ARTICLES

Rawls, Habermas and Liberal Democratic Law

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1 Introduction

The editors of the *Netherlands Journal for Legal Philosophy* have honoured me with the request to submit to this journal a discussion piece aimed at engendering a scholarly discussion of my book *The Concept of Liberal Democratic Law* (2020, hereafter *CLDL*). The theme I chose for purposes of complying with this request is expressly reflected in the title above. In what follows I will reflect on the work of Rawls and Habermas from the perspective of the main lines of thought developed in *CLDL*.

I already noted in the preface to *CLDL* that the omission of focused reflections on Rawls and Habermas in the book demands amendment. The need for such amendment was also stressed in sharp but fair terms in another recent discussion of my book hosted by the journal *Ethics & Politics*.[1] Prompted by the exceedingly generous and probing scrutiny of Frank Michelman in the same discussion, I may already have made some amends with regard to Rawls there,[2] while again not managing to do so with regard to Habermas. In what follows, I will revisit the thoughts on Rawls as prompted by Michelman and develop them further. The same lines of thought will then be extended into a reflection on Habermas' discourse-theoretical analysis of law.

The theoretical undertakings of both Rawls and Habermas pivot on an aspiration to explain (and surely to promote through explanation) the Enlightenment ideal of reason reflected in the idea of liberal democracy. The thoughts developed in *CLDL* pivot on the same aspiration. What obviously distinguishes the theoretical undertaking in *CLDL* from those of Habermas and Rawls, we shall see, is the greater emphasis in *CLDL* on the precariousness of this ideal of reason. As the preface to *CLDL* makes clear, the book was written in a context when the idea and ideal of liberal democracy were globally already obviously in trouble. The information that informed that preface has now been crowned with the events of 6 January 2021. The President of the United States had for two months been inciting his supporters not to accept the result of the 2020 presidential elections. Now he had gone further. He had effectively incited a significant mass of supporters to physically prevent the

1 Serdar Tekin, 'Between Modesty and Ambition: Remarks on The Concept of Liberal Democratic Law,' *Etica & Politica/Ethics & Politics* 23, no. 2 (2021): 459-465.

2 See Frank Michelman, 'Civility to Graciousness: Van der Walt and Rawls,' *Politica/Ethics & Politics* 23, no. 2 (2021): 495-508. My indebtedness in this article to Michelman's comments on *CLDL* will become abundantly clear below.

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certification of the election results by Congress, thereby staging an anti-democratic coup attempt – an attempt that is far from extinguished, as a most credible source makes clear[3] – in the heart of the world which was once broadly associated with 'the praised north-Atlantic development path of the constitutional democratic state'/'*der gepriesene nordatlantische Entwicklungspfad des demokratischen Rechtsstaates*' that Habermas invokes early in Faktizität und Geltung (hereafter *FG*).[4]

These are critically important facts to which the theory of liberal democracy must pay proper attention today. They confront one with the critical and elementary task to reflect carefully on the conditions that sustain the acceptance of the outcome of voting procedures that warrant no sane allegation of fraud. They demand that one takes stock of every significant factor that makes that acceptance more rather than less likely. This is the task with which *CLDL* engages, I argue in what follows, without claiming in the least that it does so exhaustively.

Section 2 of this article gives a short exposition of three of the main lines of thought developed in *CLDL*. Section 3 then moves on to an analysis of Rawls' theory of political liberalism from the perspective of the thoughts elaborated in section 2. Section 4 does the same with regard to Habermas' discourse-theoretical explanation of the legitimacy of modern law. Section 5 reflects the main lines of thought that emerge from sections 3 and 4 through the prism of the key elements of *CLDL* expounded in section 2. Section 6 concludes the article with a summary reflection on its essential points.

2 Key elements of the concept of liberal democratic law

The final chapter of *CLDL* first puts forward seven key elements of the concept of liberal democratic law, and then adds two more in the final section where it puts forward a definition of liberal democratic law. Of the nine elements thus highlighted, I will only address the following three in this article: (i) the extraction of law from life; (ii) the understanding of law as an articulation of the dividedness of life; and (iii) the need for poetic fictions that can compensate for the dividedness of life and the uprootedness of law from life.

