Mauro Piras

The basis of liberal democracy: Political not moral? Some critical remarks on Habermas's Principle D[*]

Modern democracies live in the space of pluralism. For this reason, they cannot be committed to a strong moral conception of the person and society. They cannot take sides in the controversy between visions of the good life, ethical ideals, religions and so on. On the other hand, if they were totally independent of any moral commitment, they would be condemned to a crisis of legitimacy and generate a lack of motivation in their citizens. But every attempt to strengthen the ethical foundation of liberal democracy provokes tensions with pluralism. This dilemma appears inescapable. Theories of liberal democracy try to bolster a foundation which provides both the necessary openness of democracy to pluralism, and the adequate sources of legitimacy and motivation for the proper functioning of institutions.[1]

The answer to this dilemma lies at the level of the principles grounding liberal democracy. Is it possible to define these principles so that they can justify legitimacy and political obligation, without being dependent on moral contents?

[1] For this presentation of the problem, which reflects a widespread position, see for example Larmore (1996, 152-174); for an opposite view, which denies the necessity of an underlying consensus in democracy, and stresses the positivity of conflict and the ineradicability of antagonism, see Mouffe (2000).

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We need then a theory which provides a source of legitimation for public institutions assuring their neutrality towards the plurality of visions of the good life, but also a universal principle of equal consideration of every member of the political association. Rawls's political liberalism and Habermas's deliberative democracy give two different answers to this question. The first is based on the concept of the moral person: the original position models the moral powers of persons in a situation of equality and rational individual freedom (Rawls 1999, ch. III; 2005, lectures II-III). The second is, on the contrary, based on practical discourse: principle D assures the equal consideration of every person who is directly affected by a norm of action (Habermas 1996, ch. III).[2] The rawlsian position accepts political institutions being grounded on some basic moral presuppositions: the political conception of the person implies the moral powers that we attribute to persons in order to consider them equal members of the association (Rawls 2005, 72-88, 102-110; Quong 2011). Habermas's theory, on the contrary, aims to provide a foundation *prior* to the distinction between morality and law: principle D is a principle of practical reason concerning every kind of norm of action, so it is indifferent to the moral or non moral content of norms. It is a normative principle of equal consideration of participants in a practical discourse, but it doesn't have any moral content, since it is grounded on the universal-pragmatic presuppositions of communication. It precedes the differentiation between moral and law, which is generated by the application of the moral point of view to D, on the one hand, and of the legal form to D, on the other (Habermas 1996, 104-122; Baynes 2015, ch. VI; Von Schomberg and Baynes 2002).

Habermas's proposal is the most ambitious and promising solution to the dilemma of pluralism, as formulated at the beginning of this analysis. It relies strongly on the *non-moral* character of principle D. But can this point be maintained without contradiction? I will try here to develop the thesis that it is impossible to conceive D as practical, normative and non-moral, as Habermas argues, because: (1) this interpretation generates contradictions within the theory itself; (2) D contains implicitly a reference to the moral point of view, otherwise it couldn't assure an equal consideration of participants; (3) it is probably impossible, in general, to treat persons as equal without treating them as *moral* persons.

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[2] For a presentation and analisys of Principle D, see forward, section 2.

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1.

The domains of moral and law are differentiated, according to Habermas, by some structural factors: morality concerns relations between human beings in general and deals with only deontological questions; law, on the contrary, concerns relations between members of a political association and deals not only with moral (deontological) matters, but also with pragmatic and ethical questions (Habermas 1996, 111-114, 153-158). Now, if juridical discourse is not founded on moral presuppositions, then the different types of questions that it covers – moral, pragmatic and ethical questions – are *all on the same level*. Each type of practical discourse operating inside the juridical sphere follows its own internal logic, which is that of *rightness* for moral discourses, *efficiency* for pragmatic discourses and *authenticity* for ethical discourses. But what happens if goals of efficiency or values of authenticity are in conflict with moral rightness? Habermas's answer is well-known: in these cases, right prevails over other principles and morality cannot be violated.

