

# The normative commitments of liberal democracy

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Liberal democracy has its enemies: political forces that do not share its principles and normative commitments and that aim to replace liberal democratic institutions with a different and, inevitably, more authoritarian configuration of powers. In that sense, there is nothing unavoidable about liberal democracy. Like all other regimes, it always remains vulnerable to the possible onslaught of antagonistic opponents. Unlike other regimes, however, this vulnerability confronts liberal democracy with a paradox. Since it is committed to the value of tolerance and aims to respect the plurality inherent in a modern society as much as possible, it cannot avoid the question of the proper extent of that tolerance. How can we remain committed to the ideals of liberal democracy but at the same time protect it against the threat posed by the intolerant?

It is undoubtedly a virtue of Johan van der Walt's account of liberal democratic law that it fully recognizes the fragility of the liberal democratic regime and warns, for instance, about the threat posed by politicians like Donald Trump, who fail to recognize the outcome of legitimate elections. At the same time, however, there seems to be an unresolved tension within van der Walt's position when it comes to the paradox of tolerance and our dealings with the enemies of liberal democracy.<sup>1</sup>

On the one hand, van der Walt is prepared to stand firm. In his book, *The Concept of Liberal Democratic Law*, he indicates that liberal democrats have to stand up for what they believe in and that, therefore, there comes a point at which the discussion with those who dismiss the basic liberal democratic principles 'would simply have to stop'.<sup>2</sup> Elsewhere, he is even more explicit and acknowledges that liberal democracies 'cannot avoid identifying "unreasonable" others and silencing them'.<sup>3</sup>

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<sup>1</sup> A similar point was made by Ricardo Spindola Diniz, 'Rational necessities: on the silence of liberal democratic theory in front of the unreasonable other', *Etica & Politica* 23 (2) (2021): 467-480 at 473.

<sup>2</sup> Johan van der Walt, *The Concept of Liberal Democratic Law* (New York: Routledge, 2020), 11.

<sup>3</sup> Johan van der Walt, 'Liberal democracy and the event of existence, seen from a not-so-rickety bridge between Rawls and Merleau-Ponty. Reply to my critics', *Etica & Politica* 23 (2) (2021): 521-576 at 532.

On the other hand, van der Walt's view of liberal democracy is outspokenly proceduralistic. He emphasizes that we should resist the temptation to say that those who 'adamantly disagree' with us, 'ultimately have good reasons to agree' since that would herald our descent into dogmatic liberalism.<sup>4</sup> In his contribution to this special issue, he similarly advocates a proceduralistic duty of civility which encourages us to 'live graciously enough with terms of social cooperation that one's moral autonomy (one's separate moral agency) relentlessly prevents one from considering "reasonable enough"'.<sup>5</sup>

Van der Walt thus provides us with contradictory recommendations: when confronted with what he calls the 'unreasonable other', should we identify and silence them or should we graciously accept the terms of social cooperation they propose? From the perspective of the paradox of tolerance it seems to me that the right answer requires a further distinction that van der Walt fails to make. When we disagree with opponents who, just like us, endorse the liberal democratic regime, the duty of civility seems appropriate. But when we are faced with enemies who aim to subvert liberal democracy's core principles, that gracious attitude becomes self-defeating, and a much firmer stance is needed.

My main concern with van der Walt's account is that it fails to provide us with the conceptual tools needed to make this crucial distinction between those who endorse and those who challenge liberal democratic principles,<sup>6</sup> because he is not explicit enough about what the normative commitments of liberal democracy, according to him, ought to be. As Serdar Tekin already noted, Van der Walt's rich and historically well documented analysis of liberal democracy remains 'too modest' in the sense that it is largely negative.<sup>7</sup> It points out the supposedly naturalistic, metaphysical or foundationalist elements ('rooted in life') in other theories and admonishes us to avoid those. To the

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<sup>4</sup> Van der Walt, *The Concept of Liberal Democratic Law*, 5, 196-197, 223.