(i) Extracting law from life

Liberal democratic law is not rooted in any metaphysical conception of 'life.' The concept of liberal democratic law is likewise an outcome of a theoretical extraction or 'distillation' of law from the metaphysics of life, a distillation that is reflected par excellence in the positivist legal theories of H.L.A. Hart and Hans Kelsen. These theories prevail on us not to think of law as an existential expression of the 'life' of

3 See Laurence Tribe, 'The risk of a coup in the next US election is greater now than it ever was under Trump,' *The Guardian*, 3 January 2022, https://www.theguardian.com/commentisfree/2022/jan/03/risk-us-coup-next-us-election-greater-than-under-trump.

4 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtstaats* (Frankfurt a.M: Suhrkamp, 1992), 16.

a people. They demand that one steers clear of all conceptions of the law in terms of the 'law of life' or *Lebensrecht*, as Carl Schmitt once put it.[5] This implies also steering clear of all invocations of the 'existential unity' of a people that founds the law on which Schmitt's *Verfassungslehre* pivots.[6] This understanding of law, argues *CLDL*, is not only manifest in fascistic formats of the kind that Schmitt contemplated, but also in the 'democratic' and even 'liberal democratic' versions of the 'law of life' contemplated by major legal theorists such as Hermann Heller, Rudolf Smend and Ronald Dworkin. A rigorous concept of liberal democratic law must steer clear of all of them.

(ii) Law as a reflection of the dividedness of life

The exigency to extract the concept of liberal democratic law from the metaphysics of life pivots on a regard for the dividedness of life that takes recourse to law. When life turns to law to resolve conflict, it evidently becomes manifest as divided life. Life may not always be divided (whether it is or not is a question we need not address here). But it is divided when it takes recourse to law. Metaphysical conceptions of law, to the contrary, have always – through a long history of metaphysics – presented or represented life as essentially whole and united. Hence the standard understanding of law and legal systems as an articulation of a concept of justice shared by *all* members of a legal community. In twentieth-century legal theory, this understanding of law is most notably reflected in the legal theory of Ronald Dworkin. However, one of its historically most striking articulations came to the fore in Hegel's insistence that not even the deviant figure of the criminal breaks out of this essential unity of law and justice. Hence the criminal's deep consent to his or her punishment, according to Hegel. Having momentarily fallen out of the unity of communal life reflected in a community's legal and ethical order by committing a crime, the criminal effectively wants to be punished for that crime in order to be reunited with society.[7]

In sharpest contrast to Hegel imaginable, both Hart and Kelsen stress the irreducible social divisions that compel one not to understand law as an expression of social unity, but the exact opposite of such unity. Hence Hart's insistence that 'the life of any society that lives by rules … is likely to consist in a tension between those who, on the one hand, accept and voluntary co-operate in maintaining the rules, … and those who … reject the rules and attend to them only … as a sign of possible punishment.'[8] Considered in Hart's salient terms, a society is always divided between those who have an 'internal' and those who have an 'external' perspective on whatever rule demands positive statement and enforcement. Kelsen basically articulated the same idea when he argued that liberal democracy does not

5 See Carl Schmitt, *Positionen und Begriffe: Im Kampf mit Weimar – Genf – Versailles* (Berlin: Duncker & Humblot), 229: *Alles Recht stammt aus dem Lebensrecht des Volkes* (all law derives from the law of life of the people).

6 Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 2003 [1928]), 3-4.

7 Georg Friedrich Wilhelm Hegel, *Grundlinien der Philosophie des Rechts*, in *Werke in zwanzig Bänden* 7, G.W.F. Hegel (Frankfurt a.M.: Suhrkamp, 1970), 190-192 (§ 100).

8 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 88.

Netherlands Journal of Legal Philosophy 2023 (52) 1
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turn on a majority principle, but a majority-minority principle.[9] Liberal democratic law is, in other words, always a reflection of a division between a majority and a minority. It is the expression of the endeavour to manage that division.

