Constitutional state and democracy

On Jürgen Habermas's *Between Facts and Norms*

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In his *Between Facts and Norms*,[1] Jürgen Habermas offers a justification of the 'democratic constitutional state' from the viewpoint of his communicative or discourse theory, and gives a thorough exposition of his conception of democratic politics. In what follows I will attempt to give a general outline of Habermas's political philosophy and to suggest possible features on which criticism should focus.

We are familiar with the fact that in order to surmount the difficulties of the old Critical Theory, Habermas introduces in his magnum opus *The Theory of Communicative Action*[2] a social theory based on the bisection of society. According to Habermas, the process of rationalization and modernization occurs on two levels: (1) The level of accumulating instrumental knowledge, the consequent development of productive forces and the rational organization of production. This is the level of 'systems', constituting spheres free from moral commitments, in which the action of individuals is coordinated by the so-called 'steering media' (money/economy, power/bureaucratic administration). And (2) the level of the 'institutional framework'; that is, the level of the moral regulation of social behaviour. Thus, beside the 'instrumental rationalization' of the systems, we have a 'communicative rationalization' of the so-called 'lifeworld' (*Lebenswelt*) – that is, the world-images, moral beliefs, and fundamental institutions that govern social life.

This dualistic frame of reference provides the theoretical means for a reinterpretation of the pathologies of modernity – anomie, alienation, the dissolution of the social structure, and so on – which now appear as signs of a gradual 'colonization of the lifeworld on the part of the system'. The inordinate development of the system in modernity tends to subject the 'lifeworld'

to the commands and criteria of instrumental rationality. This has destructive effects on the structures of moral–practical conscience and social solidarity, which can be reproduced only through communication (and not through the general equivalents of money and power).[3]

However, although the unchecked development of the system endangers the fabric of the lifeworld, the lifeworld itself undergoes a rationalization process that is emancipatory in character. In late modernity the authority of tradition is 'linguistified' and thus the validity of its contents depends on the communicative processes through which it is collectively controlled.[4] Such processes aim towards a consensus based on the prevalence of the best arguments, a consensus which thus deserves to be termed 'reasonable'. Consequently, we have a 'communicative thawing' of traditions which lose their inherent power to give direction to human life, and regain it only after successfully passing the test of communicative control. Thus, in late modernity we have the reflective reproduction of a decentralized world-image, wherein there is a distinction between questions of theoretical knowledge, practical knowledge and aesthetics. We have, furthermore, the formation of an autonomous communicative ethics and a universalist legal system and, finally, the emergence of an autonomous, individualized subjectivity.[5]

The procedural justification of the system of rights

In regard to the moral-practical structures, modernity brings forth a critical question: how do we coordinate individual actions when the common normative framework until now imposed by religion has been undermined? Habermas responds that in modernity

we have the formation of an autonomous morality. A 'godless society' has only one criterion to fall back on: the rational consensus of all participants, reached through non-coercive discussion, in which only the best argument reigns. Thus, in order to establish the validity of our practical rules, an ideal speech situation is required, entirely open to everyone concerned and devoid of internal and external constraints and imbalances of power. The determining factor is not whether this ideal communicative situation actually exists, but that the interlocutors – if they are in earnest about the discussion – should assume it as existing, albeit 'counterfactually'. It goes without saying that such a speech situation, in reality, could at best only be approximated. But even if it were easy to do this, a solely communicative solution to all possible practical conflicts would still be inconceivable. For so-called 'postconventional' modern ethics is established on the basis of a moral discourse and its implementation must depend on the individuals' self-control, on the 'inner voice of our moral conscience'.[6] Therefore the need arises for it to be complemented by the rules of compulsory law (*Zwangsrecht*); that is, a law enforced, if necessary, through the imposition of sanctions.

Social integration requires the existence of a general framework; it demands the regulation of the most crucial practical matters on a more solid foundation. This foundation is – according to Habermas – provided by law. Law is the institution that relieves the participants' communicative action of the heavy burden of regulating all the issues of social life. At the same time, it disengages the problem of maintaining social order from the intentions and motives of each individual. Individuals can regard the law as they wish: either as an external barrier to their arbitrary will, or as a general rule that provides the means for individual and collective freedom.[7] Thus, the law is not subject to morality but should be regarded as its useful functional complement. The law does not tell us what to do when facing moral dilemmas, but determines the general framework, within which, in principle, whatever is not explicitly prohibited is permitted. Moreover, the law functions as an intermediary between the 'lifeworld' and the 'system', raising barriers to the latter's uncontrolled expansion. It is thus the medium through which society controls the economy and the administration.[8] Lastly, it is the means for the attainment of individual and collective autonomy, since positive law is at any moment revisable and since it derives its legitimacy from the fact that it embodies – as at least it is supposed to – the rational will of the participants or of their greatest number.[9]

