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The Fragility of Liberal Democratic Law

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The Fragility of Liberal Democratic Law – Special Issue on the Work of Johan van der Walt

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INTRODUCTION

The Fragility of Liberal Democratic Law

Reflections on the Work of Johan van der Walt*

Lukas van den Berge

1 Overcoming the Streetlight Effect

According to an old Persian folk tale, Nasrudin Hodja – a man known for his wisdom but also for his occasional foolishness – was once crawling on the sidewalk under a streetlamp, obviously searching for something and appearing more and more frustrated. A friend, Mansour, passes by and asks him what he is looking for. 'I have lost the key to my house,' Nasrudin replies. Mansour decides to help his friend and kneels down next to him, searching for Nasrudin's key on the sidewalk under the streetlamp. Together, the friends look everywhere on and near the sidewalk. But although they leave no stone uninspected, they still do not manage to find Nasrudin's key. After a while, Mansour asks his friend if he can remember exactly where he has dropped it. 'Over there, in that dark corner,' Nasrudin responds. Mansour is astonished. 'In that dark corner? Then why are we looking for your key here?' 'Because there is much more light here,' says Nasrudin.[1]

In the theory of science, the story of Nasrudin (or one of its later adaptations) is often referred to in order to illustrate the 'streetlight effect': the observational bias that occurs when scientists restrict their view to what is already familiar.[2] The story of Nasrudin's search for his missing key is also relevant for legal scholarship. Martin Loughlin appropriately refers to a modern version of it while criticising positivist approaches to public law that focus on doctrinal issues while leaving the social and political foundations of public law largely unexamined.[3] But in times of academic hyper-specialisation, the streetlight effect certainly not only pertains to the limited horizon of legal positivism. For reasons that are all too understandable, legal scholars across the field tend to limit their attention strictly to their own

* This special issue presents the proceedings of a conference held in Utrecht on 23 September 2022. Many thanks to Utrecht University's Montaigne Centre for the Rule of Law and the Administration of Justice and the Netherlands Association for Philosophy of Law (VWR) for their practical help and financial support. Thanks also to our anonymous external reviewers and to Dennis Wegink and Myrthe Mijsters for their help in getting the final texts ready for publication.

1 Idries Shah, *The Exploits of the Incomparable Mulla Nasrudin* (London: The Octagon Press, 1983), 9; Laura Gibbs, *Tiny Tales of Nasruddin* (Montreal: Pressbooks, 2020), 51. See also Charles Downing, *Tales of the Hodja* (Oxford: Oxford University Press, 1964).

2 David H. Freedman, 'Why Scientific Studies Are So Often Wrong: The Streetlight Effect,' *Discover Magazine*, July 2010.

3 Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 3.

expertise, even when the most interesting answers to the questions that bother them are more likely to be found elsewhere.[4]

The approach taken to law and legal philosophy by Johan van der Walt, however, is very different. His academic work stands out through a remarkable combination of depth and breadth of learning. Relying on a deep familiarity and a profound understanding of both the analytical and the continental traditions of legal philosophy, Van der Walt is a rare expert in drawing creative and meaningful connections between the texts and insights of authors that are most commonly studied in isolation from each other. Even more impressive, perhaps, is Van der Walt's capacity to connect his philosophical analyses to a wide array of important and topical issues of law and politics. In all their profound and broad learnedness, Van der Walt's writings certainly do not display the scholarly detachedness that has made taxpayers around the world so suspicious towards the humanist tradition in academic scholarship. Instead, their pertinence to ongoing legal and political debates is felt on almost every page.

The members of the Netherlands Association for Philosophy of Law (VWR) and the editors of the *Netherlands Journal of Legal Philosophy* (*NJLP*) were honoured to receive Johan van der Walt as their special guest at the annual conference of Dutch and Flemish legal philosophers, organised in Utrecht on 23 September 2022. The theme to be discussed entailed the fragile state of basic principles of liberal democracy and the rule of law in times of upcoming authoritarianism and political illiberalism. In order to avoid the streetlight effect, it was the conference's outspoken ambition to investigate that theme not only by treading the well-lit paths of legal and legal-philosophical scholarship, but also by inspecting law and philosophy's darker corners and alleys – the places, that is, where important insights may be hiding but which remain too often unexplored. Leading us in that endeavour, Johan van der Walt proved to be a terrific guide.

For those who have not been present at the conference, it is hard (or even completely impossible) to describe the stimulating atmosphere at that event. An uncommon mixture of sharp and honest criticism, scholarly integrity and mutual respect facilitated a fruitful and enjoyable exchange of opinions and perspectives. Particularly valuable, perhaps, was the willingness of all participants to listen and to learn from each other in discussions that are too important to be dominated by superficial academic point-scoring. Johan van der Walt opened the debate by presenting a paper in which he criticises leading theories of political liberalism and democracy such as those of Rawls and Habermas. His exposition was followed by responses of Hans Lindahl, Chiara Raucea, Stefan Rummens, Ronald Tinnevelt, Nikolas Vagdoutis and Manon Westphal. The final versions of all presented papers are brought together in this special issue, supplemented by an additional response

4 Caprice L. Roberts, 'Unpopular Opinions on Legal Scholarship,' *Loyola University Chicago School of Law Journal* 50 (2018): 370-372; E. Milgram, *The Great Endarkenment: Philosophy for an Age of Hyperspecialization* (Oxford: Oxford University Press, 2015).

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of Irena Rosenthal and a concluding article in which Van der Walt replies to his critics.

2 *Law and Sacrifice*

In order to provide the reader of this issue with quick access to the discussion at hand, it may be useful to explain the wider intellectual context from which Van der Walt's critique on Rawls and Habermas originates. To a wider academic audience, Johan van der Walt is probably best known for *Law and Sacrifice*, published in 2005.[5] In that book, Van der Walt – currently working at the University of Luxembourg, but originating from Johannesburg – aims to develop a theory of law that would be particularly suited for a post-apartheid South African future. But the book's great importance certainly pertains not only to the future of South Africa alone. Although the book takes some recent developments in South African fundamental rights law and constitutional law as its point of departure, there is no question that it is highly relevant for lawyers, philosophers, political theorists and scholars working in related fields across the world.

As Van der Walt argues, law is inevitably bound up with sacrifice – hence, of course, the book's title.[6] Rather than reconciling or resolving conflicting interests, legal decisions – as well as political policies – typically sacrifice the interests of some in favour of others. In its pursuit of general goals in ways that can be expected to maintain social order and peace, law is fundamentally unable to give due weight to the rights and interests of each and every member of society.[7] Tragically, there is no reasonable principle that can help us out here. Living together in a well-ordered society necessarily requires the acceptance of binding general terms that may present themselves as objective and rational, but actually rely on particular beliefs and convictions (if not just on particular interests) that are certainly not shared by everyone. The establishment and maintenance of a legal and political order, therefore, paradoxically works towards 'the sacrificial destruction' of the radical plurality that Hannah Arendt has so aptly described as a vital condition of political life.[8]

In Van der Walt's book, the apartheid system prominently figures as an example of what can go horribly wrong in this respect. Through the systematic denial of fundamental rights to large parts of the South African population, apartheid is

5 Johan van der Walt, *Law and Sacrifice. Towards a Post-Apartheid Theory of Law* (London/New York: Routledge, 2005).

6 For his understanding of law's relation to sacrifice, Van der Walt draws most particularly on works of Giorgio Agamben, René Girard, Henri Hubert and Marcel Mauss and Jean-Luc Nancy. See Van der Walt, *Law and Sacrifice*, 11-14, 123-140 and 227-231, with further references.

7 Cf., e.g., Jacques Derrida, 'Force de loi: le fondement mystique de l'autorité,' *Cardozo Law Review* 11 (1990): 919-1045. The bibliography of *Law and Sacrifice* refers to works of Derrida in no less than 27 entries.

8 See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 7, where she describes plurality not only as an essential condition (*conditio sine qua non*), but also as a facilitating or causative condition (*conditio per quam*).

clearly designed as a system that allows for the complete obfuscation of any need to acknowledge the political viewpoints and the interests of those groups who were supposed to be satisfied with a segregated existence. Apartheid thus goes with a 'sacrificial destruction' of plurality that tends to remain without any serious attempt of justification.[9] But, as Van der Walt explains, neither could any post-apartheid legal and political order be completely faultless in this regard. Even the most liberal of constitutional democracies will inevitably have to impose rules and principles on its citizens that, on close inspection, sacrifice the interests and convictions of some to the detriment of others.[10]

Van der Walt's only hope for a post-apartheid legal order (or for any legal order, for that matter) relies on the explicit acknowledgment of the sacrificial losses that are inevitable for its own establishment and maintenance. Subsequently, a 'culture of justification' would be needed in which both public and private legal subjects are constantly required to account for such losses in ways that make clear that those who suffer them are not locked out from society as a partnership of equals.[11] For Van der Walt, it is vital in this regard that painful sacrifices on 'the losing side' are not glossed over by arguments that one-sidedly stress the 'just grounds' on which those sacrifices would be justifiable with regard to each and every member of society.[12] Instead, what would be needed is the explicit acknowledgment that those whose claims are sacrificed still belong to society as a common enterprise, without dismissing their convictions and viewpoints as simply ill-founded or unjust.

It is only by patently deviating from Nasrudin's infelicitous search method that Van der Walt succeeds in shaping his central arguments in such a compelling way. Expertly crossing the boundaries between legal dogmatics, political theory and legal philosophy, *Law and Sacrifice* opens up these disciplines to intellectual vistas with which scholars working in these respective fields are likely to be often quite unfamiliar. Moreover, the importance and the value of the book reside in Van der Walt's ability to draw meaningful connections between various strands and traditions within legal philosophy itself. There are only very few scholars who are able to reflect with such great depth and acumen on the ideas of thinkers such as Heidegger, Derrida, Levinas, Nancy and Agamben, while also giving due consideration to the ideas of Hart, Dworkin and the American realists. As such, there hardly seems to be a secret alley or dark corner of legal philosophy that Van der Walt leaves uninspected and unexamined.

3 *The Concept of Liberal Democratic Law*

In order to provide the reader with an appropriate understanding of the intellectual backgrounds of Van der Walt's critique on Rawls and Habermas, it is also useful to

9 Van der Walt, *Law and Sacrifice*, 123-124.
10 Van der Walt, *Law and Sacrifice*, 149-152.
11 Van der Walt, *Law and Sacrifice*, 139.
12 Van der Walt, *Law and Sacrifice*, 245.

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pay attention to one of his books that appeared more recently. In *The Concept of Liberal Democratic Law*, published in 2020,[13] Van der Walt's direct concern is the way in which the most valuable principles underlying democracy and the rule of law could possibly survive in the wake of upcoming populism and political illiberalism. Evidently, a threat to those principles is embodied in the rise of politicians such as Donald Trump, Viktor Orbán and Jarosław Kaczyński (not to mention the seemingly indestructible leadership of outright criminals such as Vladimir Putin).[14] Much more interestingly, however, Van der Walt argues that the fragile state of democracy and political liberalism is, for an important part, also due to significant shortcomings in the prevailing versions of those concepts themselves.

Shifting away from a special interest in post-apartheid South Africa to the future of liberal democracy and the rule of law more in general, *The Concept of Liberal Democratic Law* clearly builds on Van der Walt's earlier developed understanding of law as an endeavour that is necessarily bound up with unjustifiable losses and sacrifices. In *Law and Sacrifice* as in his more recent book, Van der Walt warns us for ways of thinking that tend to obfuscate such losses and sacrifices in the light of any rational and objective principle that aims to justify them to each and every member of society. Indeed, such a claim to rational and objective 'rightness' is out of touch with the concept of 'liberal democratic law' as Van der Walt understands it. In order to be a true liberal democrat, it is surely necessary to stay away from the populist and illiberal thought that informs many of liberal democracy's current opponents. However, it is equally important not to acquiesce in a liberal-democratic self-righteousness that too easily facilitates the dismissal of deviant views as nothing but unreasonable and objectively mistaken.[15]

A short glimpse at the polarisation of law and politics during the COVID-19 crisis may help to make clear how important such insights are to contemporary societies. Soon after the outbreak of the coronavirus, strict measures were taken by governments in order to control its spread. All over the world, the legitimacy of those measures was not only contested on social media and in large demonstrations, but also in numerous court cases.[16] The claims of protesters were almost invariably dismissed. An important question, then, seems to be how we may 'retrieve

13 Johan van der Walt, *The Concept of Liberal Democratic Law* (London/New York: Routledge, 2020).

14 Cf. Van der Walt, *The Concept of Liberal Democratic Law*, x-xii for a similar list of examples from recent politics that Van der Walt finds particularly worrying.

15 Van der Walt, *The Concept of Liberal Democratic Law*, 5.

16 See https://www.covid19litigation.org/ for the COVID-19 Litigation Project – an enormous collaborative effort of academic and other research institutions around the world, run by a management team from the University of Trento, Italy. The project offers a case law database in addition to an abundance of country reports and references to further literature on public health measures in times of COVOD-19.

friendship from the ruins of litigation.'[17] Perhaps not, one would suspect, by dismissing the claims of critics as simply ill-founded or unreasonable in the light of some objective justifying principle. Instead, it seems preferable to insist on a radical pluralism that explicitly makes room for fundamental disagreement – only to a limited extent, perhaps, on the results of serious scientific research, but certainly on the values, beliefs and convictions that should underlie proper health policies.[18]

The COVID-19 crisis is just one of the many current issues that illustrate that political and legal conflicts usually revolve around much more than just *differences of opinion*. Instead, they are most commonly also – or even primarily – rooted in different ways of seeing and experiencing the world, resulting in *differences of conviction*. As Van der Walt has it, there is no Hegelian synthesis, Dworkinian super-judge or any other harmonising philosophical concept that may provide us with a way in which such differences may ultimately be overcome. That is why, in modern societies, a legal and political order should explicitly rely on nothing more than a 'constellation of compromises' that enables us to live together and to determine common schemes of action despite all these differences.[19] According to Van der Walt, such a constellation could only have a real chance of survival if the sacrifices of those who are required to let go of certain particular interests or deeply felt beliefs are properly acknowledged and recognised.

In his recent book, Van der Walt aims to develop an understanding of liberal democracy and the rule of law that could provide such pluralist accounts of law and politics with a theoretical basis. The concept of liberal democratic law that he finally arrives at entails, for one thing, that modern law should be uprooted as much as possible from the ancient metaphysical thinking from which it has historically developed. As such, any notion of 'the good life' (either referred to in its Aristotelian sense or appearing in one of its many other guises) as a conceptual basis for legal rights and duties should be strictly dismissed.[20] Of equal importance would be the dismissal of a tradition of cynical realism that Van der Walt connects to thinkers ranging from the ancient sophists to the critical legal theorists.[21] Instead, what would be needed in today's pluriform societies is a theory of law and politics that recognises the value of ideals, but, at the same time, does not succumb to the temptation to insist that others should agree with those ideals.[22]

17 Van der Walt, *Law and Sacrifice*, 224. 'Friendship,' of course, should here be understood as 'political friendship' in the Aristotelian sense (*politikē philia*). See, e.g., Paul W. Ludwig, *Rediscovering Political Friendship: Aristotle's Theory and Modern Identity, Community, and Equality* (Cambridge: Cambridge University Press, 2020).

18 Cf., e.g., Josette Daemen, 'Freedom, Security, and the COVID-19 Pandemic,' *Critical Review of International Social and Political Philosophy* 25 (2022), pre-published online, see https://doi.org/10.1080/13698230.2022.2100961.

19 Van der Walt, *The Concept of Liberal Democratic Law*, 63.

20 Van der Walt, *The Concept of Liberal Democratic Law*, 226-227.

21 Van der Walt, *The Concept of Liberal Democratic Law*, 9-11; 29-32; 227-231.

22 Van der Walt, *The Concept of Liberal Democratic Law*, 4-5.

Just as Hart's great book to which its title obviously alludes, *The Concept of Liberal Democratic Law* was initially intended as a textbook for students. Van der Walt's original educational purposes may partly explain the book's unusual scope, covering some of the most important developments in the history of western legal thinking from classical antiquity up to the present day. However, it is certainly much more than just another textbook of legal philosophy. From beginning to end, the book develops an argument that clearly stands on its own, benefitting from the many insightful connections and important confrontations that Van der Walt succeeds in drawing between an enormously divergent set of ancient, medieval and modern authors. In opposition to Nasrudin's failed search for his missing key, there is, again, hardly a dark corner that Van der Walt leaves unexplored. Most notably, perhaps, his searching area also includes what is probably the darkest spot of all: the hidden beliefs and convictions behind prevailing theories of democracy and the rule of law themselves.[23]

4 Rawls, Habermas and the concept of liberal democratic law

Van der Walt's critique on Rawls and Habermas – the focal object of discussion of both our conference and this special issue – was developed in direct extension of *The Concept of Liberal Democratic Law*. In the preface to that book, Van der Walt explains why so little attention is paid to both Rawls and Habermas, while their theories on political liberalism and deliberative democracy are evidently highly relevant to the theme that the book develops.[24] In order to make up for that shortcoming, Van der Walt announces an article in which he will discuss the ideas of Rawls and Habermas from the perspective of his newly developed book. We could add, however, that his critique on Rawls and Habermas could just as well be taken as an extension of *Law and Sacrifice*, indicating how deeply ingrained in his legal-philosophical thinking his critical assessment of those two authors should be taken to be. But however all that may be: the editors of the *NJLP* are proud to be able to say that this article has now been printed in this special issue.

In the introduction to his article, Van der Walt refers to Hegel's famous statement regarding the need for philosophy. In an essay on Fichte and Schelling, Hegel writes as follows:

> Wenn die Macht der Vereinigung aus dem Leben der Menschen verschwindet und die Gegensätze […] Selbständigkeit gewinnen, entsteht das Bedürfnis der Philosophie.[25]

23 Such blindness has been analysed with remarkable force and beauty by Christopher Rocco, *Tragedy and Enlightenment* (Berkeley: University of California Press, 1997), 34-67, referring to the theme of blindness in Sophocles' *Oedipus the King*.

24 Van der Walt, *The Concept of Liberal Democratic Law*, xiii. In short: the inclusion of a due analysis of their respective thoughts would have made the book much too long.

25 Georg Friedrich Wilhelm Hegel, 'Differenz des Fichteschen und Schellingschen Systems der Philosophie,' in *Werke in zwanzig Bänden*, Band 2 (Frankfurt: Suhrkamp, 1970), 22.

Obviously reminiscent of a central theme from Plato's *Symposium*,[26] Hegel explains that statement by referring to a general sense of dividedness (*Entzweiung*) and raggedness (*Zerrissenheit*) that would be characteristic of the human condition and would stir the human mind to all kinds of unifying efforts, including the philosophical endeavour of harmonising only seemingly opposite values and concepts. Anyone who is familiar with either *The Concept of Liberal Democratic Law* or *Law and Sacrifice* will understand that Van der Walt's takes leave of such philosophical efforts in the strongest possible terms. Instead, the full acceptance of 'the dividedness of life' – with law and politics reflecting such dividedness – is central to his legal philosophical thinking.

As Van der Walt argues in his article, the theories of Rawls and Habermas are quite different in this regard. Turning his attention first to Rawls, Van der Walt explains that Rawls' theory of political liberalism could be seen as an attempt to bridge the gap between two aspirations. First, political liberalism recognises the liberal idea of society consisting of free and equal citizens who make their own private choices, adhering to a 'diversity of opposing and unreconcilable religious, philosophical and moral doctrines.'[27] Second, the Rawlsian theory of political liberalism also underlines the need for a 'well-ordered society' as a 'scheme of cooperation' under terms that are legitimate towards all members of society.[28] As Van der Walt explains, however, 'social cooperation and [independent] moral agency rarely sit at the same fire.'[29] Previous attempts to harmonise communal life and separate moral agency took their recourse to mysterious metaphysical concepts such as Hegelian *Sittlichkeit*. It is Rawls' explicit aim to steer clear of such metaphysical thinking.[30] But does he really succeed in doing so?

On Van der Walt's view, Rawls ultimately fails in that endeavour. For him, Rawls' 'political conception of the reasonable' carries far too much weight to rid his constellation of separate moral agency and social cooperation of its aporetic nature. In Rawls' theory of political liberalism, it would be supposed to 'achieve on its own strength everything that Hegel's concept of *Sittlichkeit* claimed to achieve,' thereby turning political liberalism into a 'comprehensive philosophy' of the kind that Rawls so explicitly intended to avoid.[31] Such a naïve confidence in the redeeming potential of a common 'reasonableness' would not be without risk. In legal and political matters of utmost controversy, an overly confident trust in the possibility of distinguishing between those who use 'reasonable' from those who propose

26 See, e.g., Charles Kahn, 'Plato's Theory of Desire,' *The Review of Metaphysics* 41 (1987): 77-103, explaining (most specifically at 93-95) that Aristophanes' speech on the human desire for 'wholeness' and the power of Eros in Plato's *Symposum* finally leads up to a philosophical desire that is aimed at 'the good' as a unified concept.

27 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 3-4.

28 Rawls, *Political Liberalism*, 35-40.

29 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 22.

30 John Rawls, 'Justice as Fairness: Political not Metaphysical,' *Philosophy & Public Affairs* 14 (1985): 223-251.

31 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25.

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'unreasonable' arguments may backfire on liberal democracy and the rule of law in serious ways. A more sustainable way out would be offered by the explicit recognition of the sacrifices of those who will have to live under the burden of legal judgements and political decisions that, from their point of view, are completely unjustifiable.

With regard to Habermas, Van der Walt draws our attention to similar problems. As Van der Walt has it, Habermas' belief in 'understanding-oriented language' (*verständigungsorientierte Sprache*) and deliberative communication that, under ideal circumstances, could ultimately deliver us the 'unforced force of the better argument' (*zwangloser Zwang des besseren Arguments*) should be dismissed as a postmetaphysical metaphysics that only obfuscates what is really going on in cases of serious legal and political conflict.[32] The same goes for Habermas' claims on the 'co-originality' (*Gleichursprünglichkeit*) of public and private autonomy and the intrinsic connection between democracy and popular sovereignty.[33] In their effort to resolve irresolvable tensions – or to bridge unbridgeable gaps, if you will – such notions are, on Van der Walt's view, nothing less metaphysical than Hegel's concept of *Sittlichkeit* or other such mysterious synthetic formulas. Nothing here remains, to be sure, of the fundamental dividedness (*Entzweiung*) and raggedness (*Zerrissenheit*) that – as Hegel once put it – so vehemently stirs the hearts and minds of philosophers.

According to Van der Walt, theories such as those of Rawls and Habermas are unfit to properly shape our liberal-democratic thinking in today's turbulent world. In his article, references abound to the deep social and political dividedness that has recently come to full light in the United States – a dividedness, to be sure, that has perhaps always been there, but has become particularly manifest after Trump's denial of the outcome of the 2020 presidential elections and the storming of the Capitol that followed on 6 January 2021. Additionally, frequent mention is made of the polarised legal and political debates on vaccination policies and other governmental measures against the spread of the coronavirus. These are all only rather arbitrary examples of the many legal and political issues that keep modern societies deeply divided – far deeper, or so it seems, than a need to remain within

32 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 41, with further references.
33 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 32.

the boundaries of 'overlapping consensus,' 'deliberative communication' or some other concept of self-proclaimed reasonableness could ever accommodate.[34]

In order to address the fragile state of liberal democracy and the rule of law more appropriately, Van der Walt's concept of liberal democratic law entails the explicit acknowledgement of the 'irreducible epistemic deficit that conditions all claims about proper communal and communicative relations and proper terms of cooperation.'[35] It is precisely the recognition of this epistemic deficit that renders it possible to cooperate with others in a deeply divided society. Think, for instance, of Sophocles' *Antigone*, dealt with in some detail in *The Concept of Liberal Democratic Law*.[36] The cooperation between Creon and Antigone breaks down because both protagonists insist on their own self-proclaimed reasonableness while dismissing the claims of the other as completely unreasonable. Any recourse to some concept of common reason that could help to solve their conflict is clearly to no avail here.[37] If we want to avoid their tragic fate, or so Van der Walt has it, we have little choice but to recognise and accept the losses and sacrifices that inevitably come with difficult compromises.

5 The responses

Van der Walt's analyses have been proven thought-provoking as illustrated well by the many comments and further reflections by his respondents. To begin with, Hans Lindahl's contribution focuses on Van der Walt's sceptical outlook on the ideal of common reason. In Lindahl's reading of Van der Walt's work, his analyses give expression to the notion of an 'enduring contingency,' in the twofold sense of an enduringly contingent legal and political arrangements and of contingency as what needs to be endured. Lindahl agrees with Van der Walt to the extent that the explicit acknowledgement of the precarity of any ideal of common reason facilitates a radical pluralism. In this regard, however, Van der Walt's analysis would not go far

34 At the conference in Utrecht on 23 September 2022, Van der Walt also mentioned the legal and political controversies that followed the announcement by the Dutch government of measures that should reduce the emission of nitrogen by stock breeding industries. At the time of the conference, farmers and their sympathisers throughout the Netherlands blocked motorways, dumped waste at central city squares and severely disrupted society also in other ways. According to Van der Walt, such conflicts centre around divergent ways of seeing and experiencing the world in ways that argumentative discussions could never appropriately address. On the Dutch nitrogen crisis and the farmer protests, see, e.g., Edwin Alblas, 'G. The Netherlands' (country report), *Yearbook of International Environmental Law* (2022), pre-published online https://doi.org/10.1093/yiel/yvac052; Claire Moses, 'Dairy Farmers in the Netherlands Are Up in Arms Over Emission Cuts,' *New York Times*, 20 August, 2022.

35 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 42.

36 Van der Walt, *The Concept of Liberal Democratic Law*, 60-64. See also Emilios Christodoulidis, 'Kosmos, Nomos, Physis and "The Concept of Liberal Democratic Law",' *Etica & Politica/Ethics & Politics* 23 (2021): 481-494.

37 Cf., e.g, Bonnie Honig, *Antigone, Interrupted* (Cambridge: Cambridge University Press, 2013); Costas Douzinas and Ronnie Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law* (New York/London: Harvester, 1994), 25-92 (Chapter 2 on 'Antigone's Dikē').

enough. What about those cases in which a certain minority group denies to be part of a greater political community in the first place? Think, for instance, of indigenous peoples who refuse to live under the sway of their colonisers. Should they simply endure the contingent legal and political order with which they find themselves confronted?

The response by Chiara Raucea touches on similar issues. Given that Van der Walt's concept of liberal democratic law is not to be grounded in any metaphysical substrate, but, instead, in nothing other than what Lindahl calls 'enduring contingency,' how, then, should we understand the first person plural – the 'we,' that is – of the members of a liberal democratic society that are supposed to live together?[38] Van der Walt's theory of liberal democratic law focuses primarily on the way in which liberal democratic societies could find a common way forward in spite of radical differences and fundamental disagreements, calling for a commitment to 'an ethics of civility' and to difficult compromises and inevitable sacrifices as the only way of keeping the members of a liberal democracy more or less together.[39] For Raucea, however, there is little in Van der Walt's theory that explains where such a commitment should come from in the first place. Nor does she deem such a commitment enough to find a real *common* forward. As a possible solution, she proposes the recognition of 'intersubjectively validated claims on how the life together of a particular community should be provisionally arranged.'

The discussion is then continued by Irena Rosenthal, who takes issue with two of Van der Walt's claims. First, she criticises his assertion that the concept of liberal democratic law should be distilled or uprooted from metaphysics. Instead, she contends that central liberal-democratic notions, such as justice, law and democracy, inevitably invoke metaphysical or ontological assumptions. No less than Rawls and Habermas, Van der Walt would thus suffer from a persistent blindness for the metaphysical underpinnings of his own theory. Instead of aiming for an impossible separation between liberal democracy and ontology, Rosenthal argues, the debate about liberal democracy should shift towards the question which ontology offers the preferred basis for contemporary liberal democratic societies. In this regard, she raises critical questions about Van der Walt's insistence on cooperation even under legal and political terms that one does not consider reasonable. Instead, she argues for an 'ethics of civility' that pays more attention to the importance of resistance against prevailing terms of cooperation by those who are structurally marginalised by those terms.

Van der Walt's analyses received further critique in the responses by Stefan Rummens and Ronald Tinnevelt. According to Rummens, Van der Walt's theory of liberal democratic law suffers from a 'fear of substance' that leaves it empty-handed while being confronted with political enemies who aim to subvert liberal democracy's core principles. Similar criticism is raised by Tinnevelt, who argues

38 Cf. Bert van Roermund, 'The Case for Embodied Democratic Law-Making,' *Etica & Politica/Ethics & Politics* 23 (2021): 509-520.

39 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25-26.

that Van der Walt's theory is mainly 'negative' in the sense that it criticises more substantive conceptions of law and democracy while offering no positive account of possible ways in which a liberal democratic ethos could be more appropriately defended against upcoming populism and illiberalism. For both Rummens and Tinnevelt, it is exactly the help of theorists such as Rawls and Habermas – on certain points so heavily criticised by Van der Walt – that could help liberal democratic societies forward in this regard. In order to corroborate that claim, Rummens and Tinnevelt (with the latter focusing especially on Habermas) offer readings of Rawls and Habermas that aim to show that Van der Walt's rendering of their respective theories is at points rather one-sided.

Van der Walt's critique on Rawls and Habermas is assessed much more favourably by Manon Westphal, who agrees that their respective theories expect too much of the law in terms of its capacity to embody terms of agreement that all citizens can consider as reasonable. As Westphal remarks, Van der Walt's concept of liberal democratic law resonates very well with theories of agonistic pluralism such as they have been developed by Chantal Mouffe, Bonnie Honig, William Connolly, James Tully and others. In her contribution, Westphal particularly concentrates on the agonistic theories of Chantal Mouffe and James Tully as valuable complements to Van der Walt's analyses. While Mouffe opts for a more confrontational conception of agonistic pluralism – stressing the importance of fierce debate – Tully's theory highlights the importance of cooperating with others without any ambition to overcome fundamental disagreements. In its openness to radical otherness, such conceptions of agonistic pluralism would have an important inclusive potential that Rawlsian and Habermasian accounts of politics are clearly lacking.

Finally, then, the response by Nikolas Vagdoutis draws our attention to the links between the ideas of Van der Walt and those of Kelsen. First of all, he discusses the obvious resemblance between Van der Walt's and Kelsen's accounts of a democratic pluralism, reminding us that both deny any homogeneous or unified concept of 'the people' as a constituent power in the strongest possible terms. The link between Van der Walt's 'distilled concept' and Kelsen's 'pure theory' of law would be more complicated. Obviously, both theories aim to abstract (or to distil, uproot or purify etc.) law from its deep entrenchment in an ancient metaphysics. Van der Walt's method of distillation, however, would finally yield an understanding of law that is much less formalistic than Kelsen's purified proceduralism, bringing Van der Walt's legal theory actually quite close to that of Hermann Heller in this regard. Given that Van der Walt's theory would be reminiscent of the latter's ideas on the *Sozialstaat*, Vagdoutis wonders why Van der Walt does not pay more attention to matters of political economy.

6 Concluding remarks

This special issue ends with an article in which Johan van der Walt constructively engages with the questions and arguments of his seven respondents. Of course, his newly developed theory could in no way be considered to provide any definitive

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answers to the problems that the fragile state of liberal democracy and the rule of law currently confront us with. Neither could his theory be expected to counter prevailing doctrines in ways that, in itself, are not also open to fundamental criticism and serious contestation. Like many other academic disciplines, law and philosophy will inevitably have to live with a plurality of mutually exclusive ways of thinking. And most fortunately so, in fact, because such a plurality ensures that inspiring and challenging intellectual conversations – such as we were lucky enough to enjoy them in Utrecht and here in this volume – will probably never end. But one thing seems beyond doubt: Johan van der Walt has significantly stimulated and enriched our legal and philosophical thinking.

ARTICLES

Rawls, Habermas and Liberal Democratic Law

Johan van der Walt

1 Introduction

The editors of the *Netherlands Journal for Legal Philosophy* have honoured me with the request to submit to this journal a discussion piece aimed at engendering a scholarly discussion of my book *The Concept of Liberal Democratic Law* (2020, hereafter *CLDL*). The theme I chose for purposes of complying with this request is expressly reflected in the title above. In what follows I will reflect on the work of Rawls and Habermas from the perspective of the main lines of thought developed in *CLDL*.

I already noted in the preface to *CLDL* that the omission of focused reflections on Rawls and Habermas in the book demands amendment. The need for such amendment was also stressed in sharp but fair terms in another recent discussion of my book hosted by the journal *Ethics & Politics*.[1] Prompted by the exceedingly generous and probing scrutiny of Frank Michelman in the same discussion, I may already have made some amends with regard to Rawls there,[2] while again not managing to do so with regard to Habermas. In what follows, I will revisit the thoughts on Rawls as prompted by Michelman and develop them further. The same lines of thought will then be extended into a reflection on Habermas' discourse-theoretical analysis of law.

The theoretical undertakings of both Rawls and Habermas pivot on an aspiration to explain (and surely to promote through explanation) the Enlightenment ideal of reason reflected in the idea of liberal democracy. The thoughts developed in *CLDL* pivot on the same aspiration. What obviously distinguishes the theoretical undertaking in *CLDL* from those of Habermas and Rawls, we shall see, is the greater emphasis in *CLDL* on the precariousness of this ideal of reason. As the preface to *CLDL* makes clear, the book was written in a context when the idea and ideal of liberal democracy were globally already obviously in trouble. The information that informed that preface has now been crowned with the events of 6 January 2021. The President of the United States had for two months been inciting his supporters not to accept the result of the 2020 presidential elections. Now he had gone further. He had effectively incited a significant mass of supporters to physically prevent the

1 Serdar Tekin, 'Between Modesty and Ambition: Remarks on The Concept of Liberal Democratic Law,' *Etica & Politica/Ethics & Politics* 23, no. 2 (2021): 459-465.

2 See Frank Michelman, 'Civility to Graciousness: Van der Walt and Rawls,' *Politica/Ethics & Politics* 23, no. 2 (2021): 495-508. My indebtedness in this article to Michelman's comments on *CLDL* will become abundantly clear below.

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certification of the election results by Congress, thereby staging an anti-democratic coup attempt – an attempt that is far from extinguished, as a most credible source makes clear[3] – in the heart of the world which was once broadly associated with 'the praised north-Atlantic development path of the constitutional democratic state'/'*der gepriesene nordatlantische Entwicklungspfad des demokratischen Rechtsstaates*' that Habermas invokes early in Faktizität und Geltung (hereafter *FG*).[4]

These are critically important facts to which the theory of liberal democracy must pay proper attention today. They confront one with the critical and elementary task to reflect carefully on the conditions that sustain the acceptance of the outcome of voting procedures that warrant no sane allegation of fraud. They demand that one takes stock of every significant factor that makes that acceptance more rather than less likely. This is the task with which *CLDL* engages, I argue in what follows, without claiming in the least that it does so exhaustively.

Section 2 of this article gives a short exposition of three of the main lines of thought developed in *CLDL*. Section 3 then moves on to an analysis of Rawls' theory of political liberalism from the perspective of the thoughts elaborated in section 2. Section 4 does the same with regard to Habermas' discourse-theoretical explanation of the legitimacy of modern law. Section 5 reflects the main lines of thought that emerge from sections 3 and 4 through the prism of the key elements of *CLDL* expounded in section 2. Section 6 concludes the article with a summary reflection on its essential points.

2 Key elements of the concept of liberal democratic law

The final chapter of *CLDL* first puts forward seven key elements of the concept of liberal democratic law, and then adds two more in the final section where it puts forward a definition of liberal democratic law. Of the nine elements thus highlighted, I will only address the following three in this article: (i) the extraction of law from life; (ii) the understanding of law as an articulation of the dividedness of life; and (iii) the need for poetic fictions that can compensate for the dividedness of life and the uprootedness of law from life.

(i) Extracting law from life

Liberal democratic law is not rooted in any metaphysical conception of 'life.' The concept of liberal democratic law is likewise an outcome of a theoretical extraction or 'distillation' of law from the metaphysics of life, a distillation that is reflected par excellence in the positivist legal theories of H.L.A. Hart and Hans Kelsen. These theories prevail on us not to think of law as an existential expression of the 'life' of

3 See Laurence Tribe, 'The risk of a coup in the next US election is greater now than it ever was under Trump,' *The Guardian*, 3 January 2022, https://www.theguardian.com/commentisfree/2022/jan/03/risk-us-coup-next-us-election-greater-than-under-trump.

4 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtstaats* (Frankfurt a.M: Suhrkamp, 1992), 16.

a people. They demand that one steers clear of all conceptions of the law in terms of the 'law of life' or *Lebensrecht*, as Carl Schmitt once put it.[5] This implies also steering clear of all invocations of the 'existential unity' of a people that founds the law on which Schmitt's *Verfassungslehre* pivots.[6] This understanding of law, argues *CLDL*, is not only manifest in fascistic formats of the kind that Schmitt contemplated, but also in the 'democratic' and even 'liberal democratic' versions of the 'law of life' contemplated by major legal theorists such as Hermann Heller, Rudolf Smend and Ronald Dworkin. A rigorous concept of liberal democratic law must steer clear of all of them.

(ii) Law as a reflection of the dividedness of life

The exigency to extract the concept of liberal democratic law from the metaphysics of life pivots on a regard for the dividedness of life that takes recourse to law. When life turns to law to resolve conflict, it evidently becomes manifest as divided life. Life may not always be divided (whether it is or not is a question we need not address here). But it is divided when it takes recourse to law. Metaphysical conceptions of law, to the contrary, have always – through a long history of metaphysics – presented or represented life as essentially whole and united. Hence the standard understanding of law and legal systems as an articulation of a concept of justice shared by *all* members of a legal community. In twentieth-century legal theory, this understanding of law is most notably reflected in the legal theory of Ronald Dworkin. However, one of its historically most striking articulations came to the fore in Hegel's insistence that not even the deviant figure of the criminal breaks out of this essential unity of law and justice. Hence the criminal's deep consent to his or her punishment, according to Hegel. Having momentarily fallen out of the unity of communal life reflected in a community's legal and ethical order by committing a crime, the criminal effectively wants to be punished for that crime in order to be reunited with society.[7]

In sharpest contrast to Hegel imaginable, both Hart and Kelsen stress the irreducible social divisions that compel one not to understand law as an expression of social unity, but the exact opposite of such unity. Hence Hart's insistence that 'the life of any society that lives by rules … is likely to consist in a tension between those who, on the one hand, accept and voluntary co-operate in maintaining the rules, … and those who … reject the rules and attend to them only … as a sign of possible punishment.'[8] Considered in Hart's salient terms, a society is always divided between those who have an 'internal' and those who have an 'external' perspective on whatever rule demands positive statement and enforcement. Kelsen basically articulated the same idea when he argued that liberal democracy does not

5 See Carl Schmitt, *Positionen und Begriffe: Im Kampf mit Weimar – Genf – Versailles* (Berlin: Duncker & Humblot), 229: *Alles Recht stammt aus dem Lebensrecht des Volkes* (all law derives from the law of life of the people).

6 Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 2003 [1928]), 3-4.

7 Georg Friedrich Wilhelm Hegel, *Grundlinien der Philosophie des Rechts*, in *Werke in zwanzig Bänden* 7, G.W.F. Hegel (Frankfurt a.M.: Suhrkamp, 1970), 190-192 (§ 100).

8 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 88.

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turn on a majority principle, but a majority-minority principle.[9] Liberal democratic law is, in other words, always a reflection of a division between a majority and a minority. It is the expression of the endeavour to manage that division.

Quite perplexingly, however, the same Hegel who stressed the essential unity of the communal life that finds expression in the law and ethics of a society also stressed the divided and torn condition of modern life. It was the task of philosophy, he averred, to overcome this dividedness of modern life – '*[w]enn die Macht der Vereinigung … aus dem Leben der Menschen verschwindet … entsteht das Bedürfnis der Philosophie*.'[10] It will never be conclusively clear, contends *CLDL*, whether Hegel considered this philosophical 'overcoming' of the dividedness of life in terms of a dialectic healing process that effectively resolves this dividedness, or whether he considered this philosophical 'overcoming' in terms of a Stoic acceptance of these divisions. *CLDL* cites striking passages from his work that render both these interpretations plausible. The famous reference in the preface to the *Grundlinien der Philosophie des Rechts* to philosophy that comes to paint its grey in grey when life has grown old and incapable of rejuvenating itself evidently testifies to the plausibility of the latter interpretation.[11] The passage in which the same work describes punishment as a restoration of communal unity would seem to point us in the direction of the former. If Hegel's thought has anything pertinent to contribute to contemporary liberal democratic legal theory, argues *CLDL*, that contribution would consist in the passages of his work that support the latter interpretation, not the former.

(iii) The definitive need for poetic fictions that may compensate for the dividedness of life manifest in liberal democratic law

CLDL accepts in Stoic fashion, as Hart and Kelsen evidently did and Hegel sometimes appeared to do, that liberal democratic law is a reflection of the dividedness of life and thus of the uprootedness of law from any metaphysical conception of unitary or reconciled life. This acceptance is accompanied by an acute sense of the existential deficit with which liberal democratic legal systems must cope, given that it can no longer claim, as Schmitt still believed one could, that law is rooted in the existential unity of the people. This means that liberal democratic law can also not be understood as a heroic-poetic expression of life, as Schmitt can also be argued to have done. *CLDL* therefore also stresses this non-poetic and unheroic character of modern law. It does so with reference to Hegel's insistence that there is no place left for heroes in the modern state.[12] The acceptance of this existential deficit and lack of heroic expression in liberal democratic law, argues *CLDL*, demands compensation. It demands sustenance of poetic fictions capable of

9 Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verlag, 1981[1929]), 53, 57, 58.

10 See G.W.F. Hegel, 'Differenz des Fichteschen und Schellingschen Systems der Philosophie,' in *Werke in zwanzig Bänden* 2 (Frankfurt a.M.: Suhrkamp, 1970), 22.

11 See Hegel, *Grundlinien der Philosophie des Rechts*, 28.

12 See Hegel, *Grundlinien der Philosophie des Rechts*, 180 (§ 93 Zusatz), Johan van der Walt, *The Concept of Liberal Democratic Law* (London: Routledge, 2020), 140.

shouldering the existential burden – the need for heroic expression – that modern law can no longer take on its own shoulders.

It is with regard to these three considerations that I will reflect on the resonances and dissonances between the concept of law developed in *CLDL*, and the concepts of law articulated in the work of Rawls and Habermas in the next two sections of this article.

3 Rawls and liberal democratic law

It is important to consider Rawls' philosophical method before we go into the key features of the concept of political liberalism developed in his work. Elements of his method – notably his description of the 'original position' and the 'veil of ignorance' drawn over those who find themselves in the original position – have been misunderstood by many of his readers as steps in a transcendental anthropological argument about principles of justice that all human beings share. Rawls expressly endeavoured to dispel this misunderstanding in two key essays respectively published in 1980 and 1985. In the first of these essays, he emphasised the 'constructive' nature of his philosophical inquiry into the principles of justice. The theory of justice as fairness, he argued, was not concerned with transcendent principles of justice that all societies would necessarily arrive at if they would think correctly about the nature of human existence. Of concern in his theory, stressed Rawls, was the concept of justice endorsed by persons belonging to historical traditions of liberal democracy.[13]

In the second essay, Rawls underlined the political nature of this concept of justice. It is the political conception of justice endorsed by a specific *political* tradition, he stressed. The invocations of the 'original position' and 'veil of ignorance' were accordingly nothing but presentational devices with which he sought to show how people living in liberal democratic traditions think about justice when they identify themselves politically with these traditions.[14] Moreover, Rawls stressed from the beginning that this initial construction of the elementary principles of justice would have to be tested on an on-going basis with regard to further developments of the political tradition from which they derive if they were to remain accurate reflections of this tradition. He referred in this regard to a 'method of reflective equilibrium.'[15]

The arguments that follow basically take Rawls at his word in a way that Habermas, surprisingly, did not quite do. Much of Habermas' critique of Rawls stems from a

13 John Rawls, 'Kantian Constructivism in Moral Theory,' *The Journal of Philosophy*, 77, no. 9 (1980): 515-572.

14 John Rawls, 'Justice as Fairness: Political not Metaphysical,' *Philosophy & Public Affairs*, 14, no. 3 (1985): 223-251. See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 5, 122.

15 The historicity or 'non-foundational' status of the method of 'reflective equilibrium' comes even more strongly to the fore in Rawls' later works. See especially Rawls, *Justice as Fairness*, 31.

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reading of his work as a transcendental philosophical statement that is not 'democratically procedural' enough and is therefore bound to be surprised by historical developments.[16] The arguments that follow, on the contrary, accept that Rawls endeavoured to present his theory of justice as a non-metaphysical reflective 'hermeneutics' on a historical tradition, namely the tradition of Western democracy. The critique of this endeavour that will nevertheless come to the fore concerns a very different point, comparable perhaps to the one that Hans Kelsen once made with reference to Savigny and the Historical School in 19th century German legal science. According to Kelsen, the Historical School's invocation of a *Volksgeist* does not represent a break with the Natural Law tradition, it just constitutes another version of it. It also invokes essential features or principles with which the law must comply, it just finds these principles in the history and not in the nature of a people.[17]

The theoretical undertakings of Savigny and the Historical School in nineteenth century German legal science and that of Rawls are politically worlds apart and no one with elementary knowledge of either will suggest otherwise. The former was brazenly nationalistic and very conservatively so.[18] The latter is not nationalistic at all, and as liberal as one might imagine. The question is, however, whether they are also methodologically as far apart as they evidently are politically. A hermeneutic reflection on the essential conceptions of justice historically endorsed in a political tradition is not *as such* less metaphysical than universalist conceptions of natural law. Its lesser – temporally, regionally and culturally determined – 'universalism' does not necessarily render it less metaphysical. It could just be giving a historical turn to metaphysical assumptions that deny their historicity – their fundamental exposure to a radical temporality that ultimately warrants no transcendent conception of anything – in a different way. This different denial of historicity could take the form of historically articulated conceptions of justice in a political tradition that fail to appreciate the always precarious ethical performance that effectively sustains them on a day-to-day basis. The questions that will be asked in what follows will concern the extent to which this different denial of historicity may be at work in Rawls' theory of justice and liberal principle of legitimation (hereafter LPL). This is *the key question* that we will ask in response to his work.

