particular societal pattern in the distribution of life-chances. In such a process, instrumental (interest-based) and ideational (moral) dimensions of judgment are not only inextricably linked, but also equally relevant. It is the very imbrication, rather than separation between, on the one hand, interests endogenous to actors' identities and, on the other, identity-transcending moral considerations, that activate the dynamics of justification.

This synergy between identity-constituting interests and context-transcending moral orientations in the symbolic practices of justification is notable in the history of rights. I will next undertake a conceptual archeology into the historical emergence of the 'due process' norm, in order to present it as a prototype of the right to justification. This will supply an additional argument in support of the right to justification: an argument emerging not within moral philosophy, but instead within the perspective of what I described above as the socio-political impulse to justification underlying the operation of modern social practices and modern power dynamics.

The prototype of modern rights as we know them are those codified in the English Magna Carta of 1215. The familiar 'moralist' rendition of the story tells us that a combination of higher taxes, unsuccessful wars and conflict with the Pope had made King John unpopular with his barons, who raised grievances against the central power and demanded limitations to that power in the form of codified freedoms.<sup>23</sup> A 'realist' reading of the document tells the story of a struggle for privilege -- what the

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<sup>22</sup> See for example, John Dewey, "The Ethics of Democracy" in *The Early Works of John Dewey (1882-1888)*, ed. Jo Ann Boyston (Carbondale: Southern Illinois University Press, 1969).

<sup>23</sup> David Crouch, William Marshal Longman (1996) p.114.



barons really sought was to overthrow the King, the demand for a charter being a "mere subterfuge".<sup>24</sup> Both readings give a story of contestation of the existing normative order in which parochial interests were mixed with cogent, for the given context, perceptions of the social circumstances for the safeguard of dignity – the increase of taxes (an attack on wellbeing), combined with central power's failing to safeguard sovereignty, triggered perceptions of unfairness and subsequent demands for altering the organization of power. The notions of unfairness in the case at hand are neither solely constituted by the encroachment on the material interests of the nobility; nor by the king's failure to perform the key legitimacy-conferring functions of central power: the protection of its subjects' wellbeing. It is the combination between interest-based motive, linked to the social position of the rebelling barons as members of the nobility, and interest-transcending notions related to the key legitimate and legitimacy-conferring functions of central power (to use Claus Offe's terms)<sup>25</sup> that prompted the contestation of the existing normative order in 13th century England.

The most significant outcome of this contestation was that, in contrast to previous cases when the rebellious nobility had rallied around an alternative monarch, it is the first time that it sought protection of their liberties in the law, namely in the principle of 'due process'. Although in current-day usage 'due process' refers to the notion that laws and legal proceedings must be fair, or the principle that the government must respect all of the legal rights that are owed to a person according to

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<sup>24</sup> Austin Lane Poole, *From Domesday Book to Magna Carta, 1087–1216* (Oxford University Press 2nd edition, 1963), p. 479.

<sup>25</sup> These functions concern "the state capacity to manage and distribute societal resources in ways that contribute to the achievement of prevailing notions of justice" (Claus Offe, *Disorganized Capitalism*, Cambridge, Mass: MIT Press, 1985; p.5.)

the law<sup>26</sup>, tracing back the line of formulations of ‘due process’ would lead us to the right to justification. Let us note that the term “due process of law” was only formulated in the revision of Magna Carta in 1369. Significantly, this formulation, which put the stress on rights codified in law, has replaced the earlier formulation of “lawful judgment of his peers”:

"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will be proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."<sup>27</sup>

This original focus on judgment and shared norms of fairness, which has subsequently been lost, is significant. The contestation of the authoritative normative order that led to the earliest codified protection against arbitrary power invoked, before all else, a notion of justification: that whenever the central authority acted to harm a person, this had to be done upon examination of the valid grounds for such an action. The later, more legalistic formulation of due process that places the stress on codified legal rules, has obliterated the original notion of justification as articulation, in the course of judgment, of the valid grounds on which central authority can act against the individual. This notion of justification, formulated in 1215, is the starting point from which an on-going process of generalization began in which freedoms gained as privilege transformed into universal rights. The engine of this generalization was the right to justification formulated in clause 29 of the 1215 statute. It is due to the notion of justification, as it invites questioning of the normative grounds of political action and its scope that, within a century, the privileges granted initially to any ‘free man’