In this sense, the mode in which positive law is legitimized is related to the mode in which moral rules are justified. Habermas describes the difference as follows:

> Whereas the moral principle operates at the level at which a specific form of argumentation is *internally* constituted, the democratic principle refers to the level at which interpenetrating forms of argumentation are *externally* institutionalized. At this latter level, provisions are made for an effective participation in discursive processes of opinion- and will-formation, which take place in forms of communication that are themselves legally guaranteed.[10]

It is thus necessary that positive law be instituted on the basis of a procedure that would control its validity discursively: a procedure that is firmly established on the notion of a discursive justification of morality and yet results in legislation in order to fulfil its important political task. Therefore the demand for the rational justification of the law through a procedure that guarantees free expression to all existing arguments and counter-arguments leads us directly to the problem of democracy and its internal relationship to the fundamental principles of the rule of law.

The 'validity' of law has a twofold meaning. First, law is put into effect socially: that is, it is legislated and ratified, it requires the observance of citizens and, if necessary, it can impose this observance on transgressors through the threat of sanctions. Here the law is valid in the sense that it is in force *de facto*; it is a fundamental component of social 'facticity'. Second, however, the law is in force in a higher sense, linked to the ideal terms of its constitution. Like the autonomous ethics of late modernity, the law derives its legitimacy from a communicative procedure for opinion- and will-formation, which must approximate, even hypothetically, the ideal conditions of symmetry that would exist in an ideal speech situation. Law is valid *de facto*, but it is also valid *as rational* in that one can assume that it is produced via an intersubjective process of non-coercive communication between free and equal individuals. Thus a tension between facticity and rational validity permeates the law.[11]

How does this approach, however, interpret individual and political rights? Since positive law derives its legitimacy from the fact that its participants can view it as a product of their own political activity, the possibility for all to participate in the instituting of laws should be secured. Thus the law should be in a position to safeguard public autonomy (the freedom of political participation). Yet it cannot do this without simultaneously upholding private autonomy (individual

freedom from interference in one's private sphere). For, ideally, those who lay down the law are also subject to it, and the law must safeguard and respect private freedom as a precondition for non-coercive political communication in democracy. Thus the

> private freedom of individuals and the public autonomy of citizens constitute respectively the terms for the attainment of one another. The subjects of law can be autonomous only to the extent that, in exercising their political rights, they are entitled to perceive themselves as authors of precisely those regulations with which, as recipients, they must comply.[12]

According to Habermas, to one who realizes that private and public autonomy are two sides of the same coin, the classic conflict between republicanism and liberalism, between the 'freedom of the ancients' and the 'freedom of the modern', appears as a meaningless quarrel, because the safeguarding of private autonomy presupposes the unimpeded exercise of political rights. On the other hand, without participation in politics, private autonomy becomes a fraud; it is left exposed – as it is – to the machinations of financial and administrative powers. Moreover private autonomy without public participation is transformed into 'negative freedom', a freedom without exterior constraints but, nevertheless, a freedom without content, since the definition of the content of freedom requires public discussion with the other free and equal participants.[13] The system of rights, then, is grounded on the idea of an ideal communicative legislative procedure.[14]

The ambiguities of the procedural justification

Habermas's fundamental intuition that in the modern world we cannot conceive of freedom without safeguarding and inter-complementing both 'individual' and 'collective' rights could be considered as immediately evident. From that point onwards, however, several notable objections have been put forward regarding the 'procedural justification' of the system of rights.
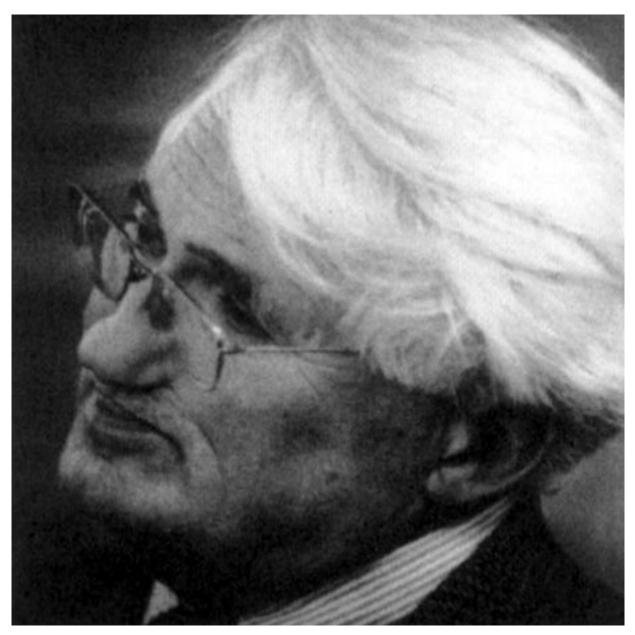
First, it has rightly been noted that the departure of the Habermasian theory of law from the Kantian one is not as decisive as its proponent would, perhaps, have wished. It is true that from Habermas's perspective, the law is not a direct manifestation of moral norms. To the degree, however, that both the law and moral rules are grounded on the concept of communicative rationality, the idealized form of communication and the moral principle of universalization, their difference is finally confined to the existence or not of external ratification and explicit legislation. The point