<sup>5</sup> Johan Van der Walt, 'Rawls, Habermas and liberal democratic law', *Netherlands Journal of Legal Philosophy*, this issue, 12.

<sup>6</sup> In this context, Chantal Mouffe makes the distinction between agonistic adversaries, who endorse the liberal democratic framework, and antagonistic enemies, who oppose it. Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000).

<sup>7</sup> Serdar Tekin, 'Between modesty and ambition: remarks on *The Concept of Liberal Democratic Law*', *Etica & Politica* 23 (2) (2021): 459-465 at 460-464.

extent that van der Walt comes up with a more positive account himself, the proposals refer to positivists like Hart and Kelsen, are always very proceduralistic in nature and generally focus on majority voting and the willingness to except the outcome of the vote – no matter what – as the core of liberal democracy.<sup>8</sup> To be fair, van der Walt sometimes qualifies this proceduralism, when he emphasizes the demand that ‘legislation remains the outcome of rational majority-minority relations’ and thus ‘precludes the comprehensive legislative enactment of any specific instance of life at the complete cost of another’<sup>9</sup>. He never explains, however, what this ‘rationality’ presupposes or entails or how we should respond to votes, procedures or political actors who do not live up to this requirement. Without such an account, the normative content of liberal democracy remains underdetermined in a problematic way.

Below I further thematize van der Walt’s reluctance to provide a more normative account of liberal democracy by focusing on what I call his *fear of substance* (section 1) and his *fear of a democratic ethos* (section 2). The fear of substance is based on a false dichotomy between pure proceduralism and metaphysical substantivism. The fear of a democratic ethos is similarly based on a false dichotomy between a proceduralistic ethics of civility and a metaphysically rooted ethos. I will argue that these fears often lead van der Walt to misrepresent both Rawls and Habermas’ views and, consequently, to obscure the promising ways in which both authors effectively provide a normatively explicit account of liberal democracy which, at the same time, remains postmetaphysical enough to serve life while showing regard for its dividedness.

## **1. The fear of substance**

In an earlier piece, Johan van der Walt already defended a proceduralistic reading of Rawls’ political liberalism which ‘contains no definitive or conclusive normative content’, which ‘remains normatively empty’ and which ‘ultimately denotes an empty space’.<sup>10</sup> In his present contribution he similarly argues that we should reject the more substantive elements in Rawls’ theory and, consequently, do away with notions such as

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<sup>8</sup> Van der Walt, *The Concept of Liberal Democratic Law*, 225-248, especially 241-243.

<sup>9</sup> Ibid., 241.

<sup>10</sup> Van der Walt, ‘Reply to my critics’, 567.

‘overlapping consensus’ or ‘central ranges of agreement’.<sup>11</sup> These notions have to become ‘devoid of intrinsic substance’<sup>12</sup> and, if we still want to give them any meaning, the only option is to treat them as reflections of ‘historical *modi vivendi*’ and not as ‘established goods’.<sup>13</sup> Although Habermas’ deliberative model of democracy presents itself as more proceduralistic than Rawls’ political liberalism, van der Walt argues that it is still by far not proceduralistic enough since it heavily relies on substantive ‘transcendental elements of language’ that ground the democratic process.<sup>14</sup>

This supposed dichotomy between either pure proceduralism or a substantive account that imposes ‘established goods’ and thus threatens the open character of the democratic process is, however, a false dichotomy, which fails to do justice to both Rawls and Habermas’s position. Both of them indeed assume that liberal democracy is characterized by a substantive core of normative principles. In Rawls, this is the notion of a *political conception of justice*, which forms the object of an overlapping consensus amongst reasonable comprehensive doctrines. Such a political conception of justice entails (1) a commitment to basic rights, liberties and opportunities, (2) a confirmation of the priority of these rights and freedoms over conceptions of the good and (3) the provision of means that allow citizens to make use of these liberties and opportunities.<sup>15</sup> For Habermas, the core of liberal democracy is captured by the *abstract scheme of rights*, which characterizes every constitutional democracy, and which refers to five categories of rights establishing (1) the greatest possible measure of individual liberties, (2) membership status in a community, (3) legal protection, (4) equal opportunity to participate in political decision-making and (5) the social and ecological means for citizens to make use of their rights.<sup>16</sup>

