

Reply to my Critics

Johan van der Walt

1 Introductory remarks

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

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

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

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

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

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

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

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

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

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

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

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

Johan van der Walt

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

3 Westphal on agonistic politics, hegemony and compromise

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

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

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

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

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

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

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

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

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

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

Johan van der Walt

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

4 Rosenthal on refusal

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

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

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

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

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

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

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

5 Lindahl on enduring contingency

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

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

Johan van der Walt

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

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

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

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

6 See Van der Walt, *The Concept of Liberal Democratic Law*, 177-178.

There is therefore no suggestion in *CLDL* that the Aboriginal people of Australia or the Mohawk traders in Canada should consider themselves ‘included’ in the liberal democratic systems of law to which a history of colonial conquest subjected them; no suggestion that colonised peoples should adopt an ‘internal perspective’ on the legal systems to which they are subjected. There is also no such suggestion in *RHLDL*. Its reference to the magnanimous acceptance of adverse vote counts among liberal democrats signals, for Lindahl, something ‘less than contingent’ that applies without question to the Aboriginal people of Australia or the Mohawk traders in Canada. However, there is nothing in that passage or the rest of *RHLDL* that suggests that. That passage talks about a liberal democratic ethic among liberal democrats who sign up for liberal democracy. The contingency of that signing-up, I believe, has now been sufficiently underlined. That signing-up says nothing about those who indeed only acquiesce pragmatically to a majority-minority constellation of sovereignty imposed on them.

There is a passage in *CLDL* that dismisses the need and usefulness for liberal democrats to engage in normative discussions with those who expressly and militantly refuse to sign up for liberal democracy. That passage, however, also has no necessary purchase on the problem that Lindahl points out. The problem that Lindahl is pointing out relates to territorial disputes and anti-colonial struggles, categories of disputation that may, but may also not, include a rejection of the merits of liberal democracy. Would Aboriginal and Mohawk resistance indeed pivot on an express rejection of the merits of liberal democratic governmental arrangements as such, liberal democrats will have to be forgiven for not finding this resistance *normatively* compelling or interesting. However, to the extent that their resistance targets their colonised status, without any discernible rejection of liberal democracy as such, there would be no reason why liberal democrats should not comprehend their stance and duly consider its legitimacy. In this regard, I believe it is also cogent to observe that decolonisation struggles would invariably stand a better chance with liberal democratic regimes of the kind contemplated in *CLDL* and *RHLDL* than with any other kind of political regime.

To sum up everything said above: I believe there is nothing in either *CLDL* or *RHLDL* that contradicts or denounces, and quite a bit that affirms the affirmation of ‘enduring contingency’ that Lindahl brings to the discussion. I do not understand, *not yet*, in any case, how the affirmation of contingency in these texts could have gone further than it does, or why it does not ‘go far enough.’ I nevertheless trust this emphasised *not yet* makes it clear enough that I do not consider this discussion terminated. Ours is a long conversation that did not start yesterday and will not end tomorrow, and it may well still bring me to better insights.

6 Rummens on normative substance and ethos, opponents and enemies, and misrepresentation of Habermas and Rawls

Stefan Rummens takes me to task for failing to distinguish between *opponents within* and *enemies of* liberal democracy. The failure to draw this distinction, he

Johan van der Walt

argues, stems from my fear of normative substance and ethos and the purely procedural conception of liberal democracy that results from this fear. This fear of substance and ethos, he adds, leads me to a reading of Rawls and Habermas that misrepresents their theoretical positions. These are the three key claims in Rummens' response with which I take issue in what follows.

To begin with my 'fear of normative substance,' I cannot see why anyone who calls him- or herself a liberal democrat would 'fear' the substantive norms and ethos of liberal democracy, and why any liberal democrat worthy of the name would not stress the crucial importance of the whole array of institutions informed by these norms and ethos, and I do believe RHLDL takes sufficient care to stress this importance in a passage that Manon Westphal finds significant enough to quote in full.⁷

RHLDL surely invokes the 'ruination' of the transcendental status of these substantive norms, but that does not imply a rejection of these norms or a hesitance to embrace them. I believe I embrace them as much as Rummens does. The difference between our respective positions should rather be sought in our different assessments of the achievements one can expect from these norms. For Rummens, these norms, once endorsed, accomplish two things that I do not believe they do:

- i They allow for a clear distinction between 'opponents within' and 'enemies of' liberal democracy.
- ii They allow 'opponents within' liberal democracy to resolve their disputes more or less unproblematically, given their partnership in the project of liberal democracy in which they both partake in a bona fide and cooperative (in any case 'not hostile') fashion.

The position I take in *CLDL* and RHLDL is informed by the perception that the endorsement of the substantive values of liberal democracy does not, as such, enable liberal democrats to draw the firm distinction that Rummens envisages under 1, and therefore also does not, as such, produce any firm basis for the cooperative and amicable dispute resolution he envisages under 2.