Rawls' concept of political liberalism pivots on two fundamental ideas that appear to burden all legitimacy concerns in political-liberal societies with a deep and seemingly irresolvable tension. It pivots, first, on the idea of the 'severalty of persons with a higher-order interest in exercising their moral agency,' as Michelman puts it. The idea of 'moral agency' necessarily implies the separateness and independence of this agency. It entails the freedom and capacity to think for

16 Jürgen Habermas, 'Reconciliation through the Public use of Reason: Remarks on John Rawls's Political Liberalism,' *The Journal of Philosophy*, 92, no. 3 (1995): 118.

17 Hans Kelsen, *Reine Rechtslehre* (Tübingen: Mohr Siebeck/Vienna: Österreich Verlag, 2017[1960]), 408.

18 See Van der Walt, *The Concept of Liberal Democratic Law*, 135-159.

oneself, and not as others tell one to think.[19] Hence the tension between this first and the second idea. The second idea demands that one considers a political-liberal society 'a scheme of cooperation' between all the separate moral agents that constitute the membership of that society. This scheme of cooperation, however, depending as it does on the cooperation between moral agents who think for themselves, separately and independently of one another, must conform to all the different moral convictions at which these moral agents are bound to arrive. The cooperation of concern here, must be informed by terms that all these moral agents can accept separately and independently.[20]

The essential problem that Rawls' concept of political liberalism faces from the bottom up should be clear: social cooperation and moral agency rarely sit at the same fire. One would only be able to contend that they do, were one to assume that separate moral agency rarely leads to irreconcilable ideas about proper cooperation. Were one to make this assumption, however, one would either be retreating from the first idea of *separate* moral agency, or one would have to believe that separate moral agents always or often enough, quite astoundingly, arrive at the same convictions regarding proper terms of social cooperation. A quick historical survey shows one the formidable philosophical stakes involved in this problem. Aristotle believed he still lived in an age in which *prohairesis* (personal moral commitment) does not ruin public virtue (*aretê*), but in fact consolidates it.[21] Among his epochal modern interlocutors, Hegel was surely the most sympathetic to Aristotle's communal ethics. But Hegel realised very lucidly that the ancient conception of ethics was only possible because of the way it basically lacked the modern idea of separate moral agency – '*[i]n den Staaten des klassischen Altertums findet sich allerdings die Allgemeinheit vor, aber die Partikularität [subjektive Zweck] war noch nicht losgebunden und freigelassen und zur Allgemeinheit, d.h. zur allgemeinen Zweck des Ganzen zurückgeführt*.'[22] Aristotelian ethical commitment and modern moral agency are therefore two very different notions. Hegel made it abundantly clear that the latter is a notion that was essentially absent from ancient societies. This insight, however, did not discourage him from the unique philosophical ambition to stage a grand metaphysical reconciliation between these two very different ideas. This is the unprecedented feat that Hegel's concept of *Sittlichkeit* purported to pull off: the embrace of separate moral agency by a communal ethics, without the latter ruining the former, or vice versa.

Metaphysical solutions such as the one proposed by Hegel – adorned as it is with the evident trappings of the miraculous that adorn all metaphysics – is precisely that to which Rawls claims not to subscribe. Solutions like these belong to the

19 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 13-14, 18-19, Michelman, 'Civility to Graciousness,' 498.

20 Rawls, *Political Liberalism*, 13-14, 18-19, Michelman, 'Civility to Graciousness,' 498.

21 For instances of Aristotle's unworried coupling of *prohairesis* and *aretê*, see *Nicomachean Ethics* 6.2.2 (1139a23-26)1 and *Rhetoric* 1.9.32 (1367b32-33). For an instructive discussion of the meaning of *prohairesis*, see Charles Chamberlain, 'The meaning of *Prohairesis* in Aristotle's Ethics,' *Transactions of the American Philological Association* 114 (1984): 147-157.

22 Hegel, *Grundlinien der Philosophie des Rechts*, 407 (§ 260). See also § 261 and § 261 *Zusatz*.

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domain of comprehensive philosophies in which his freestanding conception of political justice does not take part. According to him, Habermas' discourse-theoretical analysis of modern law is evidently yet another of these comprehensive philosophies. He does not hesitate to associate Habermas' endeavour expressly with Hegel's logic or onto-logic, nor does he shy away from noting its somewhat miraculous character (in Habermas' discourse theoretical understanding of the world, he notes, 'harmony and balance reign and both [public and private autonomy] are fully achieved').[23] We shall examine the accuracy of this assessment of Habermas' theoretical position closely in section 4. Let us first examine Rawls' own position more closely. To what extent does he himself really steer clear of the domain of comprehensive philosophies, as he claims to do?

Rawls finds the touchstone for the freestanding character of LPL in the way it promises to deal with governmental coercion. The two key ideas on which political liberalism turns – separate moral agency and social cooperation – end up in serious tension with one another whenever political decisions lead to the coercion of some moral agents by others, as happens constantly in liberal democratic societies characterised by 'reasonable pluralism.' 'Reasonable pluralism' is the term with which Rawls describes societies composed of moral agents who end up differing with one another with regard to the appropriateness of governmental policies or action, without anyone of these moral agents exercising his or her moral agency unreasonably. This is *the* problem of political liberalism according to Rawls,[24] and the dilemma with which it confronts LPL is abundantly clear: LPL demands that governmental powers can only be exercised in ways that *all* the moral agents making up a political-liberal society can endorse as reasonable and rational, notwithstanding the fundamental moral dissent that conditions their very sense of being coerced.[25]

Rawls commences to work his way through this problem by invoking the idea of a 'justification-worthy constitution.' The first step in the institutional implementation of LPL consists in assessing all serious cases of moral dissent regarding appropriate governmental policy in terms of the positive principles of cooperation entrenched in a 'justification-worthy' constitution. The justification-worthy constitution demanded by LPL contains 'a ledger of guaranteed basic liberties' that complies with a Goldilocks demand to be neither too thin, nor too thick, as Michelman puts it. Both the ledger as a whole and the individual basic liberties that it contains must be 'thin enough' to allow the separate and several moral agents invoked above to rely on their own moral agency to decide matters of utmost moral importance to them. They must nevertheless also be 'thick enough' to proscribe governmental

23 Rawls, *Political Liberalism*, 378-379, 382, 411.

24 Rawls, *Political Liberalism*, xx. See also Michelman, 'Civility to Graciousness,' 499. The systematic presentation of the key elements of Rawls' theory of LPL in what follows rely point for point on Michelman's presentation of these elements in 'Civility to Graciousness.' Some of the terms used in this presentation – notably 'justification-worthy constitution' and 'authorship of the laws by their addressees' are also Michelman's rather than Rawls.'

25 Rawls, *Political Liberalism*, 13-14, 18-19, 303, Rawls, *Justice as Fairness*, 18-19.

exercises of moral agency which some moral agents consider irreconcilable with their own moral agency, and to prescribe governmental exercises of moral agency which all agents consider indispensable for their moral agency.[26]

The aporetic nature of this constellation of social cooperation and moral agency cannot be sidestepped. Coercive governmental action regularly demands that some moral agents take leave of their moral convictions. Crucially at stake here will therefore be a constant deliberation whether the respective levels of governmentally-granted 'moral fidelity' and governmentally-imposed 'moral infidelity' are assessed in ways that sustain enduring social cooperation. This deliberation will evidently be a highly complex and precarious practice and it would need to meet expectations of adequate consistency. Inadequate consistency is bound to burden willingness to cooperate disastrously. Hence the institution of a forum in political-liberal societies – mostly a high court – that can be trusted to perform the required resolutions consistently enough to encourage instead of discourage general willingness to cooperate. The officials who staff the forum – usually judges – are well-recognised and respected as reliable experts (constitutional experts) regarding all applicable principles of cooperation. That is why their assessments of the implications of the applicable trust-worthy constitution can likewise be considered trust-worthy, notwithstanding the fact that these experts are themselves also 'several and separate' moral agents subject to the same contradictory imperatives of moral faithfulness and social cooperation.[27]

According to Rawls, general perceptions of sufficiently consistent and therefore adequately cooperation-sustaining deliberation of proper terms of cooperation, as described above, will only prevail as long as a society commits to the following four 'motivational ideas':

i It must endorse a political conception of the reasonable.[28]
ii It must make an allowance for burdens of judgement.[29]
iii It must be committed to an ideal of liberal toleration that is coupled to the idea of the 'at-least reasonable' or 'at least not unreasonable.'[30]
iv It must generally heed a call to civility.[31]

The political conception of the reasonable invoked under (i) concerns a distillation of 'basic ideas implicit in the public culture of a democratic society.' These ideas correspond with the essential elements of LPL already pointed out above: severalty of persons, separate moral agency, society as a scheme of cooperation, governmental coercion acceptable by everyone involved as reasonable and rational, a justification-worthy constitution containing a ledger of basic liberties the demands of which are neither too thick nor too thin (demanding too much social cooperation and too little moral separateness, or vice versa). The only other element that Rawls

26 Rawls, *Political Liberalism*, 232-233; Michelman 'Civility to Graciousness,' 499-500.
27 Rawls, *Political Liberalism*, 233; Michelman, 'Civility to Graciousness,' 499.
28 Rawls, *Political Liberalism*, 43; Michelman, 'Civility to Graciousness,' 502.
29 Rawls, *Political Liberalism*, 54; Michelman, 'Civility to Graciousness,' 504.
30 Rawls, *Political Liberalism*, 60, 253; Michelman, 'Civility to Graciousness,' 505.
31 Rawls, *Political Liberalism*, 217, 226, 236, 253; Michelman, 'Civility to Graciousness,' 502.

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also introduces at this point concerns the idea of 'authorship of the laws by their addressees.' It should be clear, however, that none of the elements of the political conception of the reasonable listed here either alleviate or confront the aporetic nature of LPL that we have highlighted above. They basically just restate it. One may therefore be pardoned for beginning to feel a nagging sense, at this point of the argument, that Rawls' 'political conception of the reasonable' carries too much weight. It aims to achieve on its own strength everything that Hegel's *Sittlichkeit* claimed to achieve, thereby turning LPL into a comprehensive philosophy of the kind that Rawls undertook to avoid. The 'public culture of a democratic society,' as described here, appears to reflect a neat vision of the world that explains the essential *logic* or *onto-logic* at work in this 'public culture.'

If one would take the picture at this point of Rawls' argument, the portrait of LPL that would emerge, based as it is on a 'public culture of democracy,' would resemble the theoretical position that Kelsen discerned in the thinking of Savigny and the Historical School. This, however, would be a picture prematurely taken, because there are three more elements that Rawls inserts into the composition of LPL that he wants us to behold. Two of them make a strikingly different picture of LPL come to the fore. The third blurs this different or other portrait of LPL again and makes it come across as not all that different after all, from the historical essentialism entertained by Savigny and the Historical School.

The two elements of Rawls' composition of LPL that turn it into something very different from a comprehensive view of the logic intrinsic to the 'public culture of democracy' concern the second and fourth motivational idea listed above: *making allowances for burdens of judgement* and *generally heeding the call for civility*. Both these elements entail a crucial performativity that would have no place in the composition of LPL if the logic of LPL were indeed as complete as the description of 'a public culture of democracy' has thus far portrayed it. When logic or onto-logic puts everything in place that needs to be in place, nothing remains *to be done*. But Rawls' invocation of the need to make allowances for burdens of judgement and to generally heed a call to civility makes it clear that much *remains to be done* as far as LPL is concerned. The introduction of the need to make allowances for burdens of judgement and to generally heed a call of civility into his LPL scheme reflects a clear recognition that the logical or onto-logical features of the scheme thus far highlighted does not yet render it functional. To the contrary, it makes the whole scheme come to pivot on an ethics of civility.

Stressing this ethics of civility as the heart of Rawls' LPL scheme is no reason for underestimating the importance of the institutional or onto-institutional logic or logistics of the LPL scheme. A constitution that is more rather than less respect-worthy, offers more rather than less protection of fundamental rights, is interpreted and enforced by a court or similar forum with a better rather than worse reputation of consistency and integrity (regarding trade-offs between moral autonomy and social cooperation), which generally sustains a mutually-respectful relation with a well-functioning parliamentary legislator, etc., is very likely going to augment instead of diminish the chances of an ethics of civility and an

appreciation of burdens of judgement among the people it serves. In the final analysis, however, the absence or presence of an ethics of civility duly informed by an appreciation of burdens of judgement will always be *the* critical factor, the factor that *ultimately* determines the sustainability of an LPL scheme. LPL schemes do not continue to function mechanically after a once-off installation. They are held in place by the commitment to cooperate between a critical number of citizens and residents. This commitment, we can learn from Rawls, finds it most critical challenge in the general or constant willingness to heed the call to civility, and to appreciate and live with the burdens of judgement that inform deep social differences and divisions. The events of 6 January 2021 are as stark a reminder of this elementary reality as one can imagine. Accepting the results of standard voting procedures that did not turn out in one's favour is probably one of *the* key testing grounds for the civility that ultimately sustains all LPL schemes imaginable. The people of the United States, and political liberals elsewhere in the world, have been sent a disturbing reminder that this civility can never be taken for granted.

We return to reflect more extensively on the events of 6 January towards the end of this article. However, a full appreciation of the critical sustaining role of consistent civility and sincere appreciations of burdens of judgement in any LPL scheme worthy of the word demands that we pause to also reflect incisively on the third motivational idea in Rawls' LPL scheme: commitment to an ideal of liberal toleration that is coupled to the idea of the 'at-least reasonable.' A problem raises its head here. Anything that strikes one as 'at least reasonable' or 'reasonable enough' can hardly be expected to exact a demanding exercise of 'liberal tolerance,' if 'liberal tolerance' is not to be reduced to something like average resilience in the face of quotidian adversity. 'Liberal tolerance' does no significant work if it is only called upon to tolerate that which is 'still tolerable.' Toleration of the 'still tolerable' is surely written all over the expression 'at least reasonable' or 'reasonable enough.' Again, Rawls' invocation of a call to civility and an appreciation of burdens of judgement suggest there is a lot to do and a lot of doing in LPL. The idea of the 'reasonable enough' suggests there is not so much to do after all.

It is important to stress this point for purposes of ridding Rawls' LPL scheme of a 'weak moment,' a moment in which he appears to shy away or retreat from the truly profound and exacting insights that the 'call to civility' and 'appreciation of burdens of judgement' introduce into his LPL scheme. This weak moment in Rawls' LPL scheme evidently tends to shift the respective weights carried in the relation between the onto-institutional 'logic' or 'logistics' of the LPL scheme and the ethics of civility pointed out above. It tends to shift most of the weight away from the latter and onto the former. The more those served by an LPL scheme are told that they only need to tolerate that which is still reasonable enough to tolerate, the more are they effectively instructed that the logic or logistics of the LPL scheme rolls largely on its own steam. It effectively keeps us in the zone of the tolerable. It does not exact that much of an ethical commitment. Again, the events of 6 January have sent political liberals a disturbing reminder that this is not the case and has

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probably never been the case in the United States. And who will realistically suggest that it has ever been the case anywhere else?

It is also important to note, moreover, that the notion of the 'at least reasonable' is devoid of any pertinent substance in the context that is proposed. A quick look at the only scene in Rawls' LPL scheme in which one may be tempted to raise it as a significant term of engagement makes this abundantly clear: someone raises a constitutional complaint that some or other governmental policy imposes terms of social cooperation that interfere unduly with his or her separate moral agency. Let us say the Government introduces a scheme of compulsory COVID-19 vaccination and the plaintiff is a committed anti-vaxxer. The forum called to decide the matter faces two options: 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.[32] 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.' Accepting the claim of the other as 'reasonable enough' would imply an admission that one's own claim is 'not reasonable enough.' There is no third way out. What would remain of the real sting of 'separate moral agency' and the 'severalty of persons' in Rawls' or any other LPL scheme if it were to endorse this implication?

There is no third way out of this dilemma. But there is a third way into it, a way of staying in it and living with it. This is the exactly what the insertion of a call to civility and appreciation of burdens of judgement into Rawls' LPL scheme offers one, provided one squares up to this insertion, and does not shy away from it. The nuclear essence of that which is as stake when one heeds a call to civility and appreciates burdens of judgement reveals itself when one accepts 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.' Once one grasps and accepts this nuclear civility at work in the heart and gut of Rawls' LPL scheme, one can also take leave of two other weak moments in that scheme that accompanies the notion of the 'at-least reasonable' or the 'reasonable enough.' These other two weak moments march under the banner of 'central ranges

32 As the United States Supreme Court has just done in *National Federation of Business/Ohio v. Department of Labor, Occupational Safety and Health Administration, et al* (595 US 2022). I am grateful to Frank Michelman for cautioning me to consider whether my explication of the vaxxer/anti-vaxxer case above does not present the stand-off between the two parties in terms of a logical contradiction (i.e., if the court selects the position of the one party as the 'reasonable' or 'most reasonable' stance, it is, logically speaking, rejecting the other party's position as 'unreasonable.' I fear it does appear to do that, and to the extent that it does, that is clearly a mistake. In other words, I will have to rephrase this point (nevertheless only slightly, I believe) in future and have already done so in my 'Reply to Critics' in this volume. I have not done so here because I considered it fairer to my interlocutors in this volume to just leave it as it is, and indeed fairer to Stefan Rummens. His engagement with my vaxxer/anti-vaxxer test case does not make this quite clear, but if this is what he ultimately finds bothering in it, I must concede that he has a point.

of agreement'[33] and 'overlapping consensus not based on compromise.'[34] Once it has become clear that the idea of the 'at-least reasonable' does not hold up to close scrutiny, the ideas of 'central ranges of agreement' and 'overlapping consensus' evidently cannot be expected to do so either. The latter two ideas pivot on the former. If the first falls the other two also fall.

Ridding Rawls' LPL scheme of these three weak moments need not amount to removing them entirely from the LPL scheme. The same caveat already articulated above once again applies here. All three these ideas can be understood to reflect the underlying assumptions of institutional achievements that raise instead of lower the prospects of the ethics of civility on which these institutions depend in the final analysis. In other words, one can retain the ideas of central ranges of agreement and an overlapping consensus as working assumptions – but no more than working assumptions – regarding stabilised and institutionalised political and legal procedures (describable as *presupposed* pockets of consensus à la Kelsen) without which no society can consider itself well-ordered, and without which the ethics of the political will undoubtedly be unduly overburdened, and most likely disastrously so. One should nevertheless not invoke them as established goods that either conclusively or significantly displace the on-going ethics that sustain them. Put in terms that Rawls used in this regard, they do not replace the historical *modi vivendi* on which all well-ordered societies pivot with something categorically more stable (let alone more stable for the 'right reasons').[35] They continue to depend on historical *modi vivendi* that remain fundamentally precarious, notwithstanding their contribution towards rendering these *modi vivendi* more rather than less stable.

The reading of Rawls offered above endeavours to shift the weight carried by his LPL scheme squarely onto the shoulders of the ethics that sustains this scheme in the final analysis. Any reading of Rawls that would do the opposite, that is, shift the critical achievement of his LPL scheme away from the ethics of civility back to the onto-institutional logic of the scheme, would thereby effectively be portraying the LPL scheme as the essential conceptual framework of a relatively established *form* of liberal political life. In other words, it would effectively be portraying Rawls' LPL scheme as a liberal version of the very conservative historical metaphysics that Savigny once articulated. Were one to accept this portrayal, one would have to conclude that Rawls' understanding of LPL ultimately falls back into the bubbling cauldron of the ancient metaphysics of life from which *CLDL* endeavoured to distil liberal democratic law. One would have to conclude that Rawls, notwithstanding inspiring signals to the contrary, also returns to the ancient link between law and life that has always been a standard feature of Western metaphysics. The more one can bring oneself to ignore the 'weak moments' in his LPL scheme in which ethics gives way to logic, the more one can conclude that Rawls offers one, alongside

33 Rawls, *Political Liberalism*, 156, 167.
34 Rawls, *Political Liberalism*, 170-172.
35 Rawls, *Political Liberalism*, xlii, 388, n. 21, 392.

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H.L.A. Hart and Hans Kelsen, a theory liberal political legitimacy that severs the ancient metaphysical link between law and life.

4 Habermas and liberal democratic law

Habermas' discourse theoretical analysis of both communicative action in general and of law in particular turns on two key terms: facticity and validity, *Faktizität* and *Geltung*. In what follows, we shall first take a brief look at his general theory of communicative action and then turn to a more extensive engagement with his discourse theoretical analysis of modern law. It is nevertheless important to note from the very beginning the close connection that Habermas discerns between these two fields of inquiry. As he puts it, the first two chapters of *FG* endeavour to explain why the general theory of communicative action awards a central place – *einen zentralen Stellenwert* – to law, and why it furnishes, in turn, a discourse theoretical understanding of law with an appropriate context, 'einen geeigneten Kontext.'[36]

Central to Habermas' discourse theoretical understanding of communicative action, as expounded in *FG*, is a conception of the 'linguistic turn' that is ultimately remarkably different from the understanding of this term that one usually associates with 'postmodern' social and cultural critiques, critiques that stress cultural and social specificities that resist translation and consequently give rise to hermeneutic and communication deficits, all of which invariably lead to 'blindly' agonistic social and intercultural relationships.[37] This 'postmodern' version of the linguistic turn features only for a brief moment in Habermas' theory of communicative action before it gets transformed into a rather typical 'modern' concern with universal meaning.

Habermas' epistemological narrative begins with the demise of Kantian and Hegelian idealism and the rise of empiricist theories of knowledge in the course of the nineteenth century. These empiricist theories of knowledge commenced to explain all elements of meaning not directly explicable with reference to empirical observation – all general concepts, in other words – in terms of psychological processes of representation. It is against this rise of psychologism in the theory of language and meaning that philosophers like Peirce, Frege, Russel, Moore and Husserl reacted by stressing the ideal content of concepts that transcends the psychological processing of perceptions by individual minds. Frege is the first key figure whom Habermas considers before turning his attention to Peirce. Frege insisted that a linguistic proposition regarding factual reality is not an expression of some or other individual representation of that reality, but a statement with an ideal meaning that everyone involved in that linguistic exchange understands in

36 Habermas, *Faktizität und Geltung*, 21.

37 See Allan Janik & Stephen Toulmin, *Wittgenstein's Vienna* (Chicago: Ivan R. Dee, 1996) for a profound illumination of the historical roots of this 'postmodern' understanding of the linguistic turn.

the same way. This insistence eventually paved the way to an understanding of ideal meaning as a product of shared linguistic practices and rules.[38]

This breakthrough, however, only constituted the first significant development as far as the 'linguistic turn' is concerned. The insight that the ideal meaning of phrases (meaning that everyone in a linguistic community more or less understands in the same way) is a product of linguistic practices and rules (which became the field of study of general semiotics) does not yet suffice to explain the truth content – or lack of it – of linguistic statements. According to Habermas it was Peirce who made the essential breakthrough with regard to this further element of communicative action. Someone who makes a linguistic statement, argued Peirce, not only partakes in the general rules of language (semiotics) that render common meaning possible. The person who speaks takes a performative stance vis-à-vis the addressees of his or her communication that invites them to affirm or deny the veracity of her statements. This invitation always takes place in a specific linguistic community and therefore only allows for assessments of validity within specific contexts of cultural knowledge and understanding – *factual* standards of argumentation, in other words – that effectively reduce the truth content of a statement to a validity that is conditioned by inevitable elements of sociocultural facticity. As Habermas puts it, the universal validity or *Gültigkeit* of the statement thus always gets reduced to that which is valid within a specific linguistic community. *Gültigkeit* thus always gets reduced to *gelten* (that which is valid for a specific individual or group) in concrete instances of communication.[39] This is the brief moment in which Habermas' conception of the 'linguistic turn' is more or less on the same page as 'postmodern' understandings of this term.

The performative stance of a speaker can nevertheless not be reduced to the elements of facticity with which concrete speech always compromises, argued Peirce. The speaker always assumes a context of absolute validation when he/she speaks seriously. She is not claiming that her statement is only valid 'for us, now' and not 'for everyone, always.' She invokes a context of complete, absolute or final validation, notwithstanding the fact that this context of final validation never materialises and therefore remains a counter-factual ideal.[40] The key point that Habermas makes in this regard is this: the use of language that is aimed at mutual understanding – *verständigungsorientierter Sprachgebrauch*[41] – is always conditioned by the counterfactual assumption of universal validation. Hence the irreducible exposure of factual instances of validation to learning processes – *Lernprozesse* – that effectively resist and transform the constraints that the facticity of validation imposes on existing knowledge.[42]

38 Habermas, *Faktizität und Geltung*, 25-29.
39 Habermas, *Faktizität und Geltung*, 29.
40 Habermas, *Faktizität und Geltung*, 30-31.
41 Habermas, *Faktizität und Geltung*, 33-34.
42 Habermas, *Faktizität und Geltung*, 31.

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This brief exposition of Habermas' discourse theoretical understanding of communicative action brings together the key lines of thought that inform his discourse theoretical analysis of modern law. Central to this analysis is a thesis about the way in which the two key terms at stake in his discourse theory of law, facticity and validity, actually only became two separate terms under conditions of secularisation (predominantly associated with modernity but first signs of which can be traced to Roman law[43]) that disrupt the immediate validity of factual social arrangements in societies still fully in the grip of archaic religious authority. Secularising disruption of religious authority exposes factual social arrangements to a *questioning* of validity that simply does not occur as long as religious authority prevails. Under the latter conditions, facticity enjoys an immediate and unquestioned claim to validity that basically guarantees social cohesion and integration without much further ado. Dissent, disagreement, division and difference simply do not constitute real or significant concerns under these circumstances. They only become significant concerns under circumstances of secularisation that disrupt and terminate the immediate validity of the factual. Hence the rise of serious social integration concerns in societies that embark on routes of secularisation. Habermas' discourse theory of modern law aims to show how modern legal systems managed to sustain adequate social integration (adequate coordination of conduct) under circumstances where factual social relations could no longer claim the immediate and unquestioned validity of religious authority.

According to Habermas, 'the trick' – *der Witz*[44] – of modern law was to liberate moral consciousness from the self-evident and immediate validity claim of any factual arrangement characteristic of unsecularised law, while sustaining adequate levels of social integration through factual legal coercion and sanctioning, the validity of which was not self-evident and therefore surely subject to critical reflection and questioning, but not immediately so. On the one hand, modern law created a system of subjective rights that unleashed individuals from the claims of religious authority and allowed them considerable scope for engaging in modes of conduct the moral acceptability of which was for them alone to decide. On the other hand, it retained an adequate array of 'expectation-stabilising' coercive rules with which social conduct simply had to comply at first, *as if* these rules still enjoyed the unquestioned validity of sacred authority (*'ein funktionales Äquivalent für die Erwartungsstabilisierung durch bannende Autorität'*).[45] These two dimensions of modern law found expression in positive systems of private law. The validity of any coercive elements in this field of law could only be questioned indirectly. At a first level of conduct, one simply had to comply with them. At a second level, however, the validity of these coercive elements of law could be questioned and re-assessed

43 See Habermas, *Zur Verfassung Europas. Ein Essay* (Berlin: Suhrkamp, 2011), 44.
44 Habermas, *Faktizität und Geltung*, 49.
45 Habermas, *Faktizität und Geltung*, 44-56.

by means of collective legislative procedures. Thus, argues Habermas, did modern legal systems accomplish three essential achievements:

i It allowed for factual coercion that sustained adequate social integration.
ii It granted no immediate validity to this coercion, thereby creating the scope for an independent moral autonomy that could choose either to consider legal rules morally binding, or to adopt a merely instrumental attitude to them that effectively suspends questions of their validity.
iii It created institutional platforms on which the validity of coercion could eventually be considered collectively for purposes of legislative legal reforms.

This splitting or polarisation of facticity and validity in modern law evidently did not amount to a complete eradication of questions regarding the legitimacy or validity of law. Questions regarding the validity of positive rules of law were only suspended until such time as collective democratic deliberation commenced to reflectively subject existing law to questions of validity and legitimacy. This is the essential role that Habermas attributes to legislative processes in modern societies. As a legislator – or as one who votes for a legislator – legal subjects are called upon to suspend their merely instrumental attitude to the law for purposes of adopting the perspective of a member of a free society that is actively concerned with the legitimacy of the laws that govern his or her society.[46] Of concern here is the key 'democratic thought' that informs modern law, *der demokratische Gedanken* that Habermas traces to Rousseau's and Kant's insight that the orderly egoism (*rechtlich geordneter Egoismus*) for which the system of subjective rights in modern legal systems provides the essential framework, needed to be supplemented by a set of subjective rights of a different kind (*subjektive Rechte eines anderen Typs*). These other subjective rights are citizens' rights (*Staatsbürgerrechte*) aimed at the exercise of political autonomy, and not at the arbitrary exercise of the will for private purposes for which private law rights provide.[47]

This nexus between citizens' rights, on the one hand, and the reflective democratic validation and revalidation of the facticity of positive legal rules, on the other, is the pivot on which Habermas' thesis regarding the co-originality of political and private autonomy (*Gleichursprünglichkeit von politischer und privater Autonomie*) and the intrinsic connection between popular sovereignty and human rights (*Volkssouveränität und Menschenrechte*) turns.[48] It is important to note here that Habermas reverts to the word co-originality or *Gleichursprünglichkeit* only with reference to political and private autonomy, and not with regard to human rights and popular sovereignty. With regard to the latter pair, intrinsic connection (*interne Zusammenhang*) or mutual belonging (*Zusammengehörigkeit*) remains the consistent formulation. We return to reflect further on this point below. Suffice it here to look at the brief history of modern political thought with reference to which Habermas develops the point. The history runs through the work of Hobbes, Kant and Rousseau. According to Habermas, Hobbes was fundamentally precluded from

46 Habermas, *Faktizität und Geltung*, 50.
47 Habermas, *Faktizität und Geltung*, 51.
48 Habermas, *Faktizität und Geltung*, 123, 134-135, 161.

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understanding the relation between popular sovereignty and human rights because of the reduction of rights to private law rights that permeates his whole conception of the social contract. Hobbes evidently considered the move to enter the social contract as one that was motivated strictly by a pursuit of private interests. His social contract is basically modelled on a private law contract.[49]

The realisation that the foundation of a polity requires a different kind of interest and concern, namely a public concern with the establishment of *equal rights for all*, only came forward in the political theories of Kant and Rousseau, claims Habermas. However, both of them understood this public concern in terms that ended up pitching individual rights against public sovereignty. Kant considered the basis of the equal rights of all to be based in a moral conception of natural or innate individual rights that exist prior to and independently of any exercise of political will-formation. The sovereign had to respect these rights on moral grounds and had nothing to do with their articulation.[50] Rousseau grasped the intrinsic relation between political will-formation and individual rights better, continues Habermas. However, Rousseau's predominantly 'republican' conception of equal rights pitched the public deliberation of human rights so starkly against private concerns that it again obstructed the insight into the intrinsic connection between human rights and popular sovereignty and the co-originality of private and public autonomy. Rousseau's ethical-republican (as opposed to Kantian-moral) understanding of this connection basically eclipsed private autonomy and therefore failed to grasp the communicative relation between private and public autonomy.[51]

A proper understanding of the relation between private and public autonomy only becomes possible, insists Habermas, when one adopts a discourse-theoretical regard for the tension between facticity and validity that conditions *all* communicative acts. Statements about the proper scope of modern individual rights are not subject to reflective scrutiny because of the moral reasons or natural law conceptions of innate rights that Kant contemplated. To the contrary, the decoupling of law and legal obligation from transcendent conceptions of moral or natural law authority (which effectively liberated individual moral autonomy from legal coercion) was exactly one of the key achievements of modern law. The scope of modern subjective rights is therefore not subject to reflective scrutiny because of moral considerations, but because their linguistic and argumentative terms are always embroiled in elements of facticity that invite ongoing reflection on their validity. This is true of al linguistic statements, also statements about private interests and private law rights which Rousseau basically dismissed as devoid of public concern. Statements about private interests and private law become matters of public concern whenever and *as soon as* they are articulated as performative statements that invite reflection on their validity. Hence the co-originality of private and public autonomy and the intrinsic connection between human rights and popular sovereignty, according to Habermas.

49 Habermas, *Faktizität und Geltung*, 119-121.
50 Habermas, *Faktizität und Geltung*, 121-122, 130-131.
51 Habermas, *Faktizität und Geltung*, 131-133.

Towards the end of his initial or introductory exposition of his discourse theory of modern law in the first chapter of *FG*, Habermas returns to Frege and Peirce to link the essential elements of this theory of law expressly to the elements of facticity and validity that inform every communicative act.[52] The tension between facticity and validity that conditions every performative speech act necessarily also conditions the quotidian communicative practice (*kommunikative Alltagspraxis*) through which life forms reproduce themselves. Social structures are therefore subject to the same tension between facticity and validity that conditions every performative linguistic statement aimed at understanding.[53] The tension between the positive system of private law rights aimed at the stabilisation of expectations in the private sphere, on the one hand, and the reflective legitimacy concerns for which citizens' rights and collective democratic deliberation offer an institutional platform, on the other, not only mirrors (*spiegelt*) the tension between facticity and validity intrinsic to every communicative act. It also constitutes an intensified (*intensivierte*) manifestation of this tension because of the way it pits the concern with coercive stabilisation of expectations (*Rechtszwang*) against the concern with self-legislation (*Selbstgesetzgebung*). The constitutional state, contends Habermas, answers to this essential societal concern with both coercive law and the institutional transformation of coercive law into self-legislation (*'[auf] das Desiderat der rechtlichen Transformation der vom Recht selbst vorausgesetzten Gewalt antwortet die Idee des Rechtstaates'*).[54]

It is important to highlight at least three specific ways in which the relation between facticity and validity plays out in and around the law, according to Habermas. The first way concerns the juridically *internal* relation between facticity and validity already expounded above, namely, the relation between positive private law rights and a reflective exercise of citizens' rights that allows for a constant subjection of the facticity of the former to the validity concerns pursued by the latter. The second way concerns an *external* facticity – not yet discussed above – that always imposes itself from the outside on the internal validity concerns that citizens' rights mobilise inside the law – *'[eine] von außen ins Recht eindringende Faktizität.'*[55] This *external* relation between facticity and validity (Habermas stresses*: 'externes Verhältnis von Faktizität und Geltung'*) concerns the way in which two systemic forms of social integration, money and administrative power, constrain and undermine the validity concerns mobilised through citizens' rights. Not only do the machineries of markets and state administrations wield power that is juridically untamed (*'rechtlich nicht gezähmter Macht'*), they also make use of the legitimating power of the law to adorn their factual force with a juridical coat – *'[sie bedienen sich] der legitimierenden Kraft der Rechtsform, um ihre bloß faktische Durchsetzungsfähigkeit zu bemänteln.'* Modern law therefore remains a deeply ambiguous medium of social integration. It often provides an appearance of legitimacy to illegitimate power and it is never entirely clear to what extent it is

52 Habermas, *Faktizität und Geltung*, 53.
53 Habermas, *Faktizität und Geltung*, 54.
54 Habermas, *Faktizität und Geltung*, 58.
55 Habermas, *Faktizität und Geltung*, 58.

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truly an expression of the self-government of reflective citizens engaged in the normative validation of all social relations, and to what extent it merely offers a coat of legitimation to systems of power that remains fundamentally unvalidated.[56]

The external facticity of economic and administrative power that continues to accompany and constrain the validity concerns that citizens' rights mobilise inside or through the law is exacerbated by a third relation between facticity and validity that is *internal* and intrinsic to law. Of concern is the positivity of citizens' rights themselves. Just like private law rights, citizens' rights are also positively articulated as a set of subjective rights. They can therefore also be exercised in the same way that private law rights are predominantly exercised, namely, in pursuit of private interests. Citizens' rights facilitate the reflective democratic engagement of citizens concerned with the validity of law, but they cannot and do not compel citizens to use their citizens' rights democratically for purposes of approving and improving the validity of law.[57] Moral considerations may motivate them to exercise their rights in a truly democratic fashion, but these rights remain *legal* rights. They are the reflection of *legal* rules that are only legally and not morally binding. As in the case of private law rights, every legal subject remains free to use them in a purely self-interested fashion. Habermas concludes his observations in this regard with a most remarkable comment that warrants quotation:

> The emergence of legitimacy from legality admittedly appears as a paradox only on the premise that the legal system must be imagined as a circular process that recursively feeds back into and legitimates itself. This is already contradicted by the evidence that democratic institutions of freedom disintegrate without the initiatives of a population accustomed to freedom. Their spontaneity cannot be compelled simply through law. It is regenerated from traditions and preserved in the associations of the liberal political culture.[58]

This passage must strike one as most remarkable because it evidently contradicts the key claim in *FG* regarding the co-originality (*Gleichursprünglichkeit*) of private and political autonomy and the intrinsic connection or mutual belonging (*interne Zusammenhang/Zusammengehörigkeit*) between human rights and popular sovereignty pointed out above. Habermas seems to retreat here from his critique of Rousseau's excessively 'republican' understanding of the relation between human rights and popular sovereignty which ultimately ends up pitching the former against the latter. He himself clearly acknowledges that citizens' rights can be exercised instrumentally in pursuit of private interests. They do not secure or guarantee a democratic or public spirit or ethic. To the contrary, he clearly suggests the opposite: when citizens' rights truly and effectively function as *citizens'* rights – *political* rights, in other words – and not just as a supplementary

56 Habermas, *Faktizität und Geltung*, 59-60.
57 Habermas, *Faktizität und Geltung*, 164.
58 Habermas, *Faktizität und Geltung*, 165.

constitutional entrenchment of private law rights, they do so because they are sustained and mobilised by a democratic or public ethic. 'Democratic institutions of freedom disintegrate,' he says, 'without the initiatives of a population accustomed to freedom, [the spontaneity of which] cannot be compelled … through law' – *'[R]echtliche Institutionen der Freiheit [zerfallen] ohne die Initiative einer an Freiheit gewöhnten Bevölkerung, [d]eren Spontaneität … sich eben durch Recht nicht erzwingen [lässt].'*[59]

One might wonder for a moment whether the insight articulated in this remarkable passage may have been the reason for Habermas' consistent selection of *Zusammenhang* and *Zusammengehörigkeit* instead of *Gleichursprünglichkeit* for the characterisation of the relation between popular sovereignty and human rights. One should nevertheless not do so for long. The observation that Habermas articulates in this passage evidently also ruins the idea of the *Gleichursprünglichkeit* of private and public autonomy. The quoted passage clearly suggests that public autonomy comes first and private autonomy second. If one accepts this suggestion, one must also accept that the *Zusammenhang/Zusammengehörigkeit* of popular sovereignty and human rights is also conditioned by this 'first' and 'second.' The observation in the passage quoted evidently ruins Habermas' *Gleichursprünglichkeit*-thesis. It ruins more than this, in fact. It ultimately also ruins the transcendental guarantees that Habermas claims to obtain from his Peircean conception of performative communication that always invites validation or invalidation. If citizens' rights – of which the very rationale is to allow for performative communication aimed at collective validation and reflective understanding – can be used in an arbitrary instrumental fashion, in the way private law rights are often or generally used, all collective uses of discourse can be instrumentalised and privatised thus. Once one arrives at this insight, it no longer makes sense to invoke the contrafactual idealisations *intrinsic* to language – *'[d]iese die Sprache selbst innewohnenden Idealisierungen'*[60] – that underpin Habermas' discourse theory of law.

From the perspective of *CLDL*, this general ruination of the transcendental guarantees in Habermas' discourse theory is a welcome ruination, because these guarantees are exactly that which adorns his theory with an allure of the miraculous that obstructs the invaluable insights that it can make to a realistic understanding of liberal democratic law. As the theory stands, it rests on a blue-eyed conception of a communicative civil society and public sphere that obscures the crisis of communication that always constitutes the very threshold of liberal democracy. The advanced breakdown of common public spheres and collective communicative action fuelled by social media group formations – giving rise, for example, to whole ranges of 'woke culture' and 'proud boys' bubbles that exist next to one another as if on different planets – has recently received a more realistic assessment from

59 Habermas, *Between Facts and Norms* (Cambridge/Maiden MA: Polity Press, 1997), 130-131. For the passage in the German text, see Habermas, *Faktizität und Geltung*, 165.

60 Habermas, *Faktizität und Geltung*, 33.

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Habermas.[61] In *FG*, however, we still find the following description of the higher-level intersubjectivity (*höherstufigen Intersubjektivität*) of processes of understanding in civil society and the public sphere:

> The one text of "the" public sphere, a text continually extrapolated and extending radially in all directions, is divided by internal boundaries into arbitrarily small texts for which everything else is context; yet one can always build hermeneutic bridges from one text to the next.[62]

The 'harmony and balance' of 'fully achieved' public and private autonomy that Rawls could not fail to discern in Habermas' discourse theory of law and the constitutional state,[63] was, at the time, evidently underpinned by an astoundingly optimistic vision of a healthy and cooperative social hermeneutics. His whole dynamic framework of new problems that arise on the periphery of a decentralised society, find their way into the centre of the public sphere, and eventually lead to legal reforms that reflect the learning process of modern law, pivots on this vision of an essentially always-cooperative social hermeneutics.[64] Or an *almost* always cooperative social hermeneutics. To be sure, toward the end of this remarkable chapter, Habermas acknowledges occasional crises in this world of performative communication. But these crises, he contends, can always be attributed to specific historical factors which have never culminated in an *a priori* negation of the self-empowering project of a society – '*[s]olche Krisen lassen sich allenfalls historisch erklären [und desavouierten nicht von vornherein] das Projekt der Selbstermächtigung einer Gemeinschaft*.'[65] In other words, they do not prevent discourse theory from generally *counting on* the higher-level intersubjectivity of processes of understanding in the public sphere – '*[d]ie Diskurstheorie rechnet mit der höherstufigen Intersubjektivität von Verständigungsprozessen … im Kommunikationsnetz politischer Öffentlichkeiten*.'[66]

The social vision (or lack of it) that informs the line of thinking in *CLDL* is fundamentally different from the one Habermas puts forward here. Notwithstanding the rather gloomy prospects with which it is currently confronted, it has no specific expectations regarding the overall balance or imbalance between felicitous and failed social interaction and the vicissitudes of empowerment and disempowerment in the ways of the world. It just insists, contra Habermas, that *both* felicitous and failed social interaction can invariably be traced to very specific historical factors. Felicitous social interaction can invariably be traced to concrete (institutionally at

61 Habermas, 'Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit,' in *Ein neuer Strukturwandel der Öffentlichkeit? Leviathan Sonderband 37*, eds. Martin Seeliger & Sebastian Sevignani (Baden-Baden: Nomos, 2021), 470-500.

62 Habermas, *Between Facts and Norms*, 374. For the German text, see Habermas, *Faktizität und Geltung*, 452.

63 See Rawls, *Political Liberalism*, 378-379, 382, 411.

64 Habermas, *Faktizität und Geltung*, 460-467.

65 Habermas, *Faktizität und Geltung*, 467.

66 Habermas, *Faktizität und Geltung*, 362. The emphasis on *rechnet* is mine.

best facilitated but not guaranteed) historical gestures of cooperativeness and civility that manage to keep the always present threat of an obstinate unwillingness to cooperate at bay. In the discussion of Rawls above, the cooperativeness and civility at work in the former gestures have been put forward as the essential ethics that conditions liberal democracy. The adamant refusal to cooperate invariably presents itself in terms of the sublime 'heroism' that *CLDL* identifies as the most worrying threat to liberal democracy today. This 'heroism' – thus far only briefly introduced in Section 2 above – still demands further explication. We shall turn to this explication below. Suffice it to observe for now that *CLDL* is an investigation into ways in which one's understanding of the law might raise the historical odds in favour of civil cooperativeness and against uncooperative heroisms. It entertains no transcendental conditions on which one can count in this regard.

However, there is one regard for a significant lack of integration in Habermas' discourse theoretical framework of law that a theory of liberal democratic law must take seriously. Of concern are his analyses of the way in which the systemic logics of money and administrative power not only constrain, undermine and invade the discursive reflection on validity claims that the law offers, but also co-opt the law as a façade of legitimacy that covers up the raw untamed power that these systems wield. This is indeed a huge problem that any serious theory of liberal democratic law must take seriously. But here too, Habermas' response to the question appears far from realistic enough. He offers us a view of the law as a medium that effectively regulates the relation between the systems of money and power, on the one hand, and the lifeworld on the other, thereby preventing the logistics of the former from undue interference with the reflective rationalisation processes in the latter. Here again he appears to contemplate a unitary lifeworld and to ignore the way in which an unfathomable proliferation of different group formations in 'the lifeworld' position themselves very differently vis-à-vis the systems of money and power. It seems down-right impossible to consider all these different groups configurations engaged in something that one can persuasively call a unitary resistance to the invasion of systemic logics into common processes of learning and rationalisation in the lifeworld.

