

Legitimatory Individualism and the A Priori Exchange: Höffe's Response to Habermas' Critique

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Keywords: Otfried Höffe, Jürgen Habermas, Political Justice, Commutative justice

Abstract: Höffe's philosophical work "Politische Gerechtigkeit" has garnered praise from several renowned philosophers since its publication. Habermas acclaimed the theory of political justice as the "philosophical foundation of politics," yet simultaneously questioned it for falling into the trap of the ideal observer, deficiencies in individualistic approaches, and overlooking democratic principles. Höffe, interpreting through the lens of commutative justice, responds to Habermas's critique, pointing out its neglect of a higher-order perspective on interactive subjectivity. He legitimizes legal authority by leveraging strict consent theory and principles of distributive justice. Political justice not only safeguards the a priori interests of practical subjects but also establishes the indispensable a priori conditions for communication and consensus-building among practical subjects. At the same time, it reveals the most fundamental democratic principles inherent in commutative justice.

1. Introduction

Otfried Höffe published "*Politische Gerechtigkeit*" (*Political Justice*) in 1989, revealing the contemporary dilemmas facing theories of justice. These include the dissolution of legitimacy and justice issues by legal and state empiricism, and the rejection of political rule itself by anarchism. According to his perspective, the primary concern is to legitimize institutions; whether social or political governance, the state must obtain legitimacy above the agenda before implementing distributive justice. Therefore, Höffe denies fundamental skepticism about ethics and state ethics, integrating the moral dimension into the realm of law and the state, proposing "political justice" as a universal criterion for evaluating the legitimacy of law and the state. "*Politische Gerechtigkeit*" garnered high praise from renowned philosophers including Habermas and Paul Ricœur upon its publication, but also attracted some criticism, notably Habermas's critique of Höffe's theory and Höffe's response. While Habermas interprets the theory of political justice through communicative action theory, it is precisely the overlap and distinction between different theoretical perspectives that contribute to a better understanding of Höffe and his theory of justice.

Therefore, it is necessary to elucidate the dialogue, differences, and commonalities between the two philosophers regarding the theory of political justice. The first part of this paper will elucidate Höffe's framework of political justice. The second part will present Habermas's critique of the theory of political justice. The third part will indicate Höffe's response to the critique. Finally, the fourth part will further evaluate Höffe's theory of political justice.

2. Höffe's Political Justice

To revive the ethics of law and the state, Höffe divides the argument for legitimacy into three stages. The first stage argues for the inevitability of restrictions on freedom, the second stage legitimizes legal authority, and the third stage completes the argument for the legitimacy of the basic state. In terms of argumentative strategy, Höffe draws from Hobbes and Kant, transforming traditional social contract theory into contracts for the legalization of law and the state, laying the foundation for a theory of justice. In the thought experiment of the state of nature, Höffe differs from Rawls and Locke, establishing a model closer to Hobbes's. However, unlike Hobbes, who sees survival as the overwhelming fundamental drive for everyone, Höffe simplifies law and state rule, social, historical, and cultural contexts, rights, and limitations on freedom, starting only from unrestricted freedom to argue for the political justice and legitimacy of law and the state.

1) In the state of nature, each person possesses unlimited universal freedom. However, in a world of coexistence, one's freedom of action is constrained by the fact that others also possess the same freedom of action; in a society where free individuals coexist, unrestricted freedom gradually transforms into conflicts of freedom. Therefore, social coercion and conflict are inherent and inevitable aspects of human existence. Höffe refers to the imagined coexistence of individuals without freedom restrictions desired by anarchism as a "It is utopia in a literal and self-disqualifying sense,"^[1] which not only does not exist now but is also forever impossible.

2) Höffe proposed the concept of distributive advantage, which means that when coercive authority argues for its own legitimacy, it is legitimate only when the benefits received by each restricted individual outweigh the restrictions imposed on them. In the state of nature, everyone has the freedom to kill others, defame others, and infringe on religious freedom, but their freedom is equally threatened by others. In this situation, an order of natural justice emerges, where everyone spontaneously practices commutative justice, whereby each person relinquishes a portion of their freedom to harm others in exchange for others relinquishing their freedom to harm them. "Constraints on freedom, then, are exchanged against security in one's freedom; a renunciation of freedom is compensated by a right to freedom."^[1] Although the restriction of freedom does not lose its coercive character, under strict reciprocity conditions, the relinquishment of freedom by others implies subjective demands. These mutually granted basic freedoms have the meaning of natural rights, where everyone has a moral right to resist any infringement on their freedom by others.