This idea is repeated several times: "[…] a legal order can be legitimate *only if it does not contradict basic moral principles*. In virtue of the legitimacy components of legal validity, positive law has *a reference to morality inscribed within it*";[3] "Valid legal norms indeed *harmonize with moral norms*";[4] "their [= of ethical political discourses] results must at least be *compatible with moral principles*";[5] "The law of a concrete legal community must, if it is to be legitimate, *at least be compatible with moral standards* that claim universal validity beyond the legal community".[6]

However, these affirmations sound curious; they try to preserve the priority of morality over efficiency and authenticity, but they are in contradiction with the theory. In fact, if moral discourses have a prevalent position, then this means that even in the domain of law the principle of moral equality of persons has a prior

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[3] Habermas 1996, 106, italics are mine ("[…] eine Rechtsordnung kann nur legitim sein, *wenn sie moralischen Grundsätzen nicht widerspricht*. Dem positiven Recht bleibt, über die Legitimitätskomponente der Rechtsgeltung, *ein Bezug zur Moral eingeschrieben*").

[4] *Ibidem* 156, italics are mine ("Gültige Rechtsnormen stehen […] *mit moralischen Normen in Einklang*").

[5] *Ibidem* 167, italics are mine ("[…] deren [= der ethisch-politischen Diskursen] Ergebnisse müssen *mit moralischen Grundsätzen* wenigstens *kompatibel* sein").

[6] *Ibidem* 282, italics are mine ("Das politisch gesatzte Recht einer konkreten Rechtgemeinschaft muß, wenn es legitim sein soll, *mindestens in Einklang stehen mit moralischen Grundsätzen*, die auch über die Rechtsgemeinschaft hinaus allgemeine Geltung beanspruchen").

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and grounding role. If this principle, in the domain of law, were not moral, but only a normative principle of communication, then it would only mean that in a rational discourse on pragmatic or ethical matters all participants in the discussion must have free and equal access to communication. But if the discussion leads to an agreement which accepts moral inequalities? I will examine this case in the next section. Here, I just intend to underline that the affirmation of the priority of right over efficiency and authenticity is not coherent with the general principles of the theory. This incoherence is the symptom of a more profound difficulty in the theory. Principle D, which is the basis of the legitimacy of law, should be a practical principle *without* moral content. For this reason, it is not clear why political decisions and legal norms should always be compatible with moral norms, as these quotations say. The root of this contradiction is perhaps the fact that principle D is in effect not totally independent from the moral point of view, but *it includes it in itself*.

2.

Habermas argues that morality is generated by the connection of principle D with the moral point of view. The moral point of view is the perspective which imposes, in a practical discourse about moral norms, the equal consideration of interests and value choices of every person affected by the norm under examination. The moral point of view implies a universal perspective, extended to every person concerned without any other limitation, and implies the consideration of the moral powers of persons, because it takes into account their interests and value choices. In this regard, we can say that the moral point of view coincides with the rawlsian consideration of persons as *moral* persons. At this level, treating persons as equal means adopting a principle of equal respect for their moral dignity. In Habermas's theory, this is possible only in the domain of morality. In the domain of law, on the contrary, the participants in the political association are treated as equal insofar as they are members of the association (so the extension of the principle is limited) and subjects of rights (Habermas 1996*,* 108-114, 153-158). This differentiation is made possible by the common root of the two domains in principle D. This is a principle of practical discourse which doesn't yet contain either the moral point of view or the form of law. For our discussion, the first point is important. Is it really possible that principle D doesn't have in itself the moral point of view?

We have seen the contradictions in the theory. Let's try now to see what are the roots of these contradictions in the formulation of principle D itself.

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Principle D is conceived as the general presupposition of democracy, as a presupposition external to it, which delimits the domain inside which it is possible to think of a political regime as a democratic regime. It guarantees to this regime the necessary openness to pluralism, because it puts normative and *not* moral conditions on citizens; on the other hand, it assures the respect of a principle of equal treatment of persons, a necessary condition to conceive a political regime as democratic. Principle D is presented by Habermas at the beginning of the system of rights (Habermas 1996, 107). It is enunciated, but not justified. However, through other texts and analysis, we can reconstruct the justification of D, that is provided by the principles of argumentation and discourse contained in the theory of communication. The most recent exposition of this justification is in the last episode of the long debate between Habermas and Apel (Habermas 2003, 77-97).