We can end our overview of Habermas' discourse theory of law here. We surely have not covered all the important details of the theory, but those that we have covered are all we need for purposes of an assessment of the theory from the perspective of the theory of liberal democratic law developed in *CLDL*. It should already be clear that this assessment, to which we turn squarely in the next section of this article, is bound to focus on the key point that also emerged from our discussion of Rawls. That discussion also showed up a tension in Rawls' thinking between an institutional framework (respect-worthy constitution with a ledger of fundamental rights, a constitutional review forum with a reputation of consistency, an institutional platform for popular authorship of the laws, etc.), on the one hand, and a 'constituent' ethics of civility, on the other, without which the institutional framework cannot be sustained, however much this framework may come to facilitate and strengthen this ethical sustenance. There are surely important

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differences between Rawls' framework of political liberal legitimation and Habermas' discourse theoretical analysis of the framework of legitimation in modern legal systems and we will note some of them below. Both frameworks nevertheless evince a parallel constituent/constituted-power problematic and it is this problematic that I will now endeavour to assess from the perspective of the main lines of thought developed in *CLDL*.

5 Rawls and Habermas from the perspective of *CLDL*

The parallel constituent/constituted-power problematic that emerges from the discussions of Rawls and Habermas above concerns the way in which both of them ultimately make – albeit with considerable equivocation – the institutions of liberal democracy dependent on *practices* of liberal democracy. Both theoretical undertakings show that the latter remains a precondition for the former, notwithstanding the fact that the former can aid and strengthen the latter. This prompts one to invoke a constituent/constituted-power constellation that evidently makes the constituted dependent on the constituent, a constellation that makes all durable forms of life dependent on a 'lively' ethics, to invoke Michelman's phrase again. 'Spontaneity' is the new term that we can insert into this constellation in view of the passage quoted from *FG* above. We have already observed that the invocation of a 'formless liveliness' to portray Rawls' ethics of civility takes one worryingly close to the language of Carl Schmitt. The invocation of a 'spontaneous' constituent power that precedes and conditions constituted power evidently does this again. On both counts is one reminded of the description of constituent power in Schmitt's *Verfassungslehre* as a formless force or energy (*natura naturans*) that unceasingly negates and destroys the forms that it produces (*natura naturata*) in the course of time.[67] There is, however, a radical difference between the Schmittian articulation of constituent power on the one hand, and the Rawlsian and Habermasian articulations, on the other, to which we will briefly return below.

For the reasons elaborated above, the line of thinking developed in *CLDL* surely endorses the way in which both Rawls and Habermas end up contemplating a constituent ethic that holds their whole frameworks of political liberal legitimation together. It considers this ethic the truly promising element of their respective theoretical engagements. What it does find deeply problematic, however, is the way in which they both embed this constituent ethic in a transcendental or quasi-transcendental framework that obfuscates it in a cloud of equivocation. It is interesting to note how both Habermas and Rawls, in the debate between them, notice this transcendental element in the other's work, but not in their own. Habermas takes issue with the transcendental philosophical vision in Rawls' thinking that appears to insulate the essential goods of liberal democracy from the pure democratic proceduralism that he contemplates in his own work.[68] Rawls discerns a comprehensive Kantian-Hegelian philosophy in Habermas' discourse

67 Schmitt, *Verfassungslehre*, 79-80.

68 See Habermas, 'Reconciliation through the Public use of Reason,' 118.

analyses of law and considers it incompatible with the 'freestanding' political conception of justice with which he is concerned.[69] Neither of them discerns the undeniable transcendental assumptions that inform their own respective theoretical undertakings: 'overlapping consensus' and 'central ranges of agreement about essentials' in the case of Rawls, 'transcendental elements of language' that found steady democratic learning processes in the case of Habermas.

In the case of both Rawls and Habermas, the more seriously one takes their recognition of the constituent ethic that ultimately holds their respective frameworks of legitimation together, the more does it become clear that this constituent ethic actually ruins the transcendental elements of these frameworks. The more one takes Rawls' emphasis on an ethics of civility and an appreciation of burdens of judgement seriously, the more do his claims regarding an overlapping consensus and central ranges of agreement that render liberal political arrangements stable for the right reasons appear devoid of intrinsic substance. The question pointed out in Section 3 persists: why would a framework of legitimacy that pivots on an overlapping consensus and central ranges of agreement be in need of an ethics of civility and an appreciation of burdens of judgement? The same question nags with regard to Habermas: why would one need to acknowledge the 'spontaneous initiatives of a population used to liberty' if the transcendental elements of linguistic communication effectively guide one towards increasingly legitimate forms of social integration? Habermas' remarkable invocation of *spontaneous* and therefore unprogrammable initiatives that ultimately sustain a liberal democratic culture not only ruins the neat constellation of facticity and reflective validation in terms of which he analyses modern law, as we contended above. It ruins his whole discourse theoretical understanding of language. It effectively acknowledges that language can or cannot be aimed at understanding (*verständigungsorientiert*). There are no essential elements of language that *necessarily* render it aimed at understanding.

From the perspective of the line of thought developed in *CLDL*, it seems to make much more sense to consider the constituent ethics – that Rawls and Habermas both acknowledge, but marginalise and obfuscate – the essential element that sustains the transcendental elements in their theoretical frameworks, *when* and *as long as* they sustain them, thereby obviously also ridding them of their transcendental status. Nothing is certain or guaranteed as far as this sustenance is concerned, not even in the country that Habermas associates with 'Jefferson's fortunate legacy' (*Jeffersons glückliche Erbe*) and 'the praised north-Atlantic development path of the constitutional democratic state' ('*der gepriesene nordatlantische Entwicklungspfad des demokratischen Rechtsstaates*'). If the election of Donald Trump as President of the United States in 2016 could not already make this abundantly clear, the events of 6 January 2021 surely did, to put it mildly. Looking back, one does not really understand what exactly motivated the confidence with which Rawls and Habermas articulated the transcendental

69 See Rawls, *Political Liberalism*, 378-379, 382, 411.

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elements of their respective theoretical undertakings as late in the day as 1993 and 1996 (Rawls) and 1992 (Habermas). It is not clear what warranted this confidence then.[70] It is abundantly clear, however, that this confidence is very definitely no longer warranted today. If a country with a more than two centuries long history of relatively stable democratic institutions and elections (ignoring for the moment April 1861 to May 1865 as one actually never should) can one morning wake up to the rude reality that a significant contingent of its population is refusing to accept the outcome of an election that warrants no sane suspicion of fraud and is prepared to stage that refusal with unlawful and violent revolt, any country can wake up to that reality. What purchase can notions such as overlapping consensus, central ranges of agreement, and language that is aimed at understanding (*verständigungsorientierte Sprache*) have under conditions such as these?

Once one recognises and acknowledges the constituent ethic and power that sustain the constructive assumption of a valid system of law, one can easily entertain notions of 'overlapping consensus,' 'central ranges of agreement' and 'understanding-oriented language' without succumbing to equivocations and obfuscations. These notions indeed concern critically important constructive assumptions. Following Kelsen, one could call them essential *epistemological presuppositions* that render the language of law and constitutionalism possible. As such, they could come to inform, strengthen and facilitate the constructive constituent commitment to sustain them. They nevertheless remain fundamentally dependent on this commitment and are for this reason not co-original with it.

Habermas once articulated a critique of George Bataille's concept of the 'sovereign gift' that basically arrived at the same insight that we have been contemplating here. He criticised the 'verticality' of the gift on which Bataille's heroic conception of sovereignty turns. Bataille's conception of the gift, argued Habermas, focuses predominantly if not exclusively on the vertical relation that the gift effects between the human being and the sacred, thereby neglecting the horizontal dimension – the interpersonal and community creating effect – of gift exchanges that Marcel Mauss stressed in his *Essai sur le don*.[71] Rawls' conception of burdens of judgement and an ethics of civility can plausibly be read in terms of the community creating gift that Habermas discerned in Mauss' concept of the gift.[72] Perhaps one can do the same with Habermas' own conception of the reflective validation of validity claims. One can downplay the verticality – this last all too heroic element? – that is still all too manifest in his Peircean conception of an ideal discourse situation which language *necessarily* invokes. One can do so by considering this assumption of an ideal discourse situation fundamentally dependent on the historically

70 One should note that Habermas himself did not consider the mood (*Stimmung*) in the world conducive to this kind of confidence at the time *FG* was published. See Habermas, *Faktizität und Geltung*, 13.

71 Habermas, *Der philosophische Diskurs der Moderne* (Frankfurt a.M: Suhrkamp, 1985), 247-248.

72 This reading of Rawls' concept of the duty of civility surely gives it considerably more work to do than Rawls gives it, but does not bend it so far that leading readers of Rawls would necessarily dismiss it. Michelman, in any case, 'as a follower of Rawls,' indeed observes that this move 'is not so innocent,' but appears to find enough resonance between the idea of civility with which Rawls' begins and the one with which I end up. See Michelman, 'Civility to Graciousness,' 507.

contingent horizontal communal relations that result from the magnanimous willingness of members of a society to take the validation worthiness and sincerity of one another's validity claims seriously.[73] The magnanimity of concern here – we can call it a threshold magnanimity – would imply a twofold accomplishment with which every liberal democracy begins (hence the threshold) and without which no liberal democracy will ever stand a chance.

i It would effect a 'Protagorian' (rather than a 'Socratic') acknowledgment of the irreducible epistemic deficit that conditions all claims about proper communal and communicative relations and proper terms of cooperation.[74]

ii This Protagorian acknowledgment would itself render communal and communicative relations possible as *ethical* relations. It is precisely the recognition of this epistemic deficit that renders a communal ethics possible. Recall the point we have stressed with regard to Rawls: there is no need for civility or an appreciation of burdens of judgement when one can count on the epistemic security of an overlapping consensus and central ranges of agreement.

Between (i) and (ii), one is evidently turning in circles. One is talking about a threshold magnanimity that renders the recognition of an epistemic deficit possible, and vice versa. Indeed, the line of thought developed in *CLDL* appears to lead to its own version of a certain co-originality or *Gleichursprünglichkeit*. Unlike Habermas' discourse theory, however, it does not *count on* ('*rechnet mit*') this co-originality as something that is generally given and only occasionally disrupted by specific historical factors. It considers this co-originality itself the precarious outcome of highly contingent historical factors. Among these historical factors, *CLDL* specifically underlines the presence or absence of destructive heroisms that invariably ruin civilised cooperation. Of concern is the third definitive element of liberal democratic law listed in the introduction above, namely, the poetic fictions that sustain liberal democracy. *CLDL* invoked these poetic fictions as a definitive element of liberal democratic law precisely for purposes of sidestepping the romantic heroisms that at all times threaten to derail the ideal of liberal democracy. Let us briefly take a closer look at the sidestepping at stake here.

Habermas' invocation of the heroic unison with the sacred that Bataille's understanding of the sovereign gift privileged at the expense of the horizontal community creating aspect of the gift that is central to Mauss' *Essai sur le don* is

73 I borrow the term 'magnanimous' or 'magnanimity' from Michelman. See Michelman, 'Civility to Graciousness,' 506.

74 *CLDL* discussed this epistemic deficit with reference to Protagoras and not, as philosophers often do, with reference to Socrates. See Van der Walt, *The Concept of Liberal Democratic Law*, 64-68. For Socrates – quite understandably for one so closely associated with Plato's voice – the epistemic deficit that he acknowledged was never decisively severed from an implicit assertion of transcendent knowledge. Among the Greek philosophers, Protagoras was the one who – with reference to the myth of Epimetheus – linked inclusive democratic practices to an irremediable shattering of epistemic transcendence. I am grateful to Ricardo Spindola Diniz for prompting me to differentiate here between Socratic and Protagorian conceptions of epistemic deficits and to return more precisely here to the argument developed in *CLDL*.

profoundly instructive for two reasons. On the one hand, it evidently echoes the horizontal community creating gift that we have identified above in Rawls' invocation of the appreciation of burdens of judgement and call to civility. On the other hand, it points our attention directly to that which *CLDL* considers the most worrying threat to liberal democracy today, namely the heroic visions of collective life evident in a whole array of political mobilisations aimed at 'making one's country great again.' It traces these endeavours to the ancient heroic spirit that we associate with the Homeric Greeks and contends that the human imagination will probably never be able to rid itself of this heroic spirit. The hope that latter day Agamemnon figures like Donald Trump, Vladimir Putin, Boris Johnson, Victor Orban, etc. (not hereby at all suggesting that anyone of them would have inspired Homer much), will one day simply disappear from the face of the earth, without the rest of us disappearing with them, is not a realistic one.

Hence *CLDL*'s postulation of the *definitive* need for poetic fictions through which this heroic spirit can or might be channelled – as far as feasible – to a zone of existence where it cannot threaten the cooperative ethics of decency, civility and truthfulness on which liberal democracy turns, and from where it may well also contribute to its endurance in the way a lightning conductor may contribute to the endurance of an all too inflammable substance. It is this heroic spirit that is written all over Schmitt's fascination with 'grand world politics' (*große Weltpolitik*[75]) and the miraculous sovereignty that creates law *ex nihilo*[76] that underpins this grand politics. It is this romantic fascination with heroic and grand politics that ultimately separates the constituent power contemplated by Schmitt from the constituent ethics of liberal democracy that we have distilled, above, from Rawls' framework of LPL and Habermas' discourse theoretical analysis of modern law. It is this romantic fascination with grand politics that also underpins the highly inflammable mix of poetry and politics that inspired Schmitt's political and legal thought. The identification of this romanticism as the most evident threat to liberal democracy today is key to *CLDL's* endeavour to separate poetry from politics in a way that may turn the former into a lightning conductor that safeguards instead of threatens the always inflammable substance of the latter.

75 Carl Schmitt, *Nomos der Erde* (Berlin: Duncker & Humblot, 2012), 271.

76 Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot, 1996[1922]), 43.

6 Conclusion: the community creating gift that sustains liberal democracy

CLDL does not refer to Mauss.[77] It does, however, turn squarely to the community creating gift invoked by Habermas in a passage that reflects upon the significance of voting procedures.[78] The historical exigency to reflect carefully on the significance of voting procedures and the acceptance of their results has been underlined symbolically by the events of 6 January 2021. Citizens of countries that consider themselves liberal democracies have been called in most dramatic fashion to reflect anew on the significance of voting procedures and the acceptance of their results. What do we say to one another when we say 'let's vote on it?'

When we say 'let's vote on it,' we basically tell one another that we do not have an answer to the question that we are trying to resolve. We vote on the matter because we are confronted with the necessity to accept that we are not able to convince one another on the right course of action to be taken. Put in Habermasian terms, we vote on the matter because we are making disparate validity claims coming from such different angles that they cannot be subjected to a shared process of reflective validation. Of concern is not just the contra-factuality of the ideal discourse situation that Habermas contemplates. Of concern is not just the fact that Peirce's completely validated 'final opinion' always eludes us. Of concern is something that is fundamentally more debilitating as far as Habermas' discourse theory of law and politics is concerned. Of concern is nothing less than a clash between irreducibly incongruent constellations of social facticity that renders the idea of a common validation process guided by the language we speak fundamentally implausible.

Voting procedures preserve the incongruity that confronts one here, they do not resolve it. Moreover, they are themselves 'distorted' by deep entrenchments of the systemic logics of money (consider exorbitant campaign financing) and administrative power (consider freshly gerrymandered or well-sedimented constituency designs that disempower instead of empower electorates) that Habermas brings so duly to our attention. These systemic logics always render election results deeply questionable and liberal democrats are certainly not oblivious to this elementary reality. The politically virtuous among them would always be adamantly inclined to subject voting procedures and constituency designs to critical reforms that may augment instead of diminish electoral empowerment. They nevertheless endorse them and stick to their results on the day of the count. This endorsement and sticking to are the two key instantiations of the constituent ethics to which they are committed, the ethics which preclude them from baseless fabrications of election fraud and the complete evaporation of

77 An essay on the deep difference between political liberalism and populism published in the same year that *CLDL* appeared did so extensively, though. See Van der Walt, 'The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics,' in *Law's Sacrifice: Approaching the Problem of Sacrifice in Law, Literature, and Philosophy*, ed. Brian Nail and Jeffrey Ellsworth (New York, Abingdon: Routledge, 2019). I am grateful to Michelman for alerting me to the need to link these two publications. See Michelman, 'Civility to Graciousness,' 496, 506.

78 Van der Walt, *The Concept of Liberal Democratic Law*, 242.

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common factuality that such fabrications threaten to precipitate. The liberal democratic recognition of an epistemic deficit regarding the propriety of social relations and terms of cooperation may at first glance appear to spill over into a general negation of adequately secure factual knowledge, a negation that would lead one all the way back to the problem of solipsistic psychological representations of factual reality with which Habermas' discourse theory of language and law begins. But this is not the case. We have become witnesses in our own time – with a whole century separating us from the time when the problem began to bother philosophers like Frege, Husserl, Russel and Moore – of the way in which the transsubjective ideal content of factual observations evaporates when the magnanimous willingness to cooperate evaporates. Everyone who purposefully aims to cooperate knows that one has to begin with a common assessment of relevant facts.[79]

What sustains the 'we' at work in this constituent liberal democratic ethic on which the very communality of factual reality ultimately depends, this diffuse 'we' that one may call a liberal democratic constituent power if one is adequately alert to the diffuse and centrifugal condition of this power? Of concern is not a power that culminates in the heroic concentration of a singular collective subject, but the diffuse power that sustains the minimum communality required for civilised social operation.[80] Rawls' emphasis on the role that an appreciation of burdens of judgement and an ethics of civility plays in the process of political liberal legitimation stresses the essential ethical gestures that sustain this diffuse communality and the centrifugal power or force that holds it together. The essential constituent act of liberal democratic constituent power does not consist in the reflective validation of validity claims, as not only Habermas but also Rawls in his own way – when he invokes an 'overlapping consensus' and 'central ranges of agreement' – sometimes suggest. Reflective validation of validity claims always pivots on constituted power (positive institutions of adequately recognised knowledge), not constituent power. The essential constituent act of liberal democratic constituent power consists in the magnanimous act of civilised decency through which liberal democrats manage to live with the dire lack of shared validation practices that render social disagreements and divisions irresolvable. The magnanimity of concern here finds one of its most telling expressions – perhaps its *most* telling expression – in the elementary acceptance of an adverse vote count.

79 In the course of arguments that resonate firmly with the thoughts developed here and in *CLDL*, Jan-Werner Müller writes: 'As Hannah Arendt opined, opinions ought to be constrained by facts, but they are clearly partisan perspectives and that's a fine thing, too.' See Werner-Müller, *Democracy Rules* (New York: Farrar, Straus and Giroux, 2021), 99. In view of the point we are making above, one can switch the direction of the 'but' and rephrase slightly: opinions are clearly partisan perspectives and that is a fine thing, too, but they *must* be constrained by facts.

80 This is an appropriate place and moment to recall the *communauté [qui] assume et inscrit l'impossibilité de la communauté* that Jean-Luc Nancy (whose passing away on 23 August 2021 surely still leaves many who read his work with attention with an irreparable sense of *désœuvrement*) once articulated so exquisitely. See Jean-Luc Nancy, *La communauté désœuvrée* (Paris: Christian Bourgois Éditeur, 1986), 42.

Enduring Contingency

Remarks on the Precariousness of Liberal Democratic Law

Hans Lindahl

1 Introduction

Johan van der Walt introduces his essay, 'Rawls, Habermas and Liberal Democratic Law' (hereafter RHL) by noting that both Habermas and Rawls aspire to explain and promote 'the Enlightenment ideal of reason reflected in the idea of liberal democracy' (RHL, 16). While sharing this aspiration, he adds that his book, *The Concept of Liberal Democratic Law* (hereafter *CLDL*) goes further than them in emphasising 'the precariousness of this ideal of reason' (RHL, 16). But what is the ideal of reason that animates the Enlightenment? In what sense or senses might modern reason be precarious? Does Van der Walt go far enough in emphasising such precariousness, when taking issue with Rawls and Habermas?

In response to these questions I offer a reconstruction and radicalisation of what I take to be the core insight guiding Van der Walt's essay and book, which I summarise with the expression 'enduring contingency.' Precariousness refers to the experience of radical contingency Western modernity inherited from the Middle Ages, and to which the modern concept of reason – the principle of self-preservation – is a response. Rawls, Habermas, and Van der Walt all stand within the horizon of this experience when interpreting democratic lawmaking as collective self-rule. But whereas Habermas, in particular, understands modern reason as the historical process of *overcoming* radical contingency, Van der Walt, in my reading, suggests that what he calls liberal democratic lawmaking *deals* with contingency, without being able to overcome it – not in fact, not in principle. It is for this reason that I title my commentary 'Enduring Contingency,' in the twofold sense of an enduring state of contingency and of contingency as what needs to be endured. This twofold reading of enduring contingency is, I argue, inscribed in Van der Walt's reading of the democratic majority-minority principle. While I concur with Van der Walt regarding this reading of contingency, what about those cases in which a group refuses to understand itself as a disaffected minority in conflict with a majority, hence as part of a unity, even if only the unity of a legal order? At issue is a group that demands *exclusion* from a polity rather than demanding its recognition and inclusion as a minority entitled to be treated as equal to, even if different from, the majority. In such cases, not merely *what* 'we' are as a collective but rather *that* 'we' are a collective is contested. It is this more radical modality of contingency I want to probe when assessing Van der Walt's defence of liberal democratic law.

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2 Self-preservation

Van der Walt's essay and book reject what he takes to be the metaphysical reading of law as 'an existential expression of the "life" of a people.' He adds that '[m]etaphysical conceptions of law [...] have always [...] presented or represented life as essentially whole and united.' He views law as 'the reflection of the dividedness of life,' refusing 'to understand law as an expression of social unity, but [rather as] the exact opposite of such unity' (RHL, 18). The acceptance of this condition of irreducible plurality, a plurality that endures and is to be endured, determines what Van der Walt calls the precariousness of liberal democratic law. But in what sense are this irreducible condition and its acceptance the manifestation of modern reason? How to understand modern reason as giving voice and responding to a condition of existential precariousness?

At issue here is the problem of radical contingency, masterfully described by Hans Blumenberg. Against the secularisation theorem proposed by Karl Löwith and Carl Schmitt, which assumes that key modern concepts are theological concepts in a new guise, Blumenberg views the modern concept of reason as the reoccupation of an answer position to a problem modernity inherited from the crisis of Scholastic philosophy at the end of the Middle Ages: contingency. In its radical, late Scholastic formulation, '[c]ontingency expresses the ontic constitution of a world created from nothing and destined to disappearance, a world conserved in being only through the divine will, [a world] which is measured against the idea of an unconditioned and necessary being.'[1] In the face of the extreme pressure to which contingency submits Western humankind's interpretation of itself and its relation to the world, the theological solution of transitive conservation of the world in being by a fickle and unreliable God is no longer either plausible or acceptable. Modern reason has to be understood, according to the framework provided by the reoccupation theorem, as a 'breaking out' from the challenge of theological absolutism: not transitive but intransitive conservation – *self*-preservation – is the modern concept of reason. In a footnote adjoined to the closing pages of the essay 'What is Orienting Oneself in Thinking?,' Kant indicates that Enlightenment is the maxim of always thinking for oneself. For, he adds, those who serve themselves of their own reason do nothing other than avail themselves of the 'maxim of the

1 Hans Blumenberg, 'Kontingenz,' in *Die Religion in Geschichte und Gegenwart: Handwörterbuch für Theologie und Religionswissenschaft*, vol. III, ed. Hans D. Betz et al. (Tübingen: J.C.B. Mohr, 1959 [1794]). See also Hans Blumenberg, *The Legitimacy of the Modern Age*, transl. Robert M. Wallace (Cambridge, MA: The MIT Press, 1986); Hans Blumenberg, 'Ordnungsschwund und Selbstbehauptung. Über Weltverstehen und Weltverhalten im Werden der technische Epoche,' in *Das Problem der Ordnung. Verhandlungen des VI deutschen Kongresses für Philosophie*, ed. H. Kuhn and F. Wiedmann (Meisenheim: Verlag Anton Hain, 1962); Hans Blumenberg, 'Self-Preservation and Inertia: On the Constitution of Modern Rationality,' in *Contemporary German Philosophy*, vol. 3, ed. D.E. Christensen et al. (University Park, PA: The Pennsylvania State University Press, 1983). See also Dieter Henrich's excellent essay, 'Die Grundstruktur der modernen Philosophie,' in Dieter Henrich, *Selbstverhältnisse. Gedanken und Auslegungen zu den Grundlagen der klassischen deutschen Philosophie* (Stuttgart: Philipp Reclam jun., 1982), 81-108.

self-preservation of reason.'[2] Enlightenment: the self-preservation of reason, or more properly, reason *as* self-preservation. For Western modernity, ordering becomes a *self*-ordering and *self*-grounding; democracy becomes the collective self-rule of human groups, or even, in universalising interpretations of democracy, of humanity as a whole.

A new criterion of social ordering becomes imperative when its transcendent grounding loses plausibility. Reciprocity is the answer: social order is generated immanently, through interaction between participants in that order. It fell to Hobbes, in an epochal but not oft-noticed footnote of *De Cive*, to offer the first conceptualisation of reciprocity as the political modality of self-preservation: 'the whole breach of the laws of nature consists in the false reasoning, or rather folly of those men, who see not those duties they are necessarily to perform towards others in order to their own conservation.'[3] The passage from transitive to intransitive preservation continues to reverberate, three centuries later, in Rawls' appeal to reciprocity as the key to the self-grounding of a polity:

> [T]he question of reciprocity arises when free persons, who have no moral authority over one another and who are engaging in or find themselves participating in a joint activity, are among themselves settling upon or acknowledging the rules which define it and which determine their respective shares in its benefits and burdens.[4]

So, too, reciprocity is at the root of the democratic identity principle as formulated by Habermas: '[T]he idea of self-legislation by citizens demands […] that those who are subject to the law as its addressees can also understand themselves as the authors of the law.'[5] In Habermas' discursive reading of self-preservation, a practical discourse demands that 'everyone […] take the perspective of everyone else, and thus project herself into the understandings of self and world of all others.'[6]

Certainly, there are significant differences between Rawls and Habermas. So, for example, whereas Rawls' development of the concept of reciprocity is particularistic, favouring a closed political collective as a prior condition for reciprocity, Habermas' discursive reading of practical reason explicitly understands itself as universal. But beyond their differences, both philosophers articulate a concept of liberal democratic lawmaking in which collective self-rule entails that individuals recognise one another as free and equal citizens. A collective that meets this condition is well and truly one, identical to itself. Collective unity obtained through reciprocal recognition is the criterion of necessary existence; it overcomes

2 Immanuel Kant, 'Was heißt: Sich im Denken Orientieren?,' in Immanuel Kant, *Werke*, vol. 5 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983), 329.
3 Thomas Hobbes, *Man and Citizen* (Indianapolis, IN: Hackett Publishing Company, 1991), 123.
4 John Rawls, 'Justice as Reciprocity,' in John Rawls, *Collected Papers* (Cambridge, MA: Harvard University Press, 1999), 208.
5 Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992), 153.
6 Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls' "Political Liberalism",' *Journal of Philosophy* 92 (1995): 117.

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contingency because the collective has cast aside any external – transitive – ground required to secure its existence. In its own way, the principle of self-preservation carries forward and drastically sharpens the Medieval theory of the transcendentals: *quodlibet ens est unum, verum et bonum*. For, confronted with the Scholastic challenge of radical contingency, the modern principle of self-preservation calls forth an equally radical response: only a collective the participants of which can view legal rights and obligations as expressing their reciprocal recognition qua free and equal beings is fully one, just, and good. If Löwith's secularisation theorem views the modern concept of history as eschatological because an event irrupts into the world, announcing the end of time, and if Schmitt's politics of the *katechon* seeks to hold the *eschaton* in abeyance, Blumenberg's reoccupation theorem inverts these accounts, such that the meaning of history, for modernity, plays out as an immanent process of possible unification, the endpoint of which is autonomy.[7] If collective self-rule gives meaning to history as the *telos* towards which humanity progresses, or from which it deviates, its realisation would mark the end of historical time: as the expression of necessary existence, an autonomous collective would cease to be contingent, hence no longer vulnerable to either change or disappearance, having become a self-grounding, hence self-sustaining, existence. Having extricated itself from the vicissitudes of history, autonomy, once achieved, is timeless.

This, returning to Van der Walt, is the 'Enlightenment ideal of reason.' It is precarious for Rawls, Habermas, and other modern thinkers because overcoming contingency in history and overcoming history as the domain of contingent existence haunted by the *nihil*, bespeaks a *possible*, but not inevitable, process of collective unification.

3 The majority-minority principle

That the concept of liberal democratic law holds fast to this Enlightenment ideal of reason means, according to Van der Walt, that it embraces collective self-rule as the politico-legal modality of the modern principle of self-preservation. As we have seen, this principle amounts to the imperative of unification, an ever greater inclusiveness. Habermas, in particular, argues that, as a desideratum, practical reason is 'the injunction to complete inclusion.'[8] Yet it is precisely with regard to this injunction that Van der Walt secerns a properly liberal democratic concept of law. To repeat his thesis, law is 'the reflection of the dividedness of life […] the exact opposite of [social] unity' (RHL, 18).

Here, Van der Walt follows Kelsen, who, he argues, offers 'the most rigorous theory of liberal democratic law articulated to date' (*CLDL*, 203). The crux of the matter is

7 Karl Löwith, *Meaning in History* (Chicago: University of Chicago Press, 1957); Carl Schmitt, *Nomos der Erde* (Berlin: Duncker & Humblot, 1950).

8 Jürgen Habermas, *The Postnational Constellation*, trans. Max Pensky (Cambridge: Polity Press, 2001), 148.

the concept of the people. While acknowledging that 'the unity of the people [is] an ethico-political postulate,' Kelsen is quick to note that, sociologically speaking, the people is split into groups that oppose each other on national, religious, and economic grounds; a people is only a unity in a normative sense, namely, as the unity of a legal order.[9] If, according to its idea, democracy means that the people are self-ruling insofar as they are not only the object of rule but also its *subject*, the reality of democratic rule is that it is always only as the object of rule – in the form of a posited legal order – that the people can appear as a unity. This insight underpins Kelsen's sagacious defence of the democratic majority principle. Like Carl Schmitt, Kelsen argues that it is impossible to justify the majority principle merely on the ground that more votes carry the day because they weigh more than less votes; this would amount to acknowledging that the majority is stronger than the minority, hence collapsing right into might. But whereas Schmitt seeks to avoid this collapse by postulating a substantive unity of the people as the basis of the democratic majority principle, Kelsen justifies the majority principle by appealing to the concept of freedom: 'Only the thought that as many human beings as possible – even if not all – are free, i.e. that as few people as possible should find their will in conflict with the general will of the social order, leads rationally to the majority principle.'[10] This justification also explains why the simple majority principle is the closest approximation to the idea of collective self-rule; indeed, a qualified majority principle allows a minority to block the majority view, as a result of which the minority, not the majority, is free.

While in some ways this defence of the minority principle is close to Habermas,' it diverges decisively from the latter. Kelsen is uncompromising in his *agonistic* account of democracy. Even though, as Kelsen puts it, 'the unity of the people is the ethico-political postulate of the solidarity of interests,' he views political plurality as irreducible. For Habermas, by contrast, 'solidarity with the other *as one of us* refers to the flexible "we" of a community that resists all substantial determinations and extends its permeable boundaries ever further.'[11] Notice that the idea of ever-expanding boundaries, hence of an ever greater inclusiveness, is informed by the Hegelian dialectic, whereby the experience of a limit is to already have moved beyond it.[12]

This divergence is none other than the difference between two approaches to the problem of contingency. Habermas, for the one, appeals to the ideal speech situation as the necessary presupposition that must be entertained by parties in conflict who seek to sort out their differences and who aim to generate rules that allow them to view each other as free and equal citizens. To repeat an earlier quote:

9 Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verag, 1981 [1929]), 15.

10 Kelsen, *Vom Wesen und Wert der Demokratie*, 9-10. Carl Schmitt, *Legitimität und Legalität* (Berlin: Duncker & Humblot, 1993 [1932]), 28-30.

11 Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, trans. Ciaran Cronin and Pablo de Greiff (Cambridge: Polity Press, 2005), xxxv-xxxvi.

12 '[T]he very fact that something is determined as a limitation implies that the limitation is already transcended.' Georg Friedrich Wilhelm Hegel, *Science of Logic*, trans. John Niemeyer Findlay (London: Allen & Unwin, 1969), 134.

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'[E]veryone is required to take the perspective of everyone else, and thus project herself into the understandings of self and world of all others.'[13] The imperative of practical reason is, therefore, to overcome contingency. And, in a Kantian riff, one cannot be obligated to overcome contingency unless one can do so. Complete inclusion is possible, even if not ineluctable. Kelsen, for the other, rejects this 'transcendental' move: the majority principle aims to foster a *compromise* between the parties in conflict, a compromise that falls short of the 'complete inclusion' of interests demanded by reciprocal recognition. For Kelsen, what renders the majority principle democratic is not that it seeks to overcome contingency but rather that it renders contingency bearable, endurable. *Peace*, not justice qua complete inclusion, is the injunction governing democracy in light of the irreducibly fractious nature of politics.[14]

It is to this second, agonistic reading of modern reason that Van der Walt appeals, when advocating a more 'precarious' understanding of the modern ideal of reason than that championed by Habermas or Rawls. 'A clash between irreducibly incongruent constellations of social facticity [renders] the idea of a common validation process guided by the language we speak fundamentally implausible' (RHL, 44). This insight guides his analysis of the anti-democratic coup attempt of 6 January 2021, in which a minority group of the American Republic sought to prevent the congressional certification of the results of the presidential elections of 2020. Van der Walt does not censor the coup attempt for falling short of the ideal speech situation; he rues that it betrays the democratic ethos undergirding what he refers to as the majority-minority principle: the attempted coup fails to acknowledge a plurality that endures and is to be endured.

4 The anarchist

Van der Walt's is a perceptive and courageous defence of liberal democratic law, one which indeed takes him beyond the theories of democratic law available to either Habermas or Rawls. Against both theorists, Van der Walt argues for a 'diffuse "we" that one may call a liberal democratic constituent power.' It is not a power that seeks to posit or bring about a 'singular collective subject,' but rather 'the diffuse power that sustains the minimum communality required for civilized social operation' (RHL, 45). It speaks to a form of magnanimity by the minority in the face of irresolvable disagreement and division, and which manifests itself in 'the elementary acceptance of an adverse vote count' (RHL, 45). It is in such acceptance that contingency endures and is endured.

But does this endorsement of liberal democratic law go far enough in accounting for the radical challenge of contingency? To put it another way: is Van der Walt's

13 Habermas, 'Reconciliation through the Public Use of Reason,' 117.

14 Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley CA: University of California Press, 1957), 1-24.

defence of political plurality sufficiently pluralising? Does he not, in the end, espouse an agonistic defence of political and legal *unity*?

This question arises not despite but because of the majority-minority principle. Certainly, as Van der Walt avers, democracy is marked by variable constellations of irreducible conflict between groups. To this extent, democratic politics is irreducibly plural. But it remains a *plurality within unity*: the unity of a legal order, absent which it makes no sense to speak of a majority and a minority. Here, Kelsen, Rawls, Habermas, and Van der Walt stand shoulder to shoulder: a closure into a unity, even if no more than the unity of a legal order, has already taken place in the past, such that what is at stake in democratic politics is, as Kelsen puts it, the process of giving shape, of transforming, this order. Without a prior closure, there is neither a majority nor a minority. In this minimal sense at least, the majority-minority principle is premised on a form of reciprocal recognition: it governs democratic decision-making between individuals who view each other as equal members of a legal order to which they each profess allegiance, even if they are at loggerheads about what joins them together as a collective. Thus, a majority decision, when accepted by the minority, is the *affirmation* of unity, not, as Van der Walt holds, 'the exact opposite of unity.' It means that 'we' remain committed to act as one, despite our differences. Van der Walt acknowledges as much *ex negativo*, when observing that '[t]he adamant refusal to cooperate invariably presents itself in terms of the sublime "heroism" that *CLDL* identifies as the most worrying threat to liberal democracy today' (RHL, 38). In brief, Van der Walt's concept of liberal democratic law lauds the unity articulated by the principle of self-preservation, a unity that is ultimately political and not merely legal: *e pluribus unum*.

This finding calls forth a yet more fundamental query about the majority-minority principle: what about the closure that gives rise to a collective if, by definition, it cannot be the outcome of a majority decision?

This is, of course, the conundrum of constituent power, albeit one quite different to that evinced by Van der Walt. I want to argue that Van der Walt's interpretation of constituent power operates a certain – *liberal* – neutralisation of radical contingency, and to this extent of the politics of constituent power. For contingency is not only the question about *what* 'we' are as a collective, a question the majority-minority principle seeks to address by rendering it possible, at least in principle, for the minority of today to become the majority of tomorrow. It is also always the question about *whether* we are at all a collective, a unity. Here, contingency irrupts into a legal order by way of what I elsewhere call *a-legality*, that is, behaviour by individuals or groups who the legal order includes as a minority but who, through their behaviour, *refuse* to view themselves as a minority. These are individuals or groups for whom achieving inclusion, through the operation of the majority principle, is not the solution to the problem, but the problem itself.[15]

15 See Hans Lindahl, 'A-legality: Postnationalism and the Question of Legal Boundaries,' *Modern Law Review* 73, no. 1 (2010): 30-56.

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Such is the case, amongst others, for colonised peoples. Van der Walt's critique of the insurrection of 6 January 2021 offers a powerful illustration of his defence of the majority-minority principle. But does it hold for, say, 'Native Americans' who refuse to participate in American politics because they view this characterisation as oxymoronic, identifying themselves as sovereign indigenous peoples, not as 'Americans'? Does it hold for the Aboriginal activists who pitched a Tent Embassy on the lawns of Old Parliament House in Canberra back in the 1970s and who, today, demand Aboriginal sovereignty over what settler law calls Australia? Or does the majority-minority principle hold for Mohawk traders accused by the Canadian government of smuggling cigarettes across the US/Canada border, one of whom, when asked in an interview where the cigarettes were sold, responded, in 'Canuga Hogga territory, indigenous to the people of this country – the Americas'?[16] Why should they, or other colonised peoples, be 'magnanimous' and acquiesce to 'an adverse vote count' in the settler community into which they have been forcefully integrated? Would their refusal to participate in decision-making under the majority rule, perhaps even to forcefully resist its application, qualify as 'heroic,' in the sense adverted to by Van der Walt? If they do acquiesce, might not the 'elementary acceptance' of the majority-minority principle be the expression of pragmatic resignation to an overwhelming power imbalance they cannot reverse, rather than an affirmation of the political and legal unity they disavow?

This is the precise point at which Kelsen's thesis about the anarchist returns to haunt the concept of liberal democratic law. *CLDL* mentions anarchy on various occasions, but invariably regarding Schmitt and Villey's discussions about the purported anarchy of the Middle Ages. Van der Walt does not, however, advert to the role of the anarchist in the Pure Theory of Law, despite his endorsement of Kelsen's approach to democratic lawmaking. Anarchy, for Kelsen, is systematically related to the problem for which the basic norm is a response; as my colleague, Bert van Roermund, has pointed out, the notion of the first constitution is an oxymoron.[17] Because a legal norm, to be legal, must be derived from a higher-order legal norm, there can be no first constitution. If, on the one hand, a norm is to be the first *constitution*, it must be derived from an earlier constitution, hence cannot be first; if, on the other, a norm is to be the *first* constitution, then it cannot be a constitution, being no more than a subjective act of will. Qua presupposed norm, the *Grundnorm* dissolves the oxymoron from a *juristic* point of view,[18] while also

16 Gary Foley, Andrew Schaap, and Edwina Howell (eds.), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Abingdon: Routledge, 2014); Audra Simpson, 'Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent,' *Law and Contemporary Problems* 71 (2008): 191-216.

17 See Bert van Roermund, 'Kelsen under the Low Skies. Recognition Theory Revisited and Revised,' in *Hans Kelsen anderswo / Hans Kelsen Abroad. Der Einfluss der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, Teil III*, ed. Robert Walter, Clemens Jabloner and Klaus Zeleny (Vienna: Manz Verlag, 2010), 259-279, 27ff; Bert van Roermund, 'Norm-Claims, Validity and Self-Reference,' in *Kelsen Revisited. New Essays on the Pure Theory of Law*, eds. Luis Duarte d'Almeida, John Gardner and Leslie Green (Oxford: Hart Publishing, 2013), 11-42.

18 See Joseph Raz, 'Kelsen's Theory of the Basic Norm,' *The American Journal of Jurisprudence*, 19 (1974) 1: 94-111.

highlighting that no legal order can ground itself. Kelsen asks: 'Who presupposes the basic norm?' His answer: 'Whoever interprets the subjective meaning of a constituent act and all acts posited in accordance with the constitution as their objective meaning, i.e. as [an] objectively valid norm.'[19] Whoever presupposes the basic norm views a set of norms as a legal order, as an objectively valid coercive order, rather than as an order of violence; right, not might. But, as Kelsen insists time and again, it is, but not necessary, to presuppose the basic norm. Along these lines, he notes that insofar as the *Grundnorm* speaks to a theoretical stance, even an anarchist, as a jurist, may be prepared to presuppose it to describe positive law as a system of objectively valid norms. But he also avers that when taking up a practical, political, stance, the anarchist is whom refuses to presuppose the basic norm. For political anarchists, the first constitution is and remains an oxymoron, and is, as such, an act of violent conquest that continues to hold sway in all further acts of norm-setting, *including those norms enacted on the basis of the majority principle*. The Aboriginal activists and the Mohawk traders in cigarettes are, in Kelsen's terms, political anarchists. It is the majority principle itself as the expression of unity, both political and legal, not one or other instance of its adverse application, which they oppose. They evoke another – a *strange* – order that refuses integration into a given order and its majority principle.[20]

These considerations suggest that there is a stronger sense of political plurality than contemplated in Van der Walt's treatment of the concept of liberal democratic law, a stronger sense of social division and conflict than what can be accommodated by the majority-minority principle. To be sure, Van der Walt notes at the outset of *CLDL* that even though liberal democratic theories are usually uncomfortable with endorsing revolution, 'it is at least sometimes possible to consider revolutionary transformations of legal systems as re-enactments of essential principles of law that have 'fallen into decay according to the revolutionaries' (*CLDL*, 2). But what would be those principles? Ultimately, he argues, and here he draws on Rawls, either 'law reform or revolutionary refoundations of law that violate Rawls' principle of reciprocity would surely no longer be reconcilable with the idea of liberal democratic law' (*CLDL*, 3).

What I take to be the political import of Kelsen's insight about the oxymoronic status of the first constitution is that reciprocity gets kick-started with non-reciprocal acts that are never fully redeemable. The non-reciprocal origin of legal reciprocity returns from ahead in the form of normative claims which refuse integration into the circle of reciprocity available to that legal collective, yet which the latter cannot discard as unreasonable other than by falling prey to a *petitio principii*. Acts of recognition of the Other (in ourselves) that institute relations of reciprocity are also always exposed to being acts of domination *because* they bring about and enforce relations of reciprocity. The contingency of legal orders means

19 Hans Kelsen, *Reine Rechtslehre* (Österreichische Staatsdruckerei 1993 [1960]), 208-209.

20 I draw here on the radical notion of strangeness put forth by Husserl: 'accessibility in its genuine inaccessibility, in the mode of incomprehensibility.' See Edmund Husserl, *Zur Phänomenologie der Intersubjektivität*, ed. Iso Kern (The Hague: Martinus Nijhoff, 1973), 631.

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that they are finitely questionable and finitely responsive, hence that legal orders have *fault lines* and not only transformable *limits*, demanding a range of responses to radical plurality that *suspend* the majority-minority principle.[21] Not only collective self-preservation, but also the preservation of *the strange as strange*; this, perhaps, is what enduring contingency is about as a democratic ethos. If so, what I have elsewhere characterised as restrained collective self-assertion belongs to a *modern* interpretation of democratic law, but not to the concept of *liberal* democratic law.[22]

21 See, amongst others, Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity,' in *Europe's Constitutional Mosaic*, ed. Neil Walker, Stephen Tierney and Jo Shaw (Oxford: Hart Publishing, 2011), 205-230. More generally, see Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013) and Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018).

22 For a powerful, phenomenologically inspired, contribution to democratic theory that insists on a 'second' reading of *modern* reason as dealing with, rather than overcoming, contingency, see Ferdinando Menga, 'Political Conflicts and the Transformation of Legal Orders. Phenomenological Insights on Democratic Contingency and Transgression,' *Italian Law Journal* 5 (2019) 2: 551-566, and 'Conflicts on the Threshold of Democratic Orders: A Critical Encounter with Mouffe's Theory of Agonistic Politics,' *Jurisprudence. An International Journal of Legal and Political Thought*, 8, no. 3 (2017): 532-556. Although Menga emphasises, with Lefort, that this second reading of democratic lawmaking is modern, Menga does not, in contrast to Van der Walt, interpret it as a modality of liberalism.

How Do We Make Liberal Democratic Law Together?

Remarks on Van der Walt's Notion of a 'Diffuse *We*'*

Chiara Raucea

1 Introduction

In this contribution, I will explore the question: what is *democratic* about the distilled concept of 'liberal *democratic* law' (hereafter LDL) proposed by Van der Walt? To put the question in different words, so to articulate the different layers it includes, I will also ask: given that liberal democratic law is not to be grounded in nature (or in any other metaphysical *substratum*) but it is instead to be understood as provisionally grounded on a self-made political commitment to reasonably disagree in order to live together, how shall we understand the *plural self* that is making and sustaining such a commitment? Under what *conditions* can the commitment, which is supposed to provisionally support LDL, enable and sustain 'our' life 'together'?

The purpose of this exploration is to elicit some reflections on the possibility (and, I will argue, the desirability too) to conceive LDL as driven by a two-edged commitment to a life *together*. On the one hand, I will echo Van der Walt's call for a conception of LDL that is based on a commitment to sever the link between law and any metaphysical claim on how life should be. On the other hand, however, I will advance the thesis that a liberal democratic conception of law should also run on a commitment not to sever the link between law and intersubjectively validated claims on how the life together (understood, here, as a scheme of social cooperation under some *almost agreed* political principles) of a particular community should be provisionally arranged given the circumstances (rather than through *all* circumstances).

