

COMMUNICATIVE FREEDOM, COMMUNICATIVE POWER, AND JURISGENESIS

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One of the doubts raised against discourse theory by many critics concerns the place of the individual. Liberals especially fear that the individual gets involved in a system of obligations which is derived from certain pragmatistical presuppositions of communication and which forces the individual to participate in discourses whenever he or she pursues his or her own happiness in society. But Jacques Derrida too, who could scarcely be called a "liberal" in the traditional sense, characterizes those presuppositions of communication which entail an obligation for the speaker and the hearer as "violence."¹ For these critics, it must now be a surprise to read in Jürgen Habermas's book that the individual possesses negative rights,² especially a right to privacy, which entitles him or her even to refrain from all those obligations which are linked with communication. "Legally granted liberties entitle one to *drop out* of communicative action, to refuse illocutionary obligations; they ground a privacy freed from the burden of reciprocally acknowledged and mutually expected communicative freedoms."³ This does not mean, however, that Habermas follows the traditional line of argumentation, which derives a conception of negative liberties from their opposition to the executive power of the state. The concept of "communicative freedom" holds a strong position and is mentioned quite often in the other parts of the book,⁴ but without further explanation.

Habermas later links this concept with Hannah Arendt's concept of communicative power.⁵ When the members of a commu-

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Thanks to John Farrell for his help with the argument and with the English language. I am responsible for all remaining mistakes and obscurities.

¹ See Jacques Derrida, *The Politics of Friendship*, 85 J. PHIL. 634 (1988).

² See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 120 (William Rehg trans., 1996).

³ *Id.*

⁴ See, e.g., *id.* at 132.

⁵ See *id.* at 147-50.

nity use their communicative freedom, they can generate communicative power. Habermas writes:

[D]iscursively produced and intersubjectively shared beliefs have . . . a *motivating* force. Even if this remains limited to the weakly motivating force of good reasons, . . . the public use of communicative freedom also appears as a generator of power potentials. . . . By mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law, illocutionary obligations . . . build up into a potential that holders of administrative power should not ignore.⁶

The concept of communicative power explains how reasons become factual. By being accepted on the basis of communicative freedom, reasons acquire a motivational force. This thesis needs further elaboration, and this will require the rational reconstruction of communicative freedom. It should then become evident that communicative power is a motivational resource for the obedience of norms, and thus presents itself as an alternative to coercion and violence.

Habermas discusses the legal enforcement of obedience of a rule only in relation to moral motivation generated by good reasons which are acceptable to everybody. With the concept of communicative power, the deliberative procedure becomes a generator of motivation on its own, one which is independent of moral motivation on the one hand and coercion on the other. The deliberative process is, according to Habermas's formulation, internally structured by ethical, moral, political, and pragmatic reasons.⁷ Externally, it is comprised of democratic procedures within a legal form. Communicative power is dependent on reasons, but independent of the specific kind of reasons; it only links up with the properties of the procedure which generates those reasons. These properties enable the participants to advance and question reasons and counterreasons for the cluster of validity claims which is always connected with political issues. Under this condition alone, the factual acceptance of a validity claim can acquire motivational force.

Although communicative power seems to be the strongest kind of power, since it motivates people to act on the basis of rational insight and communicative freedom, it is also the weakest in another sense. Because of its dependence on rational motivation,

⁶ *Id.* at 147.

⁷ *See id.* at 82-131.

communicative power is endangered by the following kinds of threats: reasonably justified dissent, dissent based on reasons which do not convince a majority, and unjustified and stronger countermotives. It was a republican utopia to believe that countermotives could be overridden by the public spirit of the city and its members. Even if republicans accept that people can be bad, evil can be limited by countermotives which get their strength from communicative power. The evil in mankind is powerful only in those cases where communities fall apart and people separate and disperse.⁸ But even in this case, republicans need a medium which stabilizes communicative power—that is, legal rules, constitutions, and institutions. And sometimes they even need to coerce those people who insist on their unjustified countermotives. The liberal concept of law, which is more interested in the coercive force of the law and its justification than in its integrating aspects, seems to be more realistic. Nevertheless, the relationship between communicative power and law needs further elaboration.

The following discussion seeks to demonstrate that these concepts are more fundamental to Habermas's conception of a system of rights than he himself seems to think. My remarks are intended less as a critique than as a comment on Habermas's own argument. I want to make some suggestions as to how the relation between communicative freedom and individual liberty (often called negative liberty) has to be conceived,⁹ and how communicative freedom is related to communicative power.¹⁰ Finally, I want to draw some conclusions for a discursive theory of law.¹¹

I. COMMUNICATIVE FREEDOM

Let me begin by quoting some definitional remarks on the meaning of "communicative freedom." "Communicative freedom exists only between actors who, adopting a performative attitude, want to reach an understanding with one another about something"¹² I understand communicative freedom as the possibility—mutually presupposed by participants engaged in the effort to reach an understanding—of responding to the utterances of one's counterpart and to the concomitantly raised validity claims.¹³

⁸ See generally HANNAH ARENDT, *ON REVOLUTION* (1963).

⁹ See *infra* part I.

¹⁰ See *infra* parts II & III.

¹¹ See *infra* part IV.

¹² HABERMAS, *supra* note 2, at 119.