Quite perplexingly, however, the same Hegel who stressed the essential unity of the communal life that finds expression in the law and ethics of a society also stressed the divided and torn condition of modern life. It was the task of philosophy, he averred, to overcome this dividedness of modern life – '*[w]enn die Macht der Vereinigung … aus dem Leben der Menschen verschwindet … entsteht das Bedürfnis der Philosophie*.'[10] It will never be conclusively clear, contends *CLDL*, whether Hegel considered this philosophical 'overcoming' of the dividedness of life in terms of a dialectic healing process that effectively resolves this dividedness, or whether he considered this philosophical 'overcoming' in terms of a Stoic acceptance of these divisions. *CLDL* cites striking passages from his work that render both these interpretations plausible. The famous reference in the preface to the *Grundlinien der Philosophie des Rechts* to philosophy that comes to paint its grey in grey when life has grown old and incapable of rejuvenating itself evidently testifies to the plausibility of the latter interpretation.[11] The passage in which the same work describes punishment as a restoration of communal unity would seem to point us in the direction of the former. If Hegel's thought has anything pertinent to contribute to contemporary liberal democratic legal theory, argues *CLDL*, that contribution would consist in the passages of his work that support the latter interpretation, not the former.

(iii) The definitive need for poetic fictions that may compensate for the dividedness of life manifest in liberal democratic law

CLDL accepts in Stoic fashion, as Hart and Kelsen evidently did and Hegel sometimes appeared to do, that liberal democratic law is a reflection of the dividedness of life and thus of the uprootedness of law from any metaphysical conception of unitary or reconciled life. This acceptance is accompanied by an acute sense of the existential deficit with which liberal democratic legal systems must cope, given that it can no longer claim, as Schmitt still believed one could, that law is rooted in the existential unity of the people. This means that liberal democratic law can also not be understood as a heroic-poetic expression of life, as Schmitt can also be argued to have done. *CLDL* therefore also stresses this non-poetic and unheroic character of modern law. It does so with reference to Hegel's insistence that there is no place left for heroes in the modern state.[12] The acceptance of this existential deficit and lack of heroic expression in liberal democratic law, argues *CLDL*, demands compensation. It demands sustenance of poetic fictions capable of

9 Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verlag, 1981[1929]), 53, 57, 58.

10 See G.W.F. Hegel, 'Differenz des Fichteschen und Schellingschen Systems der Philosophie,' in *Werke in zwanzig Bänden* 2 (Frankfurt a.M.: Suhrkamp, 1970), 22.

11 See Hegel, *Grundlinien der Philosophie des Rechts*, 28.

12 See Hegel, *Grundlinien der Philosophie des Rechts*, 180 (§ 93 Zusatz), Johan van der Walt, *The Concept of Liberal Democratic Law* (London: Routledge, 2020), 140.

shouldering the existential burden – the need for heroic expression – that modern law can no longer take on its own shoulders.

It is with regard to these three considerations that I will reflect on the resonances and dissonances between the concept of law developed in *CLDL*, and the concepts of law articulated in the work of Rawls and Habermas in the next two sections of this article.

3 Rawls and liberal democratic law

It is important to consider Rawls' philosophical method before we go into the key features of the concept of political liberalism developed in his work. Elements of his method – notably his description of the 'original position' and the 'veil of ignorance' drawn over those who find themselves in the original position – have been misunderstood by many of his readers as steps in a transcendental anthropological argument about principles of justice that all human beings share. Rawls expressly endeavoured to dispel this misunderstanding in two key essays respectively published in 1980 and 1985. In the first of these essays, he emphasised the 'constructive' nature of his philosophical inquiry into the principles of justice. The theory of justice as fairness, he argued, was not concerned with transcendent principles of justice that all societies would necessarily arrive at if they would think correctly about the nature of human existence. Of concern in his theory, stressed Rawls, was the concept of justice endorsed by persons belonging to historical traditions of liberal democracy.[13]

In the second essay, Rawls underlined the political nature of this concept of justice. It is the political conception of justice endorsed by a specific *political* tradition, he stressed. The invocations of the 'original position' and 'veil of ignorance' were accordingly nothing but presentational devices with which he sought to show how people living in liberal democratic traditions think about justice when they identify themselves politically with these traditions.[14] Moreover, Rawls stressed from the beginning that this initial construction of the elementary principles of justice would have to be tested on an on-going basis with regard to further developments of the political tradition from which they derive if they were to remain accurate reflections of this tradition. He referred in this regard to a 'method of reflective equilibrium.'[15]

The arguments that follow basically take Rawls at his word in a way that Habermas, surprisingly, did not quite do. Much of Habermas' critique of Rawls stems from a

13 John Rawls, 'Kantian Constructivism in Moral Theory,' *The Journal of Philosophy*, 77, no. 9 (1980): 515-572.

14 John Rawls, 'Justice as Fairness: Political not Metaphysical,' *Philosophy & Public Affairs*, 14, no. 3 (1985): 223-251. See also John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), 5, 122.