The distinction that Rummens envisages under 1 unravels the moment one takes a closer look at the ambiguous character of most political disputes that do not precipitate immediate crises of the kind that came to a head on 6 January 2021. I will stay with the American case in what follows, but the point I will be making surely also applies to politics elsewhere in the world, Europe included.

The estimated 2,000 American citizens who stormed Capitol Hill on 6 January 2021 surely exposed themselves to *prima facie* convictable charges of criminal insurrection and therefore also sufficiently warrant the *prima facie* appellation 'enemies of liberal democracy.' It is not yet clear whether Donald Trump himself

7 See Johan van der Walt, 'Rawls, Habermas and Liberal Democratic Law,' *Netherlands Journal of Legal Philosophy* 52 (2023): 25; Manon Westphal, 'Liberal Democratic Law, the Ethics of Civility, and Agonistic Politics Between Hegemony and Compromise,' *Netherlands Journal of Legal Philosophy* 52 (2023): 113.

and the close-enough circles of ‘conspirators’ around him are going to be charged and effectively convicted of criminal insurrection. Let us nevertheless suppose they will be, in the end, so that we can add another ten, twenty, hundred, or even a thousand more names, if you wish, to the charged convicted and therefore clearly identifiable ‘enemies of liberal democracy’ in the United States. Where does that leave the rest of the Republican Party’s elites who, with a handful of exceptions, continue to this day to support Trump, or fail to expressly denounce him? What about the 74 million Americans (+/- 47% of all votes cast) who voted for him a second time, knowing very well what he stood for? What about the massive contingent of them which appears willing to do so for a third time? Are they ‘opponents’ who merely oppose the Democratic Party’s interpretation or specification of the ‘liberal democratic project’ with their own interpretation of that project, as Rummens puts it with reference to Rawls and Habermas? Or should one consider them all ‘enemies of liberal democracy’ who must simply be contained ‘like war and disease,’ as he puts it with reference to Rawls?

Rummens and I agree that there is no point in wasting your breath talking to those who expressly and militantly negate the essential norms and principles of liberal democracy (no use talking to those bearskins, in other words). From a liberal democratic perspective, they indeed just have to be contained ‘like war and disease.’ The problem is, however, that a large contingent of the 74 million Americans who voted for Trump (and those who, for decades before they finally found their ideal presidential candidate, have all along had formidable champions for their anti-liberal politics in the upper echelons of American politics) do not consider themselves enemies of liberal democracy. Few or none of them will refuse to endorse Habermas’ abstract scheme of rights or the Rawlsian scheme of liberal principles that Rummens invokes as the normative substance of liberal democracy. Many Americans whom Rummens and I may well consider hostile to the liberal democracy that *we* have in mind, will simply insist that they have very different interpretations of what these Habermasian or Rawlsian schemes demand. Even some of those bearskins might do so.

In other words, Rummens’ invocation of an *underdetermined liberal democratic normative substance that requires determination and specification in an ongoing constitutional project*⁸ offers one no criteria with reference to which one can distinguish effectively between liberal democratic and the most anti-liberal-democratic politics imaginable. In this regard, the invocation of underdetermined substance that must be specified in an ongoing constitutional project is an empty edifying formula that evinces all the characteristics of the soft-Platonic metaphysics of Aristotle’s potentiality-actuality scheme that *CLDL* analyses in considerable detail. This language contributes nothing to a better understanding of either the patent crisis of liberal democracy in which Americans currently find themselves, nor its relatively regular practices in better times.

8 See Stefan Rummens, ‘The Normative Commitments of Liberal Democracy,’ *Netherlands Journal of Legal Philosophy* 52 (2023): 87.

Johan van der Walt

Even ‘relatively regular practices in better times’ of liberal democracy are fraught with countless evaporations of normative substance that harbour embryonic threats to societal integration and common peace. Every constitutional complaint about some or other governmental decision or framework exposes liberal democratic societies to such threats. The vaxxer/anti-vaxxer test case that RHLDL invokes is a case in point. The financial, emotional, and sheer existential investment without which no constitutional complaint would arrive at the doorstep of a constitutional or high court must alert one to this threat. A constitutional complaint is not a matter of two parties to a dispute telling one another: ‘Look, both our views of the matter fit well enough into our constitutional framework, but let’s have a friendly contest in court to see which one the court deems the better option.’ To the contrary, it is always a matter of both parties to a dispute bitterly rejecting one another’s position as ‘unconstitutional.’ No rational person would invest weeks and months of stressful and costly engagement without being driven by this bitterness. To think that a court decision reunites the parties under the auspices of a common constitutional project is quixotic. Their disagreements, as Frank Michelman puts it, remain ‘real and unliquidated.’⁹ Under these circumstances, it is never clear whether it is ‘opponents within’ or ‘enemies of’ liberal democracy that leave the court room.