¹³ See *id.*

The concept of communicative freedom is different from "negative" and "positive" liberty, and from "freedom of action" or "freedom of the will." It refers to one of the most obvious aspects of "freedom": the possibility to say "no." This possibility is also included in the traditional definition of "freedom of action" as the awareness of an actor that he or she could have done otherwise, if he or she had had the will to do so. The possibility to say "no" is constitutive for the possibility of alternatives, and for the actor's awareness that he or she could decide between taking an affirmative position toward a plan of action.¹⁴ Taking an affirmative position then means taking a negative position toward the counterreasons which could be mobilized against the action plan. Thus, the actor's will can be interpreted as the result of a double negativity, that is, as the negation of the possibility of a negation of her intention.¹⁵ Then, it seems that this structure of double negativity is the central feature of communicative freedom. But why "communicative?"

Speaking of a "negative position" toward subjective inclinations, social forces, or objective obstacles is only metaphorical. In fact, a negative position refers to linguistic entities, such as propositions and speech acts. The negation of a proposition is a logical operation, but one can say "yes" or "no" only to a proposition which is embedded in a pragmatic context; propositions expressed in a speech act include an order, a request, an invitation, or an imperative, as well as an assertion, a declaration, and a wish or an intention. This interdependence between the negative position and the pragmatic properties of a speech act leads to the presumption that the double negativity should be explained in terms of illocutionary relationships between speaker and hearer. It is not the logical operation of negation, but the hearer's refusal to accept the speaker's utterance, which is fundamental to communicative freedom. When a hearer says "no" to such a speech act, she refuses to accept the validity claim which is raised for the speech act and its propositional content. The possibility to say "no" is the freedom to take a position toward the validity claim of a speech act.¹⁶

¹⁴ This is accepted even by radical subjectivist approaches to the notion of "freedom." See, e.g., GALEN STRAWSON, *FREEDOM AND BELIEF* (1986).

¹⁵ See ERNST TUGENDHAT, *VORLESUNGEN ZUR EINFÜHRUNG IN DIE SPRACHANALYTISCHE PHILOSOPHIE* 110 (1976).

¹⁶ According to Immanuel Kant, the "negative attitude" is of greatest importance to the application of the first of the three maxims of common human understanding: "to think for oneself," or *Selbstdenken*; the other two being "to think from the standpoint of every one else," or *erweiterte Denkungsart*, and "always to think consistently," or *konsequente*

Obviously, a speaker often has several means to make the hearer accept a validity claim by the latter's taking an affirmative position, like deception, force, threat, rhetorical means, etc. On the other hand, the hearer might have different motives for taking an affirmative (or negative) position, like fear of sanctions or disadvantages. There is only one possibility where the freedom to take a position is reciprocally attributed by speaker and hearer. This is the case when the speaker is willing to give reasons for the validity claim, and when the hearer herself is willing to give reasons for her taking a negative position. Reasons are directly related to the freedom to take a position. Only by saying "no" does the proposition expressed by the speaker acquire the pragmatic feature of an "assertion," that is, become a proposition which is embedded in the pragmatic context of a speech act for which the speaker raises a validity claim. The hearer can decide not to react at all and to withdraw from communication or to change her attitude and to treat the reaction as a symptom which she merely observes from an external point of view. But if she decides to react by taking a position, she ascribes certain features to the expression and to the speaker, and she accepts the obligation to give reasons for her doubts. When the speaker raises a validity claim, she announces that she anticipates doubts and negations and that she is therefore willing to give reasons for the proposition. She situates her assertion within the space of possible "yes" or "no" reactions. As a consequence, the acceptance of a validity claim can now be interpreted on the basis of communicative freedom as the negation of doubts. If the hearer takes a negative position on the speaker's utterance, and the speaker decides to justify the validity claim which she raised for her utterance, she has to give counter-counterreasons against the hearer's counterreasons. The hearer's conviction of the validity of the speaker's utterance, then, is the result of a dialectical episode in which doubts are invalidated by reasons.

The freedom to take a position, as it is explained above, is only possible within a space of mutual obligations. To say "yes" or "no" sincerely, always means to accept the obligations inherent in the interplay of validity claims, doubts, and counterreasons. But the explanation of "communicative freedom" would not be sufficient if it did not entail the freedom to withdraw from communication as

Denkungsart. See IMMANUEL KANT, THE CRITIQUE OF JUDGMENT 152 n.1 (James C. Meredith trans., 1952). To think for oneself, without prejudice, requires actively doubting any knowledge which seems to be pre-given and natural. As such, Kant considered the "negative attitude" to be the constitutive intellectual attitude of enlightenment. See *id.*

such, that is, to “step out” of the mutual illocutionary obligations. Without this third possibility to choose “exit” instead of “voice” or “loyalty,” communicative freedom would not be a kind of freedom at all. The decision to communicate must be free. It is constitutive for the freedom of the speaker to raise a validity claim as well as for the hearer’s freedom to take a positive or negative position. Any coercion would violate the sincerity condition of the illocutionary success of a speech act. Thus, “communicative freedom” always presupposes “negative liberty” on a very fundamental level. But it is a different question to ask how negative liberty is related to communicative freedom after speaker and hearer have accepted mutual illocutionary obligations. I shall come back to this problem¹⁷ after the explanation of the relationship between communicative freedom and communicative power.

Communicative freedom forms part of every kind of argumentation, be it on truth claims, rightness claims, or on the sincerity of a subjective expression. The reciprocal attribution of the freedom to take a position belongs to the illocutionary obligations of an exchange of speech acts. In most of these cases, communicative freedom is not explicitly thematized by speaker and hearer; it is in the background of communication. The situation changes when human action is concerned. Here, communicative freedom comes to the fore. This has to do with a certain property possessed by the illocutionary obligations of speech acts. Communicative freedom does not just entail the obligation to give reasons for a validity claim and to argue for one’s counterreasons in the case of doubt. When the hearer accepts a validity claim on the basis of communicative freedom because she is convinced that her counterreasons cannot be defended against the speaker’s counter-counterreasons, her acceptance also entails an obligation for the sequel of interaction. With her factual acceptance, the hearer binds herself in the presence of the speaker to take the propositional content of the accepted speech act into account in her following actions. This illocutionary obligation is also based on the same communicative freedom as the acceptance of the validity claim. It is the bridge to motivation. In general, this illocutionary obligation is central to the theory of communicative action.

