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## **PHILOSOPHICAL AND ETHICAL CONTROVERSIES OF CONTRACTUALISM**

Philosophical and ethical controversies of contractualism are analyzed in the article. Revitalization of modern ethical discourse based on social agreement connected with J. Rawls whose "theory of justice" is interpreted in the light of philosophical and legal legitimization of socio-democratic practices of "a state of general prosperity". Criticism of this theory presented in the works of R. Nozick and R. Dworkin is highlighted. There the first one rejects morality of state redistribution of "justly" acquired property, the second considers moral bases of socio-regulated governed influence based on "natural law" argumentation. The analysis of discrepancies between the approaches of J. Rawls and R. Dworkin has demonstrated the difficulties of neo-liberal attempts to prove moral bases of a modern state: problem statement in the individualistic way does not consider dynamic character of human socialization and neglects an issue regarding a moral status of marginalized populations. Criticism of neo-liberal controversies of contractualism performed by J. Habermas, is analyzed. Communicative approach to dichotomy withdrawal of liberal freedom ("rights of the new") and ideas of public autonomy ("rights of the old") is revealed. The study concludes that Habermas's "involvement of the Other" is to meet all practical challenges of the modern society, it evokes a consideration of the main approach of moral bases definition of a legal, democratic, and social state. Ethical discourse content is proved to be an embodiment of a process of self-awareness created by civil society that is a special form of existence and development of social subjectivity.

**Key word:** contractualism; ethical discourse; J. Rawls's theory of justice; moral bases of a state; "involvement of the Other" of J. Habermas.

### **Introduction**

#### **Introduction**

Practical implementation of constitutional model of legal, democratic, and social state is closely connected with the relevant changes in moral consciousness of a man and society. Simultaneously, institutional bases of governmental-legal nature have not yet been secured by relevant moral-value ground in the modern Ukrainian society. A dramatic gap between law and morality defines invalid and formal character of many officially determined regulators of social relations.

A conception of social contract that constituted a basis for the main constructs of constitutional engineering, namely ideas of legal state, separation of powers, public sovereignty, etc., occupies a prominent place among the theoretical prerequisites of modern constitutional structure. Simultaneously, we consider that the greatest achievement of its developers was a philosophical interpretation of moral and value bases regarding relations between a personality, civil society, and state. Eventually, a "social contract" without deep moral ground can be easily transferred into "conspiracy", participants of which are pursuing narrow egoistic interests, using the ideals of

legal freedom and democracy as manipulative ideologemes.

We need to identify a dynamic character of ethical program of institutional security of government-legal system. Modern socio-historical challenges and relative changes in social being force philosophers of different times to perform alternate reflection of moral and value bases of socio-governmental system, including from the positions of social contract or contractualism.

### **Methods**

The purpose of the article is an analysis of modern philosophical and ethical controversies of contractualism for reconsideration of moral and value bases of legal, democratic, and social state.

The presented work is based on contractualism-oriented understanding that is considered as a set of philosophical and ethical doctrines aimed at explication of universal bases of securing benefits between a personality, civil society, and state (Boucher, Kelly, 1994; Gough, 1978). Among the direct historical premises of modern contractualism – the ethical doctrine of I. Kant presents a classical version of moral bases of a legal state in the light of terminology of socio-contract conception (Kant,

1999: 543). J. Rawls played a crucial role for defining modern socio-contract ethical discourse. Applying the methods of analytical philosophy, he had proved that the moral bases of constitutionally embedded socio-democratic practices of "a state of general prosperity". His works had major consequences and started philosophical and ethical debates devoted to definition of individual rights moral restrictions, particularly the right to private property (Rawls, 2000; 2001; 2002).

Furthermore, reflection of modern philosophical and ethical controversies of contractualism, presented in an article, considers methodological approaches of socio-constructive activity in the modern civil society (Ostrom, 2005; Scott, 1998). The special interest in the context of the article is drawn to the general orientation on criticism of high modernism theoretical schemes that notwithstanding of their orientation (liberal or socialist) are frequently a source of unsustainable forms of social relations, including those existed in moral and spiritual dimension. Consequently, the significant objective of ethic is not a production of moral norms, but activation of civil philosophical and ethical discourse, including a reconsideration of moral and value bases of legal, democratic, and social state.