To discuss this two-edged commitment of LDL to a life together, I will propose a closer reading of some of the lines of inquiry emerging from Van der Walt's book *The Concept of Liberal Democratic Law*[1] (hereafter *CLDL*) and from his

* I wish to thank Nora Timmermans, Lukasz Dziedzic and Bert van Roermund for their critical reading and helpful comments on a previous version of this article.

1 Johan van der Walt, *The Concept of Liberal Democratic Law*, Law and Politics: Continental Perspectives (New York: Routledge, 2020). More specifically, in this article, I will reflect mainly on extracts from Chapter 6 'From Nomos to Demos,' 101-124; and from the concluding chapter 'The distilled concept,' 225-248.

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discussion-piece, titled 'Rawls, Habermas and Liberal Democratic Law'[2] (hereafter RHLDL) presented at the symposium 'The Fragility of Liberal Democratic Law,' organised by The Netherlands Association for the Philosophy of Law and the *Netherlands Journal of Legal Philosophy*. I will argue that, whereas the first kind of commitment (to sever the metaphysical link between law and life) is strongly voiced by Van der Walt, the second type of commitment (not to sever the link between law and intersubjectively validated claims on a how a life together is to be arranged) is not fully explored. The link between liberal democratic law and the political commitment to a life in common remains indeed muffled in the background,[3] and it seems to surface only indistinctly from Van der Walt's appeals to individual magnanimous acts, which are expected to keep social cooperation going even when its participants accept their conflicts as irresolvable, and their attempts to mutual understanding as doomed to fail.[4]

I, therefore, envision the present contribution as a modest exercise in following the trail of clues,[5] which Van der Walt leaves behind in his setting up of a theory of liberal democratic law and which, in my view, reveals the need to further reflect on the relatedness between law and communicative practices which enable and shape social cooperation. I will offer this further reflection in the form of a number of questions on whether the notion of diffuse constituent power, which Van der Walt proposes in the last section of RHLDL, can offer sufficient common ground to reach, and sustain over time, political decisions on *our* life *together*.

2 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *The Netherlands Journal of Legal Philosophy* 51 (2023), 16-45. More specifically, in this contribution I will zoom in on Section 6, 'Conclusion: The community creating gift that sustains liberal democracy,' 44-45.

3 To a certain extent, my exploration of what is *democratic* about the distilled concept of LDL proposed by Van der Walt reiterates some of the themes that emerged in the responses to *CLDL* collected in a special issue of *Etica & Politica* dedicated to the book. For instance, the analysis I develop in Section 2 (on how LDL is expected to serve our life together) resonates with the observations put forward by Michelman, who invited Van der Walt to reconsider the 'lifelessness' of his concept of liberal democratic law in the light of the threads that connect it with the political commitments of liberal societies: "Ourselves' … 'our' … 'our' … 'for us.' It sounds pretty lively to me. If the framework laws of liberal societies are thus answerable to «us» and explicable amongst us by our history and traditions, then in what sense might the distilled liberal concept of law be said to consist in the law's uprootedness from 'life'?,' Frank Michelman, 'Civility to Graciousness: Van Der Walt and Rawls,' *Etica & Politica/Ethics & Politics* 23 (2021): 495-508, 508. The questions I raise in Section 3 (on how to understand *self*-authorship of LDL and the concept of a 'diffuse *we*' proposed by Van der Walt) resonate instead with the invite addressed to Van der Walt by Van Roermund to disambiguate the notion of body politic in his account of liberal democratic law: 'How we should conceive of this interface ["the body"; author's note] if the self is a plural self, acting jointly in relation to a world it is inclined to call 'ours'?,' Bert van Roermund, 'The Case for Embodied Democratic Law-Making,' *Etica & Politica/Ethics & Politics* 23, no. 2 (2021): 509-520.

4 See Van der Walt's reply to *Civility to Graciousness*, 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/Ethics & Politics* 23 (2021): 521-576, 564.

5 To structure the article, I will use the metaphor of a trail of clues, which will be traced and examined in the two main sections that follow.

I owe the editors of the *Netherlands Journal of Legal Philosophy* a big debt of gratitude for kindly offering me the chance to engage in a direct dialogue with professor Van der Walt. I am grateful to Professor Van der Walt for having agreed to this exchange, which generously allows me to test directly with him whether my attempted close reading of his work requires further 'distillation' from my side in order to remove any inadvertent misunderstanding of the designation '*democratic*' in the concept of LDL he proposes.

2 Trace 1: from life … to a life together

In Section 2 of RHLDL,[6] Van der Walt restates three of the key-elements of the definition of LDL he provides in the concluding chapter of his book *CLDL*.[7] The first two of these key elements refer overtly to the relation between law and life.[8] This precis will not be surprising for the readers of the *CLDL* who, thanks to the long and enriching philosophical journey offered in the book,[9] have already grown aware that the distilled concept of LDL provided therein hinges on a very specific mode of articulating the interplay between law and life. Van der Walt argues that LDL

6 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 17-20.

7 The concluding chapter of *CLDL* includes two definitions of the distilled concept of LDL. A provisional definition reads as follows: 'Liberal democratic law consists of an anomic, unnatural, inorganic, nominalist and non-spiritual system of non-actualisable legislative rules that govern, reflect and sustain the divided life of the societies that they serve,' see Van der Walt, *The Concept of Liberal Democratic Law*, 243. And a refined one that states that: 'Liberal democratic law consists of an anomic, unnatural, inorganic, nominalist and non-spiritual system of non-actualisable but adequately socialist legislative rules that govern, reflect and sustain the divided life of societies that manage to sustain sufficiently forceful poetic fictions to compensate for the grey lack of heroism that they will have to endure during the time that remains,' see Van der Walt, *The Concept of Liberal Democratic Law*, 247. The three elements that the refined definition adds to the preliminary one (namely, a reference to collective arrangements directed at the fulfilment of everyone's basic socio-economic needs, a reference to cultural practices, and a reference to time) have the effect of amplifying the connection, which was already expressed in the preliminary definition, between LDL and the life of the particular society whose divided life LDL sets to 'govern, reflect, and sustain.'

8 The restated key elements are, firstly, extracting law from life (Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 17); secondly, law as a reflection of the dividedness of life (Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18-19); thirdly, the need for poetic fictions that may compensate for the dividedness of life in liberal democratic law (Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 19-20).

9 The philosophical narrative offered in the book spans from the reconstruction of the shift in the conception of *nomos* experienced in Greek culture at end of the fifth century BCE (Van der Walt, *The Concept of Liberal Democratic Law*, 30) to a re-examination of the jurisprudential theories debated in the twentieth century, which attempted to explain (with different degrees of success, according to Van der Walt) how LDL should work in the face of social division and disagreement (Van der Walt, *The Concept of Liberal Democratic Law*, 197).

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should not be rooted in life[10] but should still serve life.[11] This last observation on the expected function of LDL generates two questions, which I set forth to address in my contribution: how should we understand the role of LDL as one '*serving*' life? (I will engage with this first question in this section); and '*whose*' life should LDL serve? (which I will discuss in the next section).

One of the key elements of the definition of LDL restated in RHLDL (namely: law as a reflection of the dividedness of life[12]) tells us more about the demands that, in Van der Walt's account, life moves to LDL. These demands, comprehensively discussed in the book, are mainly articulated in negative terms. Van der Walt argues that LDL cannot be expected to solve conflicts emerging from life by relying on conclusive appeals to correctness.[13] LDL cannot be expected to settle conflicts emerging from life by appealing to 'articulations of a concept of justice shared by *all* members of a legal community,'[14] or by appealing to historical-spiritual social unity[15] or to social integration.[16] Given that some conflicts emerging from life are irresolvable, LDL should not be driven by the presupposition that all disagreements can be approached as misunderstandings, which could be cleared with access to adequate knowledge, and which can be reconciled because an agreement is always ultimately to be found.[17]

However, if in some sense LDL must serve life, then, law should be responsive to a life that presents itself as divided, for instance, by allowing the legal system first to

10 Uprooting law from life means rejecting all those theories that appeal to (different views on) nature to provide a foundation for legal normativity. So, in other words, it means refusing to conceive the order created by the constraints that law imposes on life (*nomos*) as an embodiment of the natural cosmic order of things (*kosmos*), or as an expression of sovereign decisions aimed at mitigating the sheer violence deriving from the clash of unruly physical forces (*physis*), Van der Walt, *The Concept of Liberal Democratic Law*, 45-55.

11 'A rigorous understanding of the concept of liberal democratic law requires that one uproot and extract it from the history in which it is rooted. Moreover, only in its pure – uprooted, extracted – form can it serve the purpose that it could be expected to serve. What purpose, other than life, can it be expected to serve, one may well ask. The question is pertinent and the answer must be clear: life, nothing but life. There is a big difference, however, between being rooted in life, and serving life.' Van der Walt, *The Concept of Liberal Democratic Law*, 226.

12 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.

13 The dual relation that liberal democrats have with correctness is discussed in Van der Walt, *The Concept of Liberal Democratic Law*, 3-5, where it is summarised in the maxim: 'By all means believe that the principles and convictions by which you act are correct. (…) But, do not succumb to the temptation to insist that those who evidently and adamantly disagree with your principles and convictions ultimately have good reasons to agree with you, good reasons that somehow just remain unbeknown to them to which they should become enlightened. The moment you do this, you begin to betray liberalism. You then begin to descend into a dogmatic liberalism that ultimately risks becoming as illiberal as any adversary of liberal democracy imaginable.'

14 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.

15 See Van der Walt's discussion of Hegel and Savigny in Van der Walt, *The Concept of Liberal Democratic Law*, 135-159.

16 See Van der Walt's discussion of Smend's work and of the judicial method it inspired, namely the method used by courts that strive to balance competing values through interpretation, Van der Walt, *The Concept of Liberal Democratic Law*, 204-212.

17 See Van der Walt's reading of Dworkin, Van der Walt, *The Concept of Liberal Democratic Law*, 193-197.

detect conflicts that call for a determination and then filter in those conflicts for which a legal resolution can be provisionally provided. In his book, Van der Walt suggests that not all the ways in which law can be responsive to a split life are compatible with LDL. For instance, he objects to the merit of those accounts that depict law as 'living law'[18] and, therefore, he rejects accounts that conceive legal systems as able to organically adapt themselves to the different life experiences of people and to social changes, over time, without the necessity to constantly resort to formal legislation. Van der Walt, then, points at the merits of those accounts where the responsiveness of law to life does not aspire to any reconciliation or integration between the different opinions, positions, and convictions that give rise to conflicts in society.[19] He, indeed, endorses accounts proposed by legal theorists who see law-making as a procedural mechanism capable, by design, to produce an 'almost agreed' and 'provisional' framework of posited laws (backed up by coercion when necessary), which can secure social cooperation in the face of *irresolvable* conflicts.[20]

More specifically, Van der Walt calls attention to the crucial distinction proposed by H.L.A. Hart[21] between an internal and an external aspect of legal rules. He, then, explains why this distinction is essential to understand why legal rules, in a liberal democratic tradition, must always be approached as 'almost agreed.'[22] I argue that we can find the *first* clue about what *democratic* means in Van der Walt's concept of LDL in his reading of Hart's theory of law. The readers of *CLDL* are invited to consider Hart a pioneer of LDL[23] and to learn, from Hart's distinction

18 See Van der Walt's discussion of the 'gap problem,' Van der Walt, *The Concept of Liberal Democratic Law*, 163-167.

19 Van der Walt, *The Concept of Liberal Democratic Law*, 233.

20 In this regard see the criticism moved, in the footsteps of Rawls, to utilitarian models in general and to Coase's economic analysis of law in particular, Van der Walt, *The Concept of Liberal Democratic Law*, 129-133. These models are presented as incompatible with a distilled concept of LDL since they play down the separateness of individuals by reducing the different individual perspectives to a unifying cost-benefit calculation. Van der Walt's concept of LDL is presented in opposition to all those models that (sometimes implicitly) endorse a 'personification of society,' as the author expressly states in the following passage: 'The concept of liberal democratic law takes leave of this unification and personification of society as decisively and incisively as possible, by making the fundamental divisions and differences between people its unwavering point of departure. *Liberal democracy* begins with an adequate regard for the irredeemable social divisions that result from the sheer dividedness of life. It *begins*, in other words, *with an adequate regard for the divided conditions of life*,' Van der Walt, *The Concept of Liberal Democratic Law*, 234 (emphasis mine). In RHLDL, Van der Walt moves then to a closer examination of two accounts that seem to reserve 'adequate regard to the divided conditions of life,' see the discussion on Rawls and 'reasonable pluralism' (Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 23), and on Habermas and the 'the trick – der Witz' of modern law (Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 31).

21 Hart's theory of law is discussed in Van der Walt, *The Concept of Liberal Democratic Law*, 168-184.

22 The introduction of the expression 'almost agreed' is mine. However, in adopting it, I took inspiration from the passage where Van der Walt comments on how the functioning of performative communication in Habermas' discourse theory of law requires an '*almost* always-cooperative social hermeneutics,' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 37.

23 Even though his theory of law covers also legal systems which reject liberal political principles, Van der Walt, *The Concept of Liberal Democratic Law*, 178.

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between internal and external perspectives on legal rules, how LDL can be democratic only in a minimal sense. That means in the sense of accepting that, for posited rules to be democratic, it is not necessary that these rules are accepted by individuals in the community of reference as 'our rules,' but it is sufficient that they are seen as the 'rules accepted by *most of us*.'[24]

This is, indeed, the conclusion that can be drawn from the comments made by Van der Walt on a quote from Hart's *The Concept of Law*.[25] In the quoted passage, Hart argues that the enforcement of legal rules in liberal democracies does not (and shall not pretend to) eliminate the tension that divides a society between a majority and a minority. A majority of individuals who voluntarily comply with the posited rules and subscribe to the prescribed behaviour, because they consider it aligned with their conceptions of what is just, good or reasonable (internal point of view on legal rules). And a minority of individuals whose moral and ethical views are not reflected in (or are even in contrast to) the law in force and who, therefore, when they comply with legal rules, do so to avoid punishment (external point of view on legal rules).

In his comment on this quote, Van der Walt proposes to consider Hart's conception of law as a decisive step in the process of distillation of a concept of LDL. That is because Hart's acceptance of an ineliminable co-existence between an external and an internal perspective on laws regulating a divided society entails, indeed, the

24 The question of what this first insight on the denotation 'democratic' in the concept of LDL put forward by Van der Walt entails for the purported 'authorship' of *democratic* law is a matter that would deserve an in-depth analysis that, however, I will not provide here. For instance, it would be valuable to clarify how individuals holding contrasting internal and external perspectives on legal rules can be considered parts of the *same* legal *community*: what do they hold in common? Would it be sufficient to detect as their main thing in common their inescapable subjection to the coercion of the legal norms in force? Or would the existence of a *democratic* legal *community* depend on the presupposition that even those individuals who entertain an external point of view on some legal rules must at least entertain an internal point of view with respect to some basic norms? And, if this last question is to be answered in the positive, how to avoid falling into the trap of re-rooting law in a unifying perspective? And, again, in case of a positive answer, what these basic norms will be: the secondary rules regulating democratic law-making? Or (some) liberal democratic principles that are expected to rise to the rank of constitutional norms across different *democratic* legal *communities*? I will not venture into answering the questions posed above because I want to remain loyal to the purpose that I set at the beginning of the article, which is offering a close reading of Van der Walt's concept of LDL and, in my reading of the *CLDL* and of RHLDL, I have not been able to find sufficiently robust elements to support obvious answers which I could expect Professor Van der Walt will be prepared to subscribe to. So, I prefer leaving these interrogatives open for further discussion with the author of *CLDL*.

25 See Van der Walt, *The Concept of Liberal Democratic Law*, 177, reporting an extract from H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 88: 'At a given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. *One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence*' (emphasis mine).

acceptance that law is uprooted from life.[26] These considerations on the two different perspectives on legal rules prompt Van der Walt to suggest implicitly how LDL should serve life. The service, which a liberal democratic normative framework is expected to render to a divided life by means of its posited laws, consists in sustaining 'a reasonable and respectful compromise between those who hold external and those who hold internal perspective on its coercion.'[27]

The examination of Hart's theory of law is not the only passage[28] where Van der Walt puts forward the argument that LDL should serve a divided life by means of providing a normative framework which, by being uprooted from any comprehensive view on life, can be based only on provisional compromises that allow a majority (which subscribes to a worldview aligned with the behaviour required by the law in force) and a minority (whose behaviour is subject to the constraints imposed by the law in force, but whose worldviews are not reflected by – or are even in contrast to – the legal norms in force) to live together.[29] For instance, a strong connection between LDL and the mission to sustain the coexistence between a majority and a minority, which are subject to the same rules while holding contrasting perspectives, is also established in Chapter 9 of *CLDL*, where Van der Walt examines Kelsen's account of 'democratic people' and of 'the majority-minority principle.'[30]

From these observations on the compresence between a majority and a minority, and of the indispensable coexistence between internal and external perspectives on law within liberal democracies, we can gain a *second* illuminating insight into the meaning of 'democratic' in the concept of LDL proposed by Van der Walt. Given that some individuals will always entertain an external point of view on the legal constraints imposed on them (while they will still have to be counted as equally-worth participants in the scheme of social cooperation arranged according to liberal democratic principles), then the existence of a legal community committed

26 'The insight that Hart articulates regarding the tension between the internal and external perspectives of law that conditions all legal systems, underlines the reality that law can only be rooted in life if it becomes completely reduced to an internal perspective sustained by one social group (usually a majority) at the complete cost of an external perspective held by another social group (usually a minority). In other words, to be or become rooted in life, law has to give up all liberal democratic pretentions that purport to respect the equal worth of the external and internal perspectives to law that inform divisive social pluralities." Van der Walt, *The Concept of Liberal Democratic Law*, 179.

27 Van der Walt, *The Concept of Liberal Democratic Law*, 179.

28 See references to Rawls and Kelsen in Van der Walt, *The Concept of Liberal Democratic Law*, 178.

29 The consequent meaning of 'living together' will be questioned at the end of this section, where I will reflect on what (if not a common perspective on the law which the community gives to itself) could then bind the majority and the minority in a legal community which subscribes to LDL. I will, then, propose to interpret the commitment to a life together as referring to the commitment to maintain in place a sustainable scheme of social cooperation.

30 See, in particular, Van der Walt's comments on the concept of 'people' emerging from Kelsen's *Vom Wesen und Wert der Demokratie* (1929), Van der Walt, *The Concept of Liberal Democratic Law*, 203-204.

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to liberal principles cannot be but precarious.[31] In fact, the thriving of LDL will not depend (solely) on its constitutive features and on the tenability of its fundamental principles. The survival of LDL (and its capacity to serve a divided life) will, instead, be mainly contingent on whether the number of individuals entertaining an internal perspective on the laws in force is large enough to sustain social cooperation.[32] It will also be contingent on whether the instances of non-compliance with legal rules are not so spread to disrupt social cooperation.[33]

The theme of the fragile coexistence, in liberal democracies, between irreconcilable views whose contribution to political debates and deliberation are to be considered, in principle, as worthy of equal attention is the red thread running throughout RHLDL.[34] In this piece, Van der Walt calls attention to the irremediable precarity of liberal democracy, which depends on its constitutive incapacity to justify its laws on the basis of a unifying *good reason*, which all individuals affected or constrained by its laws could independently accept as a justification for the way how they should

31 In several passages of the book, Van der Walt insists on how the distinct traits that make a legal community committed to liberal democratic principles are the same that make its persistence over time precarious, and, in this regard, he often quotes *Böckenförde dictum:* 'Liberal Democracy lives from conditions that it cannot guarantee.' E.-W. Böckenförde, *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt: Suhrkamp, 2016 [1976]), 60, reported in Van der Walt, *The Concept of Liberal Democratic Law*, 5-6, 104, 248.

32 Along the same lines, see the comment made by Van der Walt about Rawls' Liberal Principle of Legitimation (LPL): 'LPL schemes do not continue to function mechanically after a once-off installation. They are held in place by the commitment to cooperate between *a critical number of citizens and residents*.' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 26 (emphasis mine).

33 I formulate this second contingent condition for the success of LDL since, I would argue, the commitment of a legal community to liberal democratic principles (including self-authorship and reversibility of democratic law) is incompatible with the widespread use of coercion to impose norms, which are accepted as legitimate only by a narrow minority, over a majority that entertains an external perspective on the prescribed behaviour or on the recourse to coercion to sanction it. In this regard see also footnote 35.

34 In the introduction to the article, Van der Walt signals that his account of LDL and the accounts proposed by Rawls and Habermas have in common the aspiration to link the idea of legitimacy of liberal democracy with the ideal of reason. However, what, in Van der Walt's view, is peculiar to his concept of LDL is precisely its focus on the 'precariousness of this ideal of reason,' *see* Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 16.

live together.[35] The irremediable precarity of liberal democracy also depends on the fact that LDL is expected to serve the ambiguous task to ensure that individuals, who inevitably live in a divided society, will engage over time in a scheme of cooperation compatible with liberal democratic principles.[36] But, the chance that a durable scheme of social cooperation among the members of a divided society will withstand divisions may exist only as long as the disagreement between the participants remains *reasonable*, according to a notion of 'reasonableness' which is also to be compatible with liberal democratic principles. The resulting social cooperation, therefore, cannot but be precarious too since LDL does not have the means to secure that the level of disagreement within a divided society will remain reasonable, nor does it have the means to guarantee that the members of a divided society will resort to liberal democratic reasonableness to manage their disagreements.

The focus on the precarity of liberal democratic arrangements helps us to add a *last* piece to the present reconstruction of the sense in which LDL may serve a divided life, that is: LDL is expected to serve a split life by supporting social cooperation among individuals who endorse different (and even irreconcilable) worldviews. The indicia collected so far lead us to conclude that LDL can be at the service of a split life only in a minimal sense, which a metaphor might help to elucidate. We could say that LDL can only provisionally lay down some 'rules of the game' to manage disagreement and regulate social cooperation. But it will be up to the participants to decide whether they want to play this game. In other words, it will be up to the participants to interpret their reciprocal exchanges and interactions as a matter of social cooperation and to decide whether they want to play the 'social cooperation

35 LDL is expected to embrace the awareness that the split condition of life cannot be overcome by law. Van der Walt connects this observation with the importance that parliamentary legislation and electoral vote play in liberal democratic systems. Parliamentary legislation is marked by an 'irreducible reversibility,' which signals that rules are open to changes over time precisely because there is not a necessary link between their normativity and life. The endurance of liberal democratic legislation only testifies to the maintenance of a temporary compromise, which is the 'outcome of rational majority-minority relations,' which must preclude 'the comprehensive legislative enactment of any specific instance of life at the complete cost of another,' see Van der Walt, *The Concept of Liberal Democratic Law*, 241. Electoral vote also has the function to show that majority and minority, and their ratio, are contingent configurations and none of the two sides can pretend to suppress existing political differences by claiming to embody what is absolutely 'right' because of a vote count. Judicial review is, then, vital in liberal democracies to make sure that the governing majority will not pass coercive legislation that would intrude 'more than is rationally necessary into the right to think, prefer, and exist differently' which minorities have, see Van der Walt, *The Concept of Liberal Democratic Law*, 242-243. In the concluding section of the RHLDL, Van der Walt refers again to voting procedures and to their role of being a sign, for liberal democracy, of the split condition of life. He, then, adds the reflection that the well-functioning of voting procedures rests on the 'magnanimous willingness' of the parties to cooperate. This addition resonates with the sharper focus of the paper on the precarious nature of liberal democratic institutions, which can endure only if sustained by participants engaging in voluntary and 'magnanimous' democratic practices; Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 42, 45.

36 Van der Walt calls attention on this aspect by stressing the tension between the two fundamental ideas of Rawlsian political liberalism (namely: separate moral agency, and social cooperation), see Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22.

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game' according to liberal democratic principles. Secondly, it will also be up to the participants to determine whether, over time, adjustments to the rules of their game will be needed to make their interactions and social cooperation more aligned with liberal democratic principles. To clarify how liberal law can be democratic, I propose to reflect on the presupposed conditions which would enable participants in social cooperation to make choices about its arrangement. I will do so in the next section, starting from questioning whether the concept of LDL proposed by Van der Walt presupposes that the participants engaging in social interactions can rely on principles or practices that would allow them to look at the choices they make as choices originating from their mutual commitment to cooperate.

3 Trace 2: who shall order our life *together*? … and *on behalf of* whom?

To clarify how to understand the denotation of 'democratic' in the conception of liberal *democratic* law proposed by Van der Walt, we could intuitively depart from the interpretative hypothesis that liberal democratic law is *democratic* in the sense that its legal community of reference accepts liberal norms in force as 'its own rules.' And, so, as the rules that community has given to itself to regulate social cooperation among its members. But this unsophisticated interpretative hypothesis is not really illuminating since it leaves core questions open. The main issues that the sketched interpretative hypothesis leaves without an easy answer are namely the following: if we need to consider the legal community of reference for LDL as (at least partially) determinable only once that liberal democratic institutions and liberal democratic law have been constituted,[37] then, to whom does the power to set common rules for social cooperation belong in the first place? Or, in other words, where does constituent power lay in Van der Walt's account of

37 The assumption that the community of reference of LDL is (at least partially) determinable only once LDL and liberal democratic institutions are instituted stems from the observation that the process of distillation of the concept of LDL proposed by Van der Walt aims at uprooting law from life. Consequently, as discussed in the previous section, the distilled concept of LDL entails a firm rejection of any account that defines liberal democratic legal communities by appealing to intrinsic elements that supposedly characterise them, and purportedly integrate social divisions into a unified society. The only social reality that all members of a liberal democratic legal community can be deemed to share among themselves is, at a minimum, their subjection to the law in force, which binds all of them equally even when they hold different (external and internal) perspectives on such rules. In his summary of *The Social Contract*, Van der Walt presents Rousseau as a forerunner of this understanding of the relationship between instituted law and democratic community, which is suited to describe constituent power in contemporary liberal democracies. Rousseau's contribution to the process of distillation of a concept LDL is presented as lying mainly in his intuition that no substantial unity among individuals can mark them as 'the People' before making the social contract. Thus, 'the People' follows from, rather than preceding, the one-off agreement that is presupposed as the foundational arrangement of any democratic government. See Van der Walt, *The Concept of Liberal Democratic Law*, 116-119.

LDL? And how does participation in social cooperation relate to the exercise of constituent power?[38]

Van der Walt's answer to these questions relating to constituent power materialises in the very last section of RHLDL, where he concludes his diagnosis of the constitutive precarity of LDL by suggesting that, in liberal democracies, constituent power should be understood as being exercised by a 'diffuse *we*.'[39] I argue that the suggestion to understand the constituent power as exercised by a 'diffuse *we*' (and the link that Van der Walt seems to suggest between diffuse constituent power and spontaneous individual gestures inspired by an ethics of civility) presents us with another pointer of what 'democratic' might mean in Van der Walt's conception of LDL. This pointer, however, is not easy to decipher. In this section, I reflect on what difficulties might arise in interpreting the meaning of 'democratic' in the LDL in the light of the proposal advanced by Van der Walt, in his more recent article, to understand constituent power in the form of a 'diffuse *we*.' My analysis will take as its point of departure extracts from RHLDL, which I propose to read together with texts of the two authors (Rawls, Habermas) that Van der Walt presents to his readers as companions with whom to think along about the precarity of liberal democratic institutions.

As a first move to clarify the contours of the idea advanced by Van der Walt (namely that diffuse constituent power is at play in liberal democracies), I propose to look at the context where a reference to a 'diffuse *we*' is presented for the first time. The context where the reference to constituent power in the form of a 'diffuse *we*' appears is in a discussion on the endurance of liberal democratic forms of government, rather than in a discussion on their origins.[40] One inference that we could derive from this preliminary observation is that, differently from the account of the *Social Contract* proposed by Rousseau,[41] the presupposition of a one-off past

38 This last question on social cooperation reiterates the point already raised by Van Roermund about the close connection between democratic law-making and (division of) labour. See Van Roermund, *The Case for Embodied Democratic Law-Making*, 516.

39 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

40 The 'origins' and the foundational arrangements that are supposed to sustain liberal democracies are discussed in *CLDL*. More specifically, in Chapter 6, which is tellingly titled 'From *Nomos* to *Demos*,' Van der Walt discusses how, beginning with the French Revolution, references to popular sovereignty and to 'the People' have come to the fore as foundational concepts for democratic forms of government, Van der Walt, *The Concept of Liberal Democratic Law*, 101-124. The core message of Chapter 6 is that 'the People' are hard to find and even 'unfindable,' by assumption, in modern liberal democracies. However, in Van der Walt's account, this conclusion does not lead to a complete loss of any significance of appeals to popular sovereignty and of references to 'the people' for the origins and persistence of liberal democracies. On the contrary, Van der Walt presents the readers with the need to reflect on the exigency of making references to a plural subject, which – even if it is not to be found as a sociological fact – is still to be presupposed as the source of legitimation for modern democracies. To do so, the author of *CLDL* discusses Lefort's observations on 'the political' and on the un-representability of the unity of the People, Van der Walt, *The Concept of Liberal Democratic Law*, 109-112, 232. He also examines how the ideas of 'the People' and 'general will' are used as the presuppositions on which Rousseau's social contract is based, Van der Walt, *The Concept of Liberal Democratic Law*, 115-119.

41 See footnote 37.

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agreement among the participants in social cooperation seems insufficient, in Van der Walt's account, to continue to count the constituted government, as well as the liberal laws it enacts, as democratic over time.

The article RHLDL includes repeated invitations from its author to acknowledge the 'precariousness' of the ideal of reason. The article insists on how, for LDL to endure over time, it is necessary that (a sufficiently large number of) members of the society voluntarily carry on with cooperative schemes of social interaction. In fact, whether LDL will be successful (or more successful than other forms of government) in keeping individual unwillingness to cooperate at bay and whether it will manage to achieve its primary aim of serving a life together (by keeping in place, over time, schemes of social interaction and forms of cooperation based on equal-worthiness and freedom of each participant) are outcomes dependent on historical factors rather than on the legitimacy principles backing up LDL.[42]

From this line of reasoning, the first quandary follows. The strong emphasis put by Van der Walt on the incapacity of liberal democratic institutional arrangements and liberal democratic norms to secure the stability of social cooperation over time prompts the question: if not the qualities of LDL – nor its legitimacy principles – what can, then, justify and sustain the 'common' commitment to LDL over time? The indicia emerging from the last section of RHLDL seem to lead towards the direction that there might be no (possibility of reaching a) 'common' commitment to LDL at all. In an irremediably divided society, there will be at most only individuals spontaneously committed to individually supporting liberal democratic principles and spontaneously engaging in cooperative practices.

Closely related to this point, the second move I propose to take in order to reflect on the implications of conceiving a 'diffuse *we*' as constituent power is mapping what concepts are associated by Van der Walt, in the article, to the function that a 'diffuse *we*' is expected to perform in liberal democracies. In the article, the idea of diffuse constituent power is paired by Van der Walt with the idea of a 'constituent ethics of civility.'[43] This ethics of civility is designated as 'constituent' since it is, indeed, what is needed to make LDL durable and sustainable over time. Van der Walt also argues that the constituent function, which unenforceable and spontaneous cooperative practices based on an ethics of civility play for liberal democracies, is not an element that is exclusively present in his concept of LDL. On

42 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 37-38: 'The social vision (or lack of it) that informs the line of thinking in *CLDL* (…) has no specific expectations regarding the overall balance or imbalance between felicitous and failed social interaction and the vicissitudes of empowerment and disempowerment in the ways of the world. It just insists (…) that *both* felicitous and failed social interaction can invariably be traced to concrete (institutionally at best facilitated but not guaranteed) historical gestures of cooperativeness and civility that manage to keep the always present threat of an obstinate unwillingness to cooperate at bay. (…) Suffice it to observe for now that *CLDL is an investigation into ways in which one's understanding of the law might raise the historical odds in favour of civil cooperativeness and against uncooperative heroism. It entertains no transcendental conditions on which one can count in this regard*' (emphasis mine).

43 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 38-40.

the contrary, variations of such an ethics of civility constitute a core element also in the theories on liberal political legitimation proposed by Rawls and Habermas.[44] Moreover, with regard to these two authors, Van der Walt considers appeals to a democratic ethics of civility as the 'more promising element of their respective frameworks.'[45] That is because acknowledging that democratic institutions and democratic principles need spontaneous individual compliance with democratic practices in order to endure amounts to an, at least partial, recognition that the transcendental elements included in both accounts[46] cannot alone do the work of holding up the proposed theories.

From this second observation, we can gather that, in the account of LDL proposed by Van der Walt, the notion of commonality that is expected to sustain the 'diffuse *we*' is to be interpreted without recourse to transcendental elements.[47] The remarks made by Van der Walt in the article are clearly directed at differentiating his appeals to an ethics of civility from the role played by analogous appeals to spontaneous democratic practices in Rawls and Habermas' accounts. The concept of LDL proposed by Van der Walt does not foresee that individuals, who interact and cooperate in a society where life presents itself as irremediably divided, may count on elements of commonality that could enable them to assume that their reflective practices, their communication, and their interactions are geared towards the possibility to reach intersubjective standards of what shall count, for them, as an

44 To discuss the central role that an ethics of civility plays in the theory of justice and in the liberal principle of justification proposed by Rawls, Van der Walt comments on passages where Rawls discusses the 'public culture of democracy' and the 'duty of civility to appeal to public reason,' see John Rawls, *Political Liberalism*, (New York: Columbia University Press, expanded edition, 2005), 13-15, 217, 226. Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 24-27. In support of the argument that an ethics of civility is central in Habermas' work, Van der Walt refers to the passage where Habermas acknowledges that political rights (which are supposed to express citizens' exercise of public autonomy) can be used by citizens for pure self-interest. So, whether, in the end, individuals will exercise their political rights to make public use of their communicative freedom will be very much dependent on individual spontaneous compliance with democratic practices. To say it with Habermas' words: 'Only a population accustomed to freedom can keep the institutions of freedom alive,' see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: Polity Press, 1997), 513; on the same lines see also 129-130, 461, 487. In Van der Walt's view, this recognition of the decisive role played by an ethics of civility in sustaining liberal democracies is precisely what makes both Rawls' and Habermas' theories more realistic, Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 36.

45 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.

46 Namely, in Rawls' theory of justice, the reference to a presupposed 'overlapping consensus'; and, in Habermas' theory of 'communicative action,' the reference to the use of language, which is presupposed as always oriented towards mutual understanding.

47 See Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 40 and 44.

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'at least reasonable' claim of justice,[48] or to arrive at 'intersubjectively recognised validity claims.'[49] For instance, in Habermas' theory of communicative action, the use of language is 'in common' between participants who can rely on language to coordinate their actions since the use of language is expected to be oriented towards mutual understanding.[50] However, this confidence in common communicative practices, in which factors conditioning mutual understanding are ingrained, is not shared by Van der Walt, who in several passages of the article stresses how of concern for his concept of LDL is 'a clash between irreducibly incongruent social facticity that renders the idea of a common validation process guided by the language we speak fundamentally implausible.'[51]

Consequently, the second point I would like to propose for reflection is the question of whether, in Van der Walt's account, the rejection of transcendental elements is to be interpreted as a rejection *tout court* of the possibility for participants in social interaction and cooperation to arrive at an intersubjectively validated interpretation of the goals orienting their cooperation, and at intersubjectively validated notions of their common good. An answer in the positive to this question seems to be emerging from the argument, also discussed in RHLDL, according to which the existence of liberal democracies is marked by an irresoluble 'epistemic deficit.' In Section 5 of that article, Van der Walt argues that liberal democracies can only begin and endure when individuals will magnanimously engage in social cooperation and in validation-oriented practices, in the awareness that their reciprocal exchange is inadequate to reach *together* an understanding of 'proper communal and communicative relations and proper terms of cooperation.'[52]

48 As it is, instead, the case for the account of a wide and general reflective equilibrium presupposed by Rawls. 'Wide reflective equilibrium (in the case of one citizen) is the reflective equilibrium reached when that citizen has carefully considered alternative conceptions of justice and the force of various arguments for them. (…). A well-ordered society is a society effectively regulated by a political conception of justice. Think of each citizen in such a society as having achieved wide reflective equilibrium. Since citizens recognize that they affirm the same public conception of political justice, reflective equilibrium is also general: the same conception is affirmed in everyone's considered judgements. Thus, citizens have achieved general and wide, or what we may refer to as full, reflective equilibrium. *In such a society, not only is there a public point of view from which all citizens can adjudicate their claims of political justice, but also this point of view is mutually recognized as affirmed by them all in full reflective equilibrium. This equilibrium is fully intersubjective: that is, each citizen has taken into account the reasoning and arguments of every other citizen*", (emphasis mine). Rawls, *Political Liberalism*, 490-491.

49 Habermas, *Between Facts and Norms*, 26.

50 Habermas, *Between Facts and Norms*, 17, 25-29. Discussed in Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 30 and 36-37.

51 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 44. See also 40: 'There are no essential elements of language that *necessarily* render it aimed at understanding.' See also Van der Walt's comments on the Capitol riots of 6 January 2021 and of the public, stubborn, and violent refusal of a former US president and of his supporters to acknowledge the adverse result of a valid electoral vote: 'what purchase can notions such as overlapping consensus, central ranges of agreement, and language that is aimed at understanding (*verständingungsorientierte Sprache)* have under conditions such as these?' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 41.

52 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 42.

This conclusion, however, poses yet another quandary. Is it still possible to contemplate (for a divided society, where individuals lack the capacity to arrive at intersubjectively validated notions of their common good) the possibility to express, in a first-person plural perspective, a political orientation on reasonable and just (liberal) principles that should shape their social interaction and cooperation? And if so, what are the conditions for such a first-person plural subject to emerge and to continue orienting *democratically* the process of political representation (as well as processes of law-making and of norms' interpretation)? Put in other words: what makes the 'diffuse *we*' presented in Van der Walt's account apt to count as a first-person plural *'we'*?

These are the questions that, in my view, remain still open after a closer look at the concept of diffuse constituent power presented by Van der Walt. The last passage of RHLDL, where a 'diffuse *we*' is brought into the scene as the plural subject that exercises constituent power in liberal democracies, is accompanied by two main comments by the author that, in my view, expose (without solving) the quandary I formulated above. The first comment spells out the characteristics of the kind of constituent power which, in Van der Walt's reconstruction, is supposed to be at work in liberal democracies. Such power is 'diffuse' and 'centrifugal' but is still expected to sustain 'the minimum communality required for civilised social operation.'[53] However, there are no other elements in the text that might help the reader formulate an adequately informed hypothesis on how this concept of 'minimum communality' is to be understood. The remarks on the irremediable epistemic deficit[54] would suggest, indeed, that those who exercise such 'diffuse' and 'centrifugal' power cannot arrive, because of an irremediable lack of intersubjectively validated standards, at a *shared* notion of what, at minimum, their interactions require to qualify, firstly, as social *co*-operation and, secondly, to be reckoned as *civilised* cooperation. This intuition is confirmed by Van der Walt's other comment on a 'diffuse *we*,' which reaffirms that those who are involved in the social cooperation that LDL is expected to regulate need to manage to 'live with the dire lack of shared validation practices.'[55]

Taken together, these reflections on a diffuse constituent power at work in liberal democracies prompt the formulation of the hypothesis that the concept of LDL presented by Van der Walt hinges on a very thin understanding of the notion of 'democratic.' The participants in social interactions and cooperation in a society where life presents itself as divided are not deemed capable of transcending from within the exchanges in which they engage (cooperatively or not) by means of reliable communicative practices.[56] Under these conditions, it is yet to be clarified how the voluntary engagement of several separated individuals in ethical gestures

53 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

54 The epistemic deficit that, as discussed above, represents in Van der Walt's view the threshold condition for liberal democracies to (continue to) exist.

55 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

56 Contrary to what was instead suggested by the Habermasian theory of communicative action; Habermas, *Between Facts and Norms*, 14, 16-27.

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oriented towards liberal principles can lead to the emergence of a 'we' perspective, from which liberal norms can be looked at as the *democratic* law that a community gives to itself.

‘Should I Stay or Should I Go?’ On the Relevance of an Ontology and Ethics of Non-Cooperation

Irena Rosenthal

1 Introduction

Van der Walt’s article raises the pertinent question about how liberal democracy can be sustained in contexts where liberal-democratic ideals are in peril. More specifically, the piece refers to the coup attempt on 6 January 2021 at the United States Capitol, but, with so many challenges to liberal democracy elsewhere (including, but not limited to, the erosion of judicial independence in Poland, the undermining of freedom of the press in Hungary, Israeli apartheid), this question obviously has global relevance. Van der Walt argues, via a detailed reading of Rawls and Habermas, that liberal democracy depends on a ‘constituent ethics.’[1] Importantly, the argument not only aims to engender an urgent reflection on the conditions of liberal democracy, but also defends and develops further key insights presented in Van der Walt’s book *The Concept of Liberal Democratic Law*. In particular, Van der Walt builds on his methodological claim that liberal-democratic law should be distilled or uprooted from metaphysics. This methodology indeed, as Michelman argues, invites a reflection on Rawls’ political liberalism; not unlike Van der Walt, Rawls’ ‘strategy of avoidance’ aims for liberal-democratic ideals that are ‘freestanding’ of controversial metaphysical or ontological doctrines.[2]

While I am in agreement with Van der Walt that liberal democracy depends on a constituent or ‘lively’[3] ethics (a dimension neglected by Rawls), I want to take issue with two, interrelated, claims of his article that, from my perspective, share some problematic aspects of Rawls. First, the methodological claim that liberal-democratic principles can and should be uprooted from metaphysics. I contend that liberal-democratic concepts, such as justice, law and ethics, inevitably invoke metaphysical or ontological assumptions. Instead of aiming for an impossible separation between liberal democracy and ontology, the debate about the

1 Johan Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ *Netherlands Journal of Legal Philosophy* 52 (2023): 40.

2 John Rawls, ‘Justice as Fairness: Political not Metaphysical,’ 14 *Philosophy and Public Affairs* (1985): 223-251; John Rawls, *Political Liberalism: With a New Introduction and the ‘Reply to Habermas’* (New York: Columbia University Press, 1996), 375-378. For Rawls, metaphysics refers to claims about human nature or fundamental statements on the constitutive conditions of being, including the social world, and he uses the term metaphysics interchangeably with ontology: John Rawls, *Political Liberalism*, 29, 379. Van der Walt does not seem to take issue with Rawls’ usage of the term, so I will use metaphysics and ontology interchangeable, along these Rawlsian lines. For more explanation on how metaphysics and ontology is used in political and legal philosophy, including Rawls’ political liberalism, see Irena Rosenthal, *Democracy and Ontology: Agonism between Political Liberalism, Foucault and Psychoanalysis* (Oxford: Hart Publishing, 2018), 6-12, 39.

3 Van der Walt, ‘Rawls, Habermas, and Liberal Democratic Law,’ 39.

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foundations of liberal democracy should shift towards the question which ontology offers the best orientation on liberal democratic practices. Secondly, the claim that liberal-democratic ethics ultimately boils down to the acceptance to 'live graciously enough with terms of social cooperation' that one does not consider reasonable.[4] I contend that liberal-democratic ethics should not be reduced to the willingness to cooperate, but also needs to make space for the refusal of norms and practices of cooperation. These two arguments are related in the following way: I argue that an ethics of non-cooperation becomes more pertinent when an ontology of social life takes seriously how power relations structure cooperation. As Van der Walt's ontology pays insufficient attention to the impact of power upon cooperation, his ethics misses that marginalised citizens may, at times, need to resist prevailing forms of collaboration. I conclude with a brief reflection on the refusal of Trump supporters to accept the election results and its implications for ethics.

2 Liberal democracy and ontology

Van der Walt argues that liberal-democratic law should start from the premise that life is fundamentally divided and, in contrast to ancient metaphysics and natural law, no longer presents law as an expression of the unity of life. In light of the dividedness of life liberal democracy needs to reckon with the fact that legal communities consist of people who endorse law normatively (from an 'internal' point of view as Hart would say) and those who comply with law out of fear of punishment (Hart's 'external' point of view). This is why, I presume, Van der Walt emphasises the 'precariousness'[5] of the liberal-democratic ideal of reason: liberal-democratic ideals are always contested and thus inherently instable and in danger of collapse. Rawls' political liberalism to a large extent converges with these points of Van der Walt. Political liberalism too is premised upon the dividedness of life or, as Rawls, puts it, the 'fact of pluralism.'[6] And given the ineradicable disagreement about human nature or the constitutive conditions of being, political liberalism aims for a concept of liberal-democratic justice that is 'political, not metaphysical'.[7] This implies, amongst others, that the later Rawls explicitly rejects natural law's ambition to ground principles of justice in an ahistorical concept of human nature. Moreover, political liberalism acknowledges that any liberal-democratic regime – not just actual regimes that we inhabit today, but even ideal societies – will be faced with people who reject liberal-democratic law (as it becomes clear, e.g., when Rawls remarks 'that there are doctrines that reject one or more democratic freedoms is itself a permanent fact of life'[8]).

To avoid metaphysical controversies about human nature, political liberalism presents principles of justice as reflections of the public culture of liberal

4 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 27.
5 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 16.
6 Rawls, *Political Liberalism*, 37, 59.
7 Rawls, 'Justice as Fairness: Political not Metaphysical,' 223-251.
8 Rawls, *Political Liberalism*, 64, fn. 19.

democracies. Van der Walt's criticism on Rawls is mainly concerned with this historical approach to justice: 'A hermeneutic reflection on the essential conceptions of justice historically endorsed in a political tradition is not as such less metaphysical than universalist conceptions of natural law.'[9] According to Van der Walt, grounding liberal-democratic principles in the public culture of democratic societies remains metaphysical, because it replaces controversial assumptions about human nature with 'historical essentialism': contestable claims on the 'established goods' of tradition from which principles of justice should be derived.[10] In doing so, political liberalism fails to see that the public culture of liberal democracies consists of irreconcilable views on social cooperation. For instance, some regard a compulsory COVID-19 vaccination scheme a reasonable form of social cooperation whereas others see it as a gross violation of one's autonomy. So while Rawls acknowledges disagreements about human nature, Van der Walt notes that political liberalism also fails to appreciate how the fact of pluralism challenges appeals to the unity of a historical tradition.