at which the discourse theory of law differs from the Kantian one is its close correlation between moral and democratic principles, which Kant did not, as we know, consider necessary. This close relationship is due precisely to the fact that Habermas from the start establishes his moral principle on the basis of the idea of non-coercive intersubjectivity, which also forms the basis of the democratic ideal.[15]

This fact has driven several Habermas scholars to the conclusion that he tends to confuse moral with democratic principles, rendering the former useless for the formation of a postmetaphysical philosophical ethics that would provide answers to specific moral dilemmas.[16] This critique could also be reversed and we could wonder if it is possible to consider democratic politics as moral discourse.

At this point I would like to submit the main elements of my critique of Habermasian discourse ethics.[17] Discourse ethics aims to formulate a universal moral principle that will be able to counter effectively the arguments of moral sceptics and relativists alike. However, the concept of the communicative justification of moral rules through non-coercive dialogue attaches moral truth to a concrete, historically located, and definitely limited communicative situation, no matter how many people or how much freedom this situation might include. In order to evade the stumbling block of relativism, Habermas embeds in every factual dialogue the idea of an ideal speech situation, which maintains the tension between the empirical and the transcendental, between fact and rational validity. However, as Wellmer has conclusively demonstrated, such an ideal cannot have meaning in the framework of postmetaphysical thought – towards which Habermas aspires – since its attainment would ultimately entail the abolition of all those conditions that make communication both possible and necessary, the abolition of the finite character of human existence.[18] In an ideal communicative situation we would have an ideal community that communicates non-coercively through an ideal language. However, these are figments that do not belong to this world and one can wonder what use communication would be in conditions of complete transparency.[19]

Now, this critique automatically affects the field of Habermas's political philosophy, since the moral principle of universalization and the democratic principle are considered twin concepts.[20] If the moral principle of universalization does not follow directly from the presuppositions of communication, if there is no plausible ideal that would guarantee its justification, the same would apply to the democratic principle of law

constitution. In other words, the normative content of democracy cannot be thoroughly explained on the basis of the concept of communicative rationality. The democratic principle does not follow logically from the presuppositions of the consensual resolution of our practical conflicts, but rather unavoidably accompanies the project of collective freedom. Democratic politics does not aspire to rationality, but employs it for the sake of freedom. As has rightly been noted, collective-positive freedom does not follow from communicative procedural reason, but rather from the formation of a 'democratic ethical life' (*demokratische Sittlichkeit*).[21] In other words, the project of individual and collective freedom precedes the principles of communicative reason, even if it is correct to intuit that the manifestation of the former in social praxis requires the processes and principles of the latter.

A second objection regards the adequacy of Habermas's justification of individual rights as conditions for the exercise of public autonomy – that is, as conditions for the construction of a public sphere for communication, wherein the development of communicative rationality will finally be possible. Albrecht Wellmer stresses that it is not possible to derive individual rights from the preconditions of communicative rationality, since the sphere of 'negative freedom' must occasionally include the right to act irrationally.[22]

The same realization that it is impossible to derive individual rights exclusively from the concept of popular sovereignty led Charles Larmore to invoke the moral principle of respect for a person, as a source of individual rights independent of popular sovereignty. According to his formulation, 'this principle gives form to one of the deepest levels of our moral conscience, the historically situated starting-point of our thoughts, the framework wherein we can think about justifications'.[23] Therefore it is not a matter of chance that despite Habermas's conscientious efforts

to reconcile 'negative' to 'positive' freedom in thought, at the level of political and social praxis the tension between them has remained undiminished throughout modern history.