According to the theory of communicative action, the observance of illocutionary obligations by the speaker and the hearer has consequences for their future interaction. Habermas speaks of “obligations relevant to the sequel of interaction,” or “*interaktions-*

¹⁷ See *infra* part IV.

yfolgenrelevante Verbindlichkeiten."¹⁸ If the hearer takes an affirmative position on a validity claim which was raised by the speaker for her speech act, this has consequences for his future actions. Certainly, these consequences are only relevant if speaker and hearer try to coordinate their action plans by the mutual acceptance of validity claims. To that extent, they use the illocutionary forces of communication for the purposes of coordinating their action plans. This feature distinguishes communicative action from other types of teleological action. But the illocutionary mechanism functions as an action-coordinating mechanism only if it obliges the speaker and the hearer to change their roles and to become actors.

In the special case of action norms, these illocutionary obligations become especially relevant, because the propositional content of the speech act refers directly to human action, so that the acceptance of a regulative speech act entails the illocutionary obligation to do what is required in order to satisfy the valid norm. And one can expect that the dialectical episode of reasons and counter-reasons will be continued in the episode of motives and countermotives. Hence, communicative freedom links with freedom of action and autonomous motivation. And it is this link, which makes communicative power so powerful. But one can also foresee that this tentative explanation of the idea of communicative freedom will make the relationship to "negative liberty" even more dramatic.

My thesis is that taking an affirmative position on a validity claim generates this illocutionary obligation which links reasons to motives. When the hearer takes an affirmative position, she is obliged to adopt the reasons justifying the validity claim as her own reasons, and as her own reasons for action. Taking an affirmative position is the turning point at which the speaker and the hearer legitimately expect of one another that each act according to the reasons. As a consequence, the illocutionary obligation serves as a bridge between reasons and motives. This thesis needs to be elaborated further.

II. THE MOTIVATIONAL MEANING OF THE ILLOCUTIONARY

The illocutionary force of reasons for action motives can be analyzed in three dimensions: the subjective, the intersubjective, and the relationship between the two. In the subjective dimension,

¹⁸ 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 296 (Thomas McCarthy trans., 1984).

the motivational force of reasons consists of the invalidation of countermotives. In the intersubjective dimension, mutually accepted reasons generate a shared expectation of action and a "singular action community." In the third dimension, the illocutionary obligation entails a special relationship between the actor and the community, which consists in the ascription of a special status to the actor: she becomes the accountable subject of the expected action, the one who is held responsible and treated as the author of her action. To be sure, these elements cannot be regarded as sufficient conditions for the causation of motives.

A. *The Subjective*

1.

Ego, along with alter, has accepted a validity claim because of reasons which both share, and thus, has no convincing counter-reasons which would justify taking a negative position toward the validity claim, and, consequently, would justify the corresponding countermotives. The shared conviction of ego and alter, that there are no counterreasons for countermotives, is a negative element in the motivational force of reasons. Obviously, this is true only for a *ceteris paribus* clause. In the next moment, ego and/or alter can discover new counterreasons which justify countermotives. As long as this is not the case, the negative force of reasons holds: neither alter nor ego is able to trace back any countermotives to a position whose reasons were not invalidated. On the other hand, the conviction that there are no countermotives which can be justified by counterreasons does not mean that there are no countermotives at all. De facto, in most cases, countermotives do exist. They can be stronger than the motives which are justified by reasons. From this it follows that the motivational force of reasons is very weak. It lasts only as long as there are no counterreasons for countermotives, and as long as the existing countermotives are weaker. Nevertheless, existing countermotives can be changed and weakened by reasons, and this would be impossible if reasons had no motivational force at all.

2.

The rationally motivated acceptance of a validity claim includes the illocutionary obligation to act according to the valid proposition. Something has to be done (or omitted) in order to fulfill the obligation. What has to be done is something which counts as the realization of the valid proposition. A singular ac-

tion¹⁹ has to take place, one which is done by a singular actor in a singular situation. If the valid proposition is not fulfilled by a singular action, the illocutionary obligation is violated and the shared expectation will be disappointed. Two different kinds of nonfulfillment can be distinguished. The first one concerns the cognitive aspect, that is, those cases where the valid proposition is incorrectly applied to the concrete situation.²⁰ The second one is of more interest here. It concerns the motivational aspect, that is, those cases where the valid proposition is not fulfilled, because what is required to fulfill it in a concrete situation is not done at all (not even incorrectly).

B. *The Intersubjective*

1.

Reasons which have been defended against doubts and thus have justified the acceptance of a validity claim also justify a shared expectation of an action for those who have accepted the validity claim. This expectation refers to the motive for a singular action which counts as the fulfillment of the valid proposition. Alter may now expect that ego will have the corresponding action motive—and so does ego in relation to herself. Ego accepted a validity claim which was raised by alter, because of reasons which convinced ego to reject her doubts. To the extent that these reasons convinced ego, she shares them with alter. Consequently, insofar as the expectation of ego's action motive is based on these shared reasons, the expectation of an action motive is also shared. It gains a kind of objectivity. Ego is now able to adopt a third person's point of view on her own motivational complex, and this point of view represents a legitimate expectation of an action. And alter may also expect that ego will have this expectation of herself. The possibility of such a shared expectation constitutes the social horizon within which an actor is able to form her motives in accordance with reasons. This is even true in the case of ethical deliberation: What constitutes my good life is represented by ethical reasons which are valid according to the requirements of ethical deliberation. When I accept an ethical reason, then I have to do

¹⁹ "Action" here always means an action or an omission.