The biggest concern that Van der Walt has with Rawls' historicised metaphysics is that it blinds us to the need for ethics. Rawls' historical essentialism presents political liberalism as if it can function automatically, as an 'onto-logic' that 'rolls largely on its own steam.'[11] In doing so, political liberalism shifts our attention away from the precariousness of liberal democracy and its dependence on the ongoing ethical commitment of people. In contrast, Van der Walt argues that claims about a consensus on social cooperation are nothing more than 'working assumptions' and should not be invoked as 'transcendental assumptions' or 'established goods that either conclusively or significantly displace the ongoing ethics that sustain them.'[12]

Van der Walt's nuanced reading of Rawls excavates many stronger and weaker impulses in political liberalism and his argument about the need for an ethics is profound. While Rawls' theory acknowledges the need for ethics here and there, Van der Walt rightly notes it does not figure prominently enough within political liberalism. However, Van der Walt, especially towards the end of his analysis, downplays that Rawls acknowledges the contestability of political liberalism and does not regard his principles of justice as conclusive 'established goods' or transcendental claims. For Rawls, an agreement (or a society's reflective equilibrium on justice) is not a static conclusive achievement, but rather a dynamic 'struggle [that] continues indefinitely.'[13] In fact, political liberalism assumes that no theory of justice can adequately give 'appropriate political voice' to 'groups and interests that arise from social change' and thus concedes that all agreements are contestable

9 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 21.
10 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 28.
11 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 26.
12 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 40, 28.
13 Rawls, *Political Liberalism*, 97.

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and instable.[14] Therefore, particularly in his later writings, Rawls regards the ongoing politicisation of hegemonic conceptions of justice integral to a well-ordered society, including new proposals on justice which challenge the status quo.[15] In other words, political liberalism too envisions principles of justice as tentative working assumptions and is less prone to 'epistemic security'[16] than Van der Walt suggest.

From my perspective, the problem with Rawls' scheme is not that it denies the contestability and instability of principles of justice nor, for that matter, that it begins from history (in absence of an eternal perspective – *sub specie aeternitatis*[17] – where else than in a historical context could philosophical thinking begin?). Rather, a more significant problem in political liberalism is the claim that liberal democratic concepts can and should be separated from ontology – a methodology that Van der Walt seems to share with Rawls. Van der Walt and Rawls are surely right that liberal democracies are faced with ineradicable disagreement about ontology and that we need to resist attempts to ground liberal democracy in a timeless, universal account of human nature.

Yet, I am not convinced that liberal-democratic principles can be separated or 'extracted' from ontology altogether. As I have argued extensively elsewhere, liberal-democratic principles and law unavoidably draw upon explicit or implicit controversial assumptions about the constitution of people and the social world.[18] Indeed, as Lefort, notes: 'The elaboration attested to by any political society […] involves an investigation into the world, into Being as such.'[19] These ontological assumptions influence normative choices between competing visions on liberal democracy. That is, what we want to see reflected in principles of liberal democracy and law is to some extent guided by our fundamental beliefs on what makes us human (or, rather, part of the non-human world) and how the social and political world is fundamentally constituted. For example, if your ontology asserts that liberal-democratic agency and civility is crucially dependent upon care – the physical and mental work to raise and maintain human life – you are more likely to endorse principles and law that valorise such care than someone whose ontology only highlights human autonomy and disregards the human need for care.[20]

14 Rawls, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Cambridge, MA: Harvard University Press), 140.

15 I elaborate on the role of politicising justice in the later Rawls, in 'Ontology and Political theory: A critical encounter between Rawls and Foucault,' *European Journal of Political Theory*, 18, no. 2 (2019): 238-258.

16 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 42.

17 In *A Theory of Justice* Rawls infamously compared moral reasoning with adopting an eternal perspective that enables us to 'regard the human situation not only from all social, but also from all temporal points of view.' *Political Liberalism* departs from this earlier assumption: 514.

18 Rosenthal, *Democracy and Ontology*.

19 Claude Lefort, *Democracy and Political Theory* (Cambridge: Polity Press, 1988), 219.

20 My claim is not that ontology leads to self-evident normative judgments, but rather that it orients us to a range of possibilities that normative reflection can pursue. That is, I see ontology as one of the considerations that along with normative claims shape one's reflective equilibrium on justice and fundamental laws.

Rather than assuming that liberal-democratic principles can avoid (Rawls) or be 'distilled' from ontology (Van der Walt), we should take seriously that conceptions of liberal democracy will remain grounded in a contestable ontology. From my perspective, the challenge for political and legal philosophy is not to separate liberal-democratic principles from ontology entirely – which would be impossible – but rather to search and develop ontologies that are appropriate for liberal democracy. At the very least, a liberal-democratic ontology should, as Stephen White notes, claim a 'weak' rather than a 'strong' status.[21] 'Strong' ontologies continue along the lines of traditional metaphysics and natural law and claim 'to show us "the way the world is" as if such views are unchanging and of universal reach' and necessitate self-evident normative principles. In contrast, 'weak' ontologies assume that all 'fundamental conceptualisations of self, other, and world are contestable' and prefigure liberal-democratic practices that support rather than repress ongoing liberal-democratic contestation.[22]

Van der Walt's book critically engages with traditional metaphysics so, unlike Rawls, he sees a critique of ontology as an appropriate task for political and legal philosophy. Yet, like Rawls, he does seem to assume that his own alternative conception of liberal democracy can be liberated from ontological controversies. In what follows, I will argue that Van der Walt's conception of liberal democracy cannot completely be extracted from a controversial ontology. In doing so, I will focus on what I see as the most promising and innovative feature of his theory: the need for an ethics that sustains liberal democracy.[23]

3 An ethics of liberal-democracy

Although Van der Walt underestimates how much the later Rawls acknowledges the precariousness of liberal democracy, I completely agree that Rawls did not think through the implications of the fragility of liberal-democratic life. Political liberalism focuses mainly on liberal-democratic institutions and insufficiently attends to the crucial role of ethical practices in sustaining liberal democracy. Van der Walt's theory of liberal democracy crucially corrects this deficit. He proposes an intriguing and innovative ethics of civility that centers on the 'community-creating gift': the willingness to cooperate in the face of radical disagreement and to live with outcomes of democratic procedures, which finds 'perhaps its most telling expression' in the acceptance of an adverse vote count.[24] The article under discussion highlights some contours of this ethics, but it has been developed further and in greater detail in another fascinating article – 'The Gift of Time and

21 Stephen White, *Sustaining Affirmation: The Strenghts of Weak Ontology in Political Theory* (Princeton, NJ: Princeton University Press), 8.

22 White, *Sustaining Affirmation*, 8.

23 Perhaps Van der Walt's distillation method only applies to law and not ethics. However, his critique of Rawls suggests that the method should apply more broadly, and that not just law, but other key liberal-democratic concepts too, such as justice and ethical principles, should be separated from ontology. It would be helpful if the article elaborates on the scope of the method.

24 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 45.

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the Hour of Sacrifice' – that, as Michelman rightly argues, should be read in tandem with *The Concept of Liberal Democratic Law*, and I add, with this article. Therefore, the comments below will also refer to the latter article.

In 'The Gift of Time,' Van der Walt argues that political liberalism depends on a gift economy:

> Liberals continue to stick to the consensus [without] the secure knowledge that its terms will be enforced. The gift of liberal or constitutional democracy concerns the ultimately irreducible rest of risk-taking in which liberal democratic citizens engage on a daily basis. Liberal democracy pivots on this gift of taking risks with others.[25]

If I understand Van der Walt correctly, the gift that liberal democrats offer each other is 'time,' more specifically, waiting for others to reciprocate. Giving time is risky in precarious and imperfect liberal democracies as one can never be sure that reciprocity will follow or, one might say, that others will also give their time to liberal-democratic life.

Van der Walt grounds his ethics in ontological assumptions about social life. More specifically, the gift is understood as a particular form of sacrifice, that is, giving up something valuable. Following Marcel Mauss, amongst others, Van der Walt understands sacrifice as a condition of possibility of social life: 'as a broad category of all social practices that serve as *transcendental* conditions for all other social practices.'[26] The political-liberal instantiation of sacrifice – the gift – is also understood as a *transcendental* condition:

> The liberal heart of the liberal social contract consists in the essential risk that liberals take with one another, the risk which conditions in *transcendental* fashion the time that they give to one another, and the space that comes with this time.[27]

Van der Walt's appeal to transcendental claims may seem surprising given his critique on the alleged transcendental assumptions of Rawls' political liberalism. If political liberalism should refrain from transcendental claims, why, then, does this not apply to Van der Walt's ethics too? After all, just as we disagree about human nature, or the established goods of history, we also fundamentally disagree about the constitutive elements of social life that support ethics. Van der Walt overcomes this critique to some extent, as his ontology of social life is presented as contestable and thus closer to a weak ontology than a strong one:

25 Van der Walt, 'The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics,' in *Law's Sacrifice: Approaching the Problem of Sacrifice in Law, Literature and Philosophy*, ed. Briain Nail (London/New York: Routledge, 2019), 36.

26 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 25.

27 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 32.

> The links constructed in this essay between [...] liberalism and the economy of the gift [...] should [...] be considered unstable and precarious [...]. [T]hey should not be presented in terms of *over-confident* identifications of *fixed essences or stable categories*, but rather in terms of heuristic constructions of *relatively* distinct patterns or constellations of social phenomena that allow for some general and generalising observations while demanding adequate leeway for rather frequent exceptions.[28]

But while Van der Walt identifies his ontology as contestable, his discussion of social life is quite similar to Rawls' reading of history: it reduces the 'thing' that grounds normativity (for Van der Walt: social life underlying ethics; for Rawls: history underlying justice) to just one (contestable) essence and does not reckon with competing interpretations of social life (or history) that emphasise other key elements of social (or historical) life. In doing so, Van der Walt's ontology misses crucial dimensions of social life and does not, I will argue, guide us toward the ethics that contemporary liberal democracies need.

One key feature that is missing in Van der Walt's ontology is that practices of gift-giving in liberal-democratic regimes are shaped by power relations. That is, the burdens of giving time – or more time – to liberal democracy are not similar for everyone nor equally distributed, but stratified. For example, some time investments in liberal democracy are traditionally unrecognised due to the patriarchal power relations. As pointed out by feminist Marxists and care ethicists, care work or social reproductive tasks like raising children, caring for friends and communities are a crucial condition of possibility for society and liberal democracy.[29] Yet much of liberal thought has neglected the sacrifices that care workers make to raise and sustain civil liberal democrats. As Nancy Fraser notes 'Historically, these processes of "social reproduction" have been cast as women's work, although men have always done some of it too. Comprising both affective and material labor, and often performed without pay, it is indispensable to society. Without it there could be no culture, no economy, no political organization.'[30] Van der Walt's account of ethics and his underlying ontology of the gift economy also neglect that liberal democratic practices are fundamentally constituted by the daily sacrifices of social reproduction. For example, he ignores that the acceptance of an adverse vote account is crucially dependent upon the daily sacrifices of care workers who discipline children so that future voters are eventually able to cope with the disappointment of an adverse vote count.

The constitutive role that power relations play in liberal-democratic gift-giving is also missing in Van der Walt's account of the public sphere. The risks of participating in liberal-democracy crucially depend on whether one benefits or suffers from the imperfections of liberal democracy. For example, in liberal democracies shaped by

28 Van der Walt, 'The Gift of Time and the Hour of Sacrifice,' 35.

29 See, for instance, Silvia Federici, *Wages Against Housework* (Bristol: Falling Wall Press, 1975) and Eva Kittay, *Love's Labor* (London/New York: Routledge, 1999).

30 Nancy Fraser, 'Contradictions of Capital and Care,' *New Left Review*, 100 (July/August 2016).

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institutionalised racism the risks of giving time are much higher for a woman of colour than, say, a white man. That is to say, a women of colour is much less likely to benefit from or be reciprocated by democratic procedures – the laws, democratic fora, judiciary – that emerge from cooperation than someone who is systemically privileged in existing laws and the public sphere. As Danielle Allen notes in her analysis of sacrifice and racial injustice in American democracy: 'The hard truth of democracy is that some citizens are always giving things up for others.'[31]

My point in offering these examples is not to suggest that Van der Walt's article should have analysed in great detail all the intersecting power relations that shape the liberal-democratic gift economy. Rather I want to suggest that by neglecting power relations in his ontology of liberal democratic gift-giving, Van der Walt may have missed the importance of ethical practices that help minorities to challenge structural exclusions.

Overall, the focus in Van der Walt's ethics is very much on preserving and accepting the status quo, that is, on what 'sustains the we,'[32] not on how ethics can serve those who are marginalised in the 'we.' Or, as he puts it:

> [N]uclear essence of that which is at stake when one heeds a call to civility [...] reveals itself when one *accepts to live graciously enough with terms of social cooperation* that one's moral autonomy [...] prevents one from considering 'reasonable enough.'[33]

I think that Van der Walt is right in his claim that liberal democracy requires citizens to accept that societies are divided and that one may need to live under terms of cooperation that one considers unreasonable. Yet, a 'lively' ethics should also make room for practices that change the way in which divisions are established, that open up opportunities to challenge hegemonic terms of social cooperation and foster, in Allen's words, the 'constant redistribution of patterns of sacrifice.'[34] In reducing ethics to sustaining current democratic procedures, Van der Walt's ethics is strikingly similar to Rawls's ethics. Although Rawls did not elaborate much on ethics, his focus too is mostly on virtues that, ultimately, ensure compliance with prevailing political liberal principles. For instance, with regard to education he notes that children should be taught 'to honor the fair terms of cooperation in their relations with the rest of society,' and makes no mention of the need for educational practices that encourage children to criticise prevailing power relations or structural exclusions.[35] Put differently, missing in Rawls' and Van der Walt's account is a reflection on contestatory or *agonistic* ethical practices which are conducive to the ongoing politicisation of the structural exclusions in liberal-democratic regimes.

31 Danielle Allen, *Talking to Strangers* (Chicago: The University of Chicago Press, 2004), 29.
32 Allen, *Talking to Strangers*, 28.
33 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 27.
34 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law, 39.
35 Rawls, *Political Liberalism*, 88.

4 Should I stay of should I go now? If I go, there will be trouble. And if I stay it will be double

~ The Clash

An ontology of social life that illuminates how the risks of gift-giving are unequally distributed guides to the ethical potential of withdrawing one's gift to democracy. Van der Walt's ethics assume that staying within the game and continuing to cooperate is always desirable. But for participants in liberal democracies for whom the risks of giving time to democracy are high the question 'Should I stay or should I go now?' makes sense. Going or leaving democracy means trouble: one will be seen as a disloyal citizen and give up (for now) the marginal chance to change prevailing terms of cooperation. But if one stays the trouble might be double: making sacrifices to a regime that does not reciprocate one's gifts or cooperating with others who laugh away criticisms of exclusions as an expression of deluded wokeness.

Van der Walt construes the dilemma between staying and going as if there are two options: there are 'historical gestures of cooperativeness and civility' or the 'refusal to cooperate [which] invariably presents itself in terms of the sublime heroism.'[36] In other words, Van der Walt treats the refusal to cooperate identical to the sublime heroism exemplified by Donald Trump's ambition to 'make one's country great again.' But is the refusal to cooperate invariably similar to violent heroism?

Refusing to cooperate is an important strategy for minorities who are excluded or marginalised in mainstream political fora. It allows these groups to regroup after a political defeat and to develop new strategies to politicise structural exclusions, particularly, when the powerful fail to reciprocate continuously. For example, in 1968, community organiser Saul Alinsky planned the infamous 'shit-in' at Chicago Airport after the city mayor did not follow up on commitments to invest in a poor black neighborhood.[37] Faced with a blocked political arena and dialogues that led nowhere, Alinsky mobilised his movement to occupy toilets at this (at the time) world's busiest airport so that travellers exiting airplanes would be unable to use the lavatories. The 'shit-in' never happened: imagining the scene of travellers barred from relieving themselves, or worse, the newspaper headlines about such an event, was already enough for the administration to deliver on its promises immediately or, one might say, to reciprocate. Alinsky's 'shit-in' is not exactly an example of Van der Walt's notion of civilised decency, that is, the patient waiting for others to reciprocate. But it is not a form of violent heroism either. It is an act of refusal, a withdrawal from dominant structures of cooperation, in order to push the powerful to address structural exclusions.

36 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 38.
37 Saul Alinsky, *Rules for Radicals* (New York: Random House, 1971).

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Acts of refusal are also central in the feminist tradition as Bonnie Honig notes in her recent book *A Feminist Theory of Refusal*.[38] Honig's theory of refusal draws inspiration from the *Bacchae*, the Greek drama in which women leave the city of Thebes, defying the orders of the King to stay home and care for their children. While the women in this drama have sometimes been described as mad (or, we might say, uncivilised), Honig offers a feminist reading of the play. The withdrawal from the polis, the refusal to sacrifice more time to social reproduction and sustaining the polis, enabled the women to experiment with new ways of life in 'womenled bands rather than maleheaded households.'[39] As Honig notes, the women's refusal is, of course, highly relevant and, indeed, not only fictional. The insight that the 'personal is political' – the ongoing plea to take the private sphere and social reproduction seriously in liberal thought and within liberal-democratic law – is born from fugitive spaces: book clubs, networks, dinners and office gossip that brought together women who no longer wanted to sacrifice so much to society and liberal democracy and who looked for possibilities to narrate personal experiences that, eventually, developed into a structural critique of patriarchy.

5 Conclusion: refusing elections results

The examples of refusal offered here challenge Van der Walt's binary opposition between, on the one hand, accepting a society's terms of cooperation and, on the other, the violent heroism inherent to Trump's politics. Rejecting democracy's demand for sacrifice, refusing to cooperate, can be a breeding ground for challenging dominant forms of cooperation. Highlighting the potential of refusal should of course not blind us to the fact that refusal can collapse into more dangerous forms of opposition. When the women in the *Bacchae* eventually returned to the city, they did not start a new women's band, but killed the king. Fugitive, secluded spaces off- and online can also, and sometimes do, encourage participants to use violence as a means for change. How, then, should we assess the refusal to accept the outcomes of the American elections, and what are its implications for ethics?

What struck me in Van der Walt's argument in the article under discussion is that the principle to accept election results is framed in categorical terms:

> The politically virtuous among them would always be adamantly inclined to subject voting procedures and constituency designs to critical reforms that may augment or diminish electoral empowerment. They nevertheless endorse them and stick to their results on the day of the count.[40]

Yet, should the political virtuous always accept a vote count? Just as we allow for exceptions in the most fundamental moral rules ('one shall not kill, unless in case of self-defence'), one would expect an exception in the rule on accepting election

38 Bonnie Honig, *A Feminist Theory of Refusal* (Cambridge, MA: Harvard University Press, 2021).
39 Honig, *A Feminist Theory of Refusal*, 22.
40 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 44.

results. That is, if elections are truly rigged and corrupted, as they are in authoritarian countries like Belarus, refusing elections results could be part of civilised decency. Why does Van der Walt not endorse such an exception? I expect Van der Walt precludes such an exception, because his argument is set in liberal democracies where 'systemic logics,' such as campaign financing, render election results 'deeply questionable,' but not completely fraudulent as in authoritarian regimes.[41] Yet, it appears to be at odds with Van der Walt's basic ontological premises to attribute election procedures in liberal democracies with an a priori reliability. Practices of liberal democratic are, as Van der Walt emphasises, inherently precarious and instable. In this light, we cannot rule out in advance the possibility of a corrupted election and the need to refuse it, even in regimes that are presumably liberal-democratic. So rather than claiming that liberal democrats should always endorse election results, I want to suggest that liberal democrats should endorse election results, unless compelling evidence shows that the elections were so fraudulent that refusing the vote count becomes more virtuous than endorsing it.

With regard to the recent elections in the US, I agree with Van der Walt that the accusations of election fraud were 'baseless' as no compelling evidence was presented.[42] Yet, what makes the case of the attempted coup so complicated (and perhaps even more complicated than suggested by Van der Walt's reading) is that many people who stormed the Capitol – and many people who did not – seemed to believe that the elections *were* rigged,[43] and that the participants in the coup attempt believed they were making a sacrifice for democracy and the constitution. This suggests that the problem here is more epistemic – a conflict about facts – than ethical (the will to cooperate). That is, the attempted coup may confront us with immoral behaviour that stems from what David Luban refers to as a fundamental error in the 'factual assessment of whether the world was now in a state of exception.'[44]

It would go beyond the scope of this article to elaborate on how we can prevent the huge discrepancies in factual assessment and counter the emergence of conspiracy theories that lack any basis in reality, but that nonetheless appear convincing to a substantial part of the American constituency. Van der Walt seems to believe that, ultimately, the communality of factual reality rests upon our willingness to cooperate: '[T]he transubjective ideal content of factual observations evaporates when the magnanimous willingness to cooperate evaporates.'[45] This claim strikes me as too reductionist, as if the problem of fake news and lying politicians can be solved by one ethical virtue, and not *also* requires substantial institutional measures

41 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 44.
42 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 44.
43 One of out of four American voters do not believe that the election results were legitimate. See Kevin Arceneaux and Rory Truex, 'Donald Trump and the Lie *Perspectives on Politics* 19 (2022): 1-17.
44 David Luban, 'Hannah Arendt meets Qanon: Conspiracy, Ideology, and the Collapse of Common Sense,' *Georgetown University Law Center* (2021): 31.
45 Van der Walt, 'Rawls, Habermas, and Liberal Democratic Law,' 45.

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that control commercial social media companies. With regard to the role that ethics can play, the issue of factual disagreements and conspiracy theories could mean that our ethical repertoire should be broadened and pay more attention to epistemic virtues. For example, Luban emphasises the need for epistemic vigilance:

> Given that by far the greater part of what we know comes from other people, vigilance against being misinformed or misled by them is an indispensable trait. It requires us to evaluate testimony from others along the two dimensions of competence and honesty – asking the questions *is my informant in a position to know that?* And *is my informant trying to fool me*?[46]

Epistemic vigilance sits somewhere between paranoia (the incorrigible anxiety that elections are completely rigged) and naïve trust (the belief that election procedures will, not matter what, always be reliable). This virtue complements liberal-democratic procedures that allow for checks and balances upon elections, such as investigations into allegations of fraudulent election results. Such virtues and procedures are essential to ascertain whether we should cooperate, or are confronted with the exceptional case, and the immense trouble, that comes with the refusal of election results.

46 Luban, 'Hannah Arendt meets Qanon,' 27.

The Normative Commitments of Liberal Democracy

Stefan Rummens

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 recognises the fragility of the liberal democratic regime and warns, for instance, about the threat posed by politicians like Donald Trump, who fail to recognise 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.[1]

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.'[2] Elsewhere, he is even more explicit and acknowledges that liberal democracies 'cannot avoid identifying "unreasonable" others and silencing them.'[3]

On the other hand, Van der Walt's view of liberal democracy is outspokenly proceduralistic. He emphasises 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.[4] 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

1 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, no. 2 (2021): 467-480 at 473.

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

3 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, no. 2 (2021): 521-576 at 532.

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

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moral autonomy (one's separate moral agency) relentlessly prevents one from considering "reasonable enough".'[5]

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,[6] 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.[7] It points out the supposedly naturalistic, metaphysical or foundationalist elements ('rooted in life') in other theories and admonishes us to avoid those. To the 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.[8] To be fair, Van der Walt sometimes qualifies this proceduralism, when he emphasises 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.'[9] 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 thematise 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

5 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 27.

6 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).

7 Serdar Tekin, 'Between Modesty and Ambition: Remarks on *The Concept of Liberal Democratic Law*,' *Etica & Politica* 23, no. 2 (2021): 459-465 at 460-464.

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

9 Van der Walt, *The Concept of Liberal Democratic Law*, 241.

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.'[10] 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 'overlapping consensus' or 'central ranges of agreement.'[11] These notions have to become 'devoid of intrinsic substance'[12] 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.'[13] 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.[14]

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' position. Both of them indeed assume that liberal democracy is characterised 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.[15] For Habermas, the core of liberal democracy is captured by the *abstract scheme of rights*, which characterises every constitutional democracy, and which refers to five categories of rights establishing (1) the greatest possible measure of individual liberties, (2) membership status in

10 Van der Walt, 'Reply to My Critics,' 567.
11 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27-28.
12 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 40.
13 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 28.
14 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 40.
15 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 John Rawls. *Collected Papers* (Cambridge: Harvard University Press, 1999), 573-615 at 581-582.

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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.[16]

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 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 realise their equal freedom in an essentially open-ended manner.[17]

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.[18] 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 realise 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 vaccination before the constitutional court.

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

17 For Rawls, see *Political Liberalism*, l-lvii, 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.

18 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, no. 4 (2006): 469-481; Stefan Rummens, 'Democratic deliberation as the open-ended construction of justice,' *Ratio Juris* 20, no. 3 (2007): 335-354.

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.[19]

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.[20] For Rawls, the legitimacy of majority decisions requires that all citizens (and all government officials) follow public reason.[21] 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'[22] and, subsequently, vote 'for the ordering of political values they sincerely think the most reasonable.'[23] 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.'[24] 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 value orientations, goals, and interest positions of its members.'[25] 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.

19 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27. Compare also with Van der Walt, 'Reply to My Critics,' 559.

20 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.

21 Rawls, *Political Liberalism*, lv-lvi; Rawls., 'The idea of public reason revisited,' 577-579.

22 Rawls, *Political Liberalism*, 217.

23 Rawls, *Political Liberalism*, lv.

24 Habermas, *Between Facts and Norms*, 179.

25 Habermas, *Between Facts and Norms*, 156.

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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".'[26] 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.'[27] 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 recognise, and illegitimate enemies whom we have to contain 'like war and disease.'[28]

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 recognise and fight as genuine threats to the survival of our liberal democratic regime on the other.

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.[29]

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.[30]

26 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27.
27 Rawls, *Political Liberalism*, 253.
28 Rawls, *Political Liberalism*, 64, footnote 19.
29 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 28, 39-40.
30 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 40.

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.[31] 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.'[32] This means that a proper conceptualisation 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 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.[33] 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.'[34] 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.'[35]

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.[36] 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

31 Van der Walt, 'Reply to My Critics,' 563; Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 28-29.
32 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 29.
33 Van der Walt, 'Reply to My Critics,' 550-551; Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22-23.
34 Van der Walt, 'Reply to My Critics,' 553, 554.
35 Van der Walt, 'Reply to My Critics,' 559.
36 Rawls, *Political Liberalism*, 19 and *passim*.

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is a genuine *possibility*, not that it is automatically guaranteed. Rawls explicitly recognises that many 'political, social or psychological forces'[37] are needed to effectively bring about an overlapping consensus and he fully recognises that unreasonable doctrines exist and pose a very real threat to the stability of liberal democracy.[38]

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 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.[39]

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.[40] 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.'[41] 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'[42]) represent a necessary but external condition for the proper working of liberal democratic institutions that is 'not at their disposal.'[43] These conditions, thus, represent an external *vulnerability* of liberal democracy, not an intrinsic transcendental certainty.

37 Rawls, *Political Liberalism*, 158.

38 Rawls, *Political Liberalism*, 64, footnote 19.

39 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).

40 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 35-43.

41 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 37; 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).

42 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 35; Habermas, *Between Facts and Norms*, 131.

43 Habermas, *Between Facts and Norms*, 131.

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, Habermas talks about the need for a form of life that meets morality halfway (*entgegenkommende Lebensform*).[44] 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 realised. 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*.[45]

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 realisation 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 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.[46]

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

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

46 Jürgen Habermas, 'Once Again: On the Relationship between Morality and Ethical Life,' *European Journal of Philosophy* 29 (2021): 543-551 at 548.

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So, when Habermas acknowledges that liberal democracy cannot survive without the 'initiatives of a population accustomed to freedom'[47] he is not 'ruining the transcendental elements'[48] 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.[49]

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.'[50] 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 favourably 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*.[51] 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 realising 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

47 Habermas, *Between Facts and Norms*, 131.

48 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 40.

49 Van der Walt's claim ('Rawls, Habermas and Liberal Democratic Law', 39-40) 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 institutionalised 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).

50 Van der Walt, 'Reply to My Critics,' 563.

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

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.[52]

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.[53]

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

> 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.[54]

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 recognise the political process as a process through which we, human beings, effectively attempt to actualise a better and more just society – an actualisation 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.[55]

52 Habermas, 'Once Again,' 550.
53 Jürgen Habermas, *The Inclusion of the Other. Studies in Political Theory* (Cambridge: MIT Press, 1998), xxxvi.
54 Van der Walt, *The Concept of Liberal Democratic Law*, 238.
55 Habermas, 'Once Again,' 550-551.

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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.

The Great Gamble of the Liberal State

Fragility, Motivational Weakness and Political Regress

Ronald Tinnevelt

> Und was du tust, sagt erst der andre Tag, War es zum Schaden oder Frommen.[1]

1 Introduction

In 1964 during one of the Ebrach Summer Seminars – organised by the German constitutional and administrative law scholar Ernst Forsthoff – Ernst-Wolfgang Böckenförde famously addressed the question whether a liberal, securalised state requires some form of pre-political grounding or ethical substance (*sittliche Substanz*) to sustain itself. His answer came to be known as the Böckenförde Dictum, Dilemma or Paradox: '*The liberal, secularized state is sustained by conditions it cannot itself guarantee. That is the great gamble it has made for the sake of liberty*.'[2] Böckenförde's Dictum not only plays an important role in Johan van der Walt's *The Concept of Liberal Democratic Law*[3] but also functions as the implicit frame of reference for his analysis of Rawls's political liberalism and Habermas's discourse theory of law and democracy.

Van der Walt sees a 'parallel constituent/constituted-power problematic' at work in the writings of Rawls and Habermas; a problematic relation between public ethos and the institutions of a liberal state. Both authors recognise but also marginalise, Van der Walt claims, the fact that some form of 'constituent ethic' is needed to sustain a framework of political legitimation. Even though he agrees with them that such an ethics is necessary Van der Walt argues that a constituent ethic cannot be reconciled with a (quasi-)transcendental framework of political legitimation.

1 Johan Wolfgang von Goethe, 'Ilmenau,' in *Werke*, Hamburger Ausgabe, Band 1 (München: Deutscher Taschenbuch Verlag, 1998), 110.

2 Ernst-Wolfgang Böckenförde, 'The Rise of the State as a Process of Securalization,' in *Religion, Law, and Democracy: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2020), 153 (italics in original). For a discussion of the context and meaning of this Dictum, see: Tine Stein, 'The Böckenförde Dictum – On the topicality of a liberal formula,' *Oxford Journal of Law and Religion* 7 (2018): 97-108; Christian Polke, 'Böckenförde's Dictum and the Problem of "Value Fundamentalism",' *Oxford Journal of Law and Religion* 7 (2018): 109-123; Jan-Werner Müller, 'What the Dictum Really Meant – and What It Could Mean For Us,' *Constellations* 25 (2018): 196-206; and Aline-Florence Manent, 'Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde,' *Oxford Journal of Law and Religion* 7 (2018): 74-96.

3 'The line of thinking taken from Lefort and Böckenförde runs right through this book.' Johan van der Walt, *The Concept of Liberal Democratic Law* (New York: Routledge 2020), 11.

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Although I agree with Van der Walt that political polarisation and regression make it crucial to ask what 'sustains the "we" at work in [the] constituent liberal democratic ethics on which the very communality of factual reality ultimately depends' or more timely how to deal with citizens that are unwilling to accept an adverse vote count, I will argue that his reading of the work of Böckenförde and Habermas is one-sided and – specifically with regard to Habermas – incorrect. Moreover, I will claim that this one-sided reading is partially the reason why Van der Walt does not provide us with a (convincing) response to Böckenförde's Dictum in his article, why he underestimates the possible strength and stabilizing force of liberal democracy and its institutions, and naively places his trust in poetic fictions that could magically 'compensate for the dividedness of life and the uprootedness of law from life.' Sections 2 and 3 will reconstruct Böckenförde's position and Habermas' discourse theoretical reply. Section 4 discusses Van der Walt's analysis and Section 5 ends with some concluding remarks and a question.

2 Böckenförde's Dictum

Although Böckenförde (1930-2019) – a legal scholar, philosopher of law and former justice on the German Federal Constitutional Court – has an impressive publication record that deals with a wide array of fascinating topics he is, within wider academic circles, mostly known for one sentence: 'The liberal, secularized state is sustained by conditions it cannot itself guarantee.' Several problems, however, surround this sentence. First of all, Böckenförde's Dictum has been quoted so many times that its original meaning often gets lost. According to one interpreter one could even 'use the way in which the Böckenförde Dictum has been cited and invoked to tell the story of political debates in the Federal Republic of Germany.'[4] A further complicating factor is Böckenförde's intellectual indebtedness to his controversial mentor and friend Carl Schmitt. Does the Dictum affirm or rather betray Böckenförde's Schmittianism? The Dictum, finally, has been misinterpreted in a variety of different ways. Some, according to Aline-Florence Manent, have taken the Dictum 'to imply that religion is the only source of normative substance' or that religion is always required 'to sustain the democratic state.'[5] Others, according to Tine Stein and Christian Polke, have argued more broadly that the pre-political foundations of the liberal state lie 'in the idea of the homogeneity of the people'[6] or that Böckenförde 'supports the idea of a 'guiding culture' (*Leitkultur*).'[7] Böckenförde, of course, is partially responsible for these misunderstandings due to the language he sometimes used to describe the ethos necessary to stabilise and sustain the

4 Stein, 'The Böckenförde Dictum,' 97.
5 Manent, 'Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde,' 75.
6 Stein, 'The Böckenförde Dictum,' 98.
7 Polke, 'Böckenförde's Dictum and the Problem of "Value Fundamentalism",' 115.

liberal state. He does talk about 'relative homogeneity'[8] as a sustaining element and although this notion is clearly distinguished from Schmitt's idea of 'substantial homogeneity' it still easy to misinterpret this notion as implying external 'pre-political sources of *Sittlichkeit*.'[9]

What is Böckenförde's answer to the question whether the liberal democratic order needs some form of external ethical substance to function properly? 'Can the tasks and functions that the state, our state, takes on and must take on be disconnected from an ethical-moral foundation?'[10] In his Reuchlin Prize Lecture – 'The State as an Ethical State' (1978) – during a series of extensive interviews that were held in 2009 and 2010, and in his 2006 lecture 'The Secularized State: Its Character, Justification, and Problems in the 21st Century,' Böckenförde returns to this question and addresses some misunderstandings regarding the content of the Dictum.[11] A first is that 'only religion can guarantee a state-sustaining ethos.'[12] Böckenförde does not deny that religion can play an important role in the culture 'from which the state-sustaining ethos and community spirit grow,' but there are also other sources. He mentions, for example, 'Philosophical, political and social movements.'[13] Moreover, religion can die off 'as a living force and a power with social efficacy' in which case other foundations and dispositions need to take its place.[14] (Christian) Religion, nevertheless, can only be a source as long as religious citizens 'no longer see this state, in its secularity, as something alien, hostile to their faith, but as a chance for liberty, the preservation and realization of which is also their task.'[15] An orientation towards the common good is crucial. The Dictum, in fact, can be seen as 'a plea to Christians – especially Catholics – to accept the legitimacy of the secular state.'[16]

The Dictum is also often understood to imply that 'the state is sustained by conditions it cannot itself *create*.' But this is not what Böckenförde claimed. He wrote 'by conditions it cannot itself *guarantee*.' The state, according to Böckenförde, is capable of supporting and protecting 'the existing ethos and basic convictions.' Important, however, is to recognise that a liberal, secularised state as a *liberal* state cannot seek to guarantee these 'inner regulatory forces' on the basis of 'the instruments of legal coercion and authoritative command.' It would otherwise

8 Böckenförde, *Religion, Law, and Democracy*, 227 and 379. Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2017), 75 and 333.

9 Müller, 'What the Dictum Really Meant,' 202.

10 Böckenförde, *Constitutional and Political Theory*, 87.

11 The first and third are published in Ernst-Wolfgang Böckenförde, *Religion, Law, and Democracy: Selected Writings*, ed. by Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2020). Selections of the second are published in Böckenförde, *Constitutional and Political Theory*, 369-406.

12 Böckenförde, *Religion, Law, and Democracy*, 379.

13 Böckenförde cited in Böckenförde, *Religion, Law, and Democracy*, 34.

14 Böckenförde, *Religion, Law, and Democracy*, 379.

15 Böckenförde, *Religion, Law, and Democracy*, 167.

16 Stein, 'The Böckenförde Dictum,' 100. See also Müller, 'What the dictum really meant,' 196.

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destroy the state 'as the order of liberty.'[17] But how can the state support and protect such a shared ethos? Böckenförde mentions, among else, education in school ('obligatory classes on ethics in school – alongside religion classes, not instead of them'), committing state financed public institutions (like public broadcasting) 'more strongly to a cultural and educational mission' and finally making sure that government officials abide by and effectively realise the law.[18]

So in the end Böckenförde seems to argue that the shift towards an ethical state – a liberal state sustained by a living common ethos among its citizens – can only take place 'in and through the *democratic political process*,' in the interplay between active citizenry and representatives, and by a democratic ethos sustained and affirmed on the basis of liberal democratic principles.[19]

3 Habermas's answer

Habermas' response to the Dictum comes close to Böckenförde's own reply.[20] His response can, among else, be found in the conversation on the 'pre-political moral foundations of a free state'[21] that Habermas had in the beginning of 2004 with then Cardinal Joseph Ratzinger. Although Böckenförde's question 'reflects doubt over whether the constitutional state can regenerate its normative infrastructure through its own resources,' Habermas does not dismiss it out of hand.[22] One the one hand Habermas' reply seems to echo Böckenförde's analysis when he claims that the liberal state 'depends in the long run on mentalities that it cannot produce from its own resources.'[23] Citizenship, according to Habermas, 'is 'embedded' in a civil society that is nourished by spontaneous and, if you will, "prepolitical" sources.'[24] On the other hand, this dependence on 'prepolitical' sources (Habermas uses concepts like 'political ethos,' 'democratic civic ethos' and 'ethos of liberal citizenship') does not imply 'that the liberal state is incapable of reproducing the motivations on which it depends from its own secular resources.'[25] The 'prepolitical

17 Böckenförde, *Religion, Law, and Democracy*, 167. See also Ernst Wolfgang Böckenförde, 'The Fundamental Right of Freedom of Conscience,' in: *Religion, Law, and Democracy: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2020), 198: 'It is part of the structure of the liberal Rechtsstaat that it is sustained by presuppositions that it cannot itself guarantee without jeopardizing its own liberal nature.'

18 Böckenförde, *Religion, Law, and Democracy*, 380.

19 Böckenförde, *Constitutional and Political Theory*, 106.

20 According to some critics there is an important difference. As Künkler notes: 'Böckenförde did not believe that joint participation in the democratic process alone was sufficient for this agreement to emerge and sustain itself.' Mirjam Künkler, 'Freedom in Religion, Freedom in the State,' in Böckenförde, *Religion, Law, and Democracy*, 34.

21 Florian Schuller, Foreword to Jürgen Habermas and Joseph Ratzinger, *The Dialectics of Secularization: On Reason and Religion* (San Francisco: Ignatius Press, 2006), 15.

22 Jürgen Habermas, 'Prepolitical Foundations of the Constitutional State?, in Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge: Polity Press, 2008), 3.

23 Habermas, *Between Naturalism and Religion*, 3.

24 Habermas, *Between Naturalism and Religion*, 105.

25 Habermas, *Between Naturalism and Religion*, 105.

sources' are not *external* sources but sources that are internal to and can develop within the context of democratic political processes. Democratic processes, in other words, can help sustain the liberal state without having to rely on religion, a 'leading culture' (*Leitkultur*) or the language of homogeneity.[26] The question 'can a liberal state sustain itself' consequently leads to another question 'what kind of democratic processes are required to sustain a liberal state?'

Democratic processes and practices, according to Habermas, depend on a combination of two different sources for their legitimacy and persuasive power: participatory and epistemic sources. It 'requires *the inclusion of all those affected* by the potential outcome, and it makes their decisions dependent on the *more or less discursive character* of preceding deliberations.'[27] Equal participation makes it possible for citizens to see themselves both as addressees and authors of the law. The discursive character of political opinion- and will-formation grounds 'the *presumption of rationally acceptable results*'[28] and makes it possible for citizens to see the results as rationally acceptable and to recognise their individual will in collectively binding decisions.[29] Which also partially explains why minorities are willing to accept majority decisions.

In order for these democratic processes and practices to actually be able to function as a source for political motivation they need to be embedded in a democratic constitution, accompanied by effective human rights practices and rooted in the 'impliziten Überzeugungen der Bürger.'[30] An active citizenry, according to Habermas, requires first of all a liberal political culture, a 'weitgehend implizit bleibende Grundeinverständnis […] über die demokratischen Verfassungsgrundsätze.'[31] Such a fundamental agreement can grow on the basis of a process of political socialisation and political education. The core of such a liberal political culture is the 'Bereitschaft der Bürger zur reziproken Anerkennung von Anderen als Mitbürgern und gleichberechtigten demokratischen Mitgesetzgebern.'[32] Such a political culture, according to Habermas, and in line with Böckenförde, has to be sustained and affirmed but 'cannot be *produced* by legal and administrative means.' It is a 'web of historically saturated political values founded on constitutional patriotism that can *only arise in passing*.' At best, he claims, 'it can *emerge* from a

26 Müller, 'What the dictum really meant,' 202.

27 Jürgen Habermas, Foreword to *Habermas and the Crisis of Democracy. Interviews with Leading Thinkers*, ed. Emilie Prattico, (Routledge: London and New York, 2022), xiv. See also Jürgen Habermas, 'Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit,' in *Ein neuer Strukturwandel der Öffentlichkeit?*, ed. Martin Seeliger & Sebastian Sevignani (Baden-Baden: Nomos Verlag, 2021), 476.

28 Habermas, Foreword, xiv.

29 Cathrine Holst and Anders Molander, 'Jürgen Habermas on Public Reason and Religion: Do Religious Citizens Suffer an Asymmetrical Cognitive Burden, and Should They Be Compensated?,' *Critical Review of International Social and Political Philosophy* 18 (2015): 549.

30 Habermas, 'Überlegungen und Hypothesen,' 474.

31 Habermas, 'Überlegungen und Hypothesen,' 480.

32 Habermas, 'Überlegungen und Hypothesen,' 481.

civic practice in which all citizens are *already* engaged.'[33] A second condition for an active citizenry is a sufficient degree of social equality. All citizens need to be effectively able to participate in the process of democratic opinion- and will-formation. A last condition concerns the fragile relation between democratic state and capitalist economy. A liberal state should be a welfare state guaranteeing an equal status for all.[34]

The previous can be rephrased somewhat differently. If rational morality, as Habermas often notes, is motivationally weak, the questions arises what can 'compensate for the motivational weakness of good reasons'[35] within liberal democratic states. A partial solution is provided by positive law. Positive law tells us – on the basis of sanctions backed by force – what to do or not to do. Law, however, also needs to be legitimate in order to be supported. As Habermas claims, there can be – in modern societies at least – 'no mass loyalty without legitimacy.'[36] And in this context participation and deliberation are crucial, which in turn implies that citizens need to be willing and see it as their responsibility to make use of their political rights. A democratic constitutional state 'expects that its citizens should adhere to an ethics of citizenship that goes beyond mere obedience to the law.'[37] Such an ethos, as emphasised before, cannot be morally ordered or legally imposed on the basis of the instruments of 'coercion and authoritative command' but needs to be fostered on the basis of learning processes that themselves also need to be protected and supported.[38] It is an ethos, moreover, that emerges from democratic practices in which citizens are 'already engaged.'[39] Rainer Forst expresses this dynamic succinctly 'modern forms of democratic *Sittlichkeit* contain that moment of transcendence *within themselves*, so to speak, an *inherent transcendence*: they institutionalize a form of legal and political order that reflexively generates the duty to improve on itself, procedurally and substantively, by establishing superior forms of democratic organization, of securing and interpreting human rights, and by aiming at transnational forms of democratic cooperation. It is thus a *Sittlichkeit* that is *present and at the same time yet to come*.'[40] Politico-juridical institutions, in that sense, are a necessary but not sufficient condition to generate a democratic ethos.

33 Habermas, 'Once Again: On the relationship between morality and ethical life,' *European Journal of Philosophy* 29 (2021), 550.
34 Habermas, 'Überlegungen und Hypothesent,' 483.
35 Jürgen Habermas, 'Reply,' *Constellations* 28 (2021): 71.
36 Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 1999): 62.
37 Jürgen Habermas, *Postmetaphysical Thinking II* (Cambridge: Polity Press, 2017), 222.
38 Jürgen Habermas, *Europe: The Faltering Project* (Malden: Polity Press, 2009), 75. See also Habermas, *Postmetaphysical Thinking II*, 103 and 173; and Habermas, *Between Naturalism and Religion*, 119.
39 Habermas, 'Once again,' 550.
40 Rainer Forst, 'The Autonomy of Autonomy: On Jürgen Habermas's *Auch eine Geschichte der Philosophie*,' *Constellations* 28 (2021): 22.