The validity of assertive, normative and expressive speech acts depends on the pragmatics of communication: each type of speech act is defined by the validity claims raised at the level of illocutionary forces; the validity claims specify in what sense a proposition is acceptable (as a description, an order, a prayer etc.); the enunciation is valid if the proposition is accepted in the sense of the illocutionary force, that is, if the validity claim raised by a speaker A is accepted by a speaker B in a communication which is free from any external or internal constraints. The internal logic of illocutionary forces shows that, according to Habermas, communication is possible only if certain idealized conditions are satisfied. In the discussion with Apel, he stresses four conditions:

a) inclusivity: no one who could make a relevant contribution may be prevented from participating;

b) equal distribution of communicative freedoms: everyone has an equal opportunity to make contributions;

c) truthfulness: the participants must mean what they say; and

d) absence of contingent external constraints or constraints inherent to the structure of communication (Habermas 2003, 89).

On this basis it is possible to formulate Principle D, which notoriously affirms:

Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.[7]

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[7] Habermas 1996, 107 ("Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten").

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The intrinsic sense of D is that norms of action are just if they are accepted in a rational discussion which respects the idealized conditions of communication cited above.

If principle D is justified in these terms, we can say that it imposes on participants in rational discourse an obligation of equal treatment, which is not moral, because it is only a set of inclusive conditions which ensures that each participant can have equal and free access to communication, and that each argument can be discussed without limitation except for the shared search for agreement or consensual understanding (*Einverständnis*). So these conditions are *normative* and *not moral*.

I see two difficulties in this theory.

1) The first problem is the acceptance by citizens. A principle which is the grounding presupposition of democracy should be, at least implicitly, accepted by all citizens as the shared presupposition of every discussion on politics and right. It should, as it were, set the boundaries outside which it is impossible to consider a regime democratic. It is a common normative content which all citizens must accept. This acceptance can be implicit, of course; it doesn't need a complete theoretical elaboration and a clear consciousness of it. But, in some way, citizens divided by comprehensive doctrines, religious commitments, conceptions of the good life and so on, must be united at least by a minimal normative conviction in virtue of which they treat themselves mutually as equal, even in discussions about very controversial matters. In this case, this shared normative ground should be provided by principle D.

But the acceptance of D in this sense is highly problematic. Certainly, we could think that all citizens agree on the principle that every topic must be discussed in a post-metaphysical and inclusive way: no content can be considered "sacred" and exempt from critique, and discussion must be open to the contribution of every citizen. But this principle is not so easily accepted by citizens who are divided by moral and religious doctrines, because it implies also the acceptance of a highly reflexive attitude towards every content of their own doctrines. For a citizen with a strong religious conscience, for instance, it might be difficult to accept that every moral content can be subjected to reflexion and criticism; it would be easier, for him, on the contrary, to accept a principle of equal treatment of moral persons, that can be justified for other reasons.[8]

Moreover, why should all citizens share principle D? If the answer is that they accept the theory of rational communication, we see that, of course, this is not possible: this theory is highly controversial, like every philosophical theory, and lies at the level of comprehensive doctrines. If this theory, in effect, tries to describe the

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[8] For this argument, see Larmore 1999, 139-167.

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situation of argumentation conducted by citizens of a post-metaphysical society, it is contradicted by cases such as the one I just mentioned. If it says that we can accept the validity of normative enunciations only in virtue of the principles of the pragmatics of communication, it is contested at a philosophical level (Honneth and Joas, 2002; Wingert and Günther 2001; Cooke 1994). The simplest way to think that all citizens could accept D as a presupposition of democracy is to suppose that they would find it easier to agree about *procedural* principles of deliberation, then about the *outcomes* of deliberation. The problem is that these principles, in the case of Habermas's theory, are so idealized and counterfactual that they cannot be accepted without accepting all the theory of communication.[9] So the risk is that citizens must accept the entire theory of rational communication in order to accept D.

