

The Great Gamble of the Liberal State

Fragility, Motivational Weakness and Political Regress

Ronald Tinnevelt

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

1 Introduction

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

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

- 1 Johan Wolfgang von Goethe, ‘Ilmenau,’ in *Werke*, Hamburger Ausgabe, Band 1 (München: Deutscher Taschenbuch Verlag, 1998), 110.
- 2 Ernst-Wolfgang Böckenförde, ‘The Rise of the State as a Process of Secularization,’ in *Religion, Law, and Democracy: Selected Writings*, ed. Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2020), 153 (italics in original). For a discussion of the context and meaning of this Dictum, see: Tine Stein, ‘The Böckenförde Dictum – On the topicality of a liberal formula,’ *Oxford Journal of Law and Religion* 7 (2018): 97-108; Christian Polke, ‘Böckenförde’s Dictum and the Problem of “Value Fundamentalism”,’ *Oxford Journal of Law and Religion* 7 (2018): 109-123; Jan-Werner Müller, ‘What the Dictum Really Meant – and What It Could Mean For Us,’ *Constellations* 25 (2018): 196-206; and Aline-Florence Manent, ‘Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde,’ *Oxford Journal of Law and Religion* 7 (2018): 74-96.
- 3 ‘The line of thinking taken from Lefort and Böckenförde runs right through this book.’ Johan van der Walt, *The Concept of Liberal Democratic Law* (New York: Routledge 2020), 11.

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

2 Böckenförde’s Dictum

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

4 Stein, ‘The Böckenförde Dictum,’ 97.

5 Manent, ‘Democracy and Religion in the Political and Legal Thought of Ernst-Wolfgang Böckenförde,’ 75.

6 Stein, ‘The Böckenförde Dictum,’ 98.

7 Polke, ‘Böckenförde’s Dictum and the Problem of “Value Fundamentalism”,’ 115.

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

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

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

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

9 Müller, ‘What the Dictum Really Meant,’ 202.

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

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

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

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

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

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

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

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

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

3 Habermas’s answer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 Habermas, Foreword, xiv.

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

30 Habermas, 'Überlegungen und Hypothesen,' 474.

31 Habermas, 'Überlegungen und Hypothesen,' 480.

32 Habermas, 'Überlegungen und Hypothesen,' 481.

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

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

33 Habermas, ‘Once Again: On the relationship between morality and ethical life,’ *European Journal of Philosophy* 29 (2021), 550.

34 Habermas, ‘Überlegungen und Hypothesent,’ 483.

35 Jürgen Habermas, ‘Reply,’ *Constellations* 28 (2021): 71.

36 Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge: MIT Press, 1999): 62.

37 Jürgen Habermas, *Postmetaphysical Thinking II* (Cambridge: Polity Press, 2017), 222.

38 Jürgen Habermas, *Europe: The Faltering Project* (Malden: Polity Press, 2009), 75. See also Habermas, *Postmetaphysical Thinking II*, 103 and 173; and Habermas, *Between Naturalism and Religion*, 119.

39 Habermas, ‘Once again,’ 550.

40 Rainer Forst, ‘The Autonomy of Autonomy: On Jürgen Habermas’s *Auch eine Geschichte der Philosophie*,’ *Constellations* 28 (2021): 22.

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

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

4 Van der Walt’s analysis

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

41 Habermas, Foreword, xvi and Jürgen Habermas, ‘Moral Universalism at a Time of Political Regression: A Conversation with Jürgen Habermas about the Present and His Life’s Work,’ *Theory, Culture & Society* 37 (2020): 24.

42 Habermas, ‘An author’s retrospective view,’ *Constellations* 28 (2021), 9.

43 Habermas, ‘An author’s retrospective view,’ 9.

44 Habermas, ‘Once again,’ 551.

45 Habermas, *Between Naturalism and Religion*, 102.

46 Habermas, *Between Naturalism and Religion*, 110.

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

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

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

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

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

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

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

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

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

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

50 Habermas, 'Reply,' 71.

51 Habermas, 'Reply,' 67.

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

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

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

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

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

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

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

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

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

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

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

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

57 Stein, 'The Böckenförde Dictum,' 104 (my emphasis).

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

59 Habermas, Foreword, xv.

60 Forst, 'The Autonomy of Autonomy,' 21.

61 Forst, 'The Autonomy of Autonomy,' 23.

62 Forst, 'The autonomy of autonomy,' 23.

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

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

5 Concluding remarks

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

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

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

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

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

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

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

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

68 Habermas, Foreword, xv.

69 Habermas, Foreword, xiv.

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