INTRODUCTION

The Fragility of Liberal Democratic Law

Reflections on the Work of Johan van der Walt*

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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

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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.

'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.