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Although Habermas certainly recognises that the last few years have shown clear signs of political regression and decline,[41] he still strong believes in moral progress and is convinced 'that moral conflicts can in principle be resolved *on the basis of good reasons*.'[42] His optimism is supported, he claims, by clear signs in history. His *Auch eine Geschichte der Philosophie* (2019) is a case in point. In it Habermas specifies which phenomena 'support the *fact of moral progress* and thus reveal *traces of reason in history*.' Traces that can 'inspire us to understand ourselves as autonomous rational beings.'[43]

Returning to Böckenförde's work, it is easy to see that both he and Habermas accept that democratic processes can act as a generating source for ethical substance. But what about religion? Does religion have a role to play in the 'solidarity-generating source of democratic practice'?[44] Based on Habermas' earlier work, the answer seems to be clearly 'no.' In recent years, however, things might have changed. With regard to the status of religion and use of religious language he not only stresses the importance of an institutional filter between the informal communication in the weak public sphere and the formal deliberation in the strong public sphere, but he also claims that 'liberal political orders remain dependent upon solidarity among their citizens, a solidarity whose sources could dry up as a result of an "uncontrolled" secularization of society as a whole.'[45] Certain Christian elements might have been translated and assimilated within modern liberal states but still have democratic meaning. As Habermas writes: 'The translation of the theological doctrine of creation in God's image into the idea of the equal and unconditional dignity of all human beings constitutes one such conserving translation.'[46] Religion, in that sense, can act as an important source for sustaining liberal democracies, bringing Habermas' and Böckenförde's analysis even closer.

4 Van der Walt's analysis

Van der Walt's analysis of Habermas' discourse theory of law shows deep understanding but also certain glaring shortcomings. I will briefly discuss three in this section. Habermas' discourse theory according to Van der Walt is (a) based on a blue-eyed conception of a communicative civil society and public sphere, (b) unsuccessfully tries to combine a democratic ethos with a transcendental theory of law, and (c) prioritises public autonomy. Habermas' way of combining *Moralität* and *Sittlichkeit*, I would argue, leaves ample room for questions and criticism – especially regarding the proper place of religion in the '*Sittlichkeit* that is

41 Habermas, Foreword, xvi and Jürgen Habermas, 'Moral Universalism at a Time of Political Regression: A Conversation with Jürgen Habermas about the Present and His Life's Work,' *Theory, Culture & Society* 37 (2020): 24.
42 Habermas, 'An author's retrospective view,' *Constellations* 28 (2021), 9.
43 Habermas, 'An author's retrospective view,' 9.
44 Habermas, 'Once again,' 551.
45 Habermas, *Between Naturalism and Religion*, 102.
46 Habermas, *Between Naturalism and Religion*, 110.

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present and at the same time yet to come' – but these critiques, of which I will discuss some below, moves in a different direction than Van der Walt is pointing to.

Let us start with the first claim. Although the reconstruction in the previous section was relatively short, it does show that it is difficult to deny that Habermas (i) does not have a keen eye for the motivational and solidarity-generating sources that are needed to sustain liberal democratic states, or (ii) for the problems of democratic relapse or a dysfunctionally working public sphere. Over the last few years he has repeatedly cautioned against the political regression that has occurred in many Western democracies.[47] The rationalising power of political deliberation and public debate can wither away if it is not sustained by legitimate democratic procedures, effective rights practices, a liberal political culture and learning processes – 'for otherwise power and military force take the place of political cooperation.'[48] Moreover, Habermas has always discussed the various obstacles democracy faces on a national, European and global level. To mention a few: the depolitisation of political opinion and will-formation (see *The Lure of Technocracy*), the current absence of a properly functioning European wide public sphere (see *The Crisis of the European Union* or *Europe: A Faltering Project*), the subordination of democracy to capitalist interests (also *The Lure of Technocracy*) or political parties that fail to fulfill their role as mediating institutions between society and state (see, for instance, *Between Facts and Norms* or *The Inclusion of the Other*).[49]

Given this, it is rather odd to argue, as Van der Walt does, that Habermas' discourse theory of law and democracy rests – even if we only focus our attention on *Between Facts and Norms* – 'on a blue-eyed conception of a communicative civil society and public sphere that obscures the crisis of communication that always constitutes the very threshold of liberal democracy' or that his theory is 'evidently underpinned by an astoundingly optimistic vision of a healthy and cooperative social hermeneutics.' Whether Habermas too strongly believes in moral progress and a 'Sittlichkeit that is *present and at the same time yet to come*' is something which cannot be simply argued for on the basis of short references to 'woke culture,' 'proud boys' or the Capitol riot of 6 January 2021. A nuanced theoretical *and* historical analysis is necessary to make that point; an analysis that Van der Walt does not provide us with. What, furthermore, counts against Van der Walt's claim that Habermas' theory pivots on 'an *almost* always-cooperative social hermeneutics' is precisely the strong importance that Habermas attaches to liberal political culture, democratic ethos and learning processes. The 'motivational weakness of

47 Jürgen Habermas, 'Commentary on, Cristina Lafont,' *Democracy Without Shortcuts*, *Journal of Deliberative Democracy* 16 (2020): 13.

48 Habermas, 'Moral Universalism at a Time of Political Regression,' 18. See also: Habermas, 'Überlegungen und Hypothesen,' 474.

49 Jürgen Habermas, *The Lure of Technocracy* (Cambridge: Polity Press, 2015); Jürgen Habermas, *The Crisis of the European Union* or *Europe: A Faltering Project* (Cambridge: Polity Press, 2009); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge MA: MIT Press, 1998); Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge MA: MIT Press, 2000).

good reasons'[50] is a central concern for any cognitive theory and Habermas is clearly aware of this problem.

A second point that Van der Walt raises is that Habermas unsuccessfully tries to embed a constituent ethic in a quasi-transcendental framework of political legitimation. None of the ethical conditions for a flourishing liberal democratic state, however, are necessary 'if the transcendental elements of a linguistic communication effectively guide one towards increasingly legitimate forms of social-integration.' These transcendental elements make such a constituent ethic superfluous. Habermas, however, never claims that the quasi-transcendental features of political legitimation provide the necessary motivational force for citizens to act morally or make an active use of their political rights; even a quick reading of *Faktizität und Geltung* would show this From a motivational point of view, according to both Habermas and Böckenförde, more is needed than positive laws, democratic procedures or the quasi-transcendental elements of communication and deliberation. *Auch eine Geschichte der Philosophie* again makes this point. Here Habermas deals with the 'motivational and cognitive resources on which a comparatively weak form of postmetaphysical thinking can draw to mobilize good arguments that provide *justified encouragement* to engage in cooperative action in the context of the multicultural world society in spite of the existing obstacles.'[51]

Recognising this intrinsic and mutual connection between democratic institutions and ethos, finally, makes it difficult to understand why Van der Walt argues that this connection contradicts one of the core claims of Habermas' discourse theory of law: *the co-originality of private and public autonomy*. Van der Walt is correct in claiming that Habermas leaves open the possibility that citizens' rights 'can be exercised instrumentally in pursuit of private interests' and that they do not 'secure or guarantee a democratic or public spirit or ethic.' But from this it does not follow that public autonomy comes first. Constitutional democratic states as *liberal* states create a legal and political space in which citizens are free not to actively participate in democratic process of opinion and will-formation. There is no legal duty to participate in democratic practices. This space also makes it possible for citizens to exercise their rights instrumentally (as long, of course, as they stay within the limits of positive law). There is no legal duty to exercise rights in the interest of all.

The legitimacy and stability of liberal states, however, does depend on democratic practices and a public ethos. Important to remember, though, is first of all that this 'prepolitical foundation' can be reflexively generated in and through a political *and* juridical order that guarantees citizens a status as legal persons and embeds democratic processes in constitutional institutions. Effectively securing rights and equal participation, in that sense, are two of the preconditions for a democratic ethos to develop. A second thing to keep in mind is that this ethos both applies to

50 Habermas, 'Reply,' 71.
51 Habermas, 'Reply,' 67.

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public autonomy *and* private autonomy. Both forms of autonomy need motivational support. Public autonomy, as a consequence, does not come first nor does private autonomy come second. Liberal states, in other words and to return to Böckenförde's wording, cannot impose a democratic ethos or basic convictions on their citizens but they can 'affirm them and keep them alive.'[52]

Van der Walt's critique of Habermas' discourse theory of law is therefore clearly one-sided. He underestimates the ability of liberal democracies to support and protect – partially through properly functioning politico-juridical institutions – the public ethos needed to sustain themselves. Liberal democratic states are fragile but not weak. Political regression and polarization are very serious dangers for liberal democracies but should not lead to a doom and gloom regarding the stabilizing forces of properly sustained liberal democratic institutions and processes. Over the last few years many books have been published that rightly try to warn us of the dangers of democratic backsliding and the rise of authoritarian rule – like *How Democracies Die* (2018), *How Democracies End* (2018), *The People vs. Democracy* (2019), *Twilight of Democracy* (2020) or more recently *Degenerations of Democracy* (2022) and *A Pandemic of Populists* (2022).[53] The majority of the authors of these books, however, not only try to warn us but also carefully indicate what kind of real world formal and informal instruments can function as defensive mechanisms. No simple trust in poetic fictions can be found in these works.

Van der Walt's analysis of Böckenförde's Dictum is similarly one-sided. On the basis of an analysis of Böckenförde's work and Lefort's essay 'Permanence du théologico-politique' he reaches two conclusions. A general inference – 'Liberal democracy is an ethereal vapour that cannot be salvaged'[54] – and a more specific one: 'liberal democratic practice […] actually has very little or nothing to do with liberal democratic principles, apart from being or having been inspired by them.'[55] The 'paradoxical condition of liberal democracy,' according to Van der Walt, is that 'it pivots on principles to which it cannot give effect.'[56] Böckenförde – perhaps also Lefort – would not accept these conclusions. Although Böckenförde claims that the liberal state is based on conditions 'it cannot itself guarantee' – specifically on the basis of 'legal coercion and authoritative command' – and probably would argue that the core liberal principles always need to be interpreted and reinterpreted in democratic practices and can therefore never be fully constitutionalised, he is still convinced that the liberal state is capable of supporting and protecting a democratic

52 Böckenförde, *Religion, Law, and Democracy*, 379.

53 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Viking: London, 2018); David Runciman, *How Democracy Ends* (London: Profile Books, 2018); Yascha Mounk, *The People vs. Democracy: Why Our Freedom is in Danger & How to Safe it* (Cambridge MA: Harvard University Press, 2019); Anne Applebaum, *Twilight of Democracy: The Seductive Lure of Authoritarianism* (New York: Random House, 2020); Craig Calhoun, Dilip Parameshwar Gaonkar and Charles Taylor, *Degenerations of Democracy* (Cambridge MA: Harvard University Press, 2022) and Wojciech Sadurski, *A Pandemic of Populists* (Cambridge: Cambridge University Press, 2022).

54 Van der Walt, *The Concept of Liberal Democratic Law*, 248.

55 Van der Walt, *The Concept of Liberal Democratic Law*, 6.

56 Van der Walt, *The Concept of Liberal Democratic Law*, 11.

ethos and of incorporating these principles in an open-ended manner in politico-juridical institutions. Van der Walt, in that sense, neglects the liberal quality of Böckenförde's Dictum – 'the liberal state cannot *prescribe* a particular disposition to its citizens'[57] – and the fact that Böckenförde argues that the state is responsible for sustaining and affirming a democratic ethos on the basis of liberal principles.

Böckenförde and Habermas would agree with a third conclusion that Van der Walt draws from his reading of Lefort's and Böckenförde's work: 'Dogmatic insistence on the appropriateness or correctness of liberal democratic principles obstructs the unique mode of political praxis that these principles demand.' From this insight, however, it does not follow that liberal democratic practices and their outcomes have 'very little or nothing to do with liberal democratic principles.'[58] An open-ended discussion on core liberal democratic principles is precisely the hallmark, Habermas would argue, of liberal democracies. As he claims: 'The deliberative character of the voters' political opinion and will formation *in the public sphere* is (…) not measured by the consensus reached, but by the orientation of the participants to truth and the discursive level of an open-ended conflict of opinions out of which *competing* public opinions emerge.'[59]

Van der Walt's conclusions, in short, are based on a one-sided reading of Böckenförde's and Habermas' work. This is not to say, as I claimed before, that Habermas' response to Böckenförde's Dictum is not open to criticism. His response in fact attracted criticism from different sides. Some have argued that Habermas' way of combining morality and ethical life 'goes too far in *detranscendentalizing* morality,'[60] others that his response is ambiguous: either because the normative status of Habermas' postmetaphysical and postsecular theory is unclear or because he is striving for an unworkable partnership between critical theory and Christian Democracy. Rainer Forst's critique belongs to the first category. According to Forst Habermas 'leans toward an excessively empirical (…) interpretation of motivation.'[61] If we want to salvage a form of 'unconditional moral ought' in postmetaphysical thinking its motivational force, according to Forst, cannot be made fully 'empirically dependent on the individual *ethical* will to be moral that is *encouraged* by social and political institutions and established norms.' The 'duty to aim at emancipation for the sake of justice' would in fact lose its moral force if it were to be made dependent on some form of historical success. In times of political regress this duty in fact 'remains an autonomous one and increases in importance.'[62]

James Gordon Finlayson's critique belongs to the second category. According to Finlayson, Habermas does not clarify whether the cognitive requirements of public reason are moral in nature or ethical. Both interpretations can be found in his work

57 Stein, 'The Böckenförde Dictum,' 104 (my emphasis).
58 Van der Walt, *The Concept of Liberal Democratic Law*, 6.
59 Habermas, Foreword, xv.
60 Forst, 'The Autonomy of Autonomy,' 21.
61 Forst, 'The Autonomy of Autonomy,' 23.
62 Forst, 'The autonomy of autonomy,' 23.

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and both lead to serious difficulty for the coherence of his theory. If the requirements are moral, 'that would flatly contradict his argument in *Between Facts and Norms* and the main lines of his critique of Rawls.' If they are ethical, this would imply that they 'apply to all citizens only if they shared a common ethos or conception of the good,' something which Habermas actually denies.[63] Peter Gordon develops a similar line of critique but focuses more strongly on Habermas' (implicit) claim that 'religion's persistence may prove vital for the survival of democracy itself.'[64] Like Finlayson he points toward a change in Habermas' view of secularisation. Whereas Habermas' earlier work was strongly grounded in a 'Weberian secularist theory of modernization' his later work repeatedly points towards religion as an important and continuing source of democratic meaning.[65] Although Habermas, according to Gordon, does not claim that modern democratic societies *necessarily* need to continue to rely on their religious origins in the future, his shift from a largely secular theory of communicative reason to a postsecular one might not be stable given that it tries to combine two conflicting schools of thought: critical theory and Christian Democracy. On the one hand, modern democratic societies rely on 'locating democratic legitimacy in nothing but the ungrounded activity of intersubjective discourse itself,' on the other hand on 'extolling religion as perhaps the only resource strong enough to furnish the moral substance that democracy requires.'[66]

All these critics, in short, argue that Habermas' response to Böckenförde's Dictum is flawed. Accepting this, however, does not necessarily lead to giving up on the mutual connection between public ethos, democratic institutions and liberal principles nor to Van der Walt's claim that 'liberal democracy is an ethereal vapour that cannot be salvaged.'

5 Concluding remarks

Van der Walt's analysis of Habermas' discourse theory of law mainly focuses on *Between Facts and Norms*, first published in 1992. The political challenges at that time were different from the ones we currently face. During the last few years we are increasingly confronted with phenomena like rule of law backsliding, democratic regress, conspiracy theories and polarisation. The disastrous effects of political and societal polarisation are clearly shown by the storming of Capitol Hill at the beginning of 2021. Polarisation, as Carothers and Donohue argue, 'routinely weakens respect for democratic norms, corrodes basic legislative processes, undermines the nonpartisan stature of the judiciary, and fuels public disaffection with political parties. It exacerbates intolerance and discrimination, diminishes

63 James Gordon Finlayson, *The Habermas-Rawls debate* (New York: Columbia University Press, 2019), 234.

64 Peter E. Gordon, 'Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany,' *Social Research: An International Quarterly* 80 (2013): 175.

65 Finlayson, *The Habermas-Rawls debate*, 256.

66 Gordon, 'Between Christian Democracy and Critical Theory,' 198.

societal trust, and increases violence throughout the society.'[67] Looking at *Between Facts and Norms* through the lens of these current problems would certainly lead to the conclusion that Habermas is fairly optimistic about the rationalising power of political deliberation and public debate. Since then, however, Habermas has repeatedly emphasised the importance of disagreement as the 'driving force of democratic opinion- and will-formation' and argued that political debates are 'best described in agonistic rather than in consensual terms.'[68] Law, in that sense, to use Van der Walt's phrasing, reflects the dividedness of life. From his change in tone, though, it does not follow that Habermas' response to Böckenförde's Dictum cannot provide us with a convincing answer to the question of what sustains liberal democratic states in our age.

Mainly looking at the last section of his article, I would argue, it is an open question what kind of solution Van der Walt himself can provide for the problems of our current political constellation. His one-sided analysis of Habermas' discourse theory primarily reinforces the critical – and mainly negative – conclusions he already drew in *The Concept of Liberal Democratic Law* and it neglects the potential of institutionalised democratic processes and practices. If Van der Walt is sincerely worried about the effects of polarisation and regression, more is needed than simply pointing at the promise of the general instantiations of a much needed democratic civic ethos – civilised decency, an appreciation of burdens of judgment, an endorsement of voting procedures and acceptance of an adverse vote count – or the need for poetic fictions. Böckenförde and Habermas would rightly ask how such a public ethos should be conceptualised, supported and protected, and which role democratic procedures and institutions could play in this process. Democratic voting must, as Habermas rightly argues, 'be conceived of as the final step in a problem-solving process.'[69] But what are the previous steps in this process? Which institutions and practices are needed to sustain it? How can social, political and legal trust be generated?[70] These are the questions I would like to pose to Van der Walt.

67 Thomas Carothers and Andrew O'Donohue, 'Introduction,' in *Democracies Divided: The Global Challenge of Political Polarization*, ed. T. Carothers and A. O'Donohue, (Washington: The Brookings Institution, 2019), 1-2.

68 Habermas, Foreword, xv.

69 Habermas, Foreword, xiv.

70 See in this case: Kevin Vallier, *Trust in a Polarized Age* (New York: Oxford University Press, 2021).

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Liberal Democratic Law, the Ethics of Civility, and Agonistic Politics between Hegemony and Compromise*

Manon Westphal

1 Introduction

In this article, I look at the argument that Johan van der Walt develops in his intriguing article 'Rawls, Habermas and Liberal Democratic Law' through the lens of agonistic democratic theory. My goal is to show that agonism encourages Van der Walt to emphasise the meaning of politics in his theory of liberal democratic law and, more specifically, to consider agonistic forms of conflict processing, which may contribute to circumstances that are conducive to the realisation of societal relationships shaped by what Van der Walt calls an 'ethics of civility.'

Van der Walt's critique of the theories of John Rawls und Jürgen Habermas fits very well with the agonistic perspective and in fact has some considerable proximity to the critique of these theories that agonist Chantal Mouffe has developed.[1] Agonistic democratic theory is internally diverse,[2] but can be characterised by the understanding that disagreement and conflict are constitutive of social relationships and that the goal of democratic politics must be the transformation of conflicts, not the overcoming of disagreements.[3] Van der Walt's argument clearly resonates with this understanding. In particular, his emphasis on the 'dividedness of life' and the need to abandon the 'standard understanding of law and legal systems as an articulation of a concept of justice shared by *all* members of a legal community,'[4] demarcates an understanding of the law that is well compatible with agonists' emphasis on the conflictual nature of social relationships. Agonists should also sympathise with Van der Walt's conclusion that an 'ethics of civility'[5] plays an essential role in liberal democracy. If we acknowledge that the capacity of the law to integrate the plurality of views that characterises social life is severely limited, it is vital that citizens are willing to live with disagreement and conflict.

* I thank Johan van der Walt and all participants of the Utrecht conference 'The Fragility of Liberal Democratic Law' for a stimulating discussion and very helpful feedback. In addition, I would like to thank the participants of the workshop 'Agonistic Political Theory' held at the University of Greifswald for great comments on an earlier draft of the paper.

1 Chantal Mouffe, *The Democratic Paradox* (London/New York: Verso, 2000).

2 Mark Wenman, '"Agonistic Pluralism" and Three Archetypal Forms of Politics,' *Contemporary Political Theory* 2, no. 2 (2003): 165-186.

3 Manon Westphal, 'Overcoming the Institutional Deficit of Agonistic Democracy,' *Res Publica* 25, no. 2 (2019): 187-210.

4 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 1 (2023): 18.

5 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25-26.

They need not celebrate the fact of pluralism, but they must accept that others view things differently, even when they think that the views of their fellow citizens do not count as 'at least reasonable' or 'reasonable enough.'[6] Chantal Mouffe, who welcomes even more confrontational forms of adversarial relationships than other agonists, argues that political actors must refrain from hostile activities toward those who fight for opposing political projects.[7] This argument for tamed forms of political conflict very much resembles Van der Walt's argument for an 'ethics of civility.'

The agonist reader thus feels at home with much of the argument set out in Van der Walt's article. However, reading the article through the agonistic lens also means to find that something important is missing in the picture, namely the role of politics. Van der Walt's sophisticated critique of Rawls's and Habermas's approaches shows that these two theorists expect too much of the law in terms of its capacity to embody views that all citizens can consider as reasonable. While we should indeed take this insight as a reason to think more carefully about the role of citizens' ethical stances in liberal democracy, we should entwine such considerations with reflections on the political processes in which political actors deal with their disagreements.

Van der Walt argues that law, due to its incapacity to embody unity and consensus, always reflects the 'division between a majority and a minority.'[8] It is important to consider that the ethical duty to display 'appreciation of burdens of judgment'[9] and accept that one has to live with views that one finds unreasonable, is unequally demanding for parties in situations in which acts of law-making produce winners and losers. For those who manage to implement their views, appreciating the burdens of judgment merely means to accept that there are others who view things differently. By contrast, for those who do not see their views realised in the law, the demands of civility equate with accepting political defeat. If liberal democracies want to be able to count on citizens' willingness to act according to the 'ethics of civility,' it seems important that they avoid situations in which some groups of citizens constantly find themselves on the losing side. The danger would then be that these citizens experience the requirement to act according to the ethical requirements of liberal democracy as a standard that secures the rules of an unfair game.

As I will show in the following, agonistic democrats envision forms of politics that presume the continuation of disagreement and seek to avoid situations in which political procedures produce unchallenged winners and forgotten losers. It is precisely for this reason that agonism represents a valuable complement to Van der Walt's argument. As stated above, agonism resonates with Van der Walt's

6 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 26.
7 Mouffe, *The Democratic Paradox*, 101-102.
8 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 19.
9 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 26.

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understanding of the law as a 'reflection of the dividedness of social life'[10] and his conclusion that the incapacity of the law to create a unity among the diverse views in pluralist liberal democracies requires some sort of compensation to be found in the ethical attitudes of citizens. Its value as a potential complement to Van der Walt's argument lies in the fact that entwining the case for an 'ethics of civility' with a case for agonistic politics helps avoid situations in which accepting the terms of cooperation in liberal democracy would become synonymous for some with a readiness to accept taking the role of permanent losers in the political struggle about the law.

I will proceed in three steps. First, I will briefly recapitulate Van der Walt's argument about the nature of the law as a reflection of the dividedness of social life and the fundamental role that an 'ethics of civility' plays in liberal democracy. Second, I will show how agonistic forms of political conflict processing can contribute to circumstances that are conducive to citizens' willingness to comply with the demands of an 'ethics of civility' in the face of the necessarily partial character of the law. More specifically, I will show that Chantal Mouffe's and James Tully's versions of agonistic politics embody different possibilities of ensuring that the political struggle about possibilities of determining or interpreting the law does not produce unchallenged winners and forgotten losers. While Mouffe demands that it must always be possible to question, politicise, and re-negotiate an existing hegemony, Tully envisions the creation of compromises. Third, I will present some preliminary considerations on how the agonistic lens contributes to reflections on the problem that Van der Walt refers to repeatedly in his article, which is that liberal democracies may be facing a situation in which citizens' compliance with the 'ethics of civility' erodes.

2 Law as a reflection of the dividedness of social life and the need for an ethics of civility

I cannot do justice to the complexity of Van der Walt's analysis here, but I will focus on some of the main points of his critical engagement with Rawls' theory that allow me to recapitulate what he means when he characterises law as a 'reflection of the dividedness of social life'[11] and highlights the importance of an 'ethics of civility.' Although my reconstruction of the argument will be selective and does not deal with the details of Van der Walt's critique of Habermas's theory,[12] I believe that this procedure suffices to collect the core ideas of Van der Walt's argument that are relevant to my proposal to bring the argument into conversation with agonism. After all, van der Walt confronts Rawls and Habermas with the same criticism: independent of their theories' differences, they share a reliance on a 'constituent ethic that holds their whole frameworks of political liberal legitimacy together' and make the mistake of embedding 'this constituent ethic in a transcendental or

10 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.
11 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.
12 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 20 ff.

quasi-transcendental framework that obfuscates it in a cloud of equivocation.'[13] A focused summary of Van der Walt's engagement with Rawls can therefore display the general idea of the critical argument developed in the article.

Van der Walt identifies a constitutive tension between the two fundamental ideas of Rawls' theory, which are (a) the idea of 'moral agency,' according to which all persons are free to think, and capable of thinking, for themselves and determine their own conceptions of the good,[14] and (b) the idea that people see society as '"a scheme of cooperation" between all the separate moral agents that constitute the membership of that society.'[15] These two ideas 'rarely sit at the same fire,' as Van der Walt puts it, because moral agency often leads to 'irreconcilable ideas about proper cooperation.'[16] It would be unrealistic to think that separately exercised moral agency does not produce, or only rarely produces, incompatible views on what adequate forms of cooperation look like. Here, we encounter a central point of overlap between Van der Walt's theory of liberal democratic law and agonistic democratic theory: both consider disagreement on what adequate ways of organising social life are as the rule rather than the exception.

Van der Walt points out that Rawls seeks to deal with this problem by referring to a 'justification-worthy constitution.'[17] Holding on to the normative ideal that 'governmental powers can only be exercised in ways that all the moral agents making up a political-liberal society can endorse as reasonable and rational,' Rawls advances the implementation of a constitution that guarantees basic liberties, which are '"thin enough" to allow the separate and several moral agents […] to rely on their own moral agency to decide matters of utmost moral importance to them' and at the same time '"thick enough" […] to prescribe governmental exercises of moral agency which all agents consider indispensable for their moral agency.'[18] While Rawls is optimistic that a constitution, combined with a high court that settles emerging conflicts through deliberations guided by the constitutional norms, enables liberal democracies to realise the normative ideal, Van der Walt concludes that Rawls' '"political conception of the reasonable" carries too much weight.'[19] He argues that the legal guarantee of basic rights and the endeavours of a high court to balance the two fundamental ideas of political liberalism in their interpretations of the constitution cannot sidestep the 'aporetic nature' of the relationship between moral agency and social cooperation, to the effect that '[c]oercive governmental action regularly demands that some moral agents take leave of their moral convictions.'[20]

13 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.
14 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 21-22.
15 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22.
16 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 22.
17 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 23.
18 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 24.
19 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25.
20 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 24.

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If I understand the argument correctly, the idea is roughly this: the capacity of the constitution to balance the demands of moral agency and social cooperation through legal norms that all citizens can view as reasonable is severely limited to the extent that it depends on the high level of generality on which these norms are formulated. Once the norms of basic liberties must be interpreted and applied to concrete practical questions, the disagreements that are produced by citizens' separate exercises of moral agency come to the fore and foreclose the possibility of defining policies that can be considered as reasonable by everyone. The insight that it is impossible to solve the potential for conflict that emerges from citizens' separately exercised moral agency through the means set out by Rawls is the reason why Van der Walt concludes that an 'ethics of civility' plays a more vital role in liberal democracy than Rawls acknowledges. He defines the meaning of the 'ethics of civility' as follows:

> The nuclear essence of that which is as stake when one heeds a call to civility and appreciates burdens of judgment reveals itself when one accepts 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.'[21]

According to Van der Walt, the combined implementation of a constitution that determines basic liberties and a court that produces reasonable interpretations of constitutional norms supports the 'ethics of civility,' but it cannot play the unifying role that Rawls expects of it. In the final analysis, liberal democracy depends on whether or not citizens recognise the burdens of judgment and accept that they have to live with views that they find wrong and even unreasonable.

> A constitution that is more rather than less respect-worthy, offers more rather than less protection of fundamental rights, is interpreted and enforced by a court or similar forum with a better rather than worse reputation of consistency and integrity (regarding trade-offs between moral autonomy and social cooperation) [...] is very likely going to augment instead of diminish the chances of an ethics of civility and an appreciation of burdens of judgment among the people it serves. In the final analysis, however, the absence or presence of an ethics of civility duly informed by an appreciation of burdens of judgment will always be *the* critical factor, the factor that *ultimately* determines the sustainability of an LPL scheme.[22]

This is the conclusion that Van der Walt derives from his critical engagement with Rawls (and Habermas): it is 'a constituent ethics that holds their whole frameworks of political liberal legitimation together.'[23] Both Rawls and Habermas, albeit in different ways, 'embed this constituent ethic in a transcendental or

21 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27.
22 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 25-26; emphases in the original.
23 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.

quasi-transcendental framework,'[24] but thereby only obfuscate the way in which liberal democracy pivots on a 'cooperative ethics of decency, civility and truthfulness.'[25]

3 Agonistic politics and the political processing of disagreement

As mentioned at the beginning, I propose that agonism has something important to contribute to the perspective that Van der Walt develops in his article. Before I introduce two approaches to agonistic conflict processing, I want to highlight that persistent disagreement among citizens on what the law should look like, or how it should be interpreted, is likely to result in conflictual relationships in which some manage to realise their views of what good forms of social cooperation are while others fail to do so and thus find themselves on the losing side in the relevant conflict. The unequal allocation of power is as common a feature of political relationships as is the disagreement produced by citizens' exercise of moral agency, which means that some are in a better position to realise their views in political struggles and determine the content of the law than others. To a certain extent, this is a natural condition of the circumstances of politics, which is why liberal democracy depends on the willingness of those who do not manage to realise their views to accept the authority of the law even if it expresses the views and preferences of others. However, conflicts can be processed in very different ways. For example, political processes can influence the allocation of chances to win or lose in conflicts and they can create conditions that make winning and losing matters of degree rather than matters of full victory and entire defeat.

It is important to consider possibilities of shaping the processing of conflicts in and through politics, especially if we think that the 'ethics of civility' is not a natural disposition or something that all individuals automatically perceive as their ethical obligation when they act in their roles as citizens. Van der Walt forcefully emphasises that the ethical commitments that nourish liberal democracy are contingent and precarious when he points to the crisis tendencies in contemporary liberal democracies and, in particular, the event of 6 January 2021 in the US.[26] But if the 'ethics of civility' is contingent and precarious, we must ask how liberal democracies can create circumstances that are conducive to its cultivation and render it at least less likely that people develop an unwillingness to abide by its requirements. What circumstances can render it easier for citizens to adopt a tolerating stance towards other views and accept common rules that reflect the views of others who they think are deeply mistaken about what is the right thing to do about matters of common concern? While many factors may play a role here, the extent to which citizens see their views and preferences responded to in the political processing of conflicts is an essential factor. Where some constantly find themselves on the losing side and hardly ever see their views and preferences

24 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.
25 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 43.
26 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 16, 26, 40.

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realised, they may lose faith in liberal democracy being a truly inclusive endeavour and experience the requirement to 'live graciously enough with terms of social cooperation that one's moral autonomy [...] relentlessly prevents one from considering "reasonable enough"'[27] as the rule of an unfair game.

It is at this point that agonistic conceptions of democratic politics can be insightful. In one way or another, all agonistic theories show how democracies can realise political inclusiveness, not through hunting a perfectly inclusive law, but through organising political conflict processing in ways that ensure that no party can cement its capacity to determine the content of the law.

I will illustrate this property of agonistic theories by means of two examples, namely Chantal Mouffe's and James Tully's theories. While Mouffe is more commonly associated with the concept of agonistic democracy, it is particularly interesting to include Tully's account in the discussion because his theory demonstrates that agonism must not be equated with the adversarial fight for hegemony that Mouffe famously advocates. Mouffe's hegemonic agonism represents *one* possibility of interpreting the idea of agonistic politics, but it must be located on one end of a broader spectrum of conceptions of agonistic politics that ranges from more confrontational to more cooperative ones.[28] Mouffe's and Tully's theories represent the different ends of this spectrum and thus enable a consideration of the diverse mechanisms by means of which agonistic politics might help ensure political inclusiveness under conditions of deep and persistent disagreement.

Mouffe insists on the need to distinguish between antagonism and agonism in democratic responses to disagreement. Parties who advocate opposing views on what common rules should look like must treat each other not as enemies but as adversaries. While enemies seek to destroy each other, an adversary is 'somebody whose ideas we combat but whose right to defend those ideas we do not put into question.'[29] In this sense, an adversary is 'a legitimate enemy, one with whom we have some common ground because we have a shared adhesion to the ethico-political principles of liberal democracy: liberty and equality.'[30] It seems that there is some considerable overlap between Mouffe's description of what democratic adversaries owe each other and what Van der Walt dubs an 'ethics of civility': adversaries practice constraint and do not aim at excluding from politics those whose views they struggle to consider even 'reasonable enough.'[31]

The fact that Mouffe does not expect more of political actors than that they acknowledge the status of others as adversaries has direct implications for how she envisions the process in which political decisions on controversial issues are made. For Mouffe, agonistic politics is a fight for hegemony, in which all of the involved

27 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27.
28 Westphal, 'Overcoming the Institutional Deficit of Agonistic Democracy.'
29 Mouffe, *The Democratic Paradox*, 102.
30 Mouffe, *The Democratic Paradox*, 102.
31 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27.

parties seek to realise their own political views and projects as best as possible while recognising that there are limits to the means with which they may legitimately do so. However, the democratic nature of the fight for hegemony hinges not only on the readiness of political actors to refrain from excluding their opponents from politics. In addition, it requires the availability of possibilities to question and challenge an established hegemony. Those who do not manage to decide the struggle for hegemony in their own favour, and those who speak from the margins of political discourse and have not even been recognised as relevant political actors, must be able to demand re-negotiations of the status quo.

Mouffe emphasises that all hegemonic forms of ordering of social relationships 'have a partial character'[32] which must not be concealed by long phases of undisturbed rule by those who manage to realise their views and projects at a certain point in time. Democratic forms of hegemonic politics recognise the 'necessity not only of challenging what exists but also of constructing new articulations and new institutions'[33] and abandon the idea that such processes can ever come to an end. Therefore, democracies must ensure that no winner of the political struggle for hegemony can translate their political victory into unchallenged rule and that those who experience defeat or exclusion from the struggle for hegemony have a realistic chance to politicise the decisions that have been made.

Mouffe does not discuss the question what means might be suitable to realise this idea in practice in much detail. She highlights the importance of a lively, pluralistic public sphere and the key role of parliamentary procedures shaped by confrontations among political parties representing fundamentally different political projects.[34] But even if questions of practical implementation remain, it can be concluded that Mouffe describes a political dynamic that prevents situations in which acting according to the requirements of an 'ethics of civility' would equate for some (i.e., those who lose the political struggle for hegemony one time) with accepting the role of permanent losers. If it is ensured that the outcomes of hegemonic politics are temporary and remain open to re-negotiation, all political actors get something for their willingness to comply with the adversarial rules of the game, namely the promise that they remain legitimate players in that game and retain chances to influence the rules in their political community in the future.

Tully's conception of agonistic politics goes beyond this promise for renewed politicisation and future chances to re-negotiate decisions. It describes political conflict processing as a negotiation of agreements that avoids one-sided realisations of only one political view or project. Tully considers deliberation as the most suitable political mode to realise this objective. What marks his distance from mainstream deliberative democratic theories and qualifies him as an agonist – as a

32 Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (London/New York: Verso, 2007 [1985]), 169.

33 Chantal Mouffe, *Agonistics. Thinking the World Politically* (London/New York: Verso, 2013), 11.

34 Chantal Mouffe, *On the Political* (Abingdon/New York: Routledge, 2005), 21-25.

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theorist of agonistic deliberation – is that he assumes that disagreements will not be overcome in deliberative processes: he emphasises that an agreement 'is always non-consensual to some extent.'[35] Tully argues that political actors who disagree 'over the prevailing constitutional arrangements (or some subset of them)' should follow the principle of '*audi alteram partem*, "always listen to the other side"' and expect that 'there is always something to be learned from the other side.'[36] Due to his emphasis on the continued presence of 'disagreement all the way down,'[37] Tully's case for reaching agreement in such a process is best interpreted as a case for compromise. Political actors make concessions to the views of others and thereby create arrangements that realise no view entirely, but all views to some extent.

This means that in Tully's version of agonistic politics, the political processing of disagreements creates only partial winners and partial losers. Whenever questions of what common rules should look like and how conflicts among different interpretations of constitutional norms should be settled are dealt with through the sort of compromise-oriented deliberative process that Tully envisions, nobody gets everything, and everybody gets something. As a consequence, none of the involved parties must accept the full realisation of a position that they fundamentally disagree with. Parties must accept that the resulting arrangements include concessions to views that they find wrong and maybe even unreasonable, but they do not go empty-handed because the arrangement also includes concessions to their own views.

We can read Tully's und Mouffe's agonistic theories as offering different strategies for organising the political struggle about the law in ways that can ensure that compliance with the 'ethics of civility,' which includes the readiness to accept the authority of decisions that one does not find (fully) reasonable, does not become equivalent for some with the readiness to accept permanent defeat and the inability to influence the content of common rules. Van der Walt might want to consider such agonistic forms of political conflict processing if he wants to preclude as a possible consequence of his argument for the need to recognise the centrality of an 'ethics of civility' that the functioning of liberal democracy depends upon the willingness of the weaker groups in society to sacrifice their political demands to the functioning of political cooperation.

4 Concluding remarks on the precariousness of the 'ethics of civility'

I want to close with some preliminary thoughts on what the agonistic perspective might have to contribute to the discussion of an important observation that Van der Walt refers to in different places of his article, which is that the precarious

35 James Tully, 'The agonic freedom of citizens,' *Economy and Society* 28, no. 2 (1999): 161-182, 170.

36 James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,' *The Modern Law Review* 65, no. 2 (2002): 204-228, 218.

37 Tully, 'The Unfreedom of the Moderns,' 218.

nature of the 'ethics of civility' becomes particularly visible today. Concretely, Van der Walt refers to the events of 6 January 2021, when the former US president 'effectively incited a significant mass of supporters to physically prevent the certification of the election results by Congress, thereby staging an anti-democratic coup attempt.'[38] For the sake of the argument, I will presume that this particularly dramatic event is reflective of a more general development in the societies of liberal democracies, i.e., an erosion of the readiness of citizens to comply with the requirements of the 'ethics of civility.' Indeed, scholarship on affective polarisation[39] argues that we are currently witnessing such a development.

What could the agonistic perspective contribute to reflections on this phenomenon? I believe that agonism can contribute to both diagnosis and cure. It encourages observers to ask what the condition of democratic politics in contemporary liberal democracies was in the times that preceded the recent signs of a tendency toward polarisation. In addition, it offers guidelines for reforms of democratic politics. Have liberal democracies done enough to prevent concentrations of hegemonic power? Have there been enough and sufficiently effective possibilities to question and challenge existing hegemonies? Have there been sufficient negotiations of compromises, for example in situations in which it was particularly difficult for some parties to accept political defeat, even if it was only temporary? In case a critical diagnosis guided by such questions shows that there is reason to criticise the condition of contemporary democratic politics, Mouffe's and Tully's conceptions of agonistic politics can guide considerations of potential reforms, in the sense that they recommend means that would render democratic politics more resistant to cementations of hegemonic power and more conducive to compromise.

To be clear at this point, taking an agonistic perspective on developments that may indicate an erosion of the 'ethics of civility' does not necessarily imply the legitimation of behaviour that violates the ethical requirements of liberal democracy, let alone violent acts such as the events of 6 January 2021. What the agonistic perspective suggests is that scholars and other critical observers of the current situation should be aware of the connectedness between citizens' inclination to act according to an 'ethics of civility' and the functioning of the political procedures in which they experience themselves and others as co-authors of the law under which they all live. At least in situations in which demonstrations of an unwillingness 'to live graciously enough with terms of social cooperation that one's moral autonomy [...] prevents one from considering "reasonable enough"'[40] are not limited to just a few individuals or small fractions of society but become a broader social phenomenon, agonists would suspect that critical interrogations of

38 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 16-17.

39 For example, Shanto Iyengar and Sean J. Westwood, 'Fear and Loathing across Party Lines: New Evidence on Group Polarization,' *American Political Science Review* 59, no. 3 (2015): 690-707; Jennifer McCoy and Murat Somer, 'Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies,' *The ANNALS of the AAPSS* 681 (2019): 234-271.

40 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 27.

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the ways in which democratic politics has been dealing with disagreement are in place.

Remarks on Johan van der Walt's Concept of Liberal Democratic Law

With Kelsen, Beyond Kelsen and the Unexplored Issue of Independent Technocratic Institutions

Nikolas Vagdoutis

1 Introduction

Johan van der Walt's important book *The Concept of Liberal Democratic Law* (henceforth *CLDL*) and his essay 'Rawls, Habermas and Liberal Democratic Law' (henceforth RHLDL) attempt to define – or to 'distil,' as van der Walt puts it in *CLDL*[1] – a concept of liberal democratic law and, through this, to defend liberal democracy. Given that RHLDL is based on the 'main lines of thought developed in *CLDL*,'[2] this article will analyse van der Walt's concept of law by reading these works in tandem.

The structure of this article is as follows. In Section 2, I will briefly present the basic features of Van der Walt's concept of liberal democratic law. I will, then, show in Section 3 that Van der Walt's concept is influenced significantly by Kelsen's theory, mainly by his democratic political theory but also by Kelsen's legal positivism as viewed in correlation with Kelsen's political theory. After this, I will demonstrate in Section 4 how Van der Walt also goes *beyond* Kelsen's theory by focusing on the impact of socio-economic inequalities (to which Kelsen's theory did not pay significant attention) on liberal democratic law and by suggesting a social-democratic dimension as essential part of his own concept of liberal democratic law. Due to this suggestion, I will argue that Van der Walt's concept of liberal democratic law shows a proximity to Hermann Heller's theory of the *social Rechtsstaat*. Finally, in Section 5, I will demonstrate that, although Van der Walt's theory considered the socio-economic reality and its impact on liberal democratic law (as seen above), he did not pay attention to the rise of independent technocratic institutions in the economic governance framework of contemporary liberal democracies, the main example being the independent central banks (e.g. the European Central Bank). Due to this lack of attention, Van der Walt does not focus on the extent to which these institutions are incompatible with his concept of liberal democratic law and on the extent to which they circumvent both the social and the democratic elements of contemporary liberal democracies.

1 Johan van der Walt, *The Concept of Liberal Democratic Law* (London/New York: Routledge, 2020), 4, 13.

2 Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 16.

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2 Basic features of Van der Walt's concept of liberal democratic law

Van der Walt's liberal democratic concept of law is deemed to reflect a social life in which there are 'irreducible social divisions.'[3] That is because '[l]iberal democracy begins with an adequate regard for the irredeemable social divisions that result from the sheer dividedness of life.'[4] Hence, Van der Walt opposes understandings of law that invoke an 'existential unity' of the people as the foundation of law (such as Carl Schmitt's 'fascistic' theory[5]) because the existing 'irreducible social divisions […] compel one not to understand law as an expression of social unity, but [as] the exact opposite of such unity.'[6]

Van der Walt's liberal democratic concept of law – defined as 'a reflection of the dividedness of life and thus of the uprootedness of law from any metaphysical conception of unitary or reconciled life'[7] – is concretised in certain features, the most significant of which are presented below (in Sections 2.1 and 2.2).

2.1 Parliamentary legislation and the 'majority-minority' principle

The 'principal format of law'[8] in Van der Walt's liberal democratic concept of law is parliamentary legislation. That is because this legislation is enacted through a process (the parliamentary process) that reflects the irreducible social divisions given that (and as long as) it does not fulfil any comprehensive truths regarding the terms of social cooperation. As Van der Walt writes, liberal democratic legislation is

> not the fulfilment of anyone's truth, but the compromise that constantly displaces, dislodges and uproots all comprehensive truth claims. That this is so is underlined by the astoundingly arbitrary voting procedures that conclude democratic legislation.[…] We vote when we cannot identify the correct or true way to deal with the issues of life that we need to settle. […] Anyone who considers incidental majority positions that come out of a voting procedure (which experience has shown to be irredeemably vulnerable to rapid reversal) the correct assessment of what is to be done is deeply deluded about the dynamics of voting procedures and surely not a liberal democrat. Liberal democrats do not consider majorities 'right' and minorities 'wrong.' […] The liberal democratic demand that majorities and minorities remain equally worthy of respect exacts an unwavering regard for the irreducible ignorance of both.[9]

3 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18-19.
4 Van der Walt, *The Concept of Liberal Democratic Law*, 233.
5 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.
6 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 18.
7 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 19.
8 At the same time, 'all non-legislative forms of law – customary law and judicial decisions – only remain law as long as positive legislation tolerates them as law.' Van der Walt, *The Concept of Liberal Democratic Law*, 241.
9 Van der Walt, *The Concept of Liberal Democratic Law*, 242.

As seen in the above excerpt, Van der Walt's idea that parliamentary legislation does not (and should not) endorse any comprehensive truth claim presupposes that the majority is not allowed to oppress the minority due to the fact that there is an 'irreducible ignorance' of both on how social cooperation should be regulated. This 'irreducible ignorance' comes out of the following assumption of Van der Walt: the 'liberal democratic recognition of an epistemic deficit regarding the propriety of social relations and terms of cooperation.'[10] It is this recognition of the epistemic deficit that leads to the idea of 'irreducible ignorance' of both the majority and the minority, which signifies ultimately that neither a parliamentary majority expresses a 'correct' will nor a minority expresses a 'wrong' will.