Contrary to what van der Walt suggests, however, these substantive commitments are in no way considered to be ‘established goods’. The core principles are substantive yet, at

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<sup>11</sup> Van der Walt, ‘Rawls, Habermas and liberal democratic law’, 12.

<sup>12</sup> Ibid., 23.

<sup>13</sup> Ibid., 12.

<sup>14</sup> Ibid., 23.

<sup>15</sup> John Rawls, *Political Liberalism, with a new introduction and the ‘Reply to Habermas’* (New York: Columbia University Press, 1996), xlviii, 223; ‘The idea of public reason revisited’ in id. *Collected Papers* (Cambridge: Harvard University Press, 1999), 573–615 at 581–582.

<sup>16</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996), 122–123.

the same time, still very vague and abstract. It is up to the citizens themselves to provide a more specific elaboration of what these rights entail in view of the historically specific situation of their own society. Liberal democracy, as both Habermas and Rawls explicitly acknowledge, should be seen as an ongoing *constitutional project* in which citizens attempt to realize their equal freedom in an essentially open-ended manner.<sup>17</sup>

This idea of democracy as an open-ended elaboration of an essentially underdetermined substantive core also explains the fundamental idea of the co-originality of law and democracy and the co-originality of private and public autonomy.<sup>18</sup> This co-originality should be understood in terms of a mutual presupposition. Democracy is a necessary precondition of legitimate law because only the citizens themselves can determine how the freedom of one citizen limits the equal freedom of other citizens. Any other way of determining these limits would reintroduce arbitrariness and, thus, unfreedom. That law is a precondition of the democratic process means, in turn, that democracy as a practice only makes sense as a project in which citizens jointly realize their equal freedom. If a democratic process were to lead to outcomes that are incompatible with the equal freedom of citizens, this result would amount to a performative contradiction. It does not make sense to grant people the authority to decide over the public rules of their community (as participants in the democratic process) and then deny them the authority to freely shape their own private lives (as subjects of individual rights).

What we learn from this analysis of how both Rawls and Habermas conceive of the intricate relationship between substance and procedure, is that *reasonable agreement* over the abstract substantive core of liberal democracy remains fully compatible with *reasonable disagreement* over the specific content of this core. This idea can be further illustrated by looking more closely at the status of majority decisions. Van der Walt gives the example of a committed anti-vaxxer who challenges a scheme of compulsory

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<sup>17</sup> For Rawls, see *Political Liberalism*, I-IVii, 396-409; 'The idea of public reason revisited', 581-583. Compare also with the idea of 'four-stage sequence' in *A Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999), 171-176. For Habermas see, e.g., *Between Facts and Norms*, 125-126.

<sup>18</sup> For Rawls, see *Political Liberalism*, 409-421. For Habermas, see *Between Facts and Norms*, 126-131. For a fuller analysis of the thesis of co-originality in Habermas, see Stefan Rummens, 'Debate: The co-originality of private and public autonomy in deliberative democracy', *The Journal of Political Philosophy* 14 (4) (2006): 469-481; id., 'Democratic deliberation as the open-ended construction of justice', *Ratio Juris* 20 (3) (2007): 335-354.

vaccination before the constitutional court. According to van der Walt, the court cannot avoid concluding that one of the two parties is ‘unreasonable’:

It is either going to grant the claim and tell the government (and the majority of voters that put it in power) that its terms of social cooperation are unreasonable. Or it is going to dismiss the claim and tell the plaintiff that his or her claim to separate moral agency is unreasonable. Under these circumstances, neither of the two parties ending up with a verdict of “unreasonableness” against them can be realistically expected to tolerate the adverse position of the other as “reasonable enough”. There is no third way out.<sup>19</sup>

This analysis, however, misrepresents both Rawls and Habermas’ position. On both of their accounts, it is perfectly possible that both parties to the debate are reasonable – in the sense that they refer to values that are part of the (abstract) overlapping consensus – but nevertheless (reasonably) disagree regarding the proper course of action.<sup>20</sup> For Rawls, the legitimacy of majority decisions requires that all citizens (and all government officials) follow public reason.<sup>21</sup> In view of the reasonable disagreement that is possible with regards to the specific content of public reason, however, this does not require or imply unanimous agreement. It merely requires that all parties involved exercise their duty to civility and explain how their position ‘can be supported by the political values of public reason’<sup>22</sup> and, subsequently, vote ‘for the ordering of political values they sincerely think the most reasonable’<sup>23</sup>. For Habermas, the moment of the vote represents a ‘caesura in an ongoing discussion’ and, hence, ‘the interim result of a discursive opinion-forming process’.<sup>24</sup> This caesura does not necessarily condemn the minority to unreasonableness. Indeed, the majority vote reveals an ineliminable ‘volitional moment’ in political deliberation which results from the fact that some relevant reasons related to the historical and cultural context of the citizens concerned are only valid ‘relative to the

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<sup>19</sup> Van der Walt, ‘Rawls, Habermas and liberal democratic law’, 11. Compare also with van der Walt, ‘Reply to my critics’, 559.

<sup>20</sup> With regard to the example, this is not far-fetched at all. There are many reasonable arguments available for both advocates and opponents of mandatory vaccination schemes, which all refer to the core principles of freedom and equality.

<sup>21</sup> Rawls, *Political Liberalism*, lv-lvi; id., ‘The idea of public reason revisited’, 577-579.

<sup>22</sup> Rawls, *Political Liberalism*, 217.

<sup>23</sup> Ibid., lv.

<sup>24</sup> Habermas, *Between Facts and Norms*, 179.

value orientations, goals, and interest positions of its members’.<sup>25</sup> What this means, once again, is that liberal democracy, on this account, leaves room for moral agency and moral disagreement as long as it remains within the scope of the wider reasonable agreement on the core principles embedded in the abstract scheme of rights, which members of a liberal democratic community ought to share.

In this context, it is important to point out that van der Walt’s proceduralistic understanding of the duty of civility is, in spite of claims to the contrary, incompatible with Rawls’ own understanding of this duty. As already indicated, van der Walt believes that the duty of civility implies that we graciously accept terms of cooperation which ‘one’s moral autonomy (...) relentlessly prevents one from considering “reasonable enough”’.<sup>26</sup> For Rawls, in contrast, it is necessary that the balance of political values expressed in the vote ‘can be seen as at least not unreasonable in this sense: that those who oppose it can nevertheless understand how reasonable persons can affirm it. This preserves the ties of civic friendship and is consistent with the duty of civility.’<sup>27</sup> The requirement of being ‘not unreasonable’ thereby marks a substantive constraint on what can count as a legitimate political position or a legitimate outcome of a vote. Indeed, the duty of civility, in Rawls, draws the line between reasonable opponents who endorse the political values of public reason and whose legitimacy we, therefore, have to recognize, and illegitimate enemies whom we have to contain ‘like war and disease’.<sup>28</sup>

The absence of a similar substantive criterion in van der Walt’s proceduralistic understanding of the role of voting and the duty of civility is problematic. As already indicated, it deprives him of the conceptual tools needed to distinguish between terms of cooperation which we should indeed graciously accept in spite of our (reasonable) disagreement on the one hand and proposed terms of cooperation which we should recognize and fight as genuine threats to the survival of our liberal democratic regime on the other.