3) In the secondary state of nature, each person exercises their freedom according to their own wishes and methods. Due to the lack of public boundaries of freedom, this instead leads to a resurgence of conflicts. To address the disputes over the interpretation of the boundary principles of freedom and the lack of enforceability under natural justice, Höffe proposes the implementation of an empirical and transparent legal system and the establishment of a public authority with coercive power to ensure the precise definition of basic freedoms, thereby enabling everyone to reasonably adhere to commutative justice. Natural justice first transforms into institutional justice, and ultimately into political justice. The entire process of commutative justice and the realization of political justice conforms to the principle of distributive collective interest, whereby the a priori benefits obtained by each individual in the transcendental exchange are greater than the limitations imposed on their basic freedoms.

Ultimately, Höffe argues for the inevitability of freedom restrictions and social coercion, debunking the utopian fantasies of anarchism; he completes the legitimacy argument, clarifies the boundaries of law and state power, and critiques the empiricist pursuit of unlimited power by law and the state. "Justice was measured through an impartial judgment of the advantages accruing to every party from a particular institutional settlement."^[2] He borrows from Hobbes to accomplish the legitimacy argument for law and the state, without, however, replicating Leviathan.

3. Habermas' Critique of the Political Justice

After the publication of "*Politische Gerechtigkeit*", Habermas specifically wrote a review of the book. He praised Höffe's strategic approach to the critique of legal empiricism in the process of arguing for political justice. However, he also pointed out that it shares certain shortcomings with classical liberalism, including the drawbacks of individualistic methods and the neglect of democratic principles. Additionally, he criticized Höffe's principle of justice for still being trapped in the dilemma of the ideal observer.

1) The dilemma of the ideal observer

Habermas first discusses Höffe's concept of distributive advantage. Justice implies that everyone can accept practices or rules that are beneficial to all or universally followed. Therefore, moral goodness arises from the fair universalization of the interests of each affected party. He points out that Höffe considers justice from the perspective of "distributive advantage," conceived through the image of a judge as an ideal observer in ideal circumstances. This definition remains confined to the utilitarian conception of the ideal observer, who unilaterally weighs the interests of others. Höffe overlooks the fact that any disputed practice or rule is effective only when it is agreed upon by the parties involved—i.e., in situations where all participants are compelled to consider the perspectives of others. Habermas argues that the role of the ideal judge cannot be viewed as a form of third-party neutrality; "it is an intersubjective event from which emerges a first-person plural perspective of counterfactual extended communities."^[1] Only through this intersubjective perspective, without precluding the intuitive knowledge of the parties involved or presupposing their positions of agreement or disagreement, can one fairly judge what is equally advantageous for everyone. Therefore, he believes that Höffe, in applying distributive advantage to judge the legitimacy of coercive authority and in assuming an unbiased observer role to assess justice, presupposes the value orientations and positions of the parties involved, neglecting the fact that individuals are already fully socialized and thus have certain moral intuitions and expectations. In conclusion, Habermas argues that Höffe's overly singular assumption method, which presupposes value judgments while ignoring the impact of communicative behavior.

2) The shortcomings of individualistic methods

Habermas reveals that the discourse on the legitimacy of political justice is ambiguous and incomplete in its dissolution of anarchism. He criticizes Höffe's advocacy of a conflict model based on individualism, aimed at opposing the utopian notion of anarchism seeking to escape governance and its presupposition of communalism. A natural state based on equal universal freedom inevitably leads to "The action-oriented desire of the one then comes into genuine conflict with the action-oriented desire of the other"^[3], where everyone's universal freedom is threatened by the universal freedom of others, resulting in substantial conflicts of freedom. Unlimited freedom brings about unfreedom, leading to one person's freedom being restricted by others' freedom throughout their lives. In a community, unrestricted free individuals cannot coexist; coexistence leads to conflicts with the attributes of social coercion. Therefore, Höffe, using a pessimistic anthropological approach, relies on formulating open and empirical legal norms to address conflicts arising from freedom. However, Habermas asserts that legal conflict resolution cannot be analyzed according to the model of external relations of sovereign states. Conflicts arise from the interactions of free individuals within the community, but these interactions are constrained from the outset by social norms. "The reason why legal conflict resolution mechanisms can rely on just resources is that by ensuring that subjects simultaneously become socialized individuals, preliminary consensus is ensured."^[3] It is precisely because Höffe excessively simplifies culture and social background into a series of external constraints and discards them before the legitimacy argument that the argumentation process overlooks the mutual influence between society, culture, and subjects. Habermas claims that

individuals must first construct their social attributes before social coercion acts upon them. Therefore, understanding society only based on "mutual constraints of free individuals within the same community" will result in the constitutive conditions for the emergence of social construction being overshadowed by the restrictive conditions of social coercion.