15 The historicity or 'non-foundational' status of the method of 'reflective equilibrium' comes even more strongly to the fore in Rawls' later works. See especially Rawls, *Justice as Fairness*, 31.

reading of his work as a transcendental philosophical statement that is not 'democratically procedural' enough and is therefore bound to be surprised by historical developments.[16] The arguments that follow, on the contrary, accept that Rawls endeavoured to present his theory of justice as a non-metaphysical reflective 'hermeneutics' on a historical tradition, namely the tradition of Western democracy. The critique of this endeavour that will nevertheless come to the fore concerns a very different point, comparable perhaps to the one that Hans Kelsen once made with reference to Savigny and the Historical School in 19th century German legal science. According to Kelsen, the Historical School's invocation of a *Volksgeist* does not represent a break with the Natural Law tradition, it just constitutes another version of it. It also invokes essential features or principles with which the law must comply, it just finds these principles in the history and not in the nature of a people.[17]

The theoretical undertakings of Savigny and the Historical School in nineteenth century German legal science and that of Rawls are politically worlds apart and no one with elementary knowledge of either will suggest otherwise. The former was brazenly nationalistic and very conservatively so.[18] The latter is not nationalistic at all, and as liberal as one might imagine. The question is, however, whether they are also methodologically as far apart as they evidently are politically. A hermeneutic reflection on the essential conceptions of justice historically endorsed in a political tradition is not *as such* less metaphysical than universalist conceptions of natural law. Its lesser – temporally, regionally and culturally determined – 'universalism' does not necessarily render it less metaphysical. It could just be giving a historical turn to metaphysical assumptions that deny their historicity – their fundamental exposure to a radical temporality that ultimately warrants no transcendent conception of anything – in a different way. This different denial of historicity could take the form of historically articulated conceptions of justice in a political tradition that fail to appreciate the always precarious ethical performance that effectively sustains them on a day-to-day basis. The questions that will be asked in what follows will concern the extent to which this different denial of historicity may be at work in Rawls' theory of justice and liberal principle of legitimation (hereafter LPL). This is *the key question* that we will ask in response to his work.

Rawls' concept of political liberalism pivots on two fundamental ideas that appear to burden all legitimacy concerns in political-liberal societies with a deep and seemingly irresolvable tension. It pivots, first, on the idea of the 'severalty of persons with a higher-order interest in exercising their moral agency,' as Michelman puts it. The idea of 'moral agency' necessarily implies the separateness and independence of this agency. It entails the freedom and capacity to think for

16 Jürgen Habermas, 'Reconciliation through the Public use of Reason: Remarks on John Rawls's Political Liberalism,' *The Journal of Philosophy*, 92, no. 3 (1995): 118.

17 Hans Kelsen, *Reine Rechtslehre* (Tübingen: Mohr Siebeck/Vienna: Österreich Verlag, 2017[1960]), 408.

18 See Van der Walt, *The Concept of Liberal Democratic Law*, 135-159.

oneself, and not as others tell one to think.[19] Hence the tension between this first and the second idea. The second idea demands that one considers a political-liberal society 'a scheme of cooperation' between all the separate moral agents that constitute the membership of that society. This scheme of cooperation, however, depending as it does on the cooperation between moral agents who think for themselves, separately and independently of one another, must conform to all the different moral convictions at which these moral agents are bound to arrive. The cooperation of concern here, must be informed by terms that all these moral agents can accept separately and independently.[20]