2) Another difficulty is that the conditions imposed on communication, that must guarantee its rationality, are so strong that they implicitly refer to moral contents. In a strictly procedural theory, procedures specify the conditions under which a decision can be called "just". The criterion of justice, here, is not the confrontation of the outcome with a principle or an ideal of justice, but the confrontation of real procedures with the ideal of correct procedures. So, if procedures are correct, the outcome is just, whatever its content (Ceva 2009). Now, if an intuitive moral conscience sees a contradiction between the outcome of procedures and a vague idea of justice, this contradiction doesn't allow a correction of the outcome. In this reductionist version, proceduralism risks producing the effect "anything goes". But, if we introduce limitations and correctives to procedures, in order to eschew this effect, then we risk transforming a procedural theory into a substantial one (in other words: into an "outcome oriented" theory). I think that this is the case in Habermas's theory.

Let's take an example. Suppose that under conditions of correct deliberation all citizens agree on promoting a policy of a strong reduction in the salaries of factory workers, in order to assure the competitiveness of the country in global markets. In this case, we could say, in rawlsian terms, that efficiency prevails over justice; this policy wouldn't be justified by Rawls's theory.[10] But could it be justified by Habermas's theory? In a first, limited sense, it could be. If the public deliberation which led to this conclusion respected all the conditions of ideal communication, then the outcome is just. But we see that there is a flagrant contradiction between this outcome and a vague intuition of justice according to which we can't

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[9] On the problem of Habermas's proceduralism, see Ottonelli 2012.

[10] The lexical ordination of the principles of justice and the difference principle itself impose the priority of justice on efficiency: see Rawls 1999, ch. II.

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accept accentuating income inequalities in order to face global competition. At this point, from the perspective of habermasian theory we would remark that perhaps the ideal conditions of communication were not so-well respected, in this deliberation; we could think so, because it is unlikely that factory workers would accept a big cut in salary as just. Since, according to Habermas's idea of counterfactual conditions, real communication is always related to these conditions, while at the same time always remaining ideal and not totally realized, it is always possible to raise this kind of objection to the validity of procedures.

But this kind of objection is very problematic for the status of a procedural theory. If the conditions of communication are always, to a certain degree, ideal, no real communication is, *per se*, just. So proceduralism is useless, because it doesn't give a stable standard to judge the empirical communications by. At the same time, this kind of objection transforms a procedural theory into a substantive ("outcome oriented") one. If, even in the presence of a formal (exterior) respect of procedure, it is possible to say that the ideal conditions are not satisfied, this means that we dispose of a vague criterion of justice, which is conceived of in terms of content. That is, we dispose of a substantive principle of justice, even if not specified and very vague, that allows us to judge *the outcome* of the procedures under examination. And, secondly, but most importantly for Habermas's construction, this principle is a *moral* content, it is an idea of moral person.

Let's look at our example again. Suppose that the majority of factory workers, in open and democratic processes of deliberation, accepts the big reduction in salaries and so, implicitly, the growth of profits and the increase in inequalities. They accept a situation of inequality, if judged in terms of moral equality, but they do that in a condition of equality, intended as equality of access to deliberation. In these terms, the habermasian non-moral foundation of public deliberation is respected. But, if we are dissatisfied with this outcome of the deliberation, what could we say from the point of view of this theory? We must remember that the four conditions of rational communication exposed by Habermas are aimed at excluding internal and external constraints to the free and equal participation in discourse. So, for example, the fourth condition is:

> […] absence of contingent external constraints or constraints inherent to the structure of communication: the yes/no positions of participants on criticizable validity claims should be motivated only by the power of cogent reasons to convince.[11]

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[11] Habermas 2003, 82 ("[…] Abwesenheit von kontingenten äußeren oder der Kommunikationsstruktur innewohnenden Zwängen: die Ja-/Nein-Stellungnahmen der Teilnehmer zu kritisierbaren Geltungsansprüchen dürfen nur durch die Überzeugungskraft einleuchtender Gründe motiviert sein").

