

# How Do We Make Liberal Democratic Law Together?

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

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### 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*<sup>1</sup> (hereafter *CLDL*) and from his

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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.

discussion-piece, titled ‘Rawls, Habermas and Liberal Democratic Law’<sup>2</sup> (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,<sup>3</sup> 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.<sup>4</sup>

I, therefore, envision the present contribution as a modest exercise in following the trail of clues,<sup>5</sup> 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.

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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,<sup>6</sup> Van der Walt restates three of the key-elements of the definition of LDL he provides in the concluding chapter of his book *CLDL*.<sup>7</sup> The first two of these key elements refer overtly to the relation between law and life.<sup>8</sup> 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,<sup>9</sup> 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).

should not be rooted in life<sup>10</sup> but should still serve life.<sup>11</sup> 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 ‘*servicing*’ 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<sup>12</sup>) 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.<sup>13</sup> 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,’<sup>14</sup> or by appealing to historical-spiritual social unity<sup>15</sup> or to social integration.<sup>16</sup> 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.<sup>17</sup>

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’<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

More specifically, Van der Walt calls attention to the crucial distinction proposed by H.L.A. Hart<sup>21</sup> 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.’<sup>22</sup> 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<sup>23</sup> 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.

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*.’<sup>24</sup>

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*.<sup>25</sup> 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.<sup>26</sup> 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.’<sup>27</sup>

The examination of Hart’s theory of law is not the only passage<sup>28</sup> 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.<sup>29</sup> 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.’<sup>30</sup>

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.

to liberal principles cannot be but precarious.<sup>31</sup> 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.<sup>32</sup> It will also be contingent on whether the instances of non-compliance with legal rules are not so spread to disrupt social cooperation.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.

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,<sup>37</sup> 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?<sup>38</sup>

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*.'<sup>39</sup> 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.<sup>40</sup> One inference that we could derive from this preliminary observation is that, differently from the account of the *Social Contract* proposed by Rousseau,<sup>41</sup> 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.

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.<sup>42</sup>

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'.<sup>43</sup> 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.

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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.<sup>44</sup> 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.’<sup>45</sup> 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<sup>46</sup> 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.<sup>47</sup> 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.

‘at least reasonable’ claim of justice,<sup>48</sup> or to arrive at ‘intersubjectively recognised validity claims.’<sup>49</sup> 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.<sup>50</sup> 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.’<sup>51</sup>

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 irresolvable ‘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.’<sup>52</sup>

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 (*verständigungsorientierte 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.

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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.'<sup>53</sup> 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<sup>54</sup> 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.'<sup>55</sup>

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.<sup>56</sup> 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.

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.