### Results and Discussion

I. Kant as well as J. Rawls applies an image of social contract for providing a special thinking experiment based on "ad hoc" procedure where initial conditions in a situation of moral choice during hypothetical social contract agreement are designed. The main condition of the procedure is "impediment of ignorance", where "nobody of the participants of negotiations does not know his place in society, his class position or social status, no one knows his part in natural treasures' distribution, neither his abilities, mind, power, nor his conceptions of boon or special psychological inclinations" (Rawls, 2001: 38). Taking decisions regarding establishment of socio-governmental system, a rational man cannot be dishonest as he can suffer from personal dishonesty in the future.

Following such considerations, a philosopher deduces that it has revealed correctness of his conception – "justice as honesty", as it based on the idea that principles of justice are accepted in such initial situation that is just (Rawls, 2001: 38). According to a condition of information restriction of the participants in the initial position, basically, a procedure of universalization is developing in the light of categorical imperative and relative notions of Kant's ethical theory regarding human autonomy due to which he is free inside when he acts on the base of natural duty, free of personal wishes and pleasures. Simultaneously, J. Rawls exacerbates the bases of collective nature of a universalization procedure implication, underlines that a choice of a person, regarded as noumenal "I", is a collective choice, the selected principles should be acceptable for the other "I" as well as the other participants of social contract are aware of self-preservation that is a condition of maintenance of social unity.

Based on the abovementioned moral positions of socio-governmental system, there are two main principles of justice in J. Rawls's philosophic and ethical doctrine: "1) Each person should have an equal right to the common broadest system of main equal freedoms that ought

to be correlated with the same system of freedom for all. 2) Social and economic disparities ought to be organized in a following way: a) for the highest benefit from the least privileged regarding the just savings principle; b) connected with ranks and positions opened for all under the condition of just equality of opportunity" (Rawls, 2001: 414). The first principle is identified as a principle of equal freedoms, the second: a) a principle of difference (differentiation), b) a principle of participation (equal opportunities).

Mentioned principles are presented in lexical (lexicographical) order: 1 > 2 (b) > 2 (a), namely a principle of difference is not applied while a principle of participation is not fulfilled, and a principle of participation is used only after a principle of equal freedom. The logical scheme is a right depiction of the real process of state reformation during the last centuries: from proclamation of legal equality of all members of society to implementation of a system of socio-democratic guaranties of equality realization on practice.

Commentators of the second principle mention that inequality in political, social and economic benefits distribution is legitimate under three conditions: a) encouragement of each member of society to increase his personal contribution into the social cooperation; b) facilitation of goods and services production; c) maximization of income level and income enhancement of impoverished groups based on the previous conditions (Martin, 1994: 247–248). Consequently, social disparity, structured according to the participation requirements and differences, becomes a crucial condition of practical embodiment of a principle of equal freedom, and equal opportunities.

Robert Nozick endeavored to prove inconsistency between J. Rawls's theory of justice and the fundamental principles of liberalism. According to him, on the one hand, J. Rawls's principles of justice are inferred from a consequential way, considering all consequences and their acceptance in a deal of interests' protection of the contract participants. On the other hand, later these principles are applied in a non-consequential way. As a result, rights and freedoms of a man are under a threat of negation.

Elimination of such incoherency relates to consistent development of natural law and natural state ideas. The initial point in determination of moral bases of socio-governmental system ought to be natural human rights to physical security, freedom (in its negative meaning), expropriated property without his permission on the action. The abovementioned rights are benefiting from themselves, namely they have fundamental and absolute character. "Each man has rights; has something that can do a single person or a group of people without his right's violation. These rights are so crucial that it is a question: can a state or its authorities generally impact on something" – mentioned Robert Nozick (Nozick, 1974: IX).

The philosopher is solving a problem of "state necessity", considering by contradiction and proving an inevitable character of necessity emerged in external, political form of human natural laws securing even under the conditions of hypothetical outside of the public natural state. Hence, a state is necessary, however what amount of authority, authoritative legacy should they possess?

According to R. Nozick to answer this question we need to identify the adequate principles of justice.

The historical principles of justice that determined just distribution and revealed a character of a right to private property acquisition are the most adequate to a natural right. R. Nozick formulates three principles of justice: justice in acquisition, justice in transfer, rectification of injustice (correction). J. Lock's labor theory of property is applied to determine the abovementioned principles.