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In our example, we could say that the workers accept low salaries because of fear of dismissals, unemployment and so on. These could be described as external constraints to communication: the workers would judge as just high salaries, but accept low salaries because they are obliged by contingent factors, which operate on their consciences as external forces, not as convincing arguments. Moreover: if their conviction in favour of low salaries is produced not only by forces of market relations, but also by a campaign of opinion led by the media to create an ideological justification of this choice, the access to free communication for these workers is altered and so we can say that their opting for low salaries is not just for procedural reasons.

As I already said, this kind of analysis is a problem for the status of the theory as procedural. But here I would like to stress another point. What is at stake when we say that factory workers, in our example, don't have free access to communication because their deliberation is subjected to external and internal constraints? I think that here we are talking about the status of workers as free and equal *moral* persons. The limits that market relationships and power hegemonies in the media system impose on workers' choices are limits imposed on their equal freedom as moral subjects. In fact, what is impeded is their capacity to judge the situation freely, that is, their faculty to exercise the moral power of judgment rightly, in view of their rational project of life (in which is expressed their moral power to choose ends). If we don't accept a reductionist view of proceduralism, here, it is because from a formal point of view, even if the workers accept low salaries without any evident constraints and as a result of their evaluation of the situation, we see clearly that as moral persons they are treated unjustly, insofar as they must accept a disadvantaged situation in favour of persons who are more advantaged. This moral intuition is expressed by the fourth condition imposed by Habermas on communication: the participants to discussion must be, in a certain deflationary way, *autonomous persons*, who are not influenced by other more powerful persons.

But this kind of solution generates a sort of instability in standards of justice. The intuition that persons must be treated as equal insofar as they are moral persons, is here specified as a condition of access to communication; but since this condition is rarely satisfied, it is very difficult to accept the outcome of a decision as just by only referring to procedures. This result shows that in fact the standard of justice is prior to procedures and is applied to the outcomes themselves; so the theory is not procedural, and, most of all, is not independent from any moral content. The standard is in fact *an ideal of persons as autonomous subjects*, which is *implicitly moral*. So we can say that principle D has implicit moral

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contents, namely the idea that the participants in communication must be treated as equal persons, and not only as equal participants in communication.

But, in a sense, the concept of person necessarily presupposes a moral consideration. This is the reason why we find in Habermas's theory the contradictions analyzed in the first section of this work. A strict application of principle D doesn't authorize us to fix a priority between the moral, the pragmatic and the ethical uses of practical reason. However, we are guided by the intuition of the priority of right, and so Habermas says that in the case of conflict the moral point of view prevails. This contradiction is rooted in the implicit moral character of principle D, which is not recognized by the theory.

3.

Is it possible, in general, to treat persons as equal without treating them as *moral* persons? Principle D aims at treating persons as equal from a perspective which is not moral, but practical, detached from moral questions. The difficulties in this theory suggest that probably the principle of equality applied to persons implies always a necessary dependence on the moral point of view.

Theories of equality distinguish themselves by the answer they give to the question: "equality of what?" (Sen 1992, ch. I). This question is raised at a "superficial" level. It concerns the kind of incomes, goods, resources, capacities and so on, which must be allocated in a distributive theory of equality. But the differences at this level depend on more profound distinctions concerning the conception of person. Persons can be conceived as holders of negative rights or valid titles; as potential containers of utilities; as bearers of fundamental interests, such as welfare, resources, capacities, or opportunity of welfare; and so on. In all these cases, the fundamental dimension which characterizes the theory concerns the level at which persons are equal. In fact, it is evident that treating persons *as equal* doesn't mean treating them *equally*. Treating persons equally would mean establishing a measure of arithmetical equal division of goods, resources, rights etc.; but nobody could accept that this kind of distribution as such is always *really* equal or fair. We all see that, in order to treat different persons as equal, it is often necessary to allocate goods or resources in non-equal parts. But at the same time, we don't think that, in these cases, the principle of equality is violated. The reason for this is that, in treating persons non-equally in some particular regards, we are trying to treat them *as equal moral persons*. That is, we are trying to treat them always *equally* in a moral dimension that we consider fundamental for the definition of a person.