If a court does not resolve or liquidate the ‘real and unliquidated’ disagreements between the parties in a constitutional complaint, what does it do, or what *might* it do? The court seeks to ‘vault’ the parties ‘past’ these disagreements, suggests Michelman. It invites them to ‘slide past [and] “get over” them.’ The big question, afterwards, is whether this invitation will be accepted or not. It is exactly here that the ‘ethics of civility’ may or may not save one from the embryonic societal disintegration and the ever-present threat of civil war that lurks in every grave constitutional dispute, however remote this threat may appear in ‘regular times’ of liberal democracy. RHLDL makes a crucial point in this regard that both Rummens and Tinnevelt find incomprehensible and irksome.¹⁰ I will nevertheless not shy away from stressing it again: apart from being semantically informed by normative substance that the parties appear to share (at least initially), the ethics of civility of concern here has nothing else to do with this normative information. In a very real sense, this ethics must take leave of the normative substance that informs it. Normative substance is after all exactly that which fuels the conflict or dispute semantically. Ethics is that which allows one to take leave of that conflict or dispute. More comprehensively put in view of my responses to Rosenthal and Lindahl above: Ethics is that which allows one to take leave or not to take leave of that dispute.

9 Frank Michelman, ‘Constitutional Legitimation for Political Acts,’ *The Modern Law Review* 66, no. 1 (2003): 6-8.

10 See Rummens, ‘The Normative Commitments of Liberal Democracy,’ 90, Ronald Tinnevelt, ‘The Great Gamble of the Liberal State. Fragility, Motivational Weakness and Political Regress,’ *Netherlands Journal of Legal Philosophy* 52 (2023):105.

The same point applies to the distinction that RHLDL draws between ethics and ethos that Rummens finds similarly dubious. Ethics marks the moment when normative *information* evidently becomes critically *non-informative*. It marks the moment when the semantic content of normative information, which has led to two bitterly contested ethical positions (in the sense of *ethos*), is left unresolved by judicial intervention or any other kind of mediation. The guidance of information evidently stops here. Something else must take over if societal cohesion is going to survive this normative hiatus. As I read him, ‘an appreciation of burdens of judgment’ is Rawls’ expression for this ‘something else.’ This appreciation for burdens of judgment has its critical – its *decisive* – moment when the norms and standards that inform ‘public reason’ fail to resolve intractable conflict. Rawls expressly acknowledges the possibility of such failure. When it occurs, he says, public reason turns into something that is quite different from the reliance on norms. It turns into an ethical commitment to sustain instead of destroy the norms by which we live (or have lived thus far). Public reason is then no longer a matter of reasoned argument. It turns into a decisively ethical imperative – an ‘urging’ Rawls calls it – to sustain the very basis of reasoned argument.¹¹

Rummens finds it strange that one can contemplate an ethics *without* an ethos.¹² I fully agree with him and never suggested anything to the contrary. The distinction between an ethos (a historical way of life) and the ethics (decisive ethical conduct) that sustains an ethos (by momentarily taking leave of it), does not suggest anything to the contrary. I believe my conception of the ethics of civility is fundamentally in line with Rawls.’ The only difference between his position and mine concerns the frequency or pervasiveness of the critical moment in which normative *reliance on* public reason has to give way to an ethical *sustenance of* public reason. Rawls considers this moment exceptional and rare. I consider it a daily exigency.¹³ This deviation, however, is not a misrepresentation of Rawls, as Rummens suggests. It is a critical engagement with his thinking that affirms much more of it than it ultimately questions.

Does this argument lead to a ‘misrepresentation’ of Habermas’ thinking, as Rummens likewise suggests? It is interesting that Rummens’ ‘presentation’ of Habermas makes the exact same move that my ‘misrepresentation’ of Habermas makes. Rummens himself ends up stressing the constituent commitment to liberal democracy on which Habermas’ thinking pivots, the constituent affirmation of liberal democracy that ultimately conditions the co-originality of rights and democracy, etc. In other words, his own reading of Habermas’ discourse-theoretical analysis of liberal democratic law ruins the transcendental pretensions of this analysis. Here is one of his key statements in this regard:

11 See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

12 See Rummens, ‘The Normative Commitments of Liberal Democracy,’ 93.

13 See Van der Walt, ‘Rawls, Habermas and Liberal Democracy,’ 41, footnote 72.

The principles that [Habermas] identifies ... only bind people who actually *choose* to engage in that particular practice in the first place. If you want to uphold liberal democracy, you are committed to the co-original recognition of private and public autonomy. If you want to argue rationally, you are committed to being sincere and to abstaining from the use of force. But, obviously, no one forces you to argue in a rational way. 'Convincing somebody on the basis of a lie' is a performative contradiction, as Habermas says, in the sense that lying is incompatible with the practice of rational argumentation. But this does not mean that people cannot lie – they often do. The transcendental analysis only reveals *possibilities* for human agency, but no *guarantees* that these possibilities will be realized. It is always up to the people to *freely* make that choice.¹⁴

