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

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

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1 Introduction

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

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

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

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

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

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

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

2.1 Parliamentary legislation and the 'majority-minority' principle

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 Hence, Kelsen concludes that '[t]he metaphysical-absolutistic worldview is linked to an autocratic, and the critical-relativistic to a democratic disposition.' Kelsen, *The Essence and Value of Democracy*, 103.
28 Kelsen, *The Essence and Value of Democracy*, 104.
29 Van der Walt, *The Concept of Liberal Democratic Law*, 203.
30 Van der Walt, *The Concept of Liberal Democratic Law*, 203.
31 Van der Walt, *The Concept of Liberal Democratic Law*, 202-203.
32 Van der Walt, *The Concept of Liberal Democratic Law*, 7.
33 Van der Walt, *The Concept of Liberal Democratic Law*, 203.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.1 Independent central banks: the example of the ECB

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2 Towards a 'realistic understanding of liberal democratic law'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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