The essential problem that Rawls' concept of political liberalism faces from the bottom up should be clear: social cooperation and moral agency rarely sit at the same fire. One would only be able to contend that they do, were one to assume that separate moral agency rarely leads to irreconcilable ideas about proper cooperation. Were one to make this assumption, however, one would either be retreating from the first idea of *separate* moral agency, or one would have to believe that separate moral agents always or often enough, quite astoundingly, arrive at the same convictions regarding proper terms of social cooperation. A quick historical survey shows one the formidable philosophical stakes involved in this problem. Aristotle believed he still lived in an age in which *prohairesis* (personal moral commitment) does not ruin public virtue (*aretê*), but in fact consolidates it.[21] Among his epochal modern interlocutors, Hegel was surely the most sympathetic to Aristotle's communal ethics. But Hegel realised very lucidly that the ancient conception of ethics was only possible because of the way it basically lacked the modern idea of separate moral agency – '*[i]n den Staaten des klassischen Altertums findet sich allerdings die Allgemeinheit vor, aber die Partikularität [subjektive Zweck] war noch nicht losgebunden und freigelassen und zur Allgemeinheit, d.h. zur allgemeinen Zweck des Ganzen zurückgeführt*.'[22] Aristotelian ethical commitment and modern moral agency are therefore two very different notions. Hegel made it abundantly clear that the latter is a notion that was essentially absent from ancient societies. This insight, however, did not discourage him from the unique philosophical ambition to stage a grand metaphysical reconciliation between these two very different ideas. This is the unprecedented feat that Hegel's concept of *Sittlichkeit* purported to pull off: the embrace of separate moral agency by a communal ethics, without the latter ruining the former, or vice versa.

Metaphysical solutions such as the one proposed by Hegel – adorned as it is with the evident trappings of the miraculous that adorn all metaphysics – is precisely that to which Rawls claims not to subscribe. Solutions like these belong to the

19 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 13-14, 18-19, Michelman, 'Civility to Graciousness,' 498.

20 Rawls, *Political Liberalism*, 13-14, 18-19, Michelman, 'Civility to Graciousness,' 498.

21 For instances of Aristotle's unworried coupling of *prohairesis* and *aretê*, see *Nicomachean Ethics* 6.2.2 (1139a23-26)1 and *Rhetoric* 1.9.32 (1367b32-33). For an instructive discussion of the meaning of *prohairesis*, see Charles Chamberlain, 'The meaning of *Prohairesis* in Aristotle's Ethics,' *Transactions of the American Philological Association* 114 (1984): 147-157.

22 Hegel, *Grundlinien der Philosophie des Rechts*, 407 (§ 260). See also § 261 and § 261 *Zusatz*.

Netherlands Journal of Legal Philosophy 2023 (52) 1
doi: 10.5553/NJLP/221307132023052001002

domain of comprehensive philosophies in which his freestanding conception of political justice does not take part. According to him, Habermas' discourse-theoretical analysis of modern law is evidently yet another of these comprehensive philosophies. He does not hesitate to associate Habermas' endeavour expressly with Hegel's logic or onto-logic, nor does he shy away from noting its somewhat miraculous character (in Habermas' discourse theoretical understanding of the world, he notes, 'harmony and balance reign and both [public and private autonomy] are fully achieved').[23] We shall examine the accuracy of this assessment of Habermas' theoretical position closely in section 4. Let us first examine Rawls' own position more closely. To what extent does he himself really steer clear of the domain of comprehensive philosophies, as he claims to do?

Rawls finds the touchstone for the freestanding character of LPL in the way it promises to deal with governmental coercion. The two key ideas on which political liberalism turns – separate moral agency and social cooperation – end up in serious tension with one another whenever political decisions lead to the coercion of some moral agents by others, as happens constantly in liberal democratic societies characterised by 'reasonable pluralism.' 'Reasonable pluralism' is the term with which Rawls describes societies composed of moral agents who end up differing with one another with regard to the appropriateness of governmental policies or action, without anyone of these moral agents exercising his or her moral agency unreasonably. This is *the* problem of political liberalism according to Rawls,[24] and the dilemma with which it confronts LPL is abundantly clear: LPL demands that governmental powers can only be exercised in ways that *all* the moral agents making up a political-liberal society can endorse as reasonable and rational, notwithstanding the fundamental moral dissent that conditions their very sense of being coerced.[25]

Rawls commences to work his way through this problem by invoking the idea of a 'justification-worthy constitution.' The first step in the institutional implementation of LPL consists in assessing all serious cases of moral dissent regarding appropriate governmental policy in terms of the positive principles of cooperation entrenched in a 'justification-worthy' constitution. The justification-worthy constitution demanded by LPL contains 'a ledger of guaranteed basic liberties' that complies with a Goldilocks demand to be neither too thin, nor too thick, as Michelman puts it. Both the ledger as a whole and the individual basic liberties that it contains must be 'thin enough' to allow the separate and several moral agents invoked above to rely on their own moral agency to decide matters of utmost moral importance to them. They must nevertheless also be 'thick enough' to proscribe governmental