This passage evidently reduces the transcendental elements of Habermas' discourse-theoretical understanding of the law to a contingent result of an ethical commitment. To the extent that it does this, there is little or no difference between Rummens' and my reading of Habermas (apart from the fact that his reading is much richer in important details that I find highly instructive and to which I will remain highly indebted in future discussions of Habermas' work). In the end, we just draw different conclusions from our very similar readings of Habermas. I discern a deep tension between Habermas' occasional acknowledgements of the ethical commitment that sustains liberal democracy, on the one hand, and the transcendental terms in which his most definitive works couch this commitment. For me, the former ruins the latter. Rummens discerns no disturbing tension in this regard. Not here in his response to RHLDL, in any case.¹⁵

In fact, were one to judge by this response, the occasional emphases on constituent affirmation and sustenance of liberal democracy (constitutional patriotism) become the defining element of Habermas' thinking in Rummens' reading of his work. They eclipse Habermas' extensive engagement with transcendental linguistics in major works, most notably in the two volumes of *Theorie des kommunikativen Handels* and their extensive application/adaptation in *Faktizität und Geltung*. These works surely convey the message that the transcendental achievements of linguistic usage, cognitive and normative learning, *transcend* arbitrary choice. Proper use of language, Habermas argued in these works, *necessarily* commits one to a project of cognitive and normative learning (that is, to veritable cognitive and normative progress). For those who speak properly, this commitment is not a matter of choice. Those who do not sign up for the commitment, *do not speak properly*. They use language in an improper, self-contradictory way, as his famous invocation of performative self-contradictions suggested clearly.

14 See Rummens, 'The Normative Commitments of Liberal Democracy,' 92.

15 See, however, Rummens, 'Deliberation Interrupted. Confronting Jürgen Habermas with Claude Lefort,' *Philosophy and Social Criticism* 34 (2008): 383-408 for a stunningly probing inquiry into Habermas' work that seems to highlight this very tension, and the very tension between the epistemic and the ethical on which RHLDL insists.

Over the years, many scholars considered this the definitive statement of the ‘theoretical position’ that one associates with the name Habermas, considering his massive scholarly investment in this position. Should anyone remotely respectful of this massive scholarly investment really want to trivialise it with an argument (aimed at rendering it acceptable to his relativist critics) that he never considered the commitment to cognitive and normative progress that it envisaged anything more than an option that everyone is free to take or not to take? Why the massive argument about the normative and cognitive constraints that the proper use of language imposes on the one who speaks, if these normative constraints are themselves nothing but the contingent result of the way one chooses to speak? Was there really no argument at work here that the normative and cognitive constraints that language imposes on the speaker also constrain the way the speaker chooses to speak, because, surely, no one in her right mind (no rational person) could want to speak in an improper, self-contradictory way?

Should one really read Habermas’ later work as a self-trivialisation or even rejection of the formidable scholarly position developed in *Theorie des kommunikativen Handelns* and *Faktizität und Geltung*? Has Habermas’ thinking in later years really become, predominantly, an affirmation of ‘enduring contingency’ (to borrow Lindahl’s powerful phrase once more)? I would be surprised if scholars of Habermas’ work would eventually come to answer this question affirmatively. I would be surprised if Habermas himself would. Until they do, or he does, I will believe it will remain a good question whether Rummens’ is the ‘presentation’ and mine the ‘misrepresentation’ of Habermas.

7 Tinnevelt on Habermas and Böckenförde, times of regression, and the ‘strength’ of liberal democracy

Ronald Tinnevelt writes: ‘Liberal democratic states are fragile, but not weak.’¹⁶ For Tinnevelt, the ‘fragility of liberal democracy’ does not imply, as it would for many if not most percipient scholars, that the strength or weakness of liberal democracy is variable. For him, liberal democracy is always strong (or not weak, in any case), notwithstanding its ‘fragility.’

One wonders what is left of the meaning of the word ‘fragility’ when it no longer refers to a breakability that, at least sometimes, becomes worryingly evident, evident enough to warrant perceptions of ‘weakening’ and ‘weakness’ that call for heightened concern. The perception that liberal democracy can be weaker at times and stronger at other times, does not strike Tinnevelt as worthy of contemplation. And, when this thought does not strike one as worthy of contemplation, the more nuanced observation that the strength and weakness of any political framework are rarely clearly or conclusively distinguishable, will surely also fail to do so. When one’s scholarship is so far removed from any real effort to take a careful look at the concrete ways in which the political becomes manifest, it is perhaps not surprising

16 See Tinnevelt, ‘The Great Gamble of the Liberal State,’ 105.

Johan van der Walt

that it would turn into something akin to a motivational team talk. The statement ‘liberal democratic states are fragile, but not weak’ is theoretically as uninformative as a spirited team talk.