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<sup>26</sup> The U.S. Constitution guarantees that the government cannot take away a person's basic rights to 'life, liberty or property, without due process of law.' (14<sup>th</sup> Amendment, §1)

<sup>27</sup> Magna Carta: §29

in the sense of non-serf, were extended to all: the 1354 statute replaced the formulation ‘no free man’ with ‘no man, of whatever estate or condition he may be’.<sup>28</sup>

### **3. The Problem of Validity**

If we conceive of the right to justification as being grounded in the very socio-political dynamics of the operation of modern power, this alleviates the reliance on unsafe (as compelling as they might otherwise be) idealizing presuppositions about the moral attributes of individuals or about the quality of communication. However, this relative gain in conceptualizing the right to justification comes at the expense of clarity about criteria of validity: when should a judgment about the justice of social norms and political rules be considered valid? Normative political philosophy has advanced criteria of validity in the form of constraining assumptions either about the settings of judgment -- as in the ‘ideal speech situation’ of Habermas, or in Rawls’s ‘veil of ignorance’, or alternatively by introducing more substantive tests, as that of the self-congruity of an identity (Ferrara). As Habermas notes, “there seems to be no way around the explanation of the moral point of view in terms of a procedure that claims to be context-independent.”<sup>29</sup> Yet, it seems to me that such an alternative, that is, the possibility of deriving the moral point of view from context-dependent claims, is effectively available within the very philosophical tradition within which Habermas writes – Critical Theory of Frankfurt School descent.

Within the perspective of analysis articulated by the founders of Critical Theory, normative standards informing critique are to be derived not from posited ideals of justice, but from an analysis of the socio-structural dynamics of social

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<sup>28</sup> Statute “Liberty of Subject”, 1354: §3 (1354 c. 3/ 28\_Edw\_3).

<sup>29</sup> Jürgen Habermas, “‘Reasonable’ versus “‘True’”, p. 99.

injustice operating in a given context. Three related elements are constitutive of this particular notion of critique, which I espouse in advancing my own theory of critical political judgment.<sup>30</sup> First, this is critique from an “internal point of view”, or what Theodor Adorno has described as immanent, as opposed to transcendental critique.<sup>31</sup> Second, at its center is a stratum of empirical experiences of suffering. In this sense, to borrow Michael Walzer’s apt phrase, social criticism is “the educated cousin of common complaint”.<sup>32</sup> From this perspective the question “What is Justice” cedes priority to that of “Who suffers?”. Here Critical Theory comes close to the position held by philosophical pragmatism, formulated with regard to rights by Richard Rorty in the following way:

The difference between an appeal to end suffering and an appeal to rights is the difference between an appeal to fraternity, to fellow-feeling, to sympathetic concern, and an appeal to something that exists quite independently from anybody’s feeling about anything – something that issues unconditional commands.<sup>33</sup>

The third feature of critique concerns the type of experiences of suffering that qualify as object of social criticism. These are experiences of *social* injustice —i.e., experiences originating in the socio-structural dynamics of the distribution of life-chances in society. As Nancy Fraser has noted, the empirical reference point of critical theory is to be grasped

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<sup>30</sup> This position is articulated in more detail in Albenaz Azmanova, *The Scandal of Reason: A Critical Theory of Political Judgment* (New York: Columbia University Press, 2011).

<sup>31</sup> Theodor W. Adorno, *Negative Dialectics*, trans. E. B. Ashton (New York: The Seabury Press, 1973).

<sup>32</sup> Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA: Harvard University Press, 1987), p. 65.

<sup>33</sup> Richard Rorty, “What’s wrong with rights?”, *Harper’s Magazine*, June 1996: 15-18, p. 15.

not so much in terms of individual and pre-political (psychological) experiences of suffering, but ones related to social subordination.<sup>34</sup> This re-directs attention to the political economy of capitalism, an interest the Frankfurt School writers inherited from Marx. Without upholding the importance of political economy in the production of social patterns of injustice, Critical Theory would lose its critical edge.