23 Rawls, *Political Liberalism*, 378-379, 382, 411.

24 Rawls, *Political Liberalism*, xx. See also Michelman, 'Civility to Graciousness,' 499. The systematic presentation of the key elements of Rawls' theory of LPL in what follows rely point for point on Michelman's presentation of these elements in 'Civility to Graciousness.' Some of the terms used in this presentation – notably 'justification-worthy constitution' and 'authorship of the laws by their addressees' are also Michelman's rather than Rawls.'

25 Rawls, *Political Liberalism*, 13-14, 18-19, 303, Rawls, *Justice as Fairness*, 18-19.

exercises of moral agency which some moral agents consider irreconcilable with their own moral agency, and to prescribe governmental exercises of moral agency which all agents consider indispensable for their moral agency.[26]

The aporetic nature of this constellation of social cooperation and moral agency cannot be sidestepped. Coercive governmental action regularly demands that some moral agents take leave of their moral convictions. Crucially at stake here will therefore be a constant deliberation whether the respective levels of governmentally-granted 'moral fidelity' and governmentally-imposed 'moral infidelity' are assessed in ways that sustain enduring social cooperation. This deliberation will evidently be a highly complex and precarious practice and it would need to meet expectations of adequate consistency. Inadequate consistency is bound to burden willingness to cooperate disastrously. Hence the institution of a forum in political-liberal societies – mostly a high court – that can be trusted to perform the required resolutions consistently enough to encourage instead of discourage general willingness to cooperate. The officials who staff the forum – usually judges – are well-recognised and respected as reliable experts (constitutional experts) regarding all applicable principles of cooperation. That is why their assessments of the implications of the applicable trust-worthy constitution can likewise be considered trust-worthy, notwithstanding the fact that these experts are themselves also 'several and separate' moral agents subject to the same contradictory imperatives of moral faithfulness and social cooperation.[27]

According to Rawls, general perceptions of sufficiently consistent and therefore adequately cooperation-sustaining deliberation of proper terms of cooperation, as described above, will only prevail as long as a society commits to the following four 'motivational ideas':

i It must endorse a political conception of the reasonable.[28]
ii It must make an allowance for burdens of judgement.[29]
iii It must be committed to an ideal of liberal toleration that is coupled to the idea of the 'at-least reasonable' or 'at least not unreasonable.'[30]
iv It must generally heed a call to civility.[31]

The political conception of the reasonable invoked under (i) concerns a distillation of 'basic ideas implicit in the public culture of a democratic society.' These ideas correspond with the essential elements of LPL already pointed out above: severalty of persons, separate moral agency, society as a scheme of cooperation, governmental coercion acceptable by everyone involved as reasonable and rational, a justification-worthy constitution containing a ledger of basic liberties the demands of which are neither too thick nor too thin (demanding too much social cooperation and too little moral separateness, or vice versa). The only other element that Rawls

26 Rawls, *Political Liberalism*, 232-233; Michelman 'Civility to Graciousness,' 499-500.
27 Rawls, *Political Liberalism*, 233; Michelman, 'Civility to Graciousness,' 499.
28 Rawls, *Political Liberalism*, 43; Michelman, 'Civility to Graciousness,' 502.
29 Rawls, *Political Liberalism*, 54; Michelman, 'Civility to Graciousness,' 504.
30 Rawls, *Political Liberalism*, 60, 253; Michelman, 'Civility to Graciousness,' 505.
31 Rawls, *Political Liberalism*, 217, 226, 236, 253; Michelman, 'Civility to Graciousness,' 502.

Netherlands Journal of Legal Philosophy 2023 (52) 1
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also introduces at this point concerns the idea of 'authorship of the laws by their addressees.' It should be clear, however, that none of the elements of the political conception of the reasonable listed here either alleviate or confront the aporetic nature of LPL that we have highlighted above. They basically just restate it. One may therefore be pardoned for beginning to feel a nagging sense, at this point of the argument, that Rawls' 'political conception of the reasonable' carries too much weight. It aims to achieve on its own strength everything that Hegel's *Sittlichkeit* claimed to achieve, thereby turning LPL into a comprehensive philosophy of the kind that Rawls undertook to avoid. The 'public culture of a democratic society,' as described here, appears to reflect a neat vision of the world that explains the essential *logic* or *onto-logic* at work in this 'public culture.'