²⁰ For the case of moral and legal norms, see KLAUS GÜNTHER, *THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW* (John Farrell trans., 1993); WILLIAM REHG, *INSIGHT AND SOLIDARITY: A STUDY IN THE DISCOURSE ETHICS OF JÜRGEN HABERMAS* 179-250 (1994).

what is good for me, and if I acted according to my countermotives, I would not act in accordance with my true self.

2.

As a representative of a shared expectation of action, ego is also a representative member of something like a "singular action community." This community shares only one conviction and its members mutually expect of each other the corresponding singular action. Ego's reasons for acting are thus always reasons for the members of this community. The existence of this community is highly precarious, because it is only constituted around this one conviction which was formed in the deliberative process of raising doubts against and providing defenses for validity claims. Consequently, this community is terminated when a member uses her communicative freedom and doubts the shared conviction using new and convincing counterarguments. Then the shared expectation of action loses its legitimacy, and the community necessarily falls apart. In the case of unjustified countermotives, the shared expectation of action keeps its legitimacy, and the community continues to exist. But if the agent acts according to her unjustified stronger countermotives, she loses her membership and excludes herself from the "singular action community."

C. *The Relationship Between the Subjective and the Intersubjective*

1.

When alter and ego have a mutually shared expectation of ego's singular action, and when ego takes the perspective of a representative member of the "singular action community" toward herself, she has a special status in her relationship to the community. Ego is responsible to the community for a singular action which counts as an appropriate realization of the valid proposition. The shared expectation of the singular action community, on the one hand, and the responsibility of a singular actor to act, on the other, are two complementary aspects of the illocutionary meaning of the acceptance of a validity claim. Because ego is a member of the "singular action community" too, she is also responsible to herself. A consequence of ego's responsibility is her accountability to the community in cases of violation of the illocutionary obligation. Obviously, accountability is already included in communicative freedom; the freedom to say "yes" or "no" implies the mutual ascription of the capability to orient oneself according to validity

claims. The feature of accountability is now extended to actions in general. My acceptance of a validity claim makes me accountable to the members of the "singular action community" for my acting against the propositional content of the shared conviction.

With regard to my motivation, I am subject to a change in my status.²¹ I am no longer treated as a bundle of beliefs, desires, and other motives which determine my behavior. As a member who is responsible to the community for my acting according to the legitimately shared expectation, I may not simply obey my countermotives and leave the "single action community." If I acted according to my countermotives, then I would be asked for my reasons and I would have to answer these questions for the other members who legitimately share the expectation. Being responsible means that my actions will be judged from the point of view of the shared expectation by the other members of the community—as well as by myself, who accepted the valid proposition and the illocutionary obligation inherent in the acceptance. And I have to give justifications (e.g., that I had a convincing counterreason to violate the shared expectation), or I have to provide an excuse which suspends or diminishes my responsibility (e.g., that I was coerced into violating the shared expectation; that I could not recognize that it was the shared expectation which I violated in this concrete situation; that there were stronger countermotives which are acceptable).

2.

The mutual attribution of responsibility would be impossible if there were nobody to whom it could appropriately be attributed. The illocutionary meaning of the rationally motivated acceptance of a validity claim must therefore include something more than an obligation and the corresponding responsibility. In the context of "obligation," the actor is required to obey a self-imposed imperative by overriding her countermotives. But then, the motivational force of reasons would be simply another kind of coercion—although it differs from coercion in general by its quality of being self-imposed. The performative power of reasons includes more than this "negative" aspect of weakening the strength of countermotives. It also gives something "positive" to the actor. The illocutionary meaning of the acceptance of a validity claim does also entail something like an illocutionary enfranchisement or empowerment of a singular actor to act. Ego is recognized by alter

²¹ For the semantical converse relation between "competence" and "liability," see, with reference to W.N. Hohfeld, ROBERT ALEX, *THEORIE DER GRUNDRECHTE* 219 (1985).

as someone who can make a beginning, who can initiate something. With the acceptance of the mutual illocutionary obligation to act according to the valid proposition, we authorize each other to place one another at the beginning of an action. According to the tradition of metaphysics, the actor is recognized by the singular action community as a *causa sui* and *causa libera*, the traditional notions of freedom. In less metaphysical terms, the actor is recognized as the single author of her succeeding actions. To say it in a tautological fashion with reference to the etymological relation between "*auctor*" and "*auctoritas*": We authorize each other to assume the position of authorship of our actions. To become the author of an action means more than being an actor. To be an actor means to possess a set of physiological and psychical capabilities and dispositions which are required for the formation of intentions (goals), and for the realization of operations (e.g., to raise one's arm), and because of which the actor can be observed as a cause of an event. But this is also true for someone who is causally determined by any kind of motives. To consider an actor to be also the author of her actions means something different. A singular action counts as her action only if it is done by exercising an individual power to act (*Handlungsmacht*) or agency. To be sure, this kind of power always includes psychological and physiological capabilities and dispositions, but its character as initiating a change in the world by itself is attributed to the actor by those with whom she shares an expectation of action, and because she shares it with them. Then, instead of being a reacting bundle of motives, ego becomes an actor in the very meaning of the term. She now interprets her motives in such a way that she is the origin of them. Only under this condition does it make sense to say that she could have weakened her countermotives, and that she could have avoided violating the shared expectation. The members of the community can now say to her, and she can say to herself, that she can do it, that she could really become the origin of actions. The illocutionary meaning of the acceptance of a validity claim has an enabling character; it opens up a space in which we can mutually recognize our motivational complex as a power to act which every single member can exercise by him- or herself. Being recognized as the origin of her own action motives, she can in fact become the origin of her own action motives; she can in fact exercise the power to act which was attributed to her. She can become the real author of her actions and can internalize the role of an actor who is author, thereby ascertaining her authorship. The attribution of agency thus becomes a genuine source of motivation which enables the actor to weaken