Why does Tinnevelt’s response to *CLDL* and *RHLDL* ultimately come across as something akin to a spirited team talk? The answer to this question can be found in his reading of Böckenförde and Habermas as ‘motivational thinkers,’ thinkers who provide one with good reasons to believe liberal democracy can and will survive, despite its fragility. Both these thinkers impart the message to him that democracy is, after all, ‘not weak,’ not even in historical times in which it strikes one as rather more worryingly fragile than it may have appeared in other times. To account for these worrying times, Tinnevelt takes recourse to the notion of ‘times of regression.’ These times of regression, he suggests, should not blind one to regular times in which liberal democracy is ‘not weak.’ Moreover, they do not detract anything from the sufficiently clear ‘traces of reason in history’ that ‘[support Habermas’ general optimism].’ Böckenförde and Habermas also provide him, to boot, with grounds for saying liberal democracy is ‘not weak.’ According to them, argues Tinnevelt, a number of factors contribute to the general strength of liberal democracy. Key among them are religion, education and adequate provision of socio-economic security.

I wish to make two points in response to this line of argument. The first concerns the rather unexamined distinction between regular times of strong (‘not weak’) liberal democracy and exceptional times of ‘regression.’ This firm distinction echoes Rummens’ distinction between ‘opponents within’ and ‘enemies of’ liberal democracy. Only in times of regression, should one say, following Rummens and Tinnevelt, does one find the enemies of liberal democracy on the prowl. In regular times, good old opponents in a contest between competing visions of liberal democracy take the field without ever posing a threat to the ideals they share. They therefore cast no shadow of doubt over the clear ‘traces of reason in history’ that generally prevail. Such is the metaphysical comfort that Tinnevelt draws from his reading of Habermas.

I believe I have pointed out the tenuousness of this line of argument extensively enough above, and need not do so again. The distinction between times of regression and regular times is as tenuous as the one between ‘opponents within’ and ‘enemies of’ liberal democracy. A more realistic approach to history demands a keener eye for the very inverse of that which Tinnevelt proposes. There surely are times that are better than others, but that should not blind one to the reality that bad weather invariably brews long before it erupts into a visible storm. In fact, a storm may already be brewing when the weather appears at its imaginable best. That is the only way that one can explain, as far as the ‘strength’ of liberal democracy is concerned, how quickly the apparently and at least relatively ‘good’ Obama years could have given way so abruptly to the disaster of the Trump presidency. Can one ever forget that Mitch McConnell – long-standing senator of 38 years (since 1985) – already prepared the field for the first of Trump’s three most long-term devastating blows to liberal democratic law in the United States – the appointments of Neil

Gorsuch, Brett Kavanaugh and Amy Coney Barrett to the Supreme Court – *during* the Obama presidency?

The second point follows from the first. The evident impossibility of firm and reliable distinctions between regular times and times of regression, and between cooperative ‘opponents within’ and hostile ‘enemies of’ liberal democracy in relatively open societies (that is, societies that are not in the paralysing grip of a largely monolithic totalitarian and dictatorial vision), burdens statehood, liberal democratic statehood included, with deeply ambiguous and invariably explosive political conditions. The more the state becomes the unilateral embodiment or instrument of one political vision, the more explosive and unstable the political situation is likely to become and the more repressive and illiberal it will need to become to maintain regular ‘law and order.’ The Böckenförde Dictum – the liberal democratic state lives by conditions that it cannot guarantee – engages with exactly this predicament, as Tinnevelt’s reading of the Dictum correctly underlines.

But how is it possible that the percipient author of this Dictum could have considered its application restricted to prescriptive interpretations of the core principles of liberal democracy? How could Böckenförde have thought that it would not apply to endeavours of the state to secure motivational grounds for the sustenance of liberal democracies? Under the conditions that we are contemplating, the sustenance of religion, education and ‘public institutions’ (like public broadcasting) committed “more strongly to a cultural and educational mission” will always be part of the problem. All the motivational projects named here are bound to figure among the most divisive statal engagements imaginable. In other words, statal involvement in such motivational projects is bound to contribute to the social and political tensions that it seeks to manage. It may well end up exacerbating instead of alleviating societal divisions. If Tinnevelt’s reading of Böckenförde’s work is correct (and I have no reason right now to doubt that it is) the reading of his work presented in *CLDL* is indeed one-sided and misrepresentative. It does not reflect (what would appear to be) Böckenförde’s grave underestimation of the devastating reach of his percipient Dictum. For this insight, my future engagement with this famous Dictum will surely remain deeply indebted to Tinnevelt.