3) The absence of democratic principles

Höffe interprets the state of nature in a contractual manner, elucidating how individuals achieve socialization through the exchange of freedoms, which results in spontaneous social order. However, according to Habermas, this spontaneously emergent order can arise not only through contractual means. A just society can integrate in a form of spontaneous union rather than a market-oriented one, based on political and rational spontaneous social order. Instead of contractualism, individuals in the state of nature resolve issues of free exchange through intentional negotiation for coordinated action in a liberal manner. In other words, Höffe completely overlooks the potential for political integration and legitimacy of rule through the participation of free and equal citizens in political practices and self-legislation throughout the entire process of political legitimacy argumentation. For him, democracy is merely derivative and secondary. Habermas criticizes Höffe's key points of political justice thinking for not focusing on the "practical rationality, sovereignty of will, and the unity of human rights and democracy."^[3] Therefore, his thought experiment is insufficient to establish political justice as an inherent standard for law and state, for critiquing political legitimacy.

4. Höffe responds to Habermas' critique

A year after the publication of "*Politische Gerechtigkeit*," Höffe released a new work in legal philosophy and ethics titled "*Kategorische Rechtsprinzipien: ein Kontrapunkt der Moderne*". Continuing his previous legal philosophical theories, he expounds on the principle of absolute legal rights and legal responsibility, extending Kant's categorical imperative from the realm of individual morality to the domains of law and state. He also responds to Habermas' critique of political justice theory. Höffe argues that Habermas avoids more crucial perspectives and insights: (1) Political justice includes higher-stage interactive subjectivity, (2) Viewing interactive subjectivity as a transcendental exchange provides a new understanding for individualistic premises, and (3) The principle of legitimacy justice in exchange theory provides a prerequisite for bargaining legal rights.

1) The interactive subjectivity of a priori exchange

Höffe contends that the communicative actions discussed by Habermas inevitably encounter the demands of controversial practices and negotiations over interests. Political justice is achieved by legitimizing law and the state, thereby simplifying conflicts of freedom in the state of nature into conflicts beyond basic liberties, with law and the state ensuring these basic liberties while resolving conflicts in other spheres within the legal framework. In other words, conflicts of lower-order interests can only be resolved upon the foundation of higher-order interests that are indispensable to the practical subject. These higher-order interests, concerning human interests and capacities for action, are considered a priori interests. Among these a priori interests, there exists "the most significant factor for the construction of a practical subject."^[4] In this exchange of a priori interests, it is crucial not to narrowly interpret it as merely economic exchange, nor to myopically perceive it as equivalent exchange, nor to short-sightedly view it as immediate trade-offs. In this fundamental exchange of interests between subjects, what is reflected is the interdependence of individuals on the interests of others. "The construction of practical subjectivity is intrinsically linked to both a priori interactivity and a priori interactive subjectivity,"^[4] Höffe argues against Habermas's assertion of the role of the ideal observer. While he, like Habermas, acknowledges that subjects can only be constructed socially, the difference lies in the fact that it is only after natural justice that conducive conditions emerge to realize the connection between the subject and society. To ensure that the interactive subjectivity of

practical subjects is neither impossible nor excessively harmed, social coercion plays a protective role, safeguarding the a priori interests indispensable for the construction of each practical subject. Only then can social coercion be considered legitimate. Höffe suggests that the legitimation of social coercion neither precedes nor follows exchange. Thus, participants in commutative justice, while benefiting from the advantages of voluntary association, also enable the construction of practical subjects, albeit at the cost of restricting freedom.

2) Legitimatory Individualism

In response to Habermas's criticism, Höffe denies that commutative justice can be arbitrarily dismissed as individualism lacking interactive subjectivity. In contractual exchange and legitimacy arguments, he argues that his principle of distributive advantage involves arguments of universal consensus or universal agreement.