her countermotives. It serves as a transformer of reasons into motives for action.

A consequence of the recognition as an author in this sense (and not only as a cause of an event) is that those who attribute the power to act to the actor take a certain attitude toward her. To recognize her as the author of her actions then means to disregard all other possible external and internal (psychic) causes and circumstances which might have influenced the event which is considered the author's action. The meaning of this recognition that the actor as author is an idealization which is internal to the community and is built into the acceptance of the illocutionary obligation. The members of the community expect that it is she who will do it, even if they know that internal and external circumstances always influence behavior more or less intensely. As an idealization, it presupposes that it will be only she, and nobody and nothing else, who does it—no demons, no fate, not the social milieu, nor psychic tension. To the extent that the shared expectation is legitimate and the actor is held responsible for her action, the members of the community take the participant's or the internal point of view, and not the observer's. From this point of view, internal and external circumstances are not relevant as long as the shared expectation is legitimate and nobody raises doubts about the actor's responsibility. The same is true for the actor: only when she takes the participant's point of view toward herself can she realize that it is she who is expected to act, and not her neighbor or anybody else; that she cannot refer to the circumstances or to fate. And she can only maintain the participant's point of view if she really acts. If she does not, she will be asked for justifications or excuses, or her behavior will be treated from an observer's point of view as a symptom for something else (e.g., the dominating influence of a psychic defect).

The argument that the actor is recognized as the *causa sui* of her actions does not imply any ontological thesis about freedom of the will. The decisive feature is the communicative constitution of the role of an actor who is author. A line can be drawn from the illocutionary meaning of taking an affirmative position toward a validity claim to the concepts of responsibility and accountability, and to the attribution of an individual power to act. From ego's perspective, she realizes her agency by responding to the expectation she shares with alter. To put it bluntly, the experience of freedom has primarily to do with fulfilling or disappointing expectations, with fulfilling and breaking promises, and not so

much with successful or unsuccessful interventions in the external world as a means of reaching a goal. By responding with an action to the illocutionary meaning (either by fulfilling or violating the shared expectation), we acquire a sense of freedom, and not so much by the experience of changing something in the external world.

The communicative constitution of the idealized role of the actor as an author does not mean that the singular actor is merely derived from the community, acting as if she were a puppet. There are at least two different barriers which prevent the illocutionary community from overriding the individual. The first one is the individual's right to take a negative position toward a validity claim. As long as the hearer is not convinced by counterreasons, the validity claim is not accepted and the illocutionary meaning of the acceptance cannot unfold its obligating and empowering effects on the actor. The communicative recognition of an actor as author presupposes communicative freedom. Without any right to say "no," the subsequent action does not count as an action of an author who is responsible and who can be held accountable for her behavior. On the other hand, the hearer's acceptance of a validity claim alone launches the illocutionary obligation with all the consequences mentioned above. If the acceptance can be interpreted as the hearer's rationally motivated conviction that her counterreasons against the validity claim were invalidated by counter-counterreasons, then we may say that the actor gets her power to act from the procedure in which her counterreasons were invalidated.

The second barrier which prevents the community from treating the actor as if she were a puppet is the gap between reasons and motives. If reasons were immediately transformed into sufficient action motives, the acceptance of a validity claim would trigger a simple mechanism only, one which ends with an action. It would not, however, result in illocutionary obligations and empowerments for actors who interpret themselves as the origin of their action motives, who have to make up their mind, who have to weaken countermotives, and who have to perform a singular action on their own. These consequences of the acceptance of a validity claim only make sense against the background of existing countermotives which have to be weakened by the responsible actor. The requirement of a factual acceptance of a validity claim corresponds to the factual decision of an actor. Otherwise, the shared expectation of a singular action could not be distinguished

from collective repression, and the singular action community would simply exercise some group-dynamic power over its members. The attribution of responsibility and accountability could not then be distinguished from a disciplinary power which conditions the individual in a manner Foucault associated with the functioning of modern institutions.

III. COMMUNICATIVE POWER

Up to now, I have only explained the generic features of the illocutionary meaning of the acceptance of a validity claim with reference to subsequent actions and interactions. It must be true for any kind of validity claim and any kind of reason; for truth claims as well as for ethical, political, and moral claims. The motivational force of reasons, as it is realized through illocutionary obligations and empowerments, is the same in every case. Differences exist in the content of reasons. The manner in which the acceptance of a truth claim constitutes an illocutionary obligation for subsequent interaction differs from the manner in which the motivational force of reasons for accepting moral, ethical, or political claims unfolds. The acceptance of a truth claim entails an illocutionary obligation to take a certain description of the objective world into account while drafting and executing an action plan. It enables the actor, the moment she engages in action, to trust a state of affairs as represented in a true description of the situation and its consequences. The acceptance of a truth claim empowers ego and alter to rely on a true description of their environment; in a pragmatistic sense, it constitutes a "habit" of acting.