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<sup>25</sup> Ibid., 156.

<sup>26</sup> Van der Walt, ‘Rawls, Habermas and liberal democratic law’, 12.

<sup>27</sup> Rawls, *Political Liberalism*, 253.

<sup>28</sup> Ibid., 64, n.19.

## 2. The fear of a democratic ethos

Van der Walt's criticism of Rawls and Habermas is, to a considerable extent, structured by the distinction he makes between an *onto-institutional logic or framework* on the one hand and a *constituent ethics of civility* on the other. The institutional framework not only refers to, for instance, a set of constitutional rights and legally instituted processes of democratic decision-making but also implies a reference to the normative principles or 'transcendental elements' that determine the structure of this framework.<sup>29</sup>

Van der Walt's basic claim is that the combination of logic and ethics generates an internal tension within both Rawls and Habermas' theories. More specifically, he argues that 'this constituent ethic actually ruins the transcendental elements of these frameworks' and that, consequently, a consistent reconstruction of their theories would require a fundamental shift in emphasis from logic to ethics.<sup>30</sup>

In this shift from logic to ethics more is at stake than merely a shift from substance to procedure. For van der Walt, the substantive nature of the institutional logic implies that it remains rooted in a historical form of life or ethos, which is supposed to guarantee that the substantive principles are adhered to.<sup>31</sup> This rootedness of liberal democracy makes it exclusionary and, thus, poses a threat to the dividedness of life. The shift from logic to ethics is needed to resolve this problem by severing the 'ancient metaphysical link between law and life'.<sup>32</sup> This means that a proper conceptualization of liberal democracy needs to move away from the rooted substance of the institutional logic and focus, instead, on the purely proceduralistic and, hence, uprooted ethics of civility.

In my view, van der Walt's analysis of how Rawls and Habermas' theories are supposedly rooted in life is problematic. He portrays both authors as assuming that the existence of a form of life or ethos supporting their institutional framework is somehow 'guaranteed'. In reality, neither Rawls nor Habermas makes such an assumption. Both of them are very much aware of the vulnerability of liberal democracy and both of them clearly assume that liberal democracy can only survive if enough citizens *freely* decide to

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<sup>29</sup> Van der Walt, 'Rawls, Habermas and liberal democratic law', 12, 22-23.

<sup>30</sup> *Ibid.*, 23.

<sup>31</sup> Van der Walt, 'Reply to my critics', 563; *id.*, 'Rawls, Habermas and liberal democratic law', 12-13.

<sup>32</sup> Van der Walt, 'Rawls, Habermas and liberal democratic law', 13.



endorse it. In their theories, the existence of the supporting ethos is considered to be *possible*, but *never guaranteed*.

With regard to Rawls, van der Walt focuses on what he calls the ‘serious tension’ that supposedly exists between our own individual moral agency and the need for social cooperation.<sup>33</sup> He believes that Rawls’ idea that it is possible for citizens to reasonably endorse a scheme of social cooperation amounts to an attempt to ‘square the circle’.<sup>34</sup> In view of the fact that moral disagreement is rampant, such an idea is based on an ‘anthropological or quasi-anthropological assumption’ that turns reasonable agreement amongst moral autonomous people into a ‘natural or quasi-natural reality’.<sup>35</sup>

It is, of course, true that Rawls makes certain anthropological assumptions. The most important one is that men are equipped with two basic moral powers: the capacity to form a conception of the good life and the capacity for justice.<sup>36</sup> This means that ‘moral agency’ is not a single capacity, as van der Walt suggests, but a twofold capacity on the basis of which people can develop a personal conception of the good life as well as reflect upon the ways in which that conception can be squared through a scheme of social cooperation with the conceptions of the good life of others. In other words, the potential to deal with the ‘tension’ between the personal and the social is, at least according to Rawls, built into moral reason itself. This anthropological analysis thereby only aims to show that reasonable agreement is a genuine *possibility*, not that it is automatically guaranteed. Rawls explicitly recognizes that many ‘political, social or psychological forces’<sup>37</sup> are needed to effectively bring about an overlapping consensus and he fully recognizes that unreasonable doctrines exist and pose a very real threat to the stability of liberal democracy.<sup>38</sup>