According to the first principle a person who does not acquire external things except his own body is entitled to that holding in a natural state. Individual qualities are transferred into external resources and become a source of private possession as well as they emerge during a process of labor. Simultaneously, emerged private possession should not violate rights of other people; otherwise, personal entitlement to external holding is injustice. In this regard R. Nozick clarifies J. Lock's remark that entitlement to some holding is just when it leaves enough of the same holdings to the other members of society. Particularly, he mentions that stock of resources is obviously limited; hence, their entitlement is legitimate particularly under the condition of reimbursement to other men for their loss of the right to entitle to holdings, for instance via securing of labor productivity enhancement and common welfare. R. Nozick "is convinced that free function of market system does not disrupt Lock's condition in high extent" (Nozick, 1998: 272).

According to the second principle, an owner who is justly entitled to his holding (due to the first principle) has a right to perform any transactions with it, and to intrude into the process as well as his subjugation is unjust.

The third principle is introduced with the aim to correct the situations of unjust entitlement to holding beyond owner's will (for instance, because of theft or fraud, etc.).

Consequently, organization of authorities is deduced from "natural state", from exchanges, and mutual transference of competences performed by free men, passing the stages of community for protection, community's protection-dominance, and eventually is transferred into ultra-minimal state that secures individual rights, guarantees absence of unjust "entitlements". Nevertheless, it is not authorized to redistribute justly acquired possession in any case.

R. Nozick's desire to protect a man from any possible violation from a state, generally, is natural, considering bureaucratic tendencies inherent in its development. Nevertheless, the guarantees of personal freedom presented by R. Nozick do not cover a social aspect of private property initialization; relations of exchange and distribution, meanwhile, accidental functioning of the last do not create equal opportunities for realization of personal potential for all individuals. Therefore, as we consider, implemented in practice, they are to become guarantees of personal enslavement, his subordination to private egoism created by monopoly of large corporations.

It is proved by modern tendencies of social development to some extent. Globalization, economic denationalization, connected with this efficiency decline of social state, trigger a sharp socio-economic polarization as well as increase of social tension. For instance, organization of non-regular transformations in the light of "laissez-faire"

and "minimum state" has inevitably caused exacerbation of crisis phenomena in all spheres of social life in the national society.

Nevertheless, we need to mention that extreme individualism and apologetics of "market fundamentalism", according to G. Soros (Soros, 2000), are not common for all neo-liberal controversies of contractualism. The studies of R. Dworkin are seemed to avoid it to some extent.

R. Dworkin as well as R. Nozick reveals logical controversies connected with semi-consequential character of Rawls's variant of definition of moral bases of modern socio-governmental system. He has attained this purpose via defining deeper moral and political theory. Answering this question, R. Dworkin has determined the theories based on purpose (for instance, utilitarianism), duty (for instance, I. Kant's categorical imperatives), law (for instance, T. Paine theory of revolution).

Due to R. Dworkin, the theories based on purpose or duty trigger such distribution of sources, rights, benefits, and burdens within community that facilitates reaching the purpose or duty in the best way and eradicates any other way. Simultaneously, the situation of social contract implies that every man takes care for his personal interest and allows everyone a right to veto any collective resolution. Consequently, an idea of social contract cannot play a constructive role in the situation where an outcome is determined by a fundamental purpose or duty, namely it is extra.

On the other hand, contractualism relates to a theory based on law. In other words, such a theory having main idea that any individual, even being separate from the others, has his own interests and has a right to protect them as he wishes. An idea of social contract is a way of institutions' establishment to the existence for which a man gives his consent, realizing the rights recognized as fundamental ones. It permits the following: firstly, to differentiate a right of setting a veto from vetting based on insecure interest; secondly, to implement a constructive model of individual rights protection. As a result, a theory supported an idea of social contract and based on a right, particularly, on a notion of "natural rights in the light that they are not a product of legislative work, convergence or hypothetical contract" (Dworkin, 2000: 255) is deeper.

Analyzing J. Rawls's theory of justice, R. Dworkin has concluded that a natural law to equal care and respect is an initial position which can play a role of natural completeness and is immanently related to Rawls's theoretical studies. "... occupying a neutral position, equality is based on assumption of natural law to all men and women and on equal care and respect, a right possessed by human creatures who are able to make plans and do justice instead of a right acquired via origin, merits or skills" (Dworkin, 2000: 262).