Given that the minority does not express a 'wrong' will in a liberal democracy, this means that 'liberal democracy is not premised on a simplistic understanding of majority rule' and that the 'majority-minority principle' applies instead.[11] As this 'majority-minority' principle, which Van der Walt adopts from Kelsen (see Section 3), means that the majority is not allowed to oppress the minority, liberal democratic legislation is premised on compromises between the majority and the minority. Given that liberal democratic legislation is based on these compromises between different worldviews, '[t]he law that results from liberal democratic legislation is therefore not the actualisation or teleological fulfilment of any truth claim or conviction.'[12]

2.2 The presuppositions for the sustainability of liberal democratic law: the liberal democratic constituent ethic and the socio-economic presupposition

Van der Walt's liberal democratic concept of law, while it avoids being reduced to any comprehensive truth regarding the terms of social cooperation (at least when it comes to law) through parliamentary legislation and the 'majority-minority' principle that is applied therein, comes with two presuppositions that are considered as essential for its sustainability.

The first presupposition is the liberal democratic 'constituent ethic' which Van der Walt considers as essential to sustain the civilised cooperation in a liberal democracy (and that Van der Walt contemplates under the influence of Habermas' and Rawls'

10 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

11 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

12 As Van der Walt writes: 'In liberal democracies, contends Kelsen, government concerns the effective sustenance of majority-minority relations. Strictly speaking, the majority principle is a majority-minority principle. Premised as this majority-minority principle is on compromises between different and diverging worldviews and convictions, truth claims can play no role in liberal democratic politics. The law that results from liberal democratic legislation is therefore not the actualisation or teleological fulfilment of any truth claim or conviction. It is not the fulfilment of anyone's truth, but the compromise that constantly displaces, dislodges and uproots all comprehensive truth claims.' Van der Walt, *The Concept of Liberal Democratic Law*, 203.

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theories[13]). This is the cooperative ethics of 'civilized decency'[14] and is practically tied to a communal ethics of acceptance of the democratic procedures of a parliamentary democracy (finding 'one of its most telling expressions – perhaps its *most* telling expression – in the elementary acceptance of an adverse vote count'[15]). So, this constituent ethic is actually a background presupposition for the sustainability of the institutional (parliamentary) framework of liberal democracy, not a recourse to a metaphysical-transcendental principle that would manifest an epistemic security regarding the terms of social cooperation[16] (which is also what differentiates Van der Walt's theory from Habermas' and Rawls'[17]).

The second presupposition is socio-economic: it concerns the inclusion of an 'adequate provision of socio-economic needs' in Van der Walt's definition of the liberal democratic concept of law. This inclusion is essential for the sustainability of liberal democracy because, as he writes,

> [w]idespread hunger and physical neediness invariably feed a range of unforgiving political reactions that claim to be 'rooted in the life of the people.' These reactions are bound to crush the liberal democracy we are contemplating with little delay.[18]

Due to this analysis, he argues that the legislative rules of a liberal democratic concept of law should be '*adequately socialist*.'[19]

I will demonstrate below that, whereas Van der Walt's liberal democratic concept of law is to a large extent influenced by Kelsen's theory (see Section 3), this last socio-economic presupposition of Van der Walt's concept goes clearly beyond Kelsen and shows a proximity to Heller's *social Rechtsstaat* theory (see Section 4).

13 As Van der Walt writes, 'the line of thinking developed in *CLDL* surely endorses the way in which both Rawls and Habermas end up contemplating a constituent ethic that holds their whole frameworks of political liberal legitimation together.' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39.

14 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

15 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45, see also 44.

16 This can be seen in Van der Walt's conclusion. See Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 45.

17 According to Van der Walt, '[…] they both embed this constituent ethic in a transcendental or quasi-transcendental framework that obfuscates it in a cloud of equivocation.' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39. Van der Walt identifies the 'transcendental' or 'quasi-transcendental' framework, with regards to Rawls' theory, in the idea of 'overlapping consensus' and of 'central ranges of agreement about essentials,' and, with regards to Habermas' theory, in the idea of '"transcendental elements of language" that found steady democratic learning processes.' Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 39. See also Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 42.

18 Van der Walt, *The Concept of Liberal Democratic Law*, 244.

19 Van der Walt, *The Concept of Liberal Democratic Law*, 247.

3 The influence of Kelsen's theory on Van der Walt's liberal democratic concept of law

Van der Walt hails Kelsen 'as the principal pioneer of liberal democratic law,'[20] recognising thereby Kelsen's influence on his own theory. Van der Walt endorses mainly Kelsen's democratic political theory but also, in a selective way, Kelsen's pure theory of law. I will develop, firstly (Section 3.1), the influence that concerns the former and, then (Section 3.2), the influence that concerns the latter.

3.1 Van der Walt's endorsement of Kelsen's democratic political theory

Van der Walt is influenced by the conception of democracy that Kelsen develops in *The Essence and Value of Democracy*, the book in which Kelsen 'expressly engages with the essential characteristics and values of liberal democracy.'[21] To show this influence, I will start from Kelsen's conception of democracy and, then, the similarities with Van der Walt's theory will be developed.

Kelsen's conception of democracy starts from the assumption that there is not a homogeneous and a unified concept of the people given the 'national, religious, and economic differences.'[22] Due to this assumption, Kelsen argues that the unity of the people can be conceived 'only in a normative sense,' namely as constructed merely by a legal order, given that a homogeneous concept of the people does not exist at a sociological level.[23] Moreover, he argued that this legal order should be a democratic order centered on the parliamentary process, in a legal framework in which there is both majority rule and due protection of minorities (e.g. through the protection of fundamental rights). This protection of minorities from a 'dictatorship of the majority over the minority'[24] means the actual application of the 'majority-*minority* principle,'[25] and derives in Kelsen's theory from the idea that the majority's will is not considered as the 'correct' will because in a democracy there is not any absolute (metaphysical) truth or any absolute value – what Kelsen calls 'relativism.'[26] This shows that Kelsen associates democracy with the majority-minority principle because he associates democracy, ultimately, with relativism. As Kelsen argued, '[t]he idea of democracy thus presupposes relativism as its worldview,' whereas '[t]he belief in absolute truth and absolute values' shows

20 Van der Walt, *The Concept of Liberal Democratic Law*, 203.
21 Van der Walt, *The Concept of Liberal Democratic Law*, 203.
22 As Kelsen argued '[s]ociologically, it [namely, the people] is riddled with national, religious, and economic differences and thus represents more a bundle of groups than a coherent, homogeneous mass.' Hans Kelsen, *The Essence and Value of Democracy* [1929], (New York: Rowman & Littlefield Publishers, 2013), 36.
23 Kelsen, *The Essence and Value of Democracy*, 36.
24 Kelsen, *The Essence and Value of Democracy*, 69.
25 Kelsen, *The Essence and Value of Democracy*, 69-70.
26 Kelsen, *The Essence and Value of Democracy*, 103.

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an autocratic logic.[27] The connection between relativism, the 'majority-minority principle' and democracy is particularly visible in the following phrase of Kelsen:

> [B]ecause the minority is not absolutely wrong, the coercive order must be constructed in such a way that the minority will not be rendered entirely without rights and itself can become the majority at any time. This is the actual meaning behind the political system we call democracy.[28]

The idea that the 'minority is not absolutely wrong' shows precisely Kelsen's relativism, and it is tied to the 'majority-minority' principle and to his concept of democracy.

Kelsen's influence on Van der Walt is visible by the fact that he starts, like Kelsen, from the assumption that there are social divisions (see Section 2). This leads him to approve Kelsen's conception of unity 'only in a normative sense' because this conception shows that '"[t]he people" […] is rooted in law, and not vice versa,'[29] which means that law is not rooted in any metaphysical conception of unitary life (something that is essential for Van der Walt's liberal democratic concept of law, see Section 2). It is, on the contrary, the positive legal order that 'constructs the identity of the people.'[30] Moreover, Van der Walt also agrees, crucially, with Kelsen regarding the content of this legal order that constructs the identity of the people. Like Kelsen, he argues for a democratic order that is based on the democratic-parliamentary procedures and on the 'majority-minority' principle (see Section 2).

This impact of Kelsen's theory on Van der Walt's liberal democratic concept of law is also seen by the anti-metaphysical and anti-transcendental direction of Van der Walt's conception of democracy given that, like Kelsen's relativism, he also opposed the idea of any comprehensive truth (see Section 2). Given all the abovementioned common features, it can be deduced that Van der Walt's liberal democratic theory is heavily influenced by Kelsen's political theory.

3.2 Van der Walt's selective endorsement of Kelsen's legal theory

Regarding Kelsen's pure theory of law, even though Van der Walt recognises that it is 'not as such a liberal democratic theory of law' because it does not apply exclusively to democratic regimes,[31] he endorses it.[32] That is because Kelsen's pure theory of law achieves 'the separation of law from life – and from the power relations embodied in life,'[33] which is essential for Van der Walt's liberal democratic

27 Hence, Kelsen concludes that '[t]he metaphysical-absolutistic worldview is linked to an autocratic, and the critical-relativistic to a democratic disposition.' Kelsen, *The Essence and Value of Democracy*, 103.

28 Kelsen, *The Essence and Value of Democracy*, 104.

29 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

30 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

31 Van der Walt, *The Concept of Liberal Democratic Law*, 202-203.

32 Van der Walt, *The Concept of Liberal Democratic Law*, 7.

33 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

concept of law (see Sections 2 and 3). However, Van der Walt endorses Kelsen's pure theory of law in a *selective* way, namely *only* through correlating it with a legal order that is imbued with the characteristics of liberal democracy that are presented in Kelsen's *The Essence and Value of Democracy*. This is visible in the following Van der Walt's phrase:

> It is in this work [namely, in *The Essence and Value of Democracy*] that the separation of law from life – and from the power relations embodied in life – attains an additional dimension [namely, the engagement with the essential characteristics of liberal democracy] that turns Kelsen's pure theory of law into the most rigorous theory of liberal democratic law articulated to date.[34]

So, Van der Walt endorses Kelsen's pure theory of law under the presupposition that it is associated with Kelsen's political theory. It is only under this presupposition that Kelsen's pure theory becomes 'the most rigorous theory of liberal democratic law articulated to date.'

Given the abovementioned endorsement of Kelsen's pure theory of law (which is actually a theory of legal positivism), it is no surprise, firstly, that Van der Walt considers legal positivism in general as 'necessary' for liberal democracy, justifying this by arguing that

> [l]iberal democracy is the form of government that emerged from the historical recognition that divisive social pluralities disqualify everyone from claiming the capacity to glean from nature, or from 'reason,' rules and principles that are universally valid and bind all people in the same way.[35]

So, according to Van der Walt, legal positivism is preferable because it allows the reflection of the irreducible social divisions. However, it is also no surprise, secondly, that Van der Walt endorses legal positivism under the presupposition that it applies to a legal order that has liberal democratic characteristics (which is also the presupposition under which he endorses Kelsen's pure theory of law).[36]

It is, therefore, visible that Van der Walt's liberal democratic concept of law is heavily influenced by Kelsen's theory. In spite of this influence, Van der Walt goes also beyond Kelsen's theory to an extent, as it will be seen in the next section.

34 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

35 Van der Walt, *The Concept of Liberal Democratic Law*, 7.

36 As he writes: 'The positivism that liberal democrats envisage is therefore limited to outcomes of political rivalry between liberal democrats, or to any other outcome of rivalry in which liberal democrats triumph.' Van der Walt, *The Concept of Liberal Democratic Law*, 8.

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4 Van der Walt's liberal democratic concept of law going also beyond Kelsen's theory: a proximity to Heller's social *Rechtsstaat* theory

Van der Walt goes to an extent beyond Kelsen's theory because, in contrast with Kelsen who did not relate democracy to any specific socio-economic conditions,[37] Van der Walt considers as necessary the inclusion of an 'adequate provision of socio-economic needs' in his definition of the liberal democratic concept of law (see Section 2.2). Hence, he argues that liberal democratic law should consider a certain level of socio-economic equality as necessary, which means that liberal democracy needs to be (at least to an extent) a social democracy.

Given this, he seems actually to move closer to Heller's theory regarding this point. That is because it was Heller who had argued that socio-economic inequality and social disparity put political democracy in danger because, as he wrote, 'once the proletariat believes that the democratic equality of its over-powerful opponent condemns the democratic form of class struggle to hopelessness, it resorts to dictatorship.'[38] Given this danger for democracy, Heller's thesis was clear: a democratic state under the rule of law could be sustainable only if there is, as Dyzenhaus writes regarding Heller's thesis, a 'transformation of the formal *Rechtsstaat* – the product of liberal thought – into a social *Rechtsstaat*.'[39] So, Heller considered that a 'social *Rechtsstaat*' is essential for democracy to survive, suggesting this kind of state as the only alternative against the danger of a 'fascist dictatorship' (such as the dictatorship that existed in Mussolini's Italy) in Weimar but also against the 'Bolshevist dictatorship.'[40]

37 That is possibly also because he considered that the democratic-parliamentary state embodies a class equilibrium. See Hans Kelsen, *Marx oder Lassalle. Wandlungen in der politischen Theorie des Marxismus*, (Darmstadt: Wissenschaftliche Buchgesellschaft, 1967) (Reprinted from: *Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung* 11 (1925): 261-298).

38 Hermann Heller, 'Political Democracy and Social Homogeneity' [1928], in *Weimar. A Jurisprudence of Crisis*, ed. Arthur Jacobson and Bernhard Schlink (Berkeley, London: University of California Press, 2000), 256-265, 262.

39 David Dyzenhaus, 'Hermann Heller: Introduction,' in *Weimar. A Jurisprudence of Crisis*, eds. Arthur Jacobson & Bernhard Schlink (Berkeley, London: University of California Press, 2000), 249-256, 250. Heller mentioned explicitly the term 'social *Rechtsstaat*' in his article '*Rechtsstaat* or dictatorship?' [1930], *Economy and Society*, 16(1) (1987): 127-142. However, the idea that political democracy should go hand in hand with a fight against socio-economic inequality and social disparity is already visible in his 1928 article 'Political Democracy and Social Homogeneity.' Hence, there is a certain continuity between these two articles given that both associate political democracy with the social state.

40 Hermann Heller, '*Rechtsstaat* or dictatorship?,' 127-128, 141. He noted also that the bourgeoisie, being '[f]rightened by the advance of the working masses,' was opposing the social *Rechtsstaat* and longed for a 'strong man' of 'caesaristic dimensions.' It supported, in this way, the idea of a dictatorship. Hermann Heller, '*Rechtsstaat* or dictatorship?,' 130, 133, 136-137, 140-141. Regarding this stance of the bourgeoisie see also Ellen Kennedy, 'Introduction to Hermann Heller,' *Economy and Society*, 16(1) (1987): 120-126, 124.

Although Van der Walt disagrees with other aspects of Heller's theory[41] and with Heller's assessment of Kelsen's theory as 'nomocracy,'[42] Van der Walt's idea that '*adequately socialist legislative rules*' are essential for a liberal democratic concept of law (see Section 2.2) seems not far from Heller's thought in the sense that they both suggest a social democracy[43] as necessary for democracy's sustainability.

There are certainly differences between these two theories, the main difference being that, whereas Heller's idea of a *social Rechtsstaat* signified not only the establishment of a welfare state but also the aim of democratising the economy[44] through a (social-democratic) state,[45] Van der Walt's thought seems to understand the '*adequately socialist*' measures more in the direction of a social minimum that must be guaranteed to all people to cover their physical needs[46] and less in Heller's direction of a state that would 'gain control of the economy'[47] and would lead to a democratic socialism. However, to be sure, Van der Walt does not seem opposed to a radical social democracy that would lead to a democratic socialism – besides, he uses the word '*socialist*' – as long as it maintains a liberal democratic framework

41 Van der Walt argued that '[t]he concept of legislation envisaged in Heller's melancholic yearning for a time replete with deeper meaning is not the concept of liberal democratic legislation contemplated in this book.' Van der Walt, *The Concept of Liberal Democratic Law*, 243.

42 Heller opposed Kelsen's pure theory of law as 'nomocracy' and 'empty abstraction' (in the sense that, according to Heller, it 'sees the *Rechtsstaat* in every state'). Hermann Heller, '*Rechtsstaat* or dictatorship,' 132.
Johan van der Walt does not seem to agree with this assessment of Kelsen's theory. Van der Walt, *The Concept of Liberal Democratic Law*, 243.

43 For Johan van der Walt see also his 'Delegitimation by Constitution? – Liberal Democratic Experimentalism and the Question of Socio-Economic Rights,' *KritV, CritQ, RCrit. Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue Critique Trimestrielle de Jurisprudence et de Législation*, 98, no. 3 (2015): 303-331, 317.

44 According to Preuss, Heller's *social Rechtsstaat* is deployed 'as an institutional means of fettering the dynamics of capitalist market society by extending the political principles, not only of the rule of law but also of democratic self-determination, to the sphere of the production and distribution of goods.' He continued, writing that Heller's *social Rechtsstaat* 'is based on a socio-political theory with strong ethical motives to overcome capitalism and to emancipate the proletariat, […].' Ulrich Preuss, 'The concept of rights and the welfare state,' in *Dilemmas of Law in the Welfare State*, ed. Gunther Teubner (Walter de Gruyter, 1986), 151-172, 153.

45 Scheuerman calls Heller's theory '*robust social democratic statism*.' William Scheuerman, 'Hermann Heller and the European Crisis,' *European Law Journal* 21 (2015): 302-312, 302. Heller argued indeed for the 'legal regulation of the economy' and criticized those who were 'against the extension of state regulation into the socio-economic area.' Hermann Heller, '*Rechtsstaat* or dictatorship?,' 138-139, 141.

46 Van der Walt, *The Concept of Liberal Democratic Law*, 244. See also Van der Walt 'Delegitimation by Constitution?,' 303-331.

47 As Llanque wrote: 'Heller favoured emancipation, but not from the state but through the state. […] When Heller proposed the "*sozialer Rechtsstaat*" he not only had in mind that type of state that recognizes the rule of law and establishes some features of the welfare state. His idea of the *Rechtsstaat* was much more concerned with power politics, not only in foreign affairs but first of all in domestic politics in order to gain control of the economy.' Marcus Llanque, 'Hermann Heller and the Republicanism of the Left in the Weimar Republic,' Jus Politicum, no. 23 (2019), http://juspoliticum.com/article/Hermann-Heller-and-the-Republicanism-of-the-Left-in-the-Weimar-Republic-1317.html, 20.

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that would tolerate different political positions[48] (which is a framework that Heller seems also not to disregard, given that he does not resort 'to Leninist theory and the Soviet practice of the dictatorship of the proletariat'[49]).

Despite the abovementioned differences, the crucial issue here is that, like Heller, Van der Walt conceives as necessary for liberal democracy to work a social state (albeit he focused mostly on the aspect of this state that guarantees certain minimum social conditions, as seen above). This also shows that Van der Walt's effort to extract law from life (see Section 3) is not opposed to a certain material analysis, which takes into account the socio-economic preconditions of a liberal democratic law. This material analysis is demonstrated in his argument that

> [o]ur concern with uprooting liberal democratic law from life dare not turn us into Arendtians who consider politics unconcerned with the needs and demands of life. We must therefore include a reference to "adequate provision of socio-economic needs" in our definition [of liberal democratic law] if we want it to fly.[50]

5 The independent technocratic institutions from the perspective of a liberal democratic concept of law: an unexplored issue

Whereas Van der Walt's theory has to an extent a material direction (as seen in Section 4), it does not pay sufficient attention to the independent technocratic institutions that have been established *within* contemporary liberal democracies. During the last decades there has been a rise of independent technocratic institutions especially in the domain of economy, the main example being the independent central banks. Given this, it needs to be explored the extent to which these institutions circumvent the democratic and social dimension of constitutions in contemporary liberal democracies (despite that these constitutions may have remained, at a formal level, intact) as well as the extent to which they are compatible with liberal democracy. Taking this into account, I will present firstly (in Section 5.1) the role of the independent central banks, by focusing mainly on the European Central Bank (ECB), and then (in Section 5.2) I will show why the tension between them and the democratic and social constitutionalism needs to be explored in order to reach a 'realistic understanding of liberal democratic law' (which is the understanding that Van der Walt aims at[51]).

5.1 Independent central banks: the example of the ECB

A significant example of an independent central bank is the ECB (established in the Maastricht Treaty) and housed in Frankfurt. The ECB is a technocratic institution that has significant power, while at the same time enjoying a unique independence

48 Van der Walt 'Delegitimation by Constitution?,' 317.
49 Preuss, 'The concept of rights and the welfare state,' 153.
50 Van der Walt, *The Concept of Liberal Democratic Law*, 244.
51 Van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' 36.

that makes it democratically unaccountable. The idea of central bank independence has been 'a vital tenet of ordoliberalism and an essential feature of the Bundesbank model.'[52] Regarding the ECB's independence, it was enshrined in Article 130 TFEU[53] to protect price stability from the so-called 'short-term oriented politics,'[54] namely to shield monetary policy from politics by depoliticising it.

This supposedly technical monetary policy is, nevertheless, not unrelated to economic policy. It is the ruling of the German Federal Constitutional Court[55] on the *Weiss* decision of the Court of Justice of the European Union (CJEU),[56] which brought to the fore the economic effects of monetary policy when judging the specific *PSPP* programme of the ECB. As it has been argued, in this judgment

> [t]he FCC [namely the German Federal Constitutional Court] lays bare the fuzziness of the boundary between monetary and economic matters. Although attempting to squeeze the ECB back into its narrow Treaty mandate of price stability, in reality it demonstrates the difficulties of a distinction that rests on a legal fiction: the fiction that the conduct of monetary policy can be detached from economic policy and insulated from political interference.[57]

Moreover, there has been also significant research on how the ECB's policy (especially its unconventional monetary policy) has had distributional

52 Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis. A Constitutional Analysis* (Cambridge: Cambridge University Press), 2014, 29. See also Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013), 57, 157; Hjalte Christian Lokdam, Banking on sovereignty: a genealogy of the European central bank's independence, (PhD diss., London School of Economics and Political Science, 2019), 83-84. Lokdam shows how the ordoliberals embraced central bank independence in the early post-WWII period.

53 According to Article 130 TFEU: 'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. […].'

54 Michael Ioannidis, 'The European Central Bank,' in *The EU Law of Economic and Monetary Union*, ed. Fabian Amtenbrink and Christoph Herrmann (Oxford: Oxford University Press, 2020) 353-388, 374-375.

55 *Bundesverfassungsgericht, 2 BvR 859/15*, (May 5, 2020).

56 *CJEU, Case C-493/17, Weiss and Others,* ECLI:EU:C:2018:1000 (December. 11, 2018).

57 Marco Dani et al., 'It's the political economy…! A moment of truth for the eurozone and the EU,' *International Journal of Constitutional Law* 19, no. 1 (2021): 309-327, 320.

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consequences,[58] and on how the general design of central banks as independent is related to the rise of income inequality.[59]

Acknowledging the economic dimension of monetary policy means acknowledging that independent central banks play a political (and not only a technical) role. This role has been even more prominent for the ECB given that, as Tucker writes,

> [u]nlike the central banks serving national or federal democracies, the Euro area's central bank does not work alongside a counterpart fiscal authority elected by the people. […] So, when the Euro area faced an existential crisis, the lack of confederal fiscal capabilities in elected hands left the ECB as the only institution which could keep the currency union from shattering. […] The ECB became the existential guarantor of the European Project itself.[60]

This highly political role of the ECB became very visible due to its participation in the Troika.[61] As Wilkinson writes:

> [t]he ECB would, thus, come to wield enormous power. Not only would the ECB set monetary policy, it would also negotiate economic policy in its role in the troika, monitoring compliance with adjustment programmes to the level of detail where it could be dictating the opening hours of bakeries, and public spending on pharmaceuticals.[62]

58 As Jens Van't Klooster writes: 'Central banks pursue price stability by contracting growth and ensuring that part of the active labour force remains unemployed. This involves trade-offs with pervasive distributional effects and there is nothing like a clear-cut prescription for how to make them. The effects of monetary policy are also difficult to predict, which means that there are risks, and hence again choices.' Jens van 't Klooster, 'Review of "Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State, Paul Tucker. Princeton University Press, 2018",' *Economics and Philosophy*, 36, no. 3 (2020): 476-481, 480.
Regarding the distributional effects of the unconventional monetary policy (which was practiced by the ECB during the crisis), it has been demonstrated that the 'high level of asset purchases pushes up the price of assets, which are disproportionally held by the richest households.' Clément Fontan, François Claveau & Dietsch Peter, 'Central banking and inequalities: Taking off the blinders,' in *Politics, Philosophy & Economics*, vol. 15, no. 4, 319-357 (2016), 335; see also Jens Van't Klooster, 'The ethics of delegating monetary policy,' The Journal of Politics 82, no. 2 (2020): 587-599, 595.

59 See the recent important paper by Michaël Aklin, Andreas Kern & Mario Negre, *Does Central Bank Independence Increase Inequality?*, *Policy Research Working Paper*, no. 9522 (2021), World Bank, Washington, DC, https://openknowledge.worldbank.org/handle/10986/35069.

60 Paul Tucker, 'How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment,' *German Law Journal* 22 (2021): 999-1027, 1023, 1026.

61 It also sent letters to heads of states demanding fiscal tightening measures. See Michel Rose, 'Trichet's letter to Rome published, urged cuts,' Reuters, 29 September 2011, available at https://www.reuters.com/article/us-italy-ecb-idUSTRE78S4MK20110929.

62 Michael A. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: Oxford University Press, 2021), 255-256.

Having this overview of the political role played by the ECB, the question concerns its tension 'with democratic and social commitments across the Eurozone.'[63] This question arises because fiscal policy and economic policy in liberal democracies are supposed to be conducted by elected governments along with parliaments – not by democratically unaccountable bodies. On the contrary, the ECB is an unelected institution that is independent of any political-democratic authorities and, more than that, its primary mandate is exclusively price stability (Art. 127(1) TFEU) – not full employment or any other kind of social commitment – due to the 'ordoliberal precepts' of the EMU(Economic and Monetary Union) rules embedded in the Maastricht Treaty.[64] Due to this, according to Wilkinson: '[w]hile radically independent in a formal sense, the ECB would be radically *dependent* on a particular material economic ideology written into its founding document, the Maastricht Treaty.'[65]

5.2 Towards a 'realistic understanding of liberal democratic law'

Going back to Van der Walt's thinking, on the one hand he criticises ordoliberal thinking by arguing that it provides a 'theological contextualization of free market economies'[66] since it is 'essentially reducing the political to a repair kit with which exceptional cases of market failure can be remedied.'[67] So, he demonstrates that ordoliberalism assumes free market economy as an absolute truth, which makes it 'evidently irreconcilable' with democracy.[68] However, on the other hand, he does not pay attention to the ordoliberal institutional framework that exists *within* contemporary liberal democracies in the Eurozone, the ECB being the main institution of this framework.[69] Van der Walt's omission is evident by the fact that, whereas he mentions the danger that comes from the lack of a minimum welfare state (see Section 4) and the danger that comes from the non-acceptance of the voting procedures of a liberal democracy (as was the case with the events of 6 January 2021 in the USA, see also Section 2.2), he does not mention as a danger for liberal democracy the existence of an independent central bank.

63 As Dani et al. write, 'drawing one clear line between the two policies [monetary policy and economic policy] does not result in clarity, but rather in ideological obfuscation of the underlying problems, and of the incompatibility of the current economic constitution with democratic and social commitments across the Eurozone.' Marco Dani et al., 'At the End of the Law: A Moment of Truth for the Eurozone and the EU,' *VerfBlog*, 15 May 2020, https://verfassungsblog.de/at-the-end-of-the-law/.

64 Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe*, 179, 181-182.

65 Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe*, 181.

66 Van der Walt, *The Concept of Liberal Democratic Law*, 135. He mentions specifically Walter Eucken for making an explicit recourse to this theological contextualization.

67 Van der Walt, *The Concept of Liberal Democratic Law*, 134-135. This is also related to the fact that Van der Walt clearly rejects the identification of his liberal democratic concept of law with bourgeois and/or capitalist liberalism. Van der Walt, *The Concept of Liberal Democratic Law*, 224.

68 Van der Walt, *The Concept of Liberal Democratic Law*, 135.

69 Mario Draghi had argued explicitly that 'the monetary constitution of the ECB is firmly grounded in the principles of "ordoliberalism".' Mario Draghi, 'Opening Remarks at the Session "Rethinking the Limitations of Monetary Policy",' Speech by Mario Draghi, President of the ECB, at the farewell conference honouring Governor Stanley Fischer, The Israel Museum, Jerusalem 18 June 2013, available at https://www.ecb.europa.eu/press/key/date/2013/html/sp130618.en.html.

However, this danger is not insignificant given that, as Eich has remarked in his recent important book, following the establishment of the independence of central banks during the 1980s and 1990s,

> central banks embraced a shifting mix of monetarism, nondiscretionary rules, and 'market-led' monetary policy. Governments now self-consciously constrained themselves in their ability and willingness to politicize economic conflicts. What followed was nothing less than a radical transformation of the state. If monetary policy now presented itself as apolitical for reasons of legitimacy, this also meant that central banks were no longer obliged to take economic justice or distributive concerns into account. With democracies' reach into economic policy thus curtailed, political parties were left to compete over the unenviable prize of 'ruling the void.'[70]

Eich's argumentation shows that central bank independence has insulated monetary policy from democratic deliberation and contestation,[71] leading to the transformation of the democratic state.

Taking Eich's remark into account, what is lacking from Van der Walt's theory is a focus on the (in)compatibility of independent central banks like the ECB (a central bank that enjoys a high degree of independence and wields significant power) with his liberal democratic concept of law, along with an analysis of how these institutions affect political democracy and the social state – two of the most important features of liberal democracy, which are embedded in many, if not in all, national constitutions in Europe. To analyse this tension between independent central banks and the democratic and social dimension of constitutions, a material perspective is essential, namely a perspective that focuses not only on whether the formal democratic decision-making procedures still exist but also on whether they have indeed the capacity to develop their socio-economic policies and to decide regarding their socio-economic order.[72] To put it bluntly, there needs to be a focus on this capacity in order to reach a 'realistic understanding of liberal democratic law.'

70 Stephan Eich, *The Currency of Politics: the political theory of money from Aristotle to Keynes* (Princeton: Princeton University Press, 2022), 195.

71 Eich, *The Currency of Politics*, 214.

72 See Agustín José Menéndez, 'Hermann Heller NOW,' *European Law Journal*, 21, no. 3 (2015): 285-294, 290-293. For a very recent material analysis of the EU legal order vis-à-vis the national social and democratic states see also Agustín José Menéndez, 'The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free" Competition,' in The *Cambridge Handbook on the Material* Constitution, ed. Marco Goldoni and Michael A. Wilkinson (Cambridge: Cambridge University Press 2023) 351-366.

Reply to my Critics

Johan van der Walt

1 Introductory remarks

I wish to begin by sincerely thanking the editors of this special issue of the *Netherlands Journal of Legal Philosophy* and organisers of the wonderful event on 23 September in Utrecht on which this special issue is based. I also wish to thank, in the same spirit, all the participants in the Utrecht event, but especially the discussants for the serious, probing, and certainly challenging way in which they engaged with the thoughts articulated in *The Concept of Liberal Democratic Law* and 'Rawls, Habermas and Liberal Democracy' (hereafter *CLDL* and RHLDL). I especially wish to stress my gratitude for the collegial way in which they communicated the serious questions which they brought into our discussions.

I begin with replies to Nikolas Vagdoutis, Manon Westphal, Irena Rosenthal and Hans Lindahl because I believe our respective theoretical positions are relatively easily reconcilable. I then move on to reply to the responses of Stefan Rummens and Ronald Tinnevelt, both of which reflect theoretical stances that are significantly less reconcilable with mine. I then turn to the pertinent question regarding constituent power that Chiara Raucea puts to me. My response to Raucea's question, we shall see, further underlines the key differences between Rummens' and Tinnevelt's positions, on the one hand, and mine, on the other. Towards the end of all these replies, I add a short reflection on an element of *CLDL* that none of my interlocutors in this volume addressed. Of concern are the unburdening poetic fictions that *CLDL* considers crucial for the survival of liberal democratic law.

2 Vagdoutis and the lack of institutional critique in *CLDL* and RHLDL

I am grateful to Nikolas Vagdoutis for a very perceptive reading of *CLDL's* emphasis on minimum socio-economic security as a precondition for liberal democratic law. Vagdoutis nevertheless takes me to task for letting the matter lie with a brief analytical statement that does not engage with the systemic depoliticisation of socio-economic questions by non-democratic governancial institutions such as independent central banks. Of specific concern in his response is the depoliticisation of socio-economic questions effected in Europe by the ordoliberal framework of macro-economic thinking that informs the policies and practices of the European Central Bank (ECB).

No doubt, *CLDL* does not engage in concrete analyses of social institutions. It does not even offer concrete analyses of legal institutions such as courts. An analysis of the jurisprudence of the European Court of Justice (ECJ) would surely have allowed it to engage with the same problem of ordoliberal depoliticisation that Vagdoutis

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invokes with reference to the ECB. Perceptions that the jurisprudence of the ECJ may be as informed by ordoliberal principles as the economic and monetary policies of the ECB certainly abound.

This lack of institutional critique in *CLDL* is surely a shortcoming that I hope to address in future work on the concept of liberal democratic law. I would like to mention in this regard the plan already announced in the preface of *CLDL* to extend the lines of thought developed in the book in a follow-up monograph on the question of liberal democratic judicial review. I believe I will be able to continue and make progress with this project relatively soon in view of earlier work already done in this regard.[1]

However, concrete institutional analysis of financial institutions like the ECB strikes me as a challenge that the current limits of my expertise prevent me from accepting responsibly within the foreseeable future. The important work that surely demands attention here should better be left to others who can do it much more ably and effectively than I can dream of doing. Card-carrying members of the ordoliberal clan have surely gone out of their way to make this message very clear to me.[2]

I will nevertheless risk one general observation here: Vagdoutis alerts one to a problem that raises its head squarely in my replies below to Stefan Rummens and Ronald Tinnevelt. Socio-economic politics in general and socio-economic institutional politics in particular are part and parcel of the general problem of deep social division – divided life – to which liberal democracy seeks to respond. Seen from this perspective, ordoliberal socio-economic policies are not really, or at all, *depoliticising* policies. They represent a very real politicisation of socio-economic concerns, notwithstanding their active self-presentation as a principled articulation of non-political concerns. One should not fall for the ancient trick of free-market politicians to present themselves as spokesman of objective or neutral economic policies. They pursue a politics – *their* politics – as fervently as any socialist or social democrat may pursue a very different politics. That this is so, is amply supported by Vagdoutis' argument – with reference to forceful statements of Wilkinson, Tucker and Eich – that the institutionalisation of the ECB as an 'independent' monetary institution, far from being a depoliticisation, effected a veritable political victory, and a devious one at that, for reasons of its claim to political neutrality.

The stand-off between ordoliberal politics, on the one hand, and socialist or social democratic politics, on the other, is part of the problem of divided life that *CLDL* seeks to address. From this perspective, institutions such as the ECB will never be the exclusive domain of one political force, or one unitary constituent power, as I

1 See Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin/Boston: Walter de Gruyter, 2014), 361-400.

2 See Malte Dold and Tim Krieger, 'Ordoliberalism Is Not Responsible For Jihadist Terrorism In Europe,' *New Perspectives* 25 (2017): 105-115. I did not go down without putting up a decent fight, though. See Van der Walt, 'Irresponsible Ordoliberalism and the Imperialistic Fantasy That We All Might Become Good Germans One Day' *New Perspectives* 25 (2017): 145-165.

put it below in my response to Chiara Raucea. It will always be part of the institutional spoils for which an array of conflicting political forces competes. In relatively open societies, ordoliberals – or their successors marching on whatever new banner they may invent or design – will probably always be with us, pretty much like the poor. Liberal democracy's specific concern with adequate socialist or social democratic political representation comes to a head with this relation between ordoliberalism, neoliberalism, or whatever economic liberalism, on the one hand, and the poor, on the other. If concern for the latter is going to be left to the former, socio-economic security is likely to drop to levels of insecurity that liberal democracy cannot hope to survive. Here lies the secret of the old affection between free-market ideologues and authoritarian governments: the more economic liberalism undermines social cohesion, the more dependent it becomes on authoritarian impositions of social order.

3 Westphal on agonistic politics, hegemony and compromise

Manon Westphal discerns firm resonances between central themes in *CLDL* and RHLDL, on the one hand, and the agonistic conception of politics that she describes with reference to Chantal Mouffe and James Tully, on the other. Westphal believes an engagement with Mouffe and Tully can complement and enrich the thoughts elaborated in *CLDL* and RHLDL, given the absence of a clearer picture of politics in these texts. 'Something important is missing in the picture,' she contends, 'namely the role of politics.'

I can clearly see why one may wish to link the thoughts developed in *CLDL* and RHLDL to Mouffe and Tully and sense no resistance to that link. *CLDL* contains passages that remind strongly of the 'no winner takes all' idea of democratic politics that Westphal takes from Mouffe and Tully.[3] However, judging by Westphal's presentation of their thoughts, a closer comparison of Mouffe's and Tully's positions, on the one hand, with mine on the other, is likely to also reveal significant tensions. I will highlight only two of these possible points of tension, namely, the 'avoidance of permanent losers' taken from Mouffe, and the idea of *audi alteram partem* taken from Tully. Both these ideas strike me as too idealistic. A realistic theory of liberal democratic politics may well want to replace Mouffe's concern with the avoidance of permanent losers into a concern with 'minimal losers.' And it may well have to reconcile itself with the fact that political adversaries rarely learn from one another.

Westphal's concerns with Mouffe's 'avoidance of permanent losers' and Tully's *audi alteram partem* prompt her to contemplate a 'third way' agonistic politics that plays out between 'hegemonic politics' and a 'willingness to compromise.' I do not think something like this stands a chance in the real world of political agonism. Realistically speaking, robust political action of the kind that renders agonistic

3 See Johan van der Walt, *The Concept of Liberal Democratic Law* (London: Routledge, 2020), 203-204, 343.

politics effectively *agonistic* is always conditioned by rather unforgiving conflict between at least two quests for hegemony. In other words, agonistic politics forfeits its agonistic status the moment it becomes geared for 'compromise' and for 'listening to the other side.' Thinking of antagonistic politics in such terms would be similar to contemplating a tug of war competition in which the teams agree not to pull too strongly, lest one of the teams get pulled over the victory line. To put this in Mouffe's and Tully's terms: a regular winner in politics cannot be expected to pull less strongly than it can, lest it becomes a permanent winner. A political party in pursuit of an election victory is surely not going to present itself to its constituency in terms of its astounding willingness to listen to and learn from its opponents. Politics, as we know it, does not work like this.

This does not mean that 'compromise' and 'learning from the other' never play a role in liberal democratic politics. They sometimes do, but when they do, they invariably do so because of juridical constraints to which political actors consider themselves subject. If there are elements of 'compromise' and of 'pulling less forcefully than one actually can' in liberal democratic politics, they consist in the acceptance of *juridical constraints*. These constraints typically consist in constitutional principles that proscribe the unleashing of hegemonic political projects at a cost that those not party to those projects cannot reasonably be expected to accept. And if there is, on the long run, an element of 'learning from others' in this acceptance of juridical constraints, it mostly amounts to a pragmatic reconciliation with that which is reasonably feasible under the system of law to which one considers oneself subject. In other words, it rarely if ever amounts to a hermeneutic 'learning from others.' Hermeneutic learning from others – so central to Habermas' vision of civil society – is surely not unthinkable, but it happens too rarely to 'count on it' (again Habermas' term) in any realistic understanding of the ethics of civility that sustains regular politics.

What would, then, constitute a realistic understanding of the ethics of civility? On a more abstract theoretical level, an ethics of civility would in the first place presuppose a basic acceptance that liberal democratic political relations are always majority-minority relations, as Kelsen teaches one par excellence. Speaking more concretely, it would presuppose endorsement of two politico-juridical institutions:

i Legislation that regulates electoral frameworks aimed at levelling the playing field (and, where applicable, providing for proportional representation).
ii Politically neutral judicial procedures aimed at checking and ensuring the proportionality – more specifically, *the least possible intrusiveness* – of all legislation and all executive orders that affect minority interests negatively.

The ethics of civility contemplated here would consist in the continued commitment to both these institutions in the face of adverse election results and adverse judicial decisions, notwithstanding one's realistic regard for the fact that electoral playing fields are never perfectly level, and judicial procedures never completely neutral.

The ethics of civility contemplated here will surely not prevent the same political majorities from winning the electoral stakes for years on end. It can, at best,

prevent regular if not permanent majorities from exploiting their political victories more than is absolutely necessary. Demographic realities, in conjunction with imperfect institutions, often turn certain minorities into 'eternal [or long-term] losers.' Liberal democracy and liberal democratic law concern an endeavour to ensure that all citizens and residents who understandably consider themselves demographically doomed to *permanent loser status* can with adequate plausibility be considered *minimal losers*. Under these circumstances, liberal democracy cannot claim to significantly raise the chances of listening to one another, learning from one another, and coming to understand one another better. But it can claim to offer us one of the most plausible ways (perhaps the only plausible way) of living in civilised peace with those whom we do not understand, and from whom we therefore do not seem able to learn.

4 Rosenthal on refusal

A key passage in RHLDL firmly asserts the liberal democratic duty to accept the outcome of election results, notwithstanding the fact that they are always deeply questionable in several respects. Why this emphasis on the spirit of cooperation, Irena Rosenthal asks. Has the history of 'refusals to cooperate' not time and again been the key to effective political resistance and progressive transformations of social relations? And might refusals to cooperate in pursuit of progressive social transformation not on a given day actually include the refusal to accept an adverse vote count? For Rosenthal, the emphasis on the acceptance of an adverse vote count as a key instantiation of the constituent ethics of liberal democracy plays – or risks playing – fatefully into the hands of conservative political forces seeking to entrench a prevailing status quo.

Now, *CLDL* surely cannot be said not to have acknowledged and stressed the very point that Rosenthal is making. It expressly affirms the possibility of historical circumstances under which political liberals should join the barricades.[4] And RHLDL, I would like to stress, does not contemplate any retreat from this affirmation. To the contrary, a longer version of the text (shortened later because of word count considerations) made this very clear. It contained a passage about the Afrikaner revolutionary Bram Fischer that emphatically affirmed the real possibility of fraudulent election results that not even liberal democrats should accept.

I hope this express re-affirmation of the real possibility of historical circumstances under which political liberal insurrection becomes imperative and inevitable will lay Rosenthal's main qualm regarding RHLDL to rest. But I also trust that, notwithstanding our mutual regard for the possibility of circumstances in which election results demand liberal democratic rejection, we both can still consider the acceptance of 'an adverse vote count' a general principle of democratic ethics. For

4 See Van der Walt, *The Concept of Liberal Democratic Law*, 11.

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if this is not the case, how else can we imagine organising ourselves politically in a civilised way?

I turn more squarely to the sheer contingency of liberal democracy in my response to Hans Lindahl below. Suffice it here to briefly reflect this concern with contingency onto the point about 'political ontology' that Rosenthal raises towards the end of her response. *CLDL* and RHLDL certainly retreat from any endeavour to found liberal democracy on a political ontology, as Rosenthal observes well. Its embrace of the irreducible contingency of all things political also extends to the contingency of the ways in which we come to understand the very foundations of existence, assuming for the moment, contra-intuitively, that it still makes sense to refer to the 'foundations of existence' when 'contingent understanding' happens to be one's point of departure. From this point of departure, the study of the 'foundations of existence' should rather be considered a reflexive engagement with understanding and cognition itself. In other words, it should rather be called 'phenomenology,' 'hermeneutics' or 'discourse analysis,' etcetera.

'Contingent ontologies' is a phrase that cannot be coined without effacing one side of the coin. The fact that RHLDL invokes 'transcendental conditions' of liberal democracy, as Rosenthal notices, does not contradict this point. Nothing more than a Kantian *sine qua non* is contemplated with that invocation. Those who happen to consider liberal democracy a worthy political commitment cannot avoid contemplating the preconditions that might render this commitment viable. But nothing warrants taking these preconditions for granted. Nothing guarantees the continuous survival of liberal democracy. Liberal democracy remains an ethical commitment without ontological assurances.

5 Lindahl on enduring contingency

The concluding observations in my response to Rosenthal should already make clear that I find myself in full agreement with the substantive position that Hans Lindahl takes in his comments on *CLDL* and RHLDL. I consider cogent the whole constellation of thoughts regarding 'enduring contingency' that he develops with reference to Blumenberg and Kelsen. What I do not understand is why Lindahl believes *CLDL* and RHLDL fail to reflect an adequate regard for this enduring contingency. I do not believe these texts contain a single paragraph or sentence that denies the contingency that Lindahl invokes with reference to Blumenberg, or deviates from the reading of Kelsen that he proposes. I believe, quite to the contrary, that *CLDL* contains several clear statements that underline both the contingency and the reading of Kelsen at stake here. Why is it, then, that Lindahl discerns quite a gap between the 'enduring contingency' that he contemplates, and the engagement with contingency in *CLDL* and RHLDL? Why does the latter engagement with contingency not 'go far enough' according to him?