The illocutionary consequences of accepting normative claims (moral, ethical, political) are different. Here, the obligation and empowerment are not secondary effects of the acceptance; rather, the illocutionary force primarily produces an effect which is relevant to subsequent actions. Norms are generalized expectations of behavior which are counterfactually stabilized. If somebody accepts the validity claim of a norm, it means that the "*conditions of satisfaction*"—formulated to begin with in semantic terms—are interpreted in terms of obligations relevant to the sequel of interaction."²² The norm's relevance to subsequent action is already part of the semantic content of the norm, whereas the binding force of the norm's relevance to subsequent interaction is an illocutionary consequence of the acceptance of its validity claim. In this case,

²² 1 HABERMAS, *supra* note 18, at 299.

the actor's acceptance of the validity claim *uno acto* entails the acceptance of the obligation to have the motive to obey the norm, that is, to act and to operate in such a way that the norm is fulfilled.

Morally motivated action is a special case. Here, the illocutionary obligation to transform reasons into motives refers to those reasons, and only to those reasons, which could be accepted by everybody as participants in a moral discourse. Consequently, Kant defined moral action as acting because of duty, that is, with respect to the moral law. This is obviously not true for ethical or political norms.

The decisive element in the constitution of illocutionary obligations and empowerments relevant to subsequent actions is the factual acceptance of the validity claim. Unless a validity claim is factually accepted—in a procedure which enables participants to exercise communicative freedom—the motivating force of reasons for action motives cannot be realized. It needs the mediating agency of factual acceptance for the unfolding of illocutionary obligations and empowerment. The potential of illocutionary forces becomes a power only if factual acceptance is brought about. Nevertheless, the simple fact of the acceptance of a validity claim does not suffice for the constitution of power as long as it is ego alone who accepts a validity claim raised by alter. What has to be added is a factual social dimension.

Communicative power is a reflexive identification and confirmation of those who have factually accepted a validity claim. The social space which came into being with the factual acceptance and with its illocutionary obligations relevant to subsequent interactions is now cognitively reidentified and volitively reconfirmed. By this reflexive move, the individual acquires a reflexive relationship to the first person plural—to a we who is in agreement about convictions relevant to actions. Communicative power is not simply inherent in the fact that some people accept a validity claim and share the corresponding conviction. Communicative power comes from the further fact that every individual legitimately believes that he or she belongs to a “singular action community,” and that he or she wants to belong to that community. The shared conviction is not only a social fact which can be observed from an external point of view. It is constitutive for this social fact that the participants believe that we share a conviction. This belief is a notional, not a relational element of the conviction; it is a part of its meaning.

By reflexive identification and confirmation, the illocutionary community is transformed into a social community which consists

of all those participants who factually accepted a validity claim and who have a knowledge of there being a community. The infinite space which is open to the members of the illocutionary community who legitimately share an expectation of action is now reduced to a finite social community which is open to the members who know from each other that they factually accepted the validity claim. They can expect that we (i.e., every single member of us) will act according to the valid proposition. This is the decisive feature of communicative power, as Hannah Arendt has described it several times: to act in concert.²³ Thus, communicative power is a motivational resource for a community, and a medium for the allocation of powers to act.

As my explanation of communicative power has already indicated, it is one of the strongest kinds of power on the one hand, but also one of the weakest, on the other. There are at least three different threats to the continuity of communicative power; some are internal, some are external to it. First, communicative power is threatened from within by every dissent based on justified counterreasons. All the elements that constitute communicative power—that is, the invalidation of counterreasons which justify countermotives, the shared expectation, the singular action community, the attribution of responsibility, and the power to act—subsist as long as the reasons invalidate the counterreasons. As soon as new counterreasons invalidate reasons, communicative power linked to the factual acceptance of a validity claim ends immediately. This kind of a “risk of disagreement”²⁴ is inherent in communicative power; it is one of its constitutive elements. Communicative power depends on communicative freedom. Communicative freedom produces illocutionary obligations relevant to subsequent interaction—and it again puts them into question. The negative position which is taken by the hearer opens the horizon of reasons with which the speaker can convince the hearer to invalidate her doubts and negations. And by this procedure, the speaker can motivate the hearer to accept the validity claim and the illocutionary obligation to act according to the valid proposition. But the negative position can also justify countermotives against the originally shared expectation. The social community of those who factually accepted a validity claim again opens into the infinite space of anonymous illocutionary forces.

²³ See HANNAH ARENDT, ON VIOLENCE 52 (1970) [hereinafter ARENDT, ON VIOLENCE]; see also HANNAH ARENDT, THE HUMAN CONDITION 200 (1958).

²⁴ HABERMAS, *supra* note 2, at 21.

The second threat is of a similar kind. It consists of a rationally motivated dissent. It happens when some participants are convinced by reasons to accept a validity claim, whereas others are not. In this case, communicative power comes into being only among those who factually accepted the validity claim—but it also has consequences for those who reasonably refuse to accept it. They are concerned by the actions which follow from the illocutionary obligation of those participants who accepted the validity claim. If they are in a minority, they could be forced to submit to the communicative power exercised by the majority.