Constitutional state, democratic politics

Habermas establishes, on the basis of his discourse theory of law, the constitutional guarantee of political as well as human rights, which determine the meaning of a legal person, a notion indispensable to the formation of a 'community of free and equal consociates under law'. This central notion, moreover, grounds the justification of the fundamental principles of the constitutional state. These principles can be summarized as follows.[24]

(1) Since the objective of the constitutional state is to provide the means for individual and collective autonomy, the first principle is *popular sovereignty*, which entails that every political power should emanate from the citizens' communicative power. The latter must be channelled into democratic procedures that establish the particular conditions of dialogue and communication, which can guarantee the rationality and validity of the legal regulations that result. Since few citizens can participate in such a demanding discussion, the need for representation naturally arises. The institution of parliamentary representation and the internal regulations of discussions and decision-making reflect precisely the effort to create the appropriate conditions for discussions based on the prevalence of the best arguments.[25] These are supplemented by the principles of political pluralism of the powers represented in parliament and the publication of parliamentary proceedings, which allows their scrutiny on the part of a critical public opinion.

(2) Now, whereas the parliament engages in and is responsible for the justification of laws, their specific implementation is, on the other hand, equally essential. This division of the tasks of justifying and implementing the laws is reflected in the institution of *an independent judicial power*. This is linked with the principle of ensuring the individual legal protection of each legal person who can file individual legal claims. Finally, since the judicial power can demand the mobilization of the administration, for example for the imposition of sanctions, the principle of its own commitment to the law is essential.

(3) The principle of the *rule of law*, the obligation of the administration (or executive) to comply with the laws, completes Habermas's justification of the separation of powers. This principle has the purpose of affixing the administrative power to the citizens'

communicative power, which is intermediated by the parliament's legislative power. Moreover, the possibility must exist of checking the arbitrariness of the administration, a task undertaken by constitutional courts and administrative investigations.

(4) To these should finally be added the principle of the *separation of state from society*. This principle does not have the liberal sense of separating the state – guarantor of public order and security – from a society of financially competitive individuals or interest groups. What Habermas has in mind is the formation of an autonomous 'civil society' in which pluralism and free associations, combined with a liberal political culture, would form an informal public sphere, which would control the state institutions.

These principles of the constitutional state entail a particular conception of politics. In principle, the essential objective of politics is to institute laws, since both judicial and administrative powers depend on them. Habermas advances a notion of politics that unfolds simultaneously on two levels: (a) legislated politics, regulated through procedures – the various parliaments belong to this sphere; (b) an informal formation of a public opinion in a public sphere of free discussion. These two levels constitute the concept of *deliberative politics* that depends on the legal institution of procedures and communicative presuppositions, as well as on the correct combination of instituted deliberations and informal public opinion. Hence popular sovereignty appears as a continuous procedure, in which the informal network of political deliberation controls and provides the instituted political system with material; in its turn, the political system moulds the raw material of the citizens' communicative power and transforms it into law. To this idea corresponds the image of a decentralized, pluralistic society, which no longer revolves exclusively around the state. Deliberative politics would be impossible without one of the two levels that constitute it. Without the filter of instituted deliberations, the anarchy of unchecked communication would reign, exposed moreover to the real inequalities of power between the participants. Without the informal network of public spheres of communication, legislative power would weaken; lack of a sensitive public sphere would lead to the inability to ascertain, recognize and deal with social problems.[26]

Habermas's 'radically democratic' theory attempts to contemplate the political institutions in their interaction with an active 'civil society'. The concept of 'civil society' was readmitted in contemporary discussion initially in order to analyse the dissident

movements in the former socialist countries and the democratization movements in Latin America.[27] Since then, particularly after the collapse of the Eastern European regimes and the huge rise in the demand for theories on democracy, it has become a dynamic feature of discussion in this area.[28] 'Civil society', a concept that Habermas enthusiastically adopted, is but a transfer of the notion of public sphere – which has always been the basis of the Habermasian concept of democracy[29] – to the modern discussion. Civil society is this 'weak public' which forms spheres of public communication, the vehicle of an unstructured 'public opinion'. Its communicative activity is uncontrolled and anarchic, composing a 'wild complex' that continually besieges the bastions of instituted politics. The 'weak public' itself is therefore 'set free' from the burden of decision-making, and the only thing it can and must do is to communicate informally.[30]

Habermas presents his view as the only realistic one for contemporary complex societies. And this is because, whereas he takes into account – contrary to liberalism – the fact that private autonomy is impossible without the political participation of citizens in public affairs, he does not require – contrary to republicanism – the direct and continual engagement of the participants in the exercise of popular sovereignty.[31] In this way, he takes into consideration the difficulties that arise from the growing complexity of contemporary societies, which, at times, unbearably encumber the communicative regulation of social life and lead to 'inertia'. These 'elements of inertia in society' also regard the limits of knowledge and intelligence of the public, the time pressures and the scarcity of material resources, as well as attitudes and motives, such as egocentricity, lack of willpower, irrationality and delusions, with which reality abounds.[32]

Consequences of formalism

Of the many issues raised by the Habermasian view of democratic politics I will here confine myself to just two: the justification of the institutions and principles of the democratic constitutional state and the conception of the role of the informal public sphere.