Van der Walt could, of course, retort that even these anthropological assumptions already amount to an unacceptable ‘rooting’ of the theory. But this would seem to ignore the fact that all political theories have to make at least some anthropological assumptions. Van

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<sup>33</sup> Van der Walt, ‘Reply to my critics’, 550-551; id., ‘Rawls, Habermas and liberal democratic law’, 6-7.

<sup>34</sup> Van der Walt, ‘Reply to my critics’, 553, 554.

<sup>35</sup> Ibid., 559.

<sup>36</sup> Rawls, *Political Liberalism*, 19 and *passim*.

<sup>37</sup> Ibid., 158.

<sup>38</sup> Ibid., 64, n.19

der Walt's own claim that there exists an irresolvable tension between people's moral agency and the need to find terms for social cooperation is itself a case in point. In that sense, the disagreement between him and Rawls is not a disagreement between an uprooted and a rooted theory, but rather an anthropological disagreement about the kind of moral capacities and moral motivations we can plausibly ascribe to moral individuals.<sup>39</sup>

With regard to Habermas, van der Walt repeatedly argues that the need for an ethics of civility ruins the 'transcendental guarantees' for felicitous social interaction and for the existence of a democratic spirit supposedly inherent in his analysis of the liberal democratic framework.<sup>40</sup> The problem with this criticism is, however, that Habermas never claims that such transcendental guarantees exist in the first place. The critique therefore misses the mark. Van der Walt makes much of a quote in which Habermas argues that discourse theory 'counts' on the 'higher level intersubjectivity of processes of reaching understanding that take place through democratic procedures'.<sup>41</sup> He interprets this as if Habermas assumes that such processes always certainly exist and can thus be 'counted on'. This is, however, not what he means. Habermas points out that such processes (and, more generally, a 'liberal political culture'<sup>42</sup>) represent a necessary but external condition for the proper working of liberal democratic institutions that is 'not at their disposal'.<sup>43</sup> These conditions, thus, represent an external *vulnerability* of liberal democracy, not an intrinsic transcendental certainty.

This dependence of discourse theory on motivational resources over which it has no control is, moreover, not a new element. It is already clearly present in Habermas' discourse ethics, which informs his deliberative model of democracy. In that context,

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<sup>39</sup> In my view, Rawls' position is the more plausible one. As Michael Tomasello, for instance, has shown, our capacity to cooperate with others on the basis of fair terms of cooperation is deeply engrained. The circle really does not need to be that square. Michel Tomasello, *A Natural History of Morality* (Cambridge: Harvard University Press, 2016).

<sup>40</sup> Van der Walt, 'Rawls, Habermas and liberal democratic law', 19-27.

<sup>41</sup> Van der Walt, 'Rawls, Habermas and liberal democratic law', 21; Habermas, *Between Facts and Norms*, 299. The published English translation actually uses 'reckons with' rather than 'counts on'. The German original says 'rechnet mit' (Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt am Main: Suhrkamp, 1994), 362).

<sup>42</sup> Van der Walt, 'Rawls, Habermas and liberal democratic law', 19; Habermas, *Between Facts and Norms*, 131.

<sup>43</sup> Ibid., 131.