The third kind of threat is external to communicative power. Communicative power is weak when the actor has stronger countermotives. As long as these countermotives are not justified by counterreasons that could invalidate those reasons which sustain the validity claim, they simply prevent communicative power from being generated. It is an external threat, because unjustified and stronger countermotives cannot invalidate reasons and cannot destroy the validity of the normative proposition. It even leaves the illocutionary obligation intact. It only disappoints the shared expectation, which is based on the illocutionary obligation, because the action that was expected does not take place. An actor who acts according to her stronger countermotives not only disrupts the coordination of action, but she also withdraws from the illocutionary bonds established by speaker and hearer when they enter the procedure of giving and rejecting reasons. When she accepts a validity claim and violates the illocutionary obligation to act according to the valid proposition, she will be held responsible and she has to give justifications or excuses.

How can communicative power be maintained against these different types of threat? The defense has to be appropriate to the kind of risk. Unjustified countermotives cannot be defeated in the same way as a justified dissent that leads to justified countermotives. In the first case, an illocutionary obligation has to be executed against stronger countermotives. This seems to be possible only by counter-countermotives which are still stronger than the countermotives—that is, some kind of coercion. In the other case, communicative power has to institutionalize itself. Institutions which maintain communicative power are needed even if counterreasons justify countermotives. Not any counterreason which justifies countermotives should lead to a breakdown of illocutionary obligations to act in concert. Therefore, communicative power is applied to itself—the We, made up of those who factually accepted

a validity claim and reidentified and reconfirmed themselves as a singular action community, can itself become a political community. Then, the reidentification and the reconfirmation of a singular action community is interpreted as the foundation of constitutional rules, procedures, and institutions which enable its members to reproduce communicative power through and within an institutional framework. The factual acceptance of the institutional framework generates the illocutionary obligation for the members of the political community to act according to the constitutional rules, and to reiterate the communicative power through every single issue about which they argue within the institutional framework. Rational dissent within the institutional framework does not destroy the communicative power inherent in the factual acceptance of the institutional framework itself.

IV. THE LAW: A PATTERN OF LINKS AND INTERRUPTIONS BETWEEN REASONS AND MOTIVES

Obviously, the two strategies that are to cope with the threats to communicative power can undermine communicative power itself. Coercion as a medium for overriding countermotives decouples the internal illocutionary link between communicative freedom and action motives. This would deny the functioning of communicative power as a motivational resource, because the actor who is coerced to act cannot trace back her action motive to illocutionary empowerment. The second strategy to maintain communicative power, the institutionalization of a political community, is in danger of turning the actor into a virtuous citizen who is required to support the constitution actively even if her dissent is reasonable. This is obvious in the case of minorities: should they renounce their counterreasons, accept the reasons of the majority, and transform these reasons into their motives? What if they are still convinced of their counterreasons? This would ask for either conversion or hypocrisy.

The law serves as a medium which can solve both problems at the same time. It can do so because it is a complex pattern of links and interruptions between reasons and motives. To conclude, I would like to illustrate the relationships between law and communicative power with respect to both elements of the illocutionary link between reasons and motives: (1) the "negative" or obligatory aspect, and (2) the "positive" or empowering aspect.

A. *The "Negative" or Obligatory Aspect*

Legal norms drive a wedge between the freedom to take a position and the obligation to adopt a reason as one's own reason for action. They open an artificial gap which makes subjective freedom or negative liberty necessary. Legal norms do not entail the obligation that they be adopted as one's own reasons for future actions; they are not connected with the legitimate expectation to become a motive for the actor, as are those action norms that are reciprocally accepted by speaker and hearer on the basis of an affirmative position. Instead, legal norms become relevant to the sequel of interaction by virtue of their link with coercive force. Because of this link, legal norms lose contact with illocutionary obligations. Coercive force cannot produce action motives as an affirmative position can, a position that was taken on the basis of reciprocally attributed communicative freedom. For this reason, legal norms do not care about the source of the motives for their observance. A motive to follow a legal norm which was generated by taking an affirmative position on its validity claim is as good as a motive generated by fear of sanctions or by the calculation of advantages. Consequently, as a legal person everybody is allowed to get his or her action motives from wherever he or she likes; nobody is obliged to adopt only those reasons as his or her own reasons for action which he or she accepted by taking an affirmative position on a validity claim. What action motives he or she has is up to the individual—as long as he or she does not violate the legal norms. This is the meaning of the right to negative liberty or individual freedom. A legal person is no longer obliged, with respect to legal norms, to trace her action motives back to an affirmative position taken on a validity claim and on the basis of communicative freedom. Therefore, a legal person may "step out" of the obligations of communicative action and renounce the right to take an affirmative or a negative position at all.

On the other hand, legal norms and the corresponding negative rights, although they are neutral with respect to the motives of their observance, may not exclude or destroy the possibility of being followed by reasons which were adopted because of an affirmative position. Otherwise, legal norms would abolish communicative freedom. But how can the idea of communicative freedom be preserved with regard to legal norms and negative rights? According to the discourse principle, communicative freedom presupposes that everybody can accept an action norm on the basis of taking an affirmative position on a validity claim. Con-

cerning legal norms, this presupposition cannot be realized without violating the neutrality of these norms with regard to the motives for their acceptance and their observance. This dilemma can only be solved by transforming the right to take a free position on a norm into a legal right to participate in a democratic political process of public will-formation and legislation. As a consequence of this transformation, the right to take a free position changes its character.