The abovementioned interpretation of natural law compared to R. Nozick's vision is more determined, generally, it reveals an initial integration basis of social being to the highest extent, unity of negative and positive features of individual freedom. We need to agree with R. Dworkin that intuitive thinking is based on J. Rawls's theoretical constructions. It seems to explain the deviation of the last into moral legitimization of a social state. It is interesting that accepting such natural law understanding, R. Dworkin also claims morality of social state's ideal.

Nevertheless, in contrast to J. Rawls's, it was made in another way. As well as J. Rawls and previously I. Kant, R. Dworkin endeavors to secure equality of opportunity through correcting heteronomous circumstances regarding personality (and there are natural individual talents and abilities except social resources). Simultaneously, R. Dworkin refutes Rawls's principle of differentiation as it cannot include importance of personal choice and behavior; therefore, it permits to award hard-working people as well as lazy ones to equal extent. Due to the philosopher, a hypothetical situation of out coming auction is constructed for eradication of the unjust misunderstanding, the basic condition of which should be social insurance of risks of its participants – who are free and rational-minded personalities connected with their natural weaknesses, but not with their personal choice of active or passive attitude to a life. Based on this special procedure, a practice of modern social and legal state regarding distribution of social treasures, implementation of broad different social programs, is legitimized.

Comparative analysis of J. Rawls and R. Dworkin's approaches describes a sharp controversy that appears on the way of neoliberal, contractual attempts to define moral bases of modern society. The natural law to equal care and respect contradicts to a personal interest of a free and rational-minded participant of social, contract-based mutually beneficial cooperation. If the natural right demands equal support and protection for all people despite their individual contribution in sustainable development of society, then personal interest of benefits exists for those men who actively participate in social cooperation, or in other words, in common productive activity. Simultaneously, as we can notice, intuitive consideration of collective and solidarity-based nature of moral bases of social being is depicted in the abstract natural law to equal respect and care that is weaker compared to individualistic tendencies of social contract's idea.

In this part we need to emphasize that supporting a personal interest, a side of actively engaged part of population, R. Dworkin generally is in the way of Rawls's interpretation of social contract's idea. According to this point we need to consider D. Bell's issue: "... if we define a society due to Rawls in the light of "collective enterprise based on mutual benefit" then following his logics why don't we provide more stimuli to those, who is capable to increase a general social product and use this soaring "social pie" for mutual benefit (even differentiated) for all?" (Bell, 1999: 607–608). An answer to this question, generally, contains Rawls's principle of difference based on which a condition of mutual benefit of participants of social contract, eventually, directs the maxima's law (maximal benefit security for the most deprived part of population), especially in interests security of individuals who actively participate in social cooperation. Presented consideration of J. Rawls's theoretical studies is based on the analysis of T.A. Alekseeva, who mentions: "... ultimately, Rawls's theory of justice is predominantly oriented on those, who has obtained an opportunity of choice, and is able to use it..." (Alekseeva, 1992: 107).

In this context we need to mention that without stimuli of individual initiative, interest, social variety, a society is destined to stagnation and degradation, the history of the USSR clearly depicts this idea. Therefore, J. Rawls and

R. Dworkin's wish to consider this one of the most crucial conditions of reproduction of social being is completely justified. Still "mutually benefited", namely practically individualistic view on the object, presented by the abovementioned authors, omits an issue of such people who due to different reasons (objective and subjective) are excluded from normal social well-living.

Nevertheless, existence of such "losers" in a society violates priority of equal opportunities, participation, chances of individual realization to the highest extent, impacts on unity of social and personal interests. Particularly, a tendency of marginalization inevitably negates a positive content of ideals of legal, democratic, and social state and negatively influences on integrative bases of modern society. Elimination of individuals, who are not actively participating in social cooperation in the sphere of social contract's idea, furthermore, highlights one more issue that could not be solved within neo-liberal contractualism. In our view, there are the objectives of personal socialization and transformation in a subject of social being. Having defined hypothetical participants of initial state of J. Rawls or R. Dworkin's primal auction as rational-based and free individuals – bearers of social subjectivity, "naturally-legal" and "mutually benefited" argumentation of social contract does not depict forms and ways of its realization in a real life.