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I'll try to explain this with an example. From a strict kantian perspective, treating persons as equal means that we must respect them as rational subjects who are capable of moral autonomy. The capacity to know and follow the moral law is the dimension of the agent which is constitutive of her as a moral person, and so must always be respected in the same way if we want to treat persons as equal. In this dimension, equality as distribution in equal parts coincides with equality as treating persons as equal. We must respect everyone *in the same way* as moral agents capable of moral decisions. But this equality doesn't entail an equal treatment, for example, in income and property, as is well shown in Kant's theory.

Every theory of modern democracy relies on the idea that there is a deep dimension to the person which is the object of equal treatment. Only theories of other types of political regimes, such as traditional monarchies or aristocratic societies or theocracies, for example, don't depend on a conception of this type, because they assume that persons are, for fundamental moral reasons, unequal, and that this inequality of persons is one of the sources of the legitimacy of non-democratic power.

But insofar as political power is democratically legitimated, it implies the presupposition that citizens are conceived as equal persons. And so, it implies a radical dimension of persons which is the real object of the obligation to treat them as equal. Now, in kantian theory, that I mentioned only as an example, this dimension is moral, obviously, because of the general conception of rationality in Kant. But the hypothesis that I propose is that *every* democratic theory is grounded on a conception of moral equality, even when this equality is not interpreted as moral. Of course, this is only an hypothesis, which needs to be justified, by showing analytically this element in different theories (Piras 2008; 2010). Here, I would just like to argue in what sense Habermas's conception of equality between participants in a discourse is in fact a conception of moral equality.

The radical dimension which justifies equality, in Habermas, is the capacity to accept or reject reasons.[12] Rationality is interpreted as the capacity to give reasons, that is, to satisfy validity claims. The illocutionary forces of language constitute the universal rational dimension which lead to agreement (*Einverständnis*), and consequently rational shared meanings. This is the domain of humanity, in Habermas's theory. The sociolinguistic constitution of human beings differentiates them from other natural species. This constitution makes human beings not

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[12] This thesis is, of course, highly controversial. For a critique, and a more convincing theory on the basis of equality, see Carter 2011, 538-571. See also Galeotti 2010.

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only rational subjects, but also moral persons. In fact, the capacity to recognize moral norms as valid is entirely rooted in language interaction (Habermas 1984, ch. III and V). Habermas shows that, while assertive and expressive speech acts refer to a domain of objects constituted as "external" to the linguistic formulation (the external or the internal world), normative speech acts don't refer to any "world" of this kind. Normativity is constituted by language itself. This is, in some sense, the essential intuition of Habermas's reflexion since the first appearance of the thesis that the root of rational validity is in language. The conditions of validity of speech acts, according to Habermas's interpretation, are pragmatic, because they are valid if they are acceptable in the sense of the illocutionary force. This "network" of intersubjective validity is produced by the mutual recognition of participants in interaction. By this recognition, every participant understands herself and other participants as subjects. It is well known that Habermas, in his critique of the philosophy of conscience, develops an intersubjective theory of subject: the self is constituted by the recognition given by others in linguistic communication. The pragmatic dimension of language is the source, also, of the constitution of the self. But then, how is it possible that the constraints immanent to the use of language don't imply also a principle of *respect for moral persons*, in the course of interaction?

In the course of interaction, I meet someone who is entitled, like me, to raise validity claims; by this, I recognize that she/he is a subject like me, and that I am a subject with obligations towards her/him. By this recognition, I learn that we – I and you – are autonomous subjects, capable of taking Yes/No positions as regards the validity claims raised by others. In this interaction *a weak notion of moral autonomy* is implicit, because we can't dismiss the validity claims of others without treating them unjustly as subjects; that is, *without disrespecting their nature as subjects who can decide autonomously*. But this qualification is moral. The capacity to judge by myself in a normative situation is a moral capacity: the power to judge according to a notion of the right. The inner connexion between normativity and interaction, which is the core of habermasian theory, can't be thought of without accepting the consequence that in discourse participants already recognize themselves as moral persons. This immanent but not thematized morality of communication produces the contradictions of the theory, and the *de facto* moral and substantive character of some "procedural" idealized conditions of communication. For this reason we could say that principle D, which is derived from the pragmatics of communication, is a principle not only of practical rationality, but also of *moral equality*.

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