On the one hand, as a legal right, it includes the right to negative liberty. Political rights must not oblige their holders to take a position in the political process of legislation. They may use their right to political participation, or they may, as Habermas says, "step out" and withdraw from the political sphere, without being excluded from it, meaning without losing their political rights and their status as a citizen. This is the only way in which communicative freedom can be preserved with regard to legal norms and rights. On the other hand, as a legal right which refers to a public, democratic procedure of will-formation and legislation, it allows for those citizens who participate in the procedure to produce communicative power as a motivational resource for obedience to the resulting legal norms. But this kind of communicative power differs from the one discussed earlier.²⁵ It does not depend on the factual acceptance of those reasons which are brought forward for a legal norm—although democratic legislation does not deny or reject this relation between reasons and motives in those rare cases when a citizen really is rationally motivated to accept a legal norm and to obey it. Instead, the source of communicative power lies in the acceptance of the procedure which guarantees every citizen the right to exercise communicative freedom equally. If a legal norm is a result of such a procedure, the acceptance of the procedure can produce a motive to obey this legal norm—even for those who are not convinced of the norm's validity because they can reasonably reject the reasons.²⁶

²⁵ See *supra* part III.

²⁶ To be sure, this shift in the reference of communicative power from norm to procedure does not totally remove the gap between reasons and motives, and it does not oblige the citizens to support the legal order because of their acceptance of the procedure. It leaves open the possibility to obey the norm on the basis of motives which are *independent* of the acceptance or rejection of the procedure. I can reject the procedure but obey the norm because I fear the sanctions for violation. The shift from norm to procedure explains only how the motivational resource of communicative power in a democratic society is still possible even if the link between reasons and motives with regard to the acceptance of single legal norms is interrupted.

This shift from the acceptance of a norm to the acceptance of the procedure is also the key to the solution of the minority problem. It, too, begins with an interruption of the link between reasons and motives. A minority is only obliged to obey the majority's law if, at the same time, there is a procedure which guarantees everybody the right to argue for his or her counterreasons. Only under this condition do minorities have a chance to change the majority's mind and to convince it of their counterreasons' acceptability. As a consequence, legal norms may not claim that their validity entails the obligation to obey them because of the reasons which support their validity. Those who refuse to accept these reasons are obliged to obey the law because of the democratic procedure, and because they have the right to change the law through participation in and under the conditions of that procedure. The obligation to obey the norm is shifted from the acceptance of the norm's validity claim to the acceptance of the procedure. This shift allows for the neutrality of the legal norm toward the citizen's action motives. But the right to political participation is a *conditio sine qua non* of the legitimacy of this gap between reasons and motives.²⁷

B. *The "Positive" or Empowering Aspect*

Another consequence concerns the "positive side" of the illocutionary link between reasons and motives, that is, the attribution of a power to act. On the one hand, it is one of the essentials of communicative power in a political community not only to generate illocutionary obligations to act, such as an imperative which has to be obeyed or legally enforced, but also to produce a genuine motivational resource, one which gives a power to act to the people. On the other hand, the decoupling of reasons and motives, which is a consequence of the coercive properties of the law, seems to destroy exactly this kind of motivation. It separates the people from each other and takes away their power to act in concert. The solution lies in the bifurcation of the power to act. In a political community that decides to submit to legal rules which its members give to themselves within public, democratic procedures, the power to act is divided in itself. It is shaped as a public power to act, on the one hand, and a private power to act, on the other.

²⁷ Obviously, this argument is similar to Alexis de Tocqueville's argument in his book, *Democracy in America*. See 1 ALEXIS DE TOCQUEVILLE, ÜBER DIE DEMOKRATIE IN AMERIKA 360 (Hans Zbinden trans., 1962).

Public or political rights and private rights correspond to this division. The public power to act is preserved by public procedures and the equal right of the citizens to participate in these procedures by exercising their communicative freedom and generating communicative power. As a consequence, citizens are politically responsible for their law; it is up to them to exercise their communicative power in order to change the rules.²⁸ While using their equal right to communicative freedom in order to argue for and against legal rules, citizens recognize each other as being politically competent, even if they strongly dispute one another's arguments. Finally, the public power to act is the legitimating source for the limited authorization of an administrative power for the execution of the law and of political decisions in concrete cases.²⁹

The private power to act is preserved by the artificial construction of a legal person. Within her legal domain, the legal person may exercise her own private will as long as she does not violate the equal legal domain of others. She is also legally competent to change her legal relationships according to the law, for example, to make a contract or to give up property. As a consequence, she is legally responsible to obey the law, and she is legally held accountable as the author of her actions if she violates the law. When she is held accountable for violation of the law, she is not obliged to trace back her motives to those reasons which she could have accepted as a participant in public discourse, that is, when she exercised her communicative freedom. Her status as a legal person is independent of her status as a citizen. Her legal competence to exercise her private power to act subsists in the absence of public power. Similarly, she is legally responsible in the absence of any legitimate expectation of a "single action community," an expectation generated by a factual acceptance of a validity claim. However, her status as a legal person who is legally competent and responsible is, again, indirectly linked with her status as a citizen who shares in public power. The legal competence to exercise one's private power to act, together with the complementary legal responsibility for actions, originates from the communicative power inherent in the original decision of the members of a political community to constitute itself as a legal community.

The communicative power inherent in this decision never appears in a pure fashion. From the beginning, communicative power

²⁸ See ARENDT, ON VIOLENCE, *supra* note 23, at 38-39 (Arendt's analysis of diminished political responsibility in a bureaucracy as the opposite of democracy).

²⁹ See HABERMAS, *supra* note 2, at 148.

is bifurcated. People who use their illocutionary forces to constitute a legal community *uno actu* appear as legal persons who have political and private rights. This is why, according to Habermas, communicative power is linked from the beginning to the system of rights.³⁰ Thus, communicative power is preserved as a productive and reproductive motivational resource for a constitutional democracy.

³⁰ See *id.* at 151.