Combined, the three elements of critique designate the larger conceptual territory of Critical Theory. While the *purpose of critique* is to bring to light the socio-structural origin of experiences of injustice, normative *criterion of validity* (of claims, policy actions, and political rules) is the alleviation of such suffering; in turn, the *goal of political action* is changing the pattern of social relations within which structurally generated suffering takes place (in this sense neither distribution nor recognition would suffice). The normative goal of critique, therefore, is not the articulation or production of a societal consensus over principles of justice codified as rights, but the unveiling and elimination of socio-historical patterns of injustice. The proper purpose of critique, and of political action guided by it, is emancipation, not justice.

#### **4. On the Pragmatics of Justification**

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<sup>34</sup> Nancy Fraser, "On the Place of Experience in Critical Theory: Against the Reduction of Political Sociology to Moral Psychology" in Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso, 2003), pp.201-210; at p. 205. Here Fraser rejects Axel Honneth's diagnosis that social and political conflicts have their source in the "moral" injuries that arise from assaults on the basic human need for recognition in unequal societies. She prefers to see misrecognition not as a psychological injury but as "status subordination" generated via institutionalized patterns of discrimination and value inequality.

How does the operation of judgment within the process of justification of normative claims attain emancipation in the particular sense described above? Let us examine the practical process of judgment and justification, putting aside the constraints of idealizing assumptions – both those regarding the process of reason-giving, as well as those regarding the moral and cognitive capacities of individuals. As I already noted, claims to justice most often originate as specific grievances of suffering, and proceed as a contestation of the normative order of society (provided that the sources of suffering are social in nature). According to the form of critique adumbrated above, however, there is no position of normative validity that is untainted by the dynamics of power and free of the normative vocabularies of these dynamics. This means that the structural features of the sources of social injustice are encoded in the very operation of judgment – they are endemic to the pragmatics of justification. How can then political judgment nevertheless play an emancipatory role?

I have outlined elsewhere the parameters of such a model of judgment, which I have described as a ‘critical deliberative judgment’.<sup>35</sup> This is a process of reason-giving that proceeds not so much along the logic of the force of the better argument (testing of arguments against the counterfactual situation of power-free conditions of justification), but instead as a process in which participants, by giving account of the reasons for the positions they advance, achieve an understanding of their mutual entanglement in the socio-structural production of injustice. The only procedural condition for the functioning of public deliberations in this way is the condition of socio-cultural diversity of participants (i.e., the condition of epistemic pluralism). Let me adumbrate briefly this point.

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<sup>35</sup> A.Azmanova, *The Scandal of Reason*, ch. 6-9.

Viewed as social practice, (rather than as ideal conditions for testing the legitimacy of claims in a counter-factual manner), unconstrained public discussions in which participants advance claims about the just arrangements of their collective life are deeply imbued by the features of participants' social identities and status<sup>36</sup>, as well by features of the social practices through which participants' socialization has taken place within specific contexts. It is exactly because deliberations are invariably marked by participants' social identities that the mutual reason-giving takes place as intersubjective (rather than interpersonal) dynamics of communication. To the extent that public deliberations involve the full range of socio-cultural diversity in society (ergo, the requirement of epistemic pluralism) they can be regarded as a condensed expression, in a dialogical form, of the larger dynamics of social interactions taking place in societies.

How does this dialogical expression of larger social interactions take place? Deliberations, especially if they involve a diverse public, do not immediately mobilize a 'common' sense - sense shared by all. Instead, they proceed as 'making sense in common', starting from the questioning of a social practice which, whether tacitly or explicitly, is the object of debates on justice. This happens through what I conceptualize as a process in which some aspects of common social practices become visible (to participants) as issues first of all relevant for normative disagreement and therefore -- for public debate. What deliberations in the first place do is that, as they are triggered by lived experiences of social injustice, they proceed as articulation of a number of reference points participants deem to be relevant to their relations to others in respect to the issue of injustice under discussion. For instance, the debates on

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<sup>36</sup> In line with Bourdieu, I understand this to be determined by the amount of economic, social and cultural capital an individual possesses (P. Bourdieu, "The Forms of Capital").