Hence, an issue of transitional determination of new ways of live, various freedoms of personal manifestations, activity of civil life into its opposition – domination of some private monotony (sporadic as well as personal), total absence of initiative and passivity, is still open. Simultaneously, without eradication of marginalization, excesses of mass consumption and other disintegrated tendencies of social development that create processes of social self-organization, eliminating subjectivity of human beings, social contract-based project of legal social state is non-vital and seeming to hang free in space.

The inherent reason of such individual isolation is, due to our view, a choice of methodological bases' development of normative projects of harmonization of social relations – some intuitive, "natural, legal-based" assumptions, subjective, arbitrary nature of which is not able to encompass objective dialectics of socio-historical processes on theoretical and scientific levels.

We need to mention that abovementioned individualistic "mutual benefited" restriction of social contract's idea, can partially be solved by a communicative version of contractualism developed by J. Habermas. In accordance with an idea of elimination of discrimination and suffering, appealing every person to relations of mutual respect, the German philosopher presents critical consideration of theoretical baggage of cognitive tradition based on contractualism. Such including is not integration into the rows of people with similar views and withdrawal from the others. Such "inclusion of the other" predominantly means that community' boundaries are closed for all – particularly, for those who are alien to one another and wish to stay in this state" (Habermas, 1999: 41). Analyzing Rawls's scheme of initial situation, J. Habermas demonstrates that on the one hand, its conceptual and strategic tense between intuitive inclination to secure equal respect and care of every member of society, and rational egoism of all members of social contract, on the other hand, has a

consequence of legal state construction where liberal rights are higher than a principle of democratic legitimization. As a result, private autonomy ("rights of the new" – freedom of religion and conscience, life protection, personal freedom, and freedom of property, etc.) has prevailed in the situation when public autonomy ("rights of the old" – a right to participation in a political life, political communication and everything that facilitates a practice of citizens' self-determination) has predominantly played only an instrumental role.

Hence, according to J. Habermas if we are following J. Rawls's theory of justice then a project of establishment of a democratic legal state transforms into a single act of personal laws' implementation that is unnecessary to be repeated under the institutional circumstances of established just society. Citizens could not be able to notice an open, uncomplete process of rights' implementation required by instable historical circumstances as an initial situation is not a constantly repeated democratic procedure. Therefore, public implementation of mind and principle of universalization is not an urgent realization of political autonomy but is non-violent support of stable political orders.

J. Habermas underlines that such separation of private and public autonomy, legal state and democracy is not taking into account their uncomplete procedural character, dialectical intersectionality particularly connected with the notion of positive and forced (negative) law: there is no law at all without subjective freedom of action and opportunity to defend this freedom that secures private autonomy of particular legal subjects; consequently, there is no legitimate law without common democratic identification of law by the citizens who can participate in the process as free and equal individuals. Moreover, a priority of fixed "rights of the new" contradicts with the history that proves borders' divisiveness between private and public sphere from formal point of view. Furthermore, the experience of social state demonstrates that "the borders of public and private autonomy of citizens are changeable and their implementation should depend on civil political will..." (Habermas, 1994: 65).

Respecting dialectical interconnection of private and public autonomy, overcoming challenges connected with constructing of an initial situation, the thinker had performed through the light of communicative theory. If neo-liberal adherences of contractualism focus their attention on the stable moral bases of a socio-governmental system, then J. Habermas offers to confine the analysis of prerequisites of communication, procedure of civil thought and civil will discursive establishment. Basically, he wishes to realize negotiating process between all members of society in a real life, connecting this perspective with a theoretical reconstruction of institutional and cultural conditions of social subjectivity recreation, as well as with transformation of an individual into a personality who actively participates into ratification of socially significant decisions.

The initial consideration of J. Habermas is identification of two aspects of human activity: purpose or labor-based that defines subject-object opposition of human to the world and communicative-based that facilitates symbolic interaction connected with cultural values, norms and presents subject-object quality of social being. The

purpose-based (tool-based) aspect of human activity implies the usage of Other as an object, namely a mean, whereas a communication-based aspect is aimed at Other's recognition according to its nature.