I nevertheless trust Tinnevelt will appreciate, from the observations elaborated here, why I do not consider his more complete reading of Böckenförde supportive of an *a priori* conclusion that the liberal democratic state is, notwithstanding its fragility, ‘not weak.’ Statal undertakings to render the conditions for liberal democracy more stable could render liberal democracy stronger, but it could also render it weaker. Statal intervention does not resolve the ‘enduring contingency’ of the actual strength or weakness of liberal democracy, it takes part in it and contributes to it. The same point can be made regarding Tinnevelt’s reference to Habermas’ relatively univocal invocation of religion – throughout history one of the most divisive socio-political engagements imaginable – as a resource of liberal democratic stability. That one of the leading social theorists of our time would resort to an argument as simplistic as this, is startling. Some manifestations of

Johan van der Walt

religious commitment may well contribute to stabilisations of liberal democracy, but one also knows all too well that others will not. Far from resolving it, religion too, takes part in the 'enduring contingency' of all human endeavours. Not even the provision of a minimum of social equality – Habermas' other motivational ground – escapes this dilemma. Although *CLDL* also stresses the sustenance of minimal social equality as a *sine qua non* for the survival of liberal democracy, this sustenance of social equality and the degree to which it should be done is itself one of the most divisive issues in contemporary liberal democracies.

To be fair to Tinnevelt, he is not averse to considering criticism of Habermas' position on this point. His invocation of Habermas' arguments about religion is more concerned with showing that Habermas is well aware of the motivational factors on which 'reason in history' depends. Clear evidence of this 'motivational' side to Habermas' thinking, he contends, shows up the 'one-sidedness' and even 'incorrectness' of my portrayal of Habermas' transcendentalism. In this regard I just wish to restate the closing point that I made in response to Rummens: for many readers of Habermas' work, the linguistic transcendentalism developed in *Theorie des kommunikativen Handelns* and *Faktizität und Geltung* reflects his definitive theoretical position. RHLDL evidently reflects significant doubts about this linguistic transcendentalism, but it takes it seriously. I am not convinced one does Habermas any favour by stressing elements of his later writings in a way that appears to render his earlier work obsolete. RHLDL's critical engagement with elements of tension and obfuscation in this formidable oeuvre – which pivots on the elementary insight that transcendental and motivational arguments do not support but undermine one another – strikes me as significantly more respectful.

8 Raucea and liberal democratic constituent power

The essence of the problem that I highlighted above in Rummens' and Tinnevelt's readings of Rawls, Habermas and Böckenförde concern the message of political unity and undividedness that they both draw from these readings. Rummens exports this undividedness of the political in a rather Schmittian fashion: division is not a problem between liberal democrats who take part cooperatively in the ongoing project of liberal democracy. Division only becomes a problem when the clearly identifiable enemies of liberal democracy make their appearance. Tinnevelt quotes Habermas' statement that political debates are 'best described in agonistic rather than in consensual terms' to show that Habermas' position is quite compatible with the emphasis of the dividedness of life in *CLDL* and RHLDL. The dominant picture of Habermas that emerges from his response to *CLDL* and RHLDL is nevertheless one of a theorist who still holds on to the idea of the common convictions of citizens, '[die] impliziten Überzeugungen der Bürger,' in which the liberal democratic constitution is rooted. This phrase evidently contemplates 'die impliziten Überzeugungen [aller] Bürger,' the common convictions of all citizens. The same applies to the idea of an 'active citizenry' conditioned by a 'weitgehend implizit bleibende Grundeinverständnis ... über die demokratischen

Verfassungsgrundsätze.¹⁷ Tinnevelt's reading of Böckenförde presents him likewise as a theorist who believes the liberal democratic state can provide motivational grounds for liberal democracy – through education and state sponsored institutions committed 'more strongly to a cultural and educational mission' – that motivate all citizens without demotivating some.

This is how Rummens' and Tinnevelt's readings of Rawls, Habermas and Böckenförde put forward a typically nineteenth century conception of unitary constituent power that is unburdened by internal divisions. The concept of liberal democratic constituent power contemplated in *CLDL* and *RHLDL* is very different. It locates constituent power in the power that precariously manages to keep liberal democracy intact in the face undeniable divisions that invariably threaten to tear it apart. Acceptance of an adverse vote count, argues *RHLDL*, is one of its uniquely defining moments. This evidently points to a very different understanding of constituent power, as Chiara Rauceca notices in her most meticulous and perceptive reading of *CLDL* and *RHLDL*. Hence her request that I explain what remains of constituent power if one reduces it to the 'diffuse' format of liberal democratic law-making contemplated in these texts. All that I offer in the final analysis, Rauceca suggests, is the 'diffuse we' that emerges from a contingent ethics of cooperation. How can this 'diffuse we' still constitute a first-person plural perspective with reference to which *liberal legal norms* can be considered the *democratic law* that a community gives to itself, she asks.¹⁸