Having reflected carefully on this quite perplexing question, it seems to me it is again the passage about 'accepting adverse vote-counts' in RHLDL that causes

most of the trouble here. For Lindahl, this passage, together with all the other affirmations of the democratic ethic of 'accepting adverse vote-counts' in RHLDL, creates the impression that the acceptance of a vote count enjoys a transcendent and non-contingent status in liberal democratic politics and ethics. Hence Lindahl's suggestion that my engagement with contingency 'does not go far enough.' However, according to him, the problem is not restricted to this passage in RHLDL. It extends all the way to the very passage in *CLDL* about revolt and non-cooperation that I stressed above in my reply to Rosenthal. These statements also do not go far enough, suggests Lindahl, because they reserve the liberty to revolt and to refuse cooperation to those who do so in the name of liberal democracy. In doing so, he suggests further, I end up considering liberal democracy at least in this sense 'non-contingent.' What about those who never signed up in the first place and consider themselves outsiders who simply have to comply with the demands of the 'liberal-democratic order' under which they are forcefully included, he asks in a key passage of his response, referring to Aboriginal activists in Australia and Mohawk traders in Canada. Lindahl writes:

> Why should they, or other colonized peoples, be 'magnanimous' and acquiesce to 'an adverse vote count' in the settler community into which they have been forcefully integrated? If they do acquiesce, might not the 'elementary acceptance' of the majority rule be the expression of pragmatic resignation to an overwhelming power imbalance they cannot reverse, rather than an affirmation of the political and legal unity they disavow?[5]

I will begin to respond to these striking and pertinent observations by stressing that the whole analysis of liberal democratic law in *CLDL* (taking its cue from a key passage in Hart's *The Concept of Law* regarding the irreducibility of internal and external perspectives on law in all legal systems) pivots on the regard for the fact that a considerable contingent of citizens in liberal democratic societies simply submits pragmatically to legal constraints that they experience as alienating and oppressive. Hence, my – and in fact Hart's – full recognition of the contingency and precariousness of the minimal cooperation that sustain all legal orders. Hart is fully aware that this minimal cooperation (minimal prevalence of an internal perspective on the law) is eternally shadowed by vast strata of 'pragmatic resignation.' Hence his concomitant awareness that the endurance of legal orders is fundamentally conditioned by contingent sets of power relations.[6] *CLDL* articulates the same point with reference to Kelsen's observations regarding the thoroughly contingent *Wirksamkeit* or effectiveness of every *Grundnorm*. In other words, current sets of power relations may give way to others in the course of time, but whether they do or not, will not change the fact that large contingents of society are likely to live with laws that they consider unjust, alienating and unnecessary.

5 See Hans Lindahl, 'Enduring Contingency. Remarks on the Precariousness of Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 53.

6 See Van der Walt, *The Concept of Liberal Democratic Law*, 177-178.

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There is therefore no suggestion in *CLDL* that the Aboriginal people of Australia or the Mohawk traders in Canada should consider themselves 'included' in the liberal democratic systems of law to which a history of colonial conquest subjected them; no suggestion that colonised peoples should adopt an 'internal perspective' on the legal systems to which they are subjected. There is also no such suggestion in RHLDL. Its reference to the magnanimous acceptance of adverse vote counts among liberal democrats signals, for Lindahl, something 'less than contingent' that applies without question to the Aboriginal people of Australia or the Mohawk traders in Canada. However, there is nothing in that passage or the rest of RHLDL that suggests that. That passage talks about a liberal democratic ethic among liberal democrats who sign up for liberal democracy. The contingency of that signing-up, I believe, has now been sufficiently underlined. That signing-up says nothing about those who indeed only acquiesce pragmatically to a majority-minority constellation of sovereignty imposed on them.

There is a passage in *CLDL* that dismisses the need and usefulness for liberal democrats to engage in normative discussions with those who expressly and militantly refuse to sign up for liberal democracy. That passage, however, also has no necessary purchase on the problem that Lindahl points out. The problem that Lindahl is pointing out relates to territorial disputes and anti-colonial struggles, categories of disputation that may, but may also not, include a rejection of the merits of liberal democracy. Would Aboriginal and Mohawk resistance indeed pivot on an express rejection of the merits of liberal democratic governmental arrangements as such, liberal democrats will have to be forgiven for not finding this resistance *normatively* compelling or interesting. However, to the extent that their resistance targets their colonised status, without any discernible rejection of liberal democracy as such, there would be no reason why liberal democrats should not comprehend their stance and duly consider its legitimacy. In this regard, I believe it is also cogent to observe that decolonisation struggles would invariably stand a better chance with liberal democratic regimes of the kind contemplated in *CLDL* and RHLDL than with any other kind of political regime.

To sum up everything said above: I believe there is nothing in either *CLDL* or RHLDL that contradicts or denounces, and quite a bit that affirms the affirmation of 'enduring contingency' that Lindahl brings to the discussion. I do not understand, *not yet*, in any case, how the affirmation of contingency in these texts could have gone further than it does, or why it does not 'go far enough.' I nevertheless trust this emphasised *not yet* makes it clear enough that I do not consider this discussion terminated. Ours is a long conversation that did not start yesterday and will not end tomorrow, and it may well still bring me to better insights.

6 Rummens on normative substance and ethos, opponents and enemies, and misrepresentation of Habermas and Rawls

Stefan Rummens takes me to task for failing to distinguish between *opponents within* and *enemies of* liberal democracy. The failure to draw this distinction, he

argues, stems from my fear of normative substance and ethos and the purely procedural conception of liberal democracy that results from this fear. This fear of substance and ethos, he adds, leads me to a reading of Rawls and Habermas that misrepresents their theoretical positions. These are the three key claims in Rummens' response with which I take issue in what follows.

To begin with my 'fear of normative substance,' I cannot see why anyone who calls him- or herself a liberal democrat would 'fear' the substantive norms and ethos of liberal democracy, and why any liberal democrat worthy of the name would not stress the crucial importance of the whole array of institutions informed by these norms and ethos, and I do believe RHLDL takes sufficient care to stress this importance in a passage that Manon Westphal finds significant enough to quote in full.[7]

RHLDL surely invokes the 'ruination' of the transcendental status of these substantive norms, but that does not imply a rejection of these norms or a hesitance to embrace them. I believe I embrace them as much as Rummens does. The difference between our respective positions should rather be sought in our different assessments of the achievements one can expect from these norms. For Rummens, these norms, once endorsed, accomplish two things that I do not believe they do:

i They allow for a clear distinction between 'opponents within' and 'enemies of' liberal democracy.
ii They allow 'opponents within' liberal democracy to resolve their disputes more or less unproblematically, given their partnership in the project of liberal democracy in which they both partake in a bona fide and cooperative (in any case 'not hostile') fashion.

The position I take in *CLDL* and RHLDL is informed by the perception that the endorsement of the substantive values of liberal democracy does not, as such, enable liberal democrats to draw the firm distinction that Rummens envisages under 1, and therefore also does not, as such, produce any firm basis for the cooperative and amicable dispute resolution he envisages under 2.

The distinction that Rummens envisages under 1 unravels the moment one takes a closer look at the ambiguous character of most political disputes that do not precipitate immediate crises of the kind that came to a head on 6 January 2021. I will stay with the American case in what follows, but the point I will be making surely also applies to politics elsewhere in the world, Europe included.

The estimated 2,000 American citizens who stormed Capitol Hill on 6 January 2021 surely exposed themselves to *prima facie* convictable charges of criminal insurrection and therefore also sufficiently warrant the *prima facie* appellation 'enemies of liberal democracy.' It is not yet clear whether Donald Trump himself

7 See Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 25; Manon Westphal, 'Liberal Democratic Law, the Ethics of Civility, and Agonistic Politics Between Hegemony and Compromise,' *Netherlands Journal of Legal Philosophy* 52 (2023): 113.

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and the close-enough circles of 'conspirators' around him are going to be charged and effectively convicted of criminal insurrection. Let us nevertheless suppose they will be, in the end, so that we can add another ten, twenty, hundred, or even a thousand more names, if you wish, to the charged convicted and therefore clearly identifiable 'enemies of liberal democracy' in the United States. Where does that leave the rest of the Republican Party's elites who, with a handful of exceptions, continue to this day to support Trump, or fail to expressly denounce him? What about the 74 million Americans (+/- 47% of all votes cast) who voted for him a second time, knowing very well what he stood for? What about the massive contingent of them which appears willing to do so for a third time? Are they 'opponents' who merely oppose the Democratic Party's interpretation or specification of the 'liberal democratic project' with their own interpretation of that project, as Rummens puts it with reference to Rawls and Habermas? Or should one consider them all 'enemies of liberal democracy' who must simply be contained 'like war and disease,' as he puts it with reference to Rawls?

Rummens and I agree that there is no point in wasting your breath talking to those who expressly and militantly negate the essential norms and principles of liberal democracy (no use talking to those bearskins, in other words). From a liberal democratic perspective, they indeed just have to be contained 'like war and disease.' The problem is, however, that a large contingent of the 74 million Americans who voted for Trump (and those who, for decades before they finally found their ideal presidential candidate, have all along had formidable champions for their anti-liberal politics in the upper echelons of American politics) do not consider themselves enemies of liberal democracy. Few or none of them will refuse to endorse Habermas' abstract scheme of rights or the Rawlsian scheme of liberal principles that Rummens invokes as the normative substance of liberal democracy. Many Americans whom Rummens and I may well consider hostile to the liberal democracy that *we* have in mind, will simply insist that they have very different interpretations of what these Habermasian or Rawlsian schemes demand. Even some of those bearskins might do so.

In other words, Rummens' invocation of an *underdetermined liberal democratic normative substance that requires determination and specification in an ongoing constitutional project*[8] offers one no criteria with reference to which one can distinguish effectively between liberal democratic and the most anti-liberal-democratic politics imaginable. In this regard, the invocation of underdetermined substance that must be specified in an ongoing constitutional project is an empty edifying formula that evinces all the characteristics of the soft-Platonic metaphysics of Aristotle's potentiality-actuality scheme that *CLDL* analyses in considerable detail. This language contributes nothing to a better understanding of either the patent crisis of liberal democracy in which Americans currently find themselves, nor its relatively regular practices in better times.

8 See Stefan Rummens, 'The Normative Commitments of Liberal Democracy,' *Netherlands Journal of Legal Philosophy* 52 (2023): 87.

Even 'relatively regular practices in better times' of liberal democracy are fraught with countless evaporations of normative substance that harbour embryonic threats to societal integration and common peace. Every constitutional complaint about some or other governmental decision or framework exposes liberal democratic societies to such threats. The vaxxer/anti-vaxxer test case that RHLDL invokes is a case in point. The financial, emotional, and sheer existential investment without which no constitutional complaint would arrive at the doorstep of a constitutional or high court must alert one to this threat. A constitutional complaint is not a matter of two parties to a dispute telling one another: 'Look, both our views of the matter fit well enough into our constitutional framework, but let's have a friendly contest in court to see which one the court deems the better option.' To the contrary, it is always a matter of both parties to a dispute bitterly rejecting one another's position as 'unconstitutional.' No rational person would invest weeks and months of stressful and costly engagement without being driven by this bitterness. To think that a court decision reunites the parties under the auspices of a common constitutional project is quixotic. Their disagreements, as Frank Michelman puts it, remain 'real and unliquidated.'[9] Under these circumstances, it is never clear whether it is 'opponents within' or 'enemies of' liberal democracy that leave the court room.

If a court does not resolve or liquidate the 'real and unliquidated' disagreements between the parties in a constitutional complaint, what does it do, or what *might* it do? The court seeks to 'vault' the parties 'past' these disagreements, suggests Michelman. It invites them to 'slide past [and] "get over" them.' The big question, afterwards, is whether this invitation will be accepted or not. It is exactly here that the 'ethics of civility' may or may not save one from the embryonic societal disintegration and the ever-present threat of civil war that lurks in every grave constitutional dispute, however remote this threat may appear in 'regular times' of liberal democracy. RHLDL makes a crucial point in this regard that both Rummens and Tinnevelt find incomprehensible and irksome.[10] I will nevertheless not shy away from stressing it again: apart from being semantically informed by normative substance that the parties appear to share (at least initially), the ethics of civility of concern here has nothing else to do with this normative information. In a very real sense, this ethics must take leave of the normative substance that informs it. Normative substance is after all exactly that which fuels the conflict or dispute semantically. Ethics is that which allows one to take leave of that conflict or dispute. More comprehensively put in view of my responses to Rosenthal and Lindahl above: Ethics is that which allows one to take leave or not to take leave of that dispute.

9 Frank Michelman, 'Constitutional Legitimation for Political Acts,' *The Modern Law Review* 66, no. 1 (2003): 6-8.

10 See Rummens, 'The Normative Commitments of Liberal Democracy,' 90, Ronald Tinnevelt, 'The Great Gamble of the Liberal State. Fragility, Motivational Weakness and Political Regress,' *Netherlands Journal of Legal Philosophy* 52 (2023):105.

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The same point applies to the distinction that RHLDL draws between ethics and ethos that Rummens finds similarly dubious. Ethics marks the moment when normative *information* evidently becomes critically *non-informative*. It marks the moment when the semantic content of normative information, which has led to two bitterly contested ethical positions (in the sense of *ethos*), is left unresolved by judicial intervention or any other kind of mediation. The guidance of information evidently stops here. Something else must take over if societal cohesion is going to survive this normative hiatus. As I read him, 'an appreciation of burdens of judgment' is Rawls' expression for this 'something else.' This appreciation for burdens of judgment has its critical – its *decisive* – moment when the norms and standards that inform 'public reason' fail to resolve intractable conflict. Rawls expressly acknowledges the possibility of such failure. When it occurs, he says, public reason turns into something that is quite different from the reliance on norms. It turns into an ethical commitment to sustain instead of destroy the norms by which we live (or have lived thus far). Public reason is then no longer a matter of reasoned argument. It turns into a decisively ethical imperative – an 'urging' Rawls calls it – to sustain the very basis of reasoned argument.[11]

Rummens finds it strange that one can contemplate an ethics *without* an ethos.[12] I fully agree with him and never suggested anything to the contrary. The distinction between an ethos (a historical way of life) and the ethics (decisive ethical conduct) that sustains an ethos (by momentarily taking leave of it), does not suggest anything to the contrary. I believe my conception of the ethics of civility is fundamentally in line with Rawls.' The only difference between his position and mine concerns the frequency or pervasiveness of the critical moment in which normative *reliance on* public reason has to give way to an ethical *sustenance of* public reason. Rawls considers this moment exceptional and rare. I consider it a daily exigency.[13] This deviation, however, is not a misrepresentation of Rawls, as Rummens suggests. It is a critical engagement with his thinking that affirms much more of it than it ultimately questions.

Does this argument lead to a 'misrepresentation' of Habermas' thinking, as Rummens likewise suggests? It is interesting that Rummens' 'presentation' of Habermas makes the exact same move that my 'misrepresentation' of Habermas makes. Rummens himself ends up stressing the constituent commitment to liberal democracy on which Habermas' thinking pivots, the constituent affirmation of liberal democracy that ultimately conditions the co-originality of rights and democracy, etc. In other words, his own reading of Habermas' discourse-theoretical analysis of liberal democratic law ruins the transcendental pretensions of this analysis. Here is one of his key statements in this regard:

11 See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).
12 See Rummens, 'The Normative Commitments of Liberal Democracy,' 93.
13 See Van der Walt, 'Rawls, Habermas and Liberal Democracy,' 41, footnote 72.

> The principles that [Habermas] identifies … 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.[14]

This passage evidently reduces the transcendental elements of Habermas' discourse-theoretical understanding of the law to a contingent result of an ethical commitment. To the extent that it does this, there is little or no difference between Rummens' and my reading of Habermas (apart from the fact that his reading is much richer in important details that I find highly instructive and to which I will remain highly indebted in future discussions of Habermas' work). In the end, we just draw different conclusions from our very similar readings of Habermas. I discern a deep tension between Habermas' occasional acknowledgements of the ethical commitment that sustains liberal democracy, on the one hand, and the transcendental terms in which his most definitive works couch this commitment. For me, the former ruins the latter. Rummens discerns no disturbing tension in this regard. Not here in his response to RHLDL, in any case.[15]

In fact, were one to judge by this response, the occasional emphases on constituent affirmation and sustenance of liberal democracy (constitutional patriotism) become the defining element of Habermas' thinking in Rummens' reading of his work. They eclipse Habermas' extensive engagement with transcendental linguistics in major works, most notably in the two volumes of *Theorie des kommunikativen Handels* and their extensive application/adaptation in *Faktizität und Geltung*. These works surely convey the message that the transcendental achievements of linguistic usage, cognitive and normative learning, *transcend* arbitrary choice. Proper use of language, Habermas argued in these works, *necessarily* commits one to a project of cognitive and normative learning (that is, to veritable cognitive and normative progress). For those who speak properly, this commitment is not a matter of choice. Those who do not sign up for the commitment, *do not speak properly*. They use language in an improper, self-contradictory way, as his famous invocation of performative self-contradictions suggested clearly.

14 See Rummens, 'The Normative Commitments of Liberal Democracy,' 92.

15 See, however, Rummens, 'Deliberation Interrupted. Confronting Jürgen Habermas with Claude Lefort,' *Philosophy and Social Criticism* 34 (2008): 383-408 for a stunningly probing inquiry into Habermas' work that seems to highlight this very tension, and the very tension between the epistemic and the ethical on which RHLDL insists.

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Over the years, many scholars considered this the definitive statement of the 'theoretical position' that one associates with the name Habermas, considering his massive scholarly investment in this position. Should anyone remotely respectful of this massive scholarly investment really want to trivialise it with an argument (aimed at rendering it acceptable to his relativist critics) that he never considered the commitment to cognitive and normative progress that it envisaged anything more than an option that everyone is free to take or not to take? Why the massive argument about the normative and cognitive constraints that the proper use of language imposes on the one who speaks, if these normative constraints are themselves nothing but the contingent result of the way one chooses to speak? Was there really no argument at work here that the normative and cognitive constraints that language imposes on the speaker also constrain the way the speaker chooses to speak, because, surely, no one in her right mind (no rational person) could want to speak in an improper, self-contradictory way?

Should one really read Habermas' later work as a self-trivialisation or even rejection of the formidable scholarly position developed in *Theorie des kommunikativen Handels* and *Faktizität und Geltung*? Has Habermas' thinking in later years really become, predominantly, an affirmation of 'enduring contingency' (to borrow Lindahl's powerful phrase once more)? I would be surprised if scholars of Habermas' work would eventually come to answer this question affirmatively. I would be surprised if Habermas himself would. Until they do, or he does, I will believe it will remain a good question whether Rummens' is the 'presentation' and mine the 'misrepresentation' of Habermas.

7 Tinnevelt on Habermas and Böckenförde, times of regression, and the 'strength' of liberal democracy

Ronald Tinnevelt writes: 'Liberal democratic states are fragile, but not weak.'[16] For Tinnevelt, the 'fragility of liberal democracy' does not imply, as it would for many if not most percipient scholars, that the strength or weakness of liberal democracy is variable. For him, liberal democracy is always strong (or not weak, in any case), notwithstanding its 'fragility.'

One wonders what is left of the meaning of the word 'fragility' when it no longer refers to a breakability that, at least sometimes, becomes worryingly evident, evident enough to warrant perceptions of 'weakening' and 'weakness' that call for heightened concern. The perception that liberal democracy can be weaker at times and stronger at other times, does not strike Tinnevelt as worthy of contemplation. And, when this thought does not strike one as worthy of contemplation, the more nuanced observation that the strength and weakness of any political framework are rarely clearly or conclusively distinguishable, will surely also fail to do so. When one's scholarship is so far removed from any real effort to take a careful look at the concrete ways in which the political becomes manifest, it is perhaps not surprising

16 See Tinnevelt, 'The Great Gamble of the Liberal State,' 105.

that it would turn into something akin to a motivational team talk. The statement 'liberal democratic states are fragile, but not weak' is theoretically as uninformative as a spirited team talk.

Why does Tinnevelt's response to *CLDL* and RHLDL ultimately come across as something akin to a spirited team talk? The answer to this question can be found in his reading of Böckenförde and Habermas as 'motivational thinkers,' thinkers who provide one with good reasons to believe liberal democracy can and will survive, despite its fragility. Both these thinkers impart the message to him that democracy is, after all, 'not weak,' not even in historical times in which it strikes one as rather more worryingly fragile than it may have appeared in other times. To account for these worrying times, Tinnevelt takes recourse to the notion of 'times of regression.' These times of regression, he suggests, should not blind one to regular times in which liberal democracy is 'not weak.' Moreover, they do not detract anything from the sufficiently clear 'traces of reason in history' that '[support Habermas' general optimism].' Böckenförde and Habermas also provide him, to boot, with grounds for saying liberal democracy is 'not weak.' According to them, argues Tinnevelt, a number of factors contribute to the general strength of liberal democracy. Key among them are religion, education and adequate provision of socio-economic security.

I wish to make two points in response to this line of argument. The first concerns the rather unexamined distinction between regular times of strong ('not weak') liberal democracy and exceptional times of 'regression.' This firm distinction echoes Rummens' distinction between 'opponents within' and 'enemies of' liberal democracy. Only in times of regression, should one say, following Rummens and Tinnevelt, does one find the enemies of liberal democracy on the prowl. In regular times, good old opponents in a contest between competing visions of liberal democracy take the field without ever posing a threat to the ideals they share. They therefore cast no shadow of doubt over the clear 'traces of reason in history' that generally prevail. Such is the metaphysical comfort that Tinnevelt draws from his reading of Habermas.

I believe I have pointed out the tenuousness of this line of argument extensively enough above, and need not do so again. The distinction between times of regression and regular times is as tenuous as the one between 'opponents within' and 'enemies of' liberal democracy. A more realistic approach to history demands a keener eye for the very inverse of that which Tinnevelt proposes. There surely are times that are better than others, but that should not blind one to the reality that bad weather invariably brews long before it erupts into a visible storm. In fact, a storm may already be brewing when the weather appears at its imaginable best. That is the only way that one can explain, as far as the 'strength' of liberal democracy is concerned, how quickly the apparently and at least relatively 'good' Obama years could have given way so abruptly to the disaster of the Trump presidency. Can one ever forget that Mitch McConnel – long-standing senator of 38 years (since 1985) – already prepared the field for the first of Trump's three most long-term devasting blows to liberal democratic law in the United States – the appointments of Neil

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Gorsuch, Brett Kavanaugh and Amy Coney Barrett to the Supreme Court – *during* the Obama presidency?

The second point follows from the first. The evident impossibility of firm and reliable distinctions between regular times and times of regression, and between cooperative 'opponents within' and hostile 'enemies of' liberal democracy in relatively open societies (that is, societies that are not in the paralysing grip of a largely monolithic totalitarian and dictatorial vision), burdens statehood, liberal democratic statehood included, with deeply ambiguous and invariably explosive political conditions. The more the state becomes the unilateral embodiment or instrument of one political vision, the more explosive and unstable the political situation is likely to become and the more repressive and illiberal it will need to become to maintain regular 'law and order.' The Böckenförde Dictum – the liberal democratic state lives by conditions that it cannot guarantee – engages with exactly this predicament, as Tinnevelt's reading of the Dictum correctly underlines.

But how is it possible that the percipient author of this Dictum could have considered its application restricted to prescriptive interpretations of the core principles of liberal democracy? How could Böckenförde have thought that it would not apply to endeavours of the state to secure motivational grounds for the sustenance of liberal democracies? Under the conditions that we are contemplating, the sustenance of religion, education and 'public institutions' (like public broadcasting) committed "more strongly to a cultural and educational mission"' will always be part of the problem. All the motivational projects named here are bound to figure among the most divisive statal engagements imaginable. In other words, statal involvement in such motivational projects is bound to contribute to the social and political tensions that it seeks to manage. It may well end up exacerbating instead of alleviating societal divisions. If Tinnevelt's reading of Böckenförde's work is correct (and I have no reason right now to doubt that it is) the reading of his work presented in *CLDL* is indeed one-sided and misrepresentative. It does not reflect (what would appear to be) Böckenförde's grave underestimation of the devastating reach of his percipient Dictum. For this insight, my future engagement with this famous Dictum will surely remain deeply indebted to Tinnevelt.

I nevertheless trust Tinnevelt will appreciate, from the observations elaborated here, why I do not consider his more complete reading of Böckenförde supportive of an *a priori* conclusion that the liberal democratic state is, notwithstanding its fragility, 'not weak.' Statal undertakings to render the conditions for liberal democracy more stable could render liberal democracy stronger, but it could also render it weaker. Statal intervention does not resolve the 'enduring contingency' of the actual strength or weakness of liberal democracy, it takes part in it and contributes to it. The same point can be made regarding Tinnevelt's reference to Habermas' relatively univocal invocation of religion – throughout history one of the most divisive socio-political engagements imaginable – as a resource of liberal democratic stability. That one of the leading social theorists of our time would resort to an argument as simplistic as this, is startling. Some manifestations of

religious commitment may well contribute to stabilisations of liberal democracy, but one also knows all too well that others will not. Far from resolving it, religion too, takes part in the 'enduring contingency' of all human endeavours. Not even the provision of a minimum of social equality – Habermas' other motivational ground – escapes this dilemma. Although *CLDL* also stresses the sustenance of minimal social equality as a *sine qua non* for the survival of liberal democracy, this sustenance of social equality and the degree to which it should be done is itself one of the most divisive issues in contemporary liberal democracies.

To be fair to Tinnevelt, he is not averse to considering criticism of Habermas' position on this point. His invocation of Habermas' arguments about religion is more concerned with showing that Habermas is well aware of the motivational factors on which 'reason in history' depends. Clear evidence of this 'motivational' side to Habermas' thinking, he contends, shows up the 'one-sidedness' and even 'incorrectness' of my portrayal of Habermas' transcendentalism. In this regard I just wish to restate the closing point that I made in response to Rummens: for many readers of Habermas' work, the linguistic transcendentalism developed in *Theorie des kommunikativen Handelns* and *Faktizität und Geltung* reflects his definitive theoretical position. RHLDL evidently reflects significant doubts about this linguistic transcendentalism, but it takes it seriously. I am not convinced one does Habermas any favour by stressing elements of his later writings in a way that appears to render his earlier work obsolete. RHLDL's critical engagement with elements of tension and obfuscation in this formidable oeuvre – which pivots on the elementary insight that transcendental and motivational arguments do not support but undermine one another – strikes me as significantly more respectful.

8 Raucea and liberal democratic constituent power

The essence of the problem that I highlighted above in Rummens' and Tinnevelt's readings of Rawls, Habermas and Böckenförde concern the message of political unity and undividedness that they both draw from these readings. Rummens exports this undividedness of the political in a rather Schmittian fashion: division is not a problem between liberal democrats who take part cooperatively in the ongoing project of liberal democracy. Division only becomes a problem when the clearly identifiable enemies of liberal democracy make their appearance. Tinnevelt quotes Habermas' statement that political debates are 'best described in agonistic rather than in consensual terms' to show that Habermas' position is quite compatible with the emphasis of the dividedness of life in *CLDL* and RHLDL. The dominant picture of Habermas that emerges from his response to *CLDL* and RHLDL is nevertheless one of a theorist who still holds on to the idea of the common convictions of citizens, '*[die] impliziten Überzeugungen der Bürger*,' in which the liberal democratic constitution is rooted. This phrase evidently contemplates '*die impliziten Überzeugungen [aller] Bürger*,' the common convictions of *all* citizens. The same applies to the idea of an 'active citizenry' conditioned by a '*weitgehend implizit bleibende Grundeinverständnis … über die demokratischen*

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Verfassungsgrundsätze.'[17] Tinnevelt's reading of Böckenförde presents him likewise as a theorist who believes the liberal democratic state can provide motivational grounds for liberal democracy – through education and state sponsored institutions committed 'more strongly to a cultural and educational mission'– that motivate all citizens without demotivating some.

This is how Rummens' and Tinnevelt's readings of Rawls, Habermas and Böckenförde put forward a typically nineteenth century conception of unitary constituent power that is unburdened by internal divisions. The concept of liberal democratic constituent power contemplated in *CLDL* and RHLDL is very different. It locates constituent power in the power that precariously manages to keep liberal democracy intact in the face undeniable divisions that invariably threaten to tear it apart. Acceptance of an adverse vote count, argues RHLDL, is one of its uniquely defining moments. This evidently points to a very different understanding of constituent power, as Chiara Raucea notices in her most meticulous and percipient reading of *CLDL* and RHLDL. Hence her request that I explain what remains of constituent power if one reduces it to the 'diffuse' format of liberal democratic law-making contemplated in these texts. All that I offer in the final analysis, Raucea suggests, is the 'diffuse we' that emerges from a contingent ethics of cooperation. How can this 'diffuse we' still constitute a first-person plural perspective with reference to which *liberal legal norms* can be considered the *democratic law* that a community gives to itself, she asks.[18]

The constituent power that emerges from the fallible, imperfect, and largely non-hermeneutic processing of democratic representation contemplated in *CLDL* and RHLDL (see again my response to Westphal) evidently pertains to both the winning and the losing factions that make up the democratic process in its entirety. It evidently does not belong exclusively to whatever triumphant majority may emerge from the political process. In other words, liberal democratic constituent power pertains to democratic majorities *and* minorities. Minorities, Kelsen teaches one, are as constituent as majorities. Liberal democratic constituent power cannot therefore not be conceived in terms of *one* first-person plural position. It must be contemplated in terms of several or many of them. In liberal democracies, any collective 'plurality' that attains to a first-person perspective in the way that Bert van Roermund describes so meticulously,[19] gives way to a multiplication or exponentiation of 'plurality' (plurality x plurality). Of concern is no longer a plurality of individuals that gel into one collective entity, but a plurality of individuals that represent themselves – largely without gelling – with reference to a variety of very different and always changing nodal positions. Under these circumstances, authorship of the law – the foundational law or constitution

17 For these quotations, see Tinnevelt, 'The Great Gamble of the Liberal State,' 100.

18 Chiara Raucea, 'How Do We Make Liberal Democratic Law Together? Remarks on Van der Walt's Notion of a "Diffuse We",' *Netherlands Journal of Legal Philosophy* 52 (2023): 70.

19 See Bert van Roermund, *Law in the First Person Plural* (Cheltenham: Elgar, 2020). This work remains crucially relevant here, but needs to be read against a background of multiple competing first-person pluralities.

included – cannot be identified referentially (it cannot be identified clearly enough to qualify as a referent). It can only be *inferred* and *presupposed*, as Kelsen stresses constantly and repeatedly in his acute descriptions of this process.

The apparent effectiveness or *Wirksamkeit* of a system of norms thus becomes the only register of the diffuse (spread-out, multi-nodal) and unlocatable (never *present* in one place, always *represented* in and from different places, forever changing or mutating at that) constituent power that sustains liberal democracy. The fact that a system of law still appears functional and effective *implies* a constitution that remains effective, and this *implication*, in turn, makes it possible to presuppose a foundational norm (*Grundnorm*) that is still effective (*wirksam*). This presupposition of an effective foundational norm thus becomes the oblique index or register, not of *a* constituent power, but of a constituent set of power relations. This impersonalisation of constituent power is only worrisome when one holds on to a heroic (Schmittian) concept of constituent power. It is not worrisome to liberal democrats. They are not a cohort of narcissist zealots who need to see the exclusive imprint of their own personhood – theirs and only theirs – stamped onto the law that governs them.[20] For them, the ideal of self-government retains adequate scope and meaning as long as everyone has some hand and no one has the only hand in the overall way in which the law pans out, that is, when everyone and no one governs, as Lefort puts it.[21]

No doubt, the constituent power that effectively gives the law to a liberal democratic community consists for a large part in the strength to carry the burden of accepting that others made the law in a way that you would not have made it yourself. Carrying this burden is the way in which the losers of elections take part in liberal democratic constituent power. This participation – which can never be guaranteed – is real and crucial. Without it, liberal democracy becomes, all too obviously, unsustainable. Accepting an adverse vote count is therefore as much a constituent force as the power to actively govern resulting from a favourable vote count. An 'enduring contingency' conditions the uniquely multi-lateral constituent power – or the mutually sustaining plurality of constituent powers – of concern here. Carrying the burden of passively living under laws made by others in a way that one would never have done oneself is never guaranteed.

Those who actively make the laws must reckon with this elementary fact, this elementary lack of any guarantee that laws will be obeyed. If they wish to remain *liberal democratic* law-givers, law-givers for whom access to the machinery of law enforcement remains a marginal instead of pivotal consideration, they will see to it that the burden of the losers remains as light as conceivably possible. Of concern is again the concerns of 'minimal losers' and 'least intrusiveness' that I stressed in my response to Manon Westphal. By governing and being governed in this unique way, both the winners and losers of elections contribute to the sustenance of the

20 See John Rawls, 'The Idea of Public Reason Revisited,' *University of Chicago Law Review*, 64 (1997): 766-767.

21 Claude Lefort, *L'invention démocratique* (Paris: Fayard, 1994), 92.

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constitutional framework that organises this kind of government. This is how majorities and minorities both take part in a constituent power that we have for much too long contemplated in the singular. One need not give up on the essence of the idea of government by consent to arrive at a long-overdue re-articulation of the concept of self-government: there is no law that 'a community gives to itself.' There is only law that communities – communities of the same society – give to one another in very different modes of giving.

9 Concluding remarks

Tinnevelt writes:

> It is an open question what kind of solution Van der Walt himself can provide for the problems of our current political constellation. His one-sided analysis of Habermas' discourse theory … and the critical – and mainly negative – conclusions [already drawn] in *The Concept of Liberal Democratic Law* … [neglect] the potential of institutionalized democratic processes and practices. If Van der Walt is sincerely worried about the effects of polarization and regression, more is needed than simply pointing at the promise of the general instantiations of a much needed democratic civic ethos – civilized decency, an appreciation of burdens of judgment, an endorsement of voting procedures and acceptance of an adverse vote count – or the need for poetic fictions.[22]

I am most grateful to Tinnevelt for this frank and pointed invitation to state my own contribution to the sustenance of liberal democracy more clearly, and for mentioning the one element of *CLDL* that none of my interlocutors in this volume addressed, namely, the poetic unburdening of the political that *CLDL* highlights as one of the definitive conditions for liberal democracy. Here lies the essential contribution to the understanding and sustenance of liberal democracy that *CLDL* seeks to make. The endeavour to make *this contribution*, rather than another, is indeed fundamentally informed by a concern about the 'polarisation and regression' that Tinnevelt invokes. Unlike him, I find no consolation in the brandishing of generic *a priori* assertions that 'democracy is not weak' when daily news reports relentlessly tell me that liberal democracy is currently in terrible shape in many parts of the world, unfortunately also in parts of the world that determine the fate of so many others. Under these circumstances, yet another endorsement of the 'potential of institutionalised democratic processes and practices' does not strike me as helpful. Why would another such endorsement, after so many that preceded it, suddenly be of help when the very object of endorsement appears to be in the worst shape that it has been for a long time? Why would the invocation of these processes and practices be of any assistance in a time when they are themselves exactly that which is in dire need of assistance?

22 Tinnevelt, 'The Great Gamble of the Liberal State,' 108.

Duly informed by this crisis, I asked myself a question that Tinnevelt cannot contemplate, given his *a priori* assessment that 'democracy is not weak:' why has liberal democracy become so weak in our times, why has it become so terribly frail? In asking myself this question, I commenced to reflect on another: what do those who have come to threaten liberal democratic processes and practices so effectively in our time – whether one calls them 'opponents within' or 'enemies of' liberal democracy is not helpful, we have seen – claim or pretend to offer as a better alternative? In this regard, Hermann Heller's remarkable invocation of the 'hunger for reality' (*Wirklichkeitshunger*) that drives the Weimar youth into the arms of totalitarianism underlined for me the observation of many analysts of current populist movements. These movements seek – and claim to have found – a *real demos*. The representational 'processes and practices' of liberal democracy and the artificially constructed 'people' to which they give rise no longer satisfy the hunger for reality that drive these movements to poetic and heroic conceptions of 'the people' that answers to a historical mission and destiny.

Liberal democrats typically and quite correctly dismiss this search for *the real people* as illusionary and delusionary, but this will not make these illusions and delusions go away. They have a peculiar staying power because they claim or pretend to offer nourishment for the maddening hunger for reality that drive their resistance to the representational 'processes and practices' of liberal democracy. *CLDL*'s response to this illusionary and delusionary hunger for reality pivots on the idea of channelling this hunger to a realm of poetic fiction, so as to lessen its burden on the representational processes and practices of liberal democracy. The argument is made with reference to the civilisational crisis that came to a head in fifth century Athens and is further (scandalously?) informed by a horrifying but profoundly probing argument of Carl Schmitt about the unburdening of the *Ius Publicum Europaeum* in *Nomos der Erde*.

CLDL, to be sure, does not explore this thought triumphantly. Who, after all, will take charge of this 'channelling' of the hunger of reality to a realm of poetic fiction? If there is no identifiable constituent power that can unilaterally take charge of education, religion and the provision of socio-economic security (see again the argument above with regard to the divisiveness of Habermas' and Böckenförde's motivational grounds), why would there be one that can unilaterally take charge of this 'channelling of the hunger for reality into a realm of poetic fiction'? The line of inquiry that *CLDL* is pursuing is evidently burdened by the same problems that burden the motivational arguments that Tinnevelt takes from Böckenförde and Habermas. I can therefore not claim to have found solutions to the problems we have been discussing in this volume. But it can at least claim to have embarked on a path of inquiry that does not take recourse to stock answers that are of no help right now, because these answers are themselves critically in need of help.

The constellational adjustment that marks the thinking about liberal democracy in *CLDL* and which makes it different from other current modes of doing so, concerns an endeavour to identify and perhaps even weaken – in ways not entirely plannable or foreseeable – the disastrous grip of poetic heroism on the political imagination

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of our time. If one could weaken, in all possible ways conceivable, the destructive grip of poetic heroism on the political organisation of society, who knows, one may just manage to tilt the balance in the ambiguous 'opponents within/enemies of' constellation that burdens all politics a little more in favour of the 'opponents within' element of this constellation.[23]

23 This line of thinking is now further developed in Johan van der Walt, *The Literary Exception and the Rule of Law* (London: Routledge, 2023).

SUMMARIES

Rawls, Habermas and Liberal Democratic Law

Johan van der Walt

The theoretical undertakings of both Rawls and Habermas pivot on an aspiration to explain (and surely to promote through explanation) the Enlightenment ideal of reason reflected in the idea of liberal democracy. The thoughts developed in my book *The Concept of Liberal Democratic Law* (2020, *CLDL* hereafter) pivot on the same aspiration. What obviously distinguishes the theoretical undertaking in *CLDL* from those of Habermas and Rawls, is the greater emphasis in *CLDL* on the precariousness of this ideal of reason. This article first gives a short exposition of some of the main lines of thought developed in *CLDL*. It then moves on to an analysis of Rawls' theory of political liberalism and Habermas' discourse-theoretical explanation of the legitimacy of modern law through the prism of the key elements of *CLDL* highlighted in the first part of the article.

Enduring Contingency: Remarks on the Precariousness of Liberal Democratic Law

Hans Lindahl

Van der Walt, in my reading, suggests that enduring contingency, in the twofold sense of an enduring state of contingency and of contingency as what needs to be endured, justifies the central role of the majority/minority principle in liberal democratic law. Does this endorsement of the principle go far enough in addressing the radical challenge of contingency? What about those cases in which a group refuses to understand itself as a disaffected minority in conflict with a majority, hence as part of a unity, even if only the unity of a legal order? At issue is a group that demands *exclusion* from a polity rather than demanding its recognition and inclusion as a minority entitled to be treated as equal to, even if different from, the majority. I suggest that, in the end, Van der Walt justification of the majority/minority principle espouses an agonistic defence of political and legal *unity*.

How Do We Make Liberal Democratic Law Together? Remarks on Van der Walt's Notion of a 'Diffuse *We*'

Chiara Raucea

In the last section of the article '*Rawls, Habermas and Liberal Democracy*,' Van der Walt introduces the notion of a 'diffuse *we*' to delineate the role that constituent power plays in his account of liberal democratic law. This contribution raises questions about Van der Walt's understanding of a liberal democratic community as a plural self. The first part of the article reviews some of the core passages of his *The Concept of Liberal Democratic Law* to highlight the different accounts of the *unity* of a liberal democratic community, which Van der Walt rejects. The last part of the paper questions the (epistemic) conditions under which the 'diffuse *we*' proposed by Van der Walt can socially cooperate and express a shared commitment to be bound by liberal democratic norms.

'Should I Stay or Should I Go?' On the Relevance of an Ontology and Ethics of Non-Cooperation

Irena Rosenthal

In 'Rawls, Habermas and Liberal Democratic Law, Van der Walt asks how liberal democracy can be sustained when liberal-democratic ideals are in peril. In my response, I challenge Van der Walt's methodological claim that liberal-democratic principles can and should be uprooted from metaphysics. I also question his claim that liberal-democratic ethics ultimately boils down to accepting terms of social cooperation that one does not consider reasonable. I argue that liberal-democratic ethics should not be reduced to the willingness to cooperate, but also needs to make space for the refusal of norms and practices of cooperation. As Van

der Walt's ontology pays insufficient attention to the impact of power upon cooperation, his ethics misses that citizens may, at times, need to resist prevailing forms of collaboration. I conclude with a brief reflection on the refusal of Trump supporters to accept the election results and its implications for ethics.

The Normative Commitments of Liberal Democracy

Stefan Rummens

This paper thematises an unresolved tension in Johan van der Walt's attitude towards 'the unreasonable other' who challenges the liberal democratic regime. This tension results from his reluctance to provide a more explicit account of the normative commitments of liberal democracy. Van der Walt's analysis is characterized by a 'fear of substance,' which is, however, based on a false dichotomy between pure proceduralism and metaphysical substantivism. It similarly reveals a 'fear of a democratic ethos,' which is, in turn, based on a false dichotomy between a proceduralistic ethics of civility and a metaphysically rooted ethos. These fears often lead Van der Walt to misrepresent the views of both John Rawls and Jürgen Habermas and, consequently, to obscure the promising ways in which they provide a normatively explicit account of liberal democracy that allows us to deal with the antagonistic enemy of liberal democracy in a more consistent and convincing manner.

The Great Gamble of the Liberal State: Fragility, Motivational Weakness and Political Regress

Ronald Tinnevelt

Böckenförde's famous Dictum plays an important role in Johan van der Walt's *The Concept of Liberal Democratic Law* and functions as the implicit frame of reference for his analysis of the works of Rawls and Habermas. Van der Walt sees a 'parallel constituent/constituted-power problematic' at work in the writings of both authors; a problematic relation between public ethos and the institutions of a liberal state. Although I agree with Van der Walt that it is crucial to critically reflect on the question what can sustain the 'we' at work in liberal democratic ethics, I will argue (1) that his reading of the work of Böckenförde and Habermas is one-sided and misrepresentative, and (2) that this misrepresentation partially explains why Van der Walt does not provide us with a convincing response to Böckenförde's Dictum.

Liberal Democratic Law, the Ethics of Civility, and Agonistic Politics between Hegemony and Compromise

Manon Westphal

This article brings Van der Walt's argument on the importance of an 'ethics of civility' in liberal democracies into dialogue with agonistic democratic theory. While agonists agree with Van der Walt that democracy requires citizens' readiness to live with views that they do not consider 'reasonable enough,' they focus on the political processing of conflicts among political actors with opposing views of what is reasonable. The article argues that agonism may be a suitable complement to Van der Walt's argument, because it shows how politics can help foster citizens' willingness to act according to the demands of an 'ethics of civility.' It refers to Chantal Mouffe's and James Tully's agonistic theories and shows that both describe forms of conflict processing that prevent situations in which an 'ethics of civility' would demand too unequally distributed sacrifices: continued hegemonic struggle in the case of Mouffe and compromise in the case of Tully.

Remarks on Johan van der Walt's Concept of Liberal Democratic Law: With Kelsen, Beyond Kelsen and the Unexplored Issue of Independent Technocratic Institutions

Nikolas Vagdoutis

This article engages with Van der Walt's concept of liberal democratic law. Firstly, it shows that his concept is significantly influenced by Hans Kelsen's theory, mainly

by Kelsen's democratic political theory but also by Kelsen's legal theory (insofar as the latter is considered to be related to the former). Secondly, it demonstrates that he goes also beyond Kelsen's theory by considering necessary for the sustainability of liberal democratic law an adequate social state. Given this, I argue that there is, to an extent, a proximity to Hermann Heller's *social Rechtsstaat* theory. Thirdly, it shows that – although the socio-economic level is, to an extent, considered – he leaves unexplored the rise of independent technocratic institutions in the economic governance framework of contemporary liberal democracies (the independent central banks, like the European Central Bank, being the main example). I argue that this issue needs to be explored in order to reach a realistic understanding of liberal democratic law (an understanding that Van der Walt aims at).

Reply to my Critics

Johan van der Walt

In this 'reply to my critics,' I engage with questions of institutional critique such as the critique of the depoliticising effect of the monetary practices of the European Central Bank (in response to Nikolas Vagdoutis), agonistic politics (in response to Manon Westphal), the enduring contingency of liberal democracy (in response to Hans Lindahl), the role of revolt and refusals to cooperate in liberal democracies (in response to Irena Rosenthal), the relation between the substantive norms and the actual ethics of liberal democracy (in response to Stefan Rummens), and times of regression and the strength and weakness of liberal democracy (in response to Ronald Tinnevelt).

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Altijd al willen weten hoe je zo'n pitbull temt? En hoe je die rat, die je het bloed onder de nagels vandaan haalt, tot rede kunt brengen? Wil je zo'n arrogante advocaat van de Zuidas eens van zijn troon stoten? Of ben je die begripvolle mediator helemaal zat?

Dan is dit boek over acht verschillende gedragstypes uit de advocatuur onmisbaar voor jou! Bruno Tideman kan putten uit ruim dertig jaar ervaring als advocaat. Hij heeft de meest voorkomende types in een rijk geschakeerde dierenriem gerangschikt en beschrijft hun modus operandi.

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Introduction

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