wearing the Islamic headscarf in universities in France and Turkey, although having a common point of normative contestation (allowing or not the display of religion identity in a secular society), have brought forward different reference points as being normatively relevant. In the French case, the grievance against the headscarf ban concerns the tacit subordination of Islamic group identity to a hegemonic secular identity. In the Turkish case, the grievance against the headscarf ban concerns the deprivation of women from more traditional rural background from access to university education. In the first case, the field of relevant reference points is constructed along the distinctions between a dominant secular French culture versus socially subordinated religious culture; in the second case the key distinction structuring the field of reference points is that between an identity related to a hegemonic urban modern culture versus an identity related to a subordinate traditional rural culture. The differences between the sets of reference points activated in the two debates are due to the differences in the experiences of injustice that have initiated these debates.

In other words, the formulation of conflicting positions (e.g. “the ban of the headscarf is beneficial/detrimental to diversity”) is both constrained and enabled by a basic overlapping agreement on what issues count as politically significant ones -- salient issues of governance around which a debate about the just rules of social coordination can take place. These first articulations of visibility and relevance are not a matter of purely factual knowledge (e.g. “most women in liberal democracies do not display signs of their religious beliefs”), and neither do they have an evaluative function (e.g., it is better not to display religious symbols in public), they simply orient judgment by way of drawing distinctions, by way of a discrimination among reference points, a discernment of what stands out to attention.



In the course of mutual argumentation, the diversity of reference points that individual participants introduce start to form a structured field of references, thereby articulating the contours of a shared notion of fairness. Shared perceptions are thus formed concerning what issues are salient ones in the formation of a collective notion of fairness: for instance, that corporate right to free speech is related to the right of self-governance, or that corporate taxation has something to do with the preservation of lives – to return to the examples used at the beginning of this analysis. It is this field of mutually connected reference points that serves as a framework for collective meaning-formation around a shared notion of fairness. This process of drawing distinctions and establishing linkages among reference points eventually brings about a conception of fairness to emerge that is shared by participants irrespectively of any moral disagreement they might have (for instance, regarding the prioritization among rights); it even enables the communicative expression of that disagreement. Thus conceptualized, the societal notion of fairness does not express a pre-existing, fixed cultural identity of a community in the sense of a shared ethical life (*Sittlichkeit*); it expresses the relational nature of the social practices within which actors maintain and alter the normative order of society.

### **5. Emancipation through Deliberation?**

The emergence, in the process of deliberative justification, of what I described above as a shared conception of fairness is the first step in the adjustment among conflicting rights within the general conception of justice. As it spells out the issues (reference points) in relation to which normative claims acquire particular signification (both meaning and significance), the conception of fairness serves as a structured space of validity within which political judgment operates. In this sense the function of public

deliberations is different from what is commonly prescribed by models of deliberative democracy. The functions of democratic discussions, in my account, is neither to spell out the just rules of social cooperation and political order, nor to bring about a consensus on a course of political action, but (1) to articulate the *valid grounds* of political decision-making and policy action; (2) to allow a *disclosure of the social origin* of lived experiences of suffering. Let me clarify this double function of critical deliberative judgment.

To the extent that public deliberations are triggered by specific grievances concerning the authoritative normative order of society, they inevitably, though initially only implicitly, address the legitimacy relationship between public authority and citizens. This legitimacy relationship is constituted by what Claus Offe has described as ‘the key legitimate and legitimacy-conferring state functions’.<sup>37</sup> These are functions (i.e. from defense of territorial integrity to redistributing wealth, or protection of collective identities) that citizens expect from public authority, conditioning their obedience on the effective delivery of these functions. Before this relationship takes the explicit form of discrete functions of public authority, it is perceived by citizens in terms of reference points of practices, consequences of these practices, and rules codifying these practices that are seen to be politically relevant. Thus, suffering in individual instances of harm (say, a life lost in a hurricane) would not be considered as politically relevant (and thus would not enter society’s notion of fairness) to the extent that the sources of such suffering are seen to be personal, rather than social. Such instances of suffering do not give grounds for political action, as they are not perceived as relevant to the societal notions of fairness and therefore remain outside the legitimacy relationship between public authority and citizens.