The constituent power that emerges from the fallible, imperfect, and largely non-hermeneutic processing of democratic representation contemplated in *CLDL* and *RHLDL* (see again my response to Westphal) evidently pertains to both the winning and the losing factions that make up the democratic process in its entirety. It evidently does not belong exclusively to whatever triumphant majority may emerge from the political process. In other words, liberal democratic constituent power pertains to democratic majorities *and* minorities. Minorities, Kelsen teaches one, are as constituent as majorities. Liberal democratic constituent power cannot therefore not be conceived in terms of *one* first-person plural position. It must be contemplated in terms of several or many of them. In liberal democracies, any collective 'plurality' that attains to a first-person perspective in the way that Bert van Roermund describes so meticulously,¹⁹ gives way to a multiplication or exponentiation of 'plurality' (plurality x plurality). Of concern is no longer a plurality of individuals that gel into one collective entity, but a plurality of individuals that represent themselves – largely without gelling – with reference to a variety of very different and always changing nodal positions. Under these circumstances, authorship of the law – the foundational law or constitution

17 For these quotations, see Tinnevelt, 'The Great Gamble of the Liberal State,' 100.

18 Chiara Rauceca, 'How Do We Make Liberal Democratic Law Together? Remarks on Van der Walt's Notion of a "Diffuse We",' *Netherlands Journal of Legal Philosophy* 52 (2023): 70.

19 See Bert van Roermund, *Law in the First Person Plural* (Cheltenham: Elgar, 2020). This work remains crucially relevant here, but needs to be read against a background of multiple competing first-person pluralities.

Johan van der Walt

included – cannot be identified referentially (it cannot be identified clearly enough to qualify as a referent). It can only be *inferred* and *presupposed*, as Kelsen stresses constantly and repeatedly in his acute descriptions of this process.

The apparent effectiveness or *Wirksamkeit* of a system of norms thus becomes the only register of the diffuse (spread-out, multi-nodal) and unlocatable (never *present* in one place, always *represented* in and from different places, forever changing or mutating at that) constituent power that sustains liberal democracy. The fact that a system of law still appears functional and effective *implies* a constitution that remains effective, and this *implication*, in turn, makes it possible to presuppose a foundational norm (*Grundnorm*) that is still effective (*wirksam*). This presupposition of an effective foundational norm thus becomes the oblique index or register, not of a constituent power, but of a constituent set of power relations. This impersonalisation of constituent power is only worrisome when one holds on to a heroic (Schmittian) concept of constituent power. It is not worrisome to liberal democrats. They are not a cohort of narcissist zealots who need to see the exclusive imprint of their own personhood – theirs and only theirs – stamped onto the law that governs them.²⁰ For them, the ideal of self-government retains adequate scope and meaning as long as everyone has some hand and no one has the only hand in the overall way in which the law pans out, that is, when everyone and no one governs, as Lefort puts it.²¹

No doubt, the constituent power that effectively gives the law to a liberal democratic community consists for a large part in the strength to carry the burden of accepting that others made the law in a way that you would not have made it yourself. Carrying this burden is the way in which the losers of elections take part in liberal democratic constituent power. This participation – which can never be guaranteed – is real and crucial. Without it, liberal democracy becomes, all too obviously, unsustainable. Accepting an adverse vote count is therefore as much a constituent force as the power to actively govern resulting from a favourable vote count. An ‘enduring contingency’ conditions the uniquely multi-lateral constituent power – or the mutually sustaining plurality of constituent powers – of concern here. Carrying the burden of passively living under laws made by others in a way that one would never have done oneself is never guaranteed.

Those who actively make the laws must reckon with this elementary fact, this elementary lack of any guarantee that laws will be obeyed. If they wish to remain *liberal democratic* law-givers, law-givers for whom access to the machinery of law enforcement remains a marginal instead of pivotal consideration, they will see to it that the burden of the losers remains as light as conceivably possible. Of concern is again the concerns of ‘minimal losers’ and ‘least intrusiveness’ that I stressed in my response to Manon Westphal. By governing and being governed in this unique way, both the winners and losers of elections contribute to the sustenance of the

20 See John Rawls, ‘The Idea of Public Reason Revisited,’ *University of Chicago Law Review*, 64 (1997): 766-767.

21 Claude Lefort, *L'invention démocratique* (Paris: Fayard, 1994), 92.

constitutional framework that organises this kind of government. This is how majorities and minorities both take part in a constituent power that we have for much too long contemplated in the singular. One need not give up on the essence of the idea of government by consent to arrive at a long-overdue re-articulation of the concept of self-government: there is no law that ‘a community gives to itself.’ There is only law that communities – communities of the same society – give to one another in very different modes of giving.