From the perspective of the principle of distributive advantage, the distinction between distributive advantage and utilitarianism lies in the advancement of procedural issues, with the core being the equal consideration of the needs and interests of all. The institutionalization of legal rights involves every individual in the community, and to avoid the favoritism and discrimination of utilitarianism, the institutionalization of law must be beneficial to every individual. Grounded in **consent theory**, legitimatory individualism involves a very strict theory of consent. "It is the community that has to justify itself before each individual rather than vice versa."^[5] Höffe emphasizes that a strict concept of consent requires agreement from all sides, strict consistency. This consistency is combined with basic freedom and basic equality: if an individual freely expresses consent, they are regarded as free and equal. Moreover, there is an indisputable standard for the authority to curtail liberties, "curtailing liberties is justified if everybody can agree to it. According to the principle that 'he who volunteers cannot be wronged', an authority is legitimate if it is voluntarily accepted."^[5] Therefore, when the legitimation of the coercive authority of law requires the universal consent of all free and equal individuals, it is self-evident and indisputable that the characteristic is individual rather than collective.

Furthermore, in "Legitimatory Individualism aligns with the universal consensus of individuality,"^[4] lies part of the foundation of basic democracy, wherein law and the state can only be legitimized through the consent of each individual.

3) The a priori exchange as a prerequisite condition

Höffe acknowledges that Habermas's advocacy for a substantive debate is understandable, but in the realm of legitimacy arguments and the exchange of a priori interests, everything loses its significance. Without recognition of principles of justice, any legal authority and state order would lose moral legitimacy. According to Höffe, substantive debate is nothing more than "a repetition of defense strategies used to answer that still unresolved question."^[4]

In the negotiations of legal practice, it can be structurally divided into two parts: the first part emphasizes the minimal and fundamental conditions for the legitimacy of law and the state. On one hand, legitimacy arguments safeguard the a priori interests of both parties in commutative justice, while on the other hand, these a priori interests provide the prerequisites for communication and harmonization processes for individuals endowed with linguistic talents and practical capabilities, precisely becoming the prerequisite for "democracy as a constitutional principle." In summary, in terms of logical structure, natural justice comes first, followed by the legitimacy of coercive authority derived from basic democracy (independent of any actual communication process), and finally constitutional democracy. Höffe not only refutes Habermas's accusation of the lack of democracy in his theory of political justice but also further reveals that Habermas does not systematically value these a priori interests in deliberative ethics. Because these a priori interests "are indispensable for the construction of practical subjects,"^[4] but at the same time, they face various threats, hence, they deserve protection by law and the state endowed with coercive authority.

5. Conclusion

In conclusion, Höffe fundamentally safeguards the indispensable a priori interests of individuals by emphasizing commutative justice as a higher-order interactive subjectivity. He reaffirms that the principle of distributive advantage differs procedurally from utilitarianism, implementing a strict theory of consent in contractual theory, thereby achieving an indisputable standard of legitimacy for legal authority. The legitimization of political justice establishes the fundamental conditions for law and the state, providing the preliminary elements for constitutional democracy. In other words, political justice narrows the scope of social conflict, allowing for adjustments in the modes of conflict for practical subjects. Höffe humbly acknowledges that his argument for the legitimacy of the state is only in a secondary and ancillary sense, merely advocating for more restraint on the part of the state.

While Höffe's arguments for political justice and legitimacy are successful, his strategy in argumentation is flawed. Although he only considers thought experiments and contractual theory as hypothetical academic tools in his arguments for legitimacy, he does not believe in a historical moment where people transition from a state of perpetual war to a secondary state of nature, stripped of external factors such as history, culture, and politics, to explore a universal, absolute theory of justice. However, Höffe's contractual theory also suffers from the same pitfalls as liberalism, as it reduces individuals to atomized, isolated entities and then argues how these individuals form political communities. This approach to establishing freedom elevates "everyone to a state of 'absolute freedom,' which is equivalent to uprooting everyone, requiring 'nihilism' to lay the foundation of political philosophy, and the result can only be a thorough shaking of the foundations of political society."^[6] Despite his claim that focusing on the argument for social coercion in the task of legitimization can avoid the pitfalls of traditional contractual theory, it is evident that subsequent critics are not convinced.

In conclusion, unlike natural sciences, philosophical theories are not easily confrontational. While Habermas highly praises "*Politische Gerechtigkeit*," he also raises questions through his stylized deliberative ethics. Höffe's response does not shy away from the challenge but rather attempts to incorporate communicative action theory into the framework of political justice by shifting perspectives. His profound interpretation of democratic institutions through commutative justice alone is sufficient to address Habermas's concerns.

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