Simultaneously, in modern epoch there are dangerous tendencies of communication distortion, its exclusion of a person that are manifested in totally consuming conformist attitude to a life and other processes diluting human identity. The reason of these tendencies, according to J. Habermas, is domination of purpose-based aspect of human activity in the forms of technocratic, science-based ideology, subject-object culture of which triggers distortion of communicative action.

The issues of human emancipation, social subjective development, and achievement of dynamic social consensus are predominantly considered in moral and spiritual way in connection with sense determination of true, undistorted communication through discourse-based procedures – specific practices of collective reflection, search of other means and forms of enlightenment that could substitute science-based, tool-based factors of social consciousness. All these theoretical thoughts are based on regulative principle of an ideal communicative community, conditioned by human rights and symmetric relations in communication that forced its participants to eradicate all existed contradictions in an ideal form.

Intersubjective position, undoubtedly, adequately reflects a dialectical unity of general and particular in social being in comparison with neo-liberal ethical controversies of socio-contracted conception. However, it, obviously, does not eliminate a gap between existed and essential. Indicating a static, anti-historical character of socio-contracted ethical project of J. Rawls, J. Habermas similarly has such weaknesses. Particularly, democratic regarding its orientation, a conception of unlimited discourse "has left this issue of institutionalization of a discourse itself under the circumstances of social complexity increasing and growing its dynamics when a process of accepting decisions requires detailed professional processing and is limited in time, unsolved" (Yermolenko, 1999: 209). Therefore, a project of discourse moral practice actualization particularly considered through communicative rationality is under a threat to be left behind historical changes of a border line between private and public autonomy, that line after which variety of civil sphere is transformed into its opposition. A reason of such backwardness, as we consider, is absence of direct study of objective processes of social being. Such circumstance is dangerous as it creates a prerequisite for social object transformation into a toy of unknown patterns of social development.

### Conclusions

We consider that ethics' reorientation of modern contractualism into a search of forms and procedures of symmetric civil communications as a developmental form of variety of social subjectivity and Habermas's "appeal to Other", reflects practical realities, having indirectly defined the main direction in moral bases' determination of modern society. Simultaneously, content enrichment of ethical discourse should be performed on a basis of study of real existed social tendencies regarding establishment and development of co-productive civil platforms of socio-

political dialogue. Therefore, ethical bases of legal, democratic, and social state are becoming the embodiment of a process of self-awareness of an emerged civil society that is a special form of social subjectivity's existence and development.

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### ФІЛОСОФСЬКО-ЕТИЧНІ КОНТРОВЕРСІЇ КОНТРАКТУАЛІЗМУ

У статті аналізуються філософсько-етичні контрверсії контрактуалізму. Активізація сучасного суспільно-договірного етичного дискурсу пов'язується з Дж. Ролзом, «теорія справедливості» якого інтерпретується як форма філософсько-етичної легітимізації соціально-демократичних практик «держави загального добробуту». Висвітлюється критика цієї теорії, представлена у працях Р. Нозіка та Р. Дворкіна. Якщо перший заперечує моральність державного перерозподілу «справедливо» набутої власності, то другий визначає моральні засади соціально-регулюючого впливу держави за допомогою «природно-правової» аргументації. Аналіз розходжень між підходами Дж. Ролза та Р. Дворкіна висвічує труднощі неоліберальних спроб обґрунтувати моральні засади сучасної держави: індивідуалістична постановка проблеми не враховує динамічність соціалізації людини і лише без відповіді питання про моральний статус маргіналів. Аналізується критика неоліберальних контрверсій контрактуалізму, здійснена Ю. Габермасом. Розкривається комунікативний підхід до зняття протиставлення ліберальних свобод («прав нових») ідеї публічної автономії («правам старих»). Робиться висновок, що габермасівське «залучення Іншого» відповідає практичним запитам сучасного суспільства, підводячи до визначення провідного напрямку визначення моральних засад правової, демократичної та соціальної держави. Доводиться, що змістовне наповнення етичного дискурсу є втіленням процесу самоусвідомлення народжуваного громадянського суспільства як особливої форми існування та розвитку соціальної суб'єктності.

**Ключові слова:** контрактуалізм; етичний дискурс; теорія справедливості Дж. Ролза; моральні засади держави; «залучення Іншого» Ю. Габермаса.

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