First of all one must note that the procedural viewpoint regards, at most, the justification of the system of rights and the fundamental principles of the separation of powers. From this point onwards additional empirical arguments must be rallied for or against the political institutions. Such an example is the institution of representation. This means, however, that it is impossible to ignore the extensive historical experience provided by the actual operation of the parliamentary system. Nevertheless, in his justification, Habermas appears to be writing as a nineteenth-century liberal intellectual. Otherwise he would not have failed to wonder seriously about both the feasibility and the nature of representation, as well as about the reliability of the institutions that mediate between parliaments and citizens (e.g. political parties and mass media).

Amid conditions prevailing in the nineteenth century, with the partial safeguarding of the right to vote and the club-parties of the various bourgeois groups, the idea of representation of particular interests and opinions in a public sphere of legislated and regulated discussion found genuine ground to develop. However, the democratization of the institutions of the classic liberal constitutional state produced, as we well know, great changes in the actual functioning of the representative institutions. The club-parties turned into bureaucratically organized mass parties, gradually assuming a 'pluralistic' character and becoming autonomous from their clientele, to which, increasingly, they convey the commands of party leadership. Parliamentary discussion turns into a legitimizing theatrical performance, while the existence of government parliamentary majorities increasingly transports the centre of gravity from parliaments to governmental authority. Thus representation is gradually replaced by mass acquiescence to sections of the leading elite; an acquiescence orchestrated by the state and the parties to take place on one day every four or five years, leading the people to political passivity during the entire interval.[33]

I would be both glad and relieved to admit that this frequently reiterated critique, which today incenses the advocates of existing 'democracy' and its universalist principles – as if the only way to defend them would be to conceal their discrediting – is exaggerated, misplaced and wrong, if only there existed a plausible proposition on how public control of professional politicians and party bureaucrats would be feasible. Habermas's suggestion is unsatisfactory. To the question why members of parliament should make their decisions on the basis of discursively produced resolutions (instead of seeking subsequently to justify them), he responds that they are obliged to do so because their voters could punish them by later withholding their vote.[34] However, this presumed existence of choice is obviously fictitious, since voters are called to choose between 'pluralistic parties' in the same way that they select their brand of detergent. Among similar products they choose the one that appears least disagreeable.

However, even if we succumbed to the myth that the pseudo-representative institutions of the 'democratic

constitutional state' are democratic in character, even if we downgraded the importance of the fact that the mammoth growth of both state and semi-state bureaucracy creates limitless opportunities for circumventing the legality of the rule of law, we couldn't avert our eyes from the most recent international developments. Today, the internationalization of the market economy is shifting the centre of major decision-making even further to multinational companies and the international organizations under their control, far from any democratic or representative control on the part of the citizens.[35]

The second point of criticism refers to so-called 'civil society' and the public sphere of communication – that is, the network of free groups and associations, and also the media that are supposed to function as loudspeakers, amplifying and spreading the voice of those civil movements independent of the state. As several scholars have noted, the concept of civil society is controversial. No one knows whether it is an ideal, a project or an actual reality.[36] In Habermas, the notion of 'civil society' is the radically democratic component of his views on democratic politics. However, the projection of the normative idea of civil society remains without substance while Habermas avoids reflecting on the actual conditions for its existence, reducing it into an 'empirical problem'.[37]

However, such a reflection could show that the political system itself undermines both the actual abilities and the predisposition of the citizens to intervene in the political processes. Political participation requires an institutional framework that instead of discouraging would educate people in citizenship and guarantee the necessary material preconditions. The answers to such questions, provided by Habermas on the periphery of his normative justification, are again inadequate. The demand for an active civil society is linked to the existence of a 'liberal-egalitarian political culture sensitive to problems affecting society as a whole – a culture that is even jumpy or in a constant state of vibration, and thus responsive'.[38] However, political culture does not drop from the skies, but is cultivated on the land or left untended to wither together with the rest of the plants in the garden of democracy. And Habermas, no doubt from excessive procedural modesty, makes no hint about this cultivation; on the contrary he posits, as we have seen, the existence of 'inertia', turning it – in effect – into a fact of human nature, and once more avoiding pondering the social circumstances that give birth to it, favour and intensify it.[39]