9 Concluding remarks

Tinnevelt writes:

It is an open question what kind of solution Van der Walt himself can provide for the problems of our current political constellation. His one-sided analysis of Habermas’ discourse theory ... and the critical – and mainly negative – conclusions [already drawn] in *The Concept of Liberal Democratic Law* ... [neglect] the potential of institutionalized democratic processes and practices. If Van der Walt is sincerely worried about the effects of polarization and regression, more is needed than simply pointing at the promise of the general instantiations of a much needed democratic civic ethos – civilized decency, an appreciation of burdens of judgment, an endorsement of voting procedures and acceptance of an adverse vote count – or the need for poetic fictions.²²

I am most grateful to Tinnevelt for this frank and pointed invitation to state my own contribution to the sustenance of liberal democracy more clearly, and for mentioning the one element of *CLDL* that none of my interlocutors in this volume addressed, namely, the poetic unburdening of the political that *CLDL* highlights as one of the definitive conditions for liberal democracy. Here lies the essential contribution to the understanding and sustenance of liberal democracy that *CLDL* seeks to make. The endeavour to make *this contribution*, rather than another, is indeed fundamentally informed by a concern about the ‘polarisation and regression’ that Tinnevelt invokes. Unlike him, I find no consolation in the brandishing of generic *a priori* assertions that ‘democracy is not weak’ when daily news reports relentlessly tell me that liberal democracy is currently in terrible shape in many parts of the world, unfortunately also in parts of the world that determine the fate of so many others. Under these circumstances, yet another endorsement of the ‘potential of institutionalised democratic processes and practices’ does not strike me as helpful. Why would another such endorsement, after so many that preceded it, suddenly be of help when the very object of endorsement appears to be in the worst shape that it has been for a long time? Why would the invocation of these processes and practices be of any assistance in a time when they are themselves exactly that which is in dire need of assistance?

22 Tinnevelt, ‘The Great Gamble of the Liberal State,’ 108.

Johan van der Walt

Duly informed by this crisis, I asked myself a question that Tinnevelt cannot contemplate, given his *a priori* assessment that ‘democracy is not weak:’ why has liberal democracy become so weak in our times, why has it become so terribly frail? In asking myself this question, I commenced to reflect on another: what do those who have come to threaten liberal democratic processes and practices so effectively in our time – whether one calls them ‘opponents within’ or ‘enemies of’ liberal democracy is not helpful, we have seen – claim or pretend to offer as a better alternative? In this regard, Hermann Heller’s remarkable invocation of the ‘hunger for reality’ (*Wirklichkeitshunger*) that drives the Weimar youth into the arms of totalitarianism underlined for me the observation of many analysts of current populist movements. These movements seek – and claim to have found – a *real demos*. The representational ‘processes and practices’ of liberal democracy and the artificially constructed ‘people’ to which they give rise no longer satisfy the hunger for reality that drive these movements to poetic and heroic conceptions of ‘the people’ that answers to a historical mission and destiny.

Liberal democrats typically and quite correctly dismiss this search for *the real people* as illusionary and delusionary, but this will not make these illusions and delusions go away. They have a peculiar staying power because they claim or pretend to offer nourishment for the maddening hunger for reality that drive their resistance to the representational ‘processes and practices’ of liberal democracy. *CLDL*’s response to this illusionary and delusionary hunger for reality pivots on the idea of channelling this hunger to a realm of poetic fiction, so as to lessen its burden on the representational processes and practices of liberal democracy. The argument is made with reference to the civilisational crisis that came to a head in fifth century Athens and is further (scandalously?) informed by a horrifying but profoundly probing argument of Carl Schmitt about the unburdening of the *Ius Publicum Europaeum* in *Nomos der Erde*.

CLDL, to be sure, does not explore this thought triumphantly. Who, after all, will take charge of this ‘channelling’ of the hunger for reality to a realm of poetic fiction? If there is no identifiable constituent power that can unilaterally take charge of education, religion and the provision of socio-economic security (see again the argument above with regard to the divisiveness of Habermas’ and Böckenförde’s motivational grounds), why would there be one that can unilaterally take charge of this ‘channelling of the hunger for reality into a realm of poetic fiction’? The line of inquiry that *CLDL* is pursuing is evidently burdened by the same problems that burden the motivational arguments that Tinnevelt takes from Böckenförde and Habermas. I can therefore not claim to have found solutions to the problems we have been discussing in this volume. But it can at least claim to have embarked on a path of inquiry that does not take recourse to stock answers that are of no help right now, because these answers are themselves critically in need of help.

The constellational adjustment that marks the thinking about liberal democracy in *CLDL* and which makes it different from other current modes of doing so, concerns an endeavour to identify and perhaps even weaken – in ways not entirely plannable or foreseeable – the disastrous grip of poetic heroism on the political imagination

of our time. If one could weaken, in all possible ways conceivable, the destructive grip of poetic heroism on the political organisation of society, who knows, one may just manage to tilt the balance in the ambiguous ‘opponents within/enemies of’ constellation that burdens all politics a little more in favour of the ‘opponents within’ element of this constellation.²³

23 This line of thinking is now further developed in Johan van der Walt, *The Literary Exception and the Rule of Law* (London: Routledge, 2023).