Habermas talks about the need for a form of life that meets morality halfway (*entgegenkommende Lebensform*)<sup>44</sup>. It is important not to misconstrue the methodology of discourse theory and the specific nature of Habermas' 'transcendental' reconstruction of the practice of liberal democracy and the practice of rational communication. The principles that he identifies – e.g., the co-originality of private and public autonomy in the case of liberal democracy, and the ideal speech situation in the case of rational communication – are transcendental in the sense that they are constitutive of the practice under consideration. But this means that these principles only bind people who actually *choose* to engage in that particular practice in the first place. If you want to uphold liberal democracy, you are committed to the co-original recognition of private and public autonomy. If you want to argue rationally, you are committed to being sincere and to abstaining from the use of force. But, obviously, no one forces you to argue in a rational way. 'Convincing somebody on the basis of a lie' is a performative contradiction, as Habermas says, in the sense that lying is incompatible with the practice of rational argumentation. But this does not mean that people cannot lie – they often do. The transcendental analysis only reveals *possibilities* for human agency, but no *guarantees* that these possibilities will be realized. It is always up to the people to *freely* make that choice. As Habermas says, engaging in moral or democratic deliberation always presupposes, on the side of participants, a 'resolve to freedom' – *ein Entschluß zur Freiheit*.<sup>45</sup>

Contrary to what van der Walt assumes, Habermas is very much aware of the fragility of liberal democracy. Although he believes that his transcendental analysis reveals the *possibility* of progress in terms of the realization of human freedom, the threat of the demise of liberal democracy remains ever present:

Reason does not litigate, within the tumult of historical contingencies, in the sovereign manner of a dialectically ruling absolute spirit. It operates instead (...) through the socialized subjects' own fallible cognitive, social-cognitive and political-moral learning processes. The results of such fallible learning processes

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<sup>44</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: Polity Press, 1990), 207-208.

<sup>45</sup> Jürgen Habermas, *Truth and Justification* (Cambridge: Polity Press, 2003), 249; the German original in id., *Wahrheit und Rechtfertigung. Philosophische Aufsätze* (Frankfurt am Main: Suhrkamp, 1999), 286.

are reflected not only in organizational, technical and economic ‘productive forces’ but also in the laborious progress in the institutionalization of equal freedoms, which is constantly threatened by regression.<sup>46</sup>

So, when Habermas acknowledges that liberal democracy cannot survive without the ‘initiatives of a population accustomed to freedom’<sup>47</sup> he is not ‘ruining the transcendental elements’<sup>48</sup> of his framework. He is acknowledging that these transcendental elements, which represent the constitutive principles of the liberal democratic practice – its substance – are not self-evident and require a democratic ethos to support it. This democratic ethos, consequently, cannot itself be purely proceduralistic, as van der Walt would like to have it. It depends, instead, on the willingness of enough citizens to commit to practices of *reasonable* democratic deliberation which respect the substantive, yet underdetermined principles of liberal democracy. Logic and ethics are, in this sense, tailored to complement each other, both in Habermas and in Rawls. There is, pace van der Walt, no tension between them, and no trade-off is possible.<sup>49</sup>

In conclusion of this section, I would like to briefly turn the tables. In the context of his proceduralistic reconstruction of Rawls’ duty of civility, van der Walt argues that a liberal principle of legitimacy ‘cannot be a concern with a positive historical form or ethos. It is an ethical response to the absence of such form or ethos.’<sup>50</sup> Whether the idea of an ethics without ethos makes sense, seems, first of all, questionable to me. If all citizens are supposed to endorse this ethics, it seems that that shared endorsement would inevitably constitute a new ethos of its own. The more general question I would like to focus on, however, is whether the idea of an ethics without an ethos does not take the regard for the dividedness of life too far. As Claude Lefort – an author often favorably

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<sup>46</sup> Jürgen Habermas, ‘Once again: On the relationship between morality and ethical life’, *European Journal of Philosophy* 29 (2021): 543-551 at 548.

<sup>47</sup> Habermas, *Between Facts and Norms*, 131.

<sup>48</sup> Van der Walt, ‘Rawls, Habermas and liberal democratic law’, 23.