The same applies to his view on the role of the mass media. When the question is posed why the media should undertake to amplify the faint voices that automatically arise in a civil society, he invokes their normative self-understanding (e.g. 'the professional code of journalism') and the 'formal organization of a free press by laws governing mass communication' in the hope that this will lead to their sensitization, particularly in 'crisis situations' – for example, cases of civil disobedience.[40] However, our knowledge of media sociology belies such hopes.[41] Even if they were realistic, it would be worthwhile examining whether the exceptional cases of 'crisis situations' entitle us to speak about the 'communicative practices of self-determination' to which Habermas refers.[42]

The 'democratic deficit' observed in contemporary democracies and induced by the passivity of the citizens is not difficult to interpret. It goes hand in hand with the widespread feeling that political participation is futile. Under the present conditions of the internationalization of the economy there is no possibility for the development of a civil society, truly autonomous from the state and the ideology of the free market. A genuine effort to control the market economy would entail state interventions and regulations, incompatible with the requirements of competitiveness, imposed by the present phase of the marketization process. It is not by accident that the state tolerates the autonomous institutions of civil society only to the extent that these are integrated into the framework of the neoliberal or social-liberal consensus.[43] Thus, in Europe, the crippling of the trade unions' resistance or their effective controlling by the state has been a fundamental precondition for the imposition of the privatizations, the dissolution of the welfare state and the deregulation of the labour market – elements which, on the whole, have not been changed by the new social-liberal governments. Civil society's degree of autonomy is laid bare by the fact that, among the 'alternative projects' of the so-called 'third sector', the state has supported those which can offer 'flexible' and cheap social services – contributing to the reduction of social policy expenses.

In the case of Germany, which Habermas has in mind, the model of civil society can be applied only to a segment of the autonomous movements. During the entire period of the 1980s and 1990s, the German state has maintained a two-pronged policy towards those democratic, alternative or ecological movements, which until then had had no access to the official political system. Those 'alternative projects' willing to collaborate and compromise have been institutionalized and have entered the political arena, gaining influence – only on the 'lesser decisions', naturally. Conversely,

radical political groups and alternative projects (e.g. squatters' movements) have been violently suppressed and excluded from the public sphere of political communication. Concurrently, structural unemployment and the dramatic growth of social inequality have created new categories of socially excluded individuals, whose voice cannot be heard. These people often have no other way to express themselves than through the unprovoked exercise of violence. Their ideological position, if they have one, can be at either end of the political spectrum…[44] *Mutatis mutandis*, similar phenomena appear in other European countries as well.[45]

Taking the necessity of the market economy, the bureaucratic administration and representative democracy for granted, the Habermasian approach undermines the possibility of a truly autonomous civil society that would demand an authentic democratization against the power elites of the state and the capital. In this sense, the idea of enhancing civil society without changing anything in the institutional framework of modern societies is not a feasible political programme but wishful thinking.

I would like to close with a provisional conclusion. Trapped in the notion of procedurally justifying the normative principles of the democratic constitutional state, Habermas avoids reflecting on the substantive presuppositions and conditions for the functioning of his model. However, radical democratic thought cannot be complacently confined to a rational justification (which is, in any case, inadequate) if it is truly interested in the issues of democracy and freedom. And this because once it raises its eyes, it faces the entire social, economic, political and ecological context, only within which can the question of democratic principle be stated in concrete terms. Democracy is not just a matter of procedures; it is inseparable from the problem of the terms for constructing a society in which the relations between its free and equal members would be characterized by solidarity.[46] If the term is to have any meaning, 'civil society' must aspire to something more than a simple conglomeration of rational individuals, and this means that we will have to reconsider our institutions from the perspective, and under the pressure, of the need to bolster social solidarity and to create the conditions for social affluence in a broad (and not just a material) sense.