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<sup>37</sup> Claus Offe, *Disorganized Capitalism*, p.5.

However, when suffering is seen to be caused by the authoritative rules of social cooperation (and thus by the politically sanctioned social order), then forms of suffering start to matter politically— i.e., they become reference points in societal notions of fairness. Thus, if hurricanes systematically destroy the residences of the poor, this indicates that the sources of harm are social, rather than natural and personal. Then the loss of residence caused by a natural disaster becomes a relevant reference point in societal conception of fairness, redefining the grounds on which political decision and action can be undertaken. In this sense public deliberations have the important function of enunciating the valid grounds of political action in the form of internally structured (via mutually related reference points) notion of fairness.

Additionally, especially when conducted in conditions of epistemic pluralism (representation of the full range of socio-economic and socio-cultural identities) public deliberations have the capacity to alter the legitimacy relationship by way of giving political relevance to previously unquestioned social practices. For instance, to return to the examples already used, deliberations might establish a link between corporate taxation and famine, between corporate right to free speech and the right to self-government, between access to sanitation and the right to life, access to internet and the freedom of expression— links that had previously not been drawn, but which, when articulated, begin giving particular signification to the debated issues of justice. Thus, once access to clean water starts to be problematized in relation to the right to life within society's conception of fairness, the provision of clean water enters the legitimacy relationship between public authority and citizens and calls for policy action.

Judgment in this formula of unconstrained (non-ideal) public deliberations allows for universal validity without presupposing universal justice. Let us recall that

in the process of justification of normative claims, judgment proceeds from the particular experiences of structurally generated social harm, and its purpose is not so much the formulation of binding norms and rules, but the clarification of the social sources of injustice. Within this process, universality emerges not in a subsumptive, but in an “interactive,” way, to use Seyla Benhabib’s terms. This is universality enabled not by compliance with abstract moral commands, but by the all-human experience of suffering. Moreover, the power of such judgment to compel political action is all the more stronger when public deliberations reveal the socio-structural origins of suffering: as inaction cannot be justified in the face of socially generated, and therefore avoidable, suffering. It is in this sense that unconstrained public discussions can be a venue of critical judgment with emancipatory outcomes. To enable public deliberations to play such an emancipatory role, we do not need substantive or procedural tools giving access to the moral point of view. Instead, the single condition is full representation of the socio-economic and socio-cultural dimensions relevant to those grievances that are object of debates on justice. Such representation would enable the disclosure of the social origin of lived experiences of suffering. It would do so by allowing participants to come to an understanding of the relational nature of specific grievances, as well as of their own complicity in the social production of harm by way of their participation in the mundane social practices underlying this production.<sup>38</sup>

## **Conclusion**

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<sup>38</sup> I provide an empirical account of this process in A. Azmanova, *The Scandal of Reason*, Ch 9.

With typical wit, Stanisław Lec -- the Polish-Jewish aristocrat, socialist and incurable maverick, remarked that executioners always wear a mask – that of justice. Rather than relying on the appeal to universal justice that human rights so strongly emanate, I have advanced here a model of critical political judgment that checks the validity of claims to justice and related to them political action against an alternative measure: that of emancipation from structurally generated suffering. I argued that the best setting for such judgment is unconstrained (non-ideal) public deliberations in which all relevant socio-economic and socio-cultural positions are represented. Such diversity prompts debates to focus not so much on the best course of political action, but to articulate, within an emerging framework-conception of fairness, the valid grounds of political judgment and policy action. Moreover, this formula of justification enables the disclosure of the structural, rather than agent-specific or community-specific sources of harm, thus pressing a more urgent call for political action. This strategy allows for universal validity without presupposing universal justice: when debates of justice are triggered by specific grievances, and the claims for redress are directed to others involved in the social practices within which suffering originates, the process of justification follows the logic of transcending individual circumstances and particular cultural contexts and reaching the socially relevant, rather than the universal, scope of validity. This scope of validity needs not be larger than the social practices within which the grievances of injustice originate; yet there is in principle no limit to the dynamics of generalization. It is the question “Who suffers?”, rather than “What is justice?” that will tell judgment how far to go.