<sup>49</sup> Van der Walt’s claim (‘Rawls, Habermas and liberal democratic law’, 19-20) that the need for a democratic culture undermines the thesis of the co-originality of law and democracy is based on an equivocation. The thesis of co-originality deals with the constitutive principles of liberal democracy as a practice. ‘Democracy’ in this context, thus, refers to the legal protection of the public autonomy of citizens and the existence of legally institutionalized democratic decision-making processes. The ‘democratic ethos’ (or ‘liberal political culture’), in contrast, refers to the motivations of citizens needed to support the practice of liberal democracy as a whole (Habermas, *Between Facts and Norms*, 131).

<sup>50</sup> Van der Walt, ‘Reply to my critics’, 563.

quoted by van der Walt – rightly argues, a liberal democratic society cannot dodge the question of its own *political integration*. A democratic society cannot be a pure diversity (*diversité-en-soi*) but has to constitute itself, rather, as a *unity-in-diversity*.<sup>51</sup> Even though the place of power, in a democracy, is empty, it is still a place – a political stage – that brings people together and allows for the common identification of citizens with the democratic project in which they all participate. Without such an identification, society would fall apart and the democratic project of realizing human freedom would come to a halt.

In this sense, the contributions of both Rawls and Habermas represent highly relevant attempts to provide a postmetaphysical account of the ethos of liberal democracy. This ethos is postmetaphysical in the sense that it does not rely on prepolitical forms of integration but is constructed in the democratic process itself:

A political culture, which first has to develop informally around formally already guaranteed constitutional claims to political inclusion, no longer exists as a historically *evolved* milieu; rather – and this is the novelty – it has to *emerge* because it cannot be *produced* by legal and administrative means.<sup>52</sup>

This type of constitutional patriotism – as Habermas calls it – does not lead to the elimination of dividedness, but rather aims to serve its purpose:

The ‘inclusion of the other’ means rather that the boundaries of the community are open for all, also and most especially for those who are strangers to one another and want to remain strangers.<sup>53</sup>

At the same time, however, the constitutional project that binds us, cannot be fully severed from life because the identification of citizens with the democratic process is possible only if they feel that their real-life concerns and needs are taken seriously. We cannot retreat to a purely messianic conception of politics – as van der Walt sometimes seems to do – in which

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<sup>51</sup> Lefort, *Democracy and Political Theory*, 232; the French original in Claude Lefort, *Essais sur le Politique. XIX<sup>e</sup>-XX<sup>e</sup> siècles* (Paris: Editions du Seuil, 1986), 276.

<sup>52</sup> Habermas, ‘Once again’, 550.

<sup>53</sup> Jürgen Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge: MIT Press, 1998), xxxvi.

the reconciliation of the torn state of terrestrial life [is left] up to God, and to the return of the Messiah. (...) [The *hoos mè*] took actualisation out of the hands of human beings, hands that are so prone to false actualisation.<sup>54</sup>

Such a messianic conception of politics sounds like a perfect recipe for the alienation of dissatisfied voters from the liberal democratic regime. Especially in view of the threat currently posed by the rise of populism – a concern van der Walt and I share – it seems crucial to take the socio-economic and cultural concerns of voters seriously so that they can at least recognize the political process as a process through which we, human beings, effectively attempt to actualize a better and more just society – an actualization which, of course, always remains incomplete, open-ended and fragile.

In such [democratic] struggles, moral outrage over social and political injustices can serve as a pacemaker for the spread of a new kind of political ethical life, which *founds* solidarity between citizens across social and cultural divides. In culturally pluralistic societies, this dynamic describes a relationship between morality and ethical life in which the critical voice of violated basic rights takes the lead.<sup>55</sup>

To conclude, law does not serve life best by being completely severed from it. It serves life best by being connected to a democratic process that mediates, but through that mediation maintains, the gap between morality and ethics – the gap between law and life.

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<sup>54</sup> Van der Walt, *The Concept of Liberal Democratic Law*, 238.

<sup>55</sup> Habermas, 'Once again', 550-551.