Notes

1. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Polity Press, Cambridge, 1996. This volume also contains Habermas's earliest documents on the constitutional state and democracy; specifically 'Popular Sovereignty as Procedure' (1988) and 'Citizenship and National Identity' (1990). Habermas has recently published various papers explicating his political philosophy, as well as responses to criticisms, in his *Die Einbeziehung des Anderen*, Suhrkamp, Frankfurt am Main, 1997.
2. Jürgen Habermas, *The Theory of Communicative Action*, 2 vols, trans. Thomas McCarthy, Polity Press, Cambridge, 1991.
3. Habermas, *The Theory of Communicative Action*, vol. 2, pp. 303–73.
4. The 'rational potential' of communication is well analysed in Jürgen Habermas, 'Toward a Critique of the Theory of Meaning', in *Postmetaphysical Thinking*, Polity Press, Cambridge, 1992.
5. Habermas, *The Theory of Communicative Action*, vol. 2, pp. 145–7.
6. With regard to the philosophical justification of 'discourse ethics' offered by Habermas, see Jürgen Habermas, 'Discourse Ethics: Notes on a Programme of Philosophical Justification', in *Moral Consciousness and Communicative Action*, Polity Press, Cambridge, 1990, pp. 43–115.
7. *Between Facts and Norms*, pp. 38–9.
8. Ibid., pp. 56, 80–81.
9. Ibid., p. 32.
10. Ibid., pp. 110–11.
11. Ibid., pp. 28–34.
12. Habermas, *Die Einbeziehung des Anderen*, p. 298.
13. Ibid., pp. 299–303.
14. Habermas gives a thorough account of the 'logical genesis' of individual and political rights from the normative idea of 'popular sovereignty' in the third chapter of *Between Facts and Norms*, 'A Reconstructive Approach to Law I: The System of Rights', pp. 82–131.
15. See Onora O'Neill, 'Kommunikative Rationalität und praktische Vernunft', *Deutsche Zeitschrift für Philosophie*, vol. 41, no. 2, 1993, pp. 329–32. The law–morality relation is not – as it might initially seem – a philosophic nicety. Its political ramifications become apparent in a text by Habermas himself, wherein he counters Carl Schmitt's familiar critique of the idea of the international imposition of human rights, which is depicted as a catastrophic moralization of politics. According to Schmitt, such 'politics of human rights' is bound to degenerate into rampant moral struggle against 'evil'. Facing this critique Habermas must persist in the distinction between legal and moral rules. See J. Habermas, 'Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren', in *Die Einbeziehung des Anderen*, pp. 192–236.
16. See Rolf Zimmermann, *Utopie–Rationalität–Politik*, Verlag Karl Alber, Freiburg and Munich, 1985, pp. 337–9; and also Albrecht Wellmer, 'Ethics and Dialogue' in *The Persistence of Modernity*, MIT Press, Cambridge MA, 1991, p. 64.
17. See Konstantinos Kavoulakos, *Jürgen Habermas: Ta themelia tou Logou kai tis kritikis koinonikis theorias*

[*Jürgen Habermas: The Foundations of Reason and Critical Social Theory*], Polis Publications, Athens, 1996.

18. See Wellmer, 'Ethics and Dialogue'; and also Wellmer's *Endspiele: Die unversönliche Moderne*, Suhrkamp, Frankfurt am Main, 1993, p. 221.

19. See Kavoulakos, *Jürgen Habermas*, pp. 177–80.

20. See, for example, the critique made by Udo Tietz, 'Faktizität, Geltung und Demokratie', *Deutsche Zeitschrift für Philosophie*, vol. 41, no. 2, 1993, pp. 333–42.

21. Albrecht Wellmer, 'Models of Freedom in the Modern World', *The Philosophical Forum*, vol. XXI, nos 1–2, 1989–90, pp. 227–52.

22. Ibid.

23. Charles Larmore, 'Die Wurzeln radikaler Demokratie', *Deutsche Zeitschrift für Philosophie*, vol. 41, no. 2, 1993, p. 327.

24. *Between Facts and Norms*, pp. 168–76.

25. See also Habermas, 'Discourse Ethics', p. 92.

26. *Between Facts and Norms*, pp. 307–8.

27. See, for example, Andrew Arato, 'Civil Society against the State: Poland 1980–81', *Telos* 47, 1981.

28. Jean Cohen and Andrew Arato's *Civil Society and Political Theory* (MIT Press, Cambridge MA, 1992) and John Keane's *Democracy and Civil Society* (Verso, London and New York, 1988) are becoming classics. For a concise and clear account of the argument, see Michael Walzer 'The Idea of Civil Society', *Dissent*, Spring 1991, pp. 293–304. See also U. Rödel et al., *Die demokratische Frage*, Suhrkamp, Frankfurt am Main, 1989; and U. Rödel, ed., *Autonome Gesellschaft und libertäre Demokratie*, Suhrkamp, Frankfurt am Main, 1990.

29. Jürgen Habermas, *The Structural Transformation of the Public Sphere*, MIT Press, Cambridge MA, 1991.

30. *Between Facts and Norms*, pp. 307–8.

31. Ibid., pp. 300–301. See also Jürgen Habermas, 'Three Normative Models of Democracy', *Constellations*, vol. 1, no. 1, 1994, pp. 1–10.

32. *Between Facts and Norms*, p. 325.

33. This critique from a 'leftist' viewpoint has been put forward by various authors. For example see: Johannes Agnioli, *Die Transformation der Demokratie*, Ca ira Verlag, Freiburg, 1990. See also Cornelius Castoriadis, 'Power, Politics, Autonomy' in *Philosophy, Politics, Autonomy*, trans. D.A. Curtis, Oxford University Press, New York and Oxford, 1991; 'The Problem of Democracy Today', *Democracy and Nature* 8, 1996, pp. 18–35; and 'Anthropology, Philosophy, Politics', *Thesis Eleven* 49, 1997, pp. 99–116.

34. *Between Facts and Norms*, pp. 487–8.

35. The economic and social dimensions of a 'neoliberal consensus' that determines the general framework for the function of an internationalized market economy has been very well analysed by Takis Fotopoulos, *Towards an Inclusive Democracy: The Crisis of the Growth Economy and the Need for a New Liberatory Project*, Cassel, London and New York, 1997.

36. An idea of the variety of viewpoints on 'civil society' is given by Volker Gransow, 'Zivilgesellschaft und demokratische Frage', *Das Argument* 180, pp. 249–54, 1990. For a left-wing critique of the contemporary social-liberal use of the term, see John Ely, 'The Politics of Civil Society', *Telos* 93, 1992, 173–91; and 'Libertarian Ecology and Civil Society', *Society and Nature* 6, 1994, pp. 98–151.

37. A similar critique of the 'procedural model' of democracy is made by Cornelius Castoriadis, 'Democracy as Procedure and Democracy as Regime', *Constellations*, vol. 4, no. 1, 1997, pp. 1–18.

38. *Between Facts and Norms*, p. 488.

39. K. Naumann ('Mythos "Zivilgesellschaft"', *Vorgänge*, vol. 30, no. 6, 1991, p. 63) reaches the same conclusion regarding the procedural viewpoint. In great part, 'inertia' has to do with the actual opportunities for citizens to participate in democratic governance. This is a point to which Habermas gives less and less attention (presumably because the distribution of goods is something which goes beyond his formalist analysis of procedures). Even from a sympathetic standpoint, Kevin Olson ('Democratic Inequalities: The Problem of Equal Citizenship in Habermas's Democratic Theory', *Constellations*, vol. 5, no. 2, 1998, pp. 215–33) argues that Habermas's theory makes an inadequate connection between autonomy and social rights and therefore fails to empower all those whose democratic participation is hindered by material inequalities. The importance of the cultural conditions of democracy is stressed by Orville Lee, 'Culture and Democratic Theory: Toward a Theory of Symbolic Democracy', *Constellations*, vol. 5, no. 4, 1998, pp. 433–55. Lee points to the fact that the Habermasian strand of critical theory fails to pose the question of democracy in relation to the symbolic order of society, i.e. the symbolic force that determines the structure and hierarchy of social identities. This force is unequally distributed throughout the social order and forms a structural constraint on 'symbolic democracy'.

40. *Between Facts and Norms*, pp. 378, 380–84.

41. See, for example, Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of Mass Media*, Pantheon Books, New York, 1988.

42. *Between Facts and Norms*. See also the similar critical observation by Peter Dews, 'Faktizität, Geltung und Öffentlichkeit', *Deutsche Zeitshrift für Philosophie*, vol 41, no. 2, 1993, pp. 359–64.

43. See Fotopoulos, *Towards an Inclusive Democracy*, pp. 158–65. The term 'social-liberal' is used here to characterize the new social-democratic policy and ideology of the 1990s, as exemplified by Blair and Jospin.

44. See Roland Ruth, *Demokratie von unten. Neue soziale Bewegungen auf dem Wege zur politischen Institution*, Bund Verlag, Cologne, 1994.

45. See Margit Mayer, 'The Role of Urban Social Movement Organisations in the Innovative Urban Policies and Institutions', in Panos Getimis and Grigoris Kafkalas, eds, *Urban and Regional Development in the New Europe*, Topos, Athens, 1993.

46. See also Micha Brumlik 'Was heisst zivile Gesellschaft?', *Blätter für deutsche und internationale Politik*, vol. 36, no. 8, 1991, pp. 987–93.