If one would take the picture at this point of Rawls' argument, the portrait of LPL that would emerge, based as it is on a 'public culture of democracy,' would resemble the theoretical position that Kelsen discerned in the thinking of Savigny and the Historical School. This, however, would be a picture prematurely taken, because there are three more elements that Rawls inserts into the composition of LPL that he wants us to behold. Two of them make a strikingly different picture of LPL come to the fore. The third blurs this different or other portrait of LPL again and makes it come across as not all that different after all, from the historical essentialism entertained by Savigny and the Historical School.

The two elements of Rawls' composition of LPL that turn it into something very different from a comprehensive view of the logic intrinsic to the 'public culture of democracy' concern the second and fourth motivational idea listed above: *making allowances for burdens of judgement* and *generally heeding the call for civility*. Both these elements entail a crucial performativity that would have no place in the composition of LPL if the logic of LPL were indeed as complete as the description of 'a public culture of democracy' has thus far portrayed it. When logic or onto-logic puts everything in place that needs to be in place, nothing remains *to be done*. But Rawls' invocation of the need to make allowances for burdens of judgement and to generally heed a call to civility makes it clear that much *remains to be done* as far as LPL is concerned. The introduction of the need to make allowances for burdens of judgement and to generally heed a call of civility into his LPL scheme reflects a clear recognition that the logical or onto-logical features of the scheme thus far highlighted does not yet render it functional. To the contrary, it makes the whole scheme come to pivot on an ethics of civility.

Stressing this ethics of civility as the heart of Rawls' LPL scheme is no reason for underestimating the importance of the institutional or onto-institutional logic or logistics of the LPL scheme. A constitution that is more rather than less respect-worthy, offers more rather than less protection of fundamental rights, is interpreted and enforced by a court or similar forum with a better rather than worse reputation of consistency and integrity (regarding trade-offs between moral autonomy and social cooperation), which generally sustains a mutually-respectful relation with a well-functioning parliamentary legislator, etc., is very likely going to augment instead of diminish the chances of an ethics of civility and an

appreciation of burdens of judgement among the people it serves. In the final analysis, however, the absence or presence of an ethics of civility duly informed by an appreciation of burdens of judgement will always be *the* critical factor, the factor that *ultimately* determines the sustainability of an LPL scheme. LPL schemes do not continue to function mechanically after a once-off installation. They are held in place by the commitment to cooperate between a critical number of citizens and residents. This commitment, we can learn from Rawls, finds it most critical challenge in the general or constant willingness to heed the call to civility, and to appreciate and live with the burdens of judgement that inform deep social differences and divisions. The events of 6 January 2021 are as stark a reminder of this elementary reality as one can imagine. Accepting the results of standard voting procedures that did not turn out in one's favour is probably one of *the* key testing grounds for the civility that ultimately sustains all LPL schemes imaginable. The people of the United States, and political liberals elsewhere in the world, have been sent a disturbing reminder that this civility can never be taken for granted.

We return to reflect more extensively on the events of 6 January towards the end of this article. However, a full appreciation of the critical sustaining role of consistent civility and sincere appreciations of burdens of judgement in any LPL scheme worthy of the word demands that we pause to also reflect incisively on the third motivational idea in Rawls' LPL scheme: commitment to an ideal of liberal toleration that is coupled to the idea of the 'at-least reasonable.' A problem raises its head here. Anything that strikes one as 'at least reasonable' or 'reasonable enough' can hardly be expected to exact a demanding exercise of 'liberal tolerance,' if 'liberal tolerance' is not to be reduced to something like average resilience in the face of quotidian adversity. 'Liberal tolerance' does no significant work if it is only called upon to tolerate that which is 'still tolerable.' Toleration of the 'still tolerable' is surely written all over the expression 'at least reasonable' or 'reasonable enough.' Again, Rawls' invocation of a call to civility and an appreciation of burdens of judgement suggest there is a lot to do and a lot of doing in LPL. The idea of the 'reasonable enough' suggests there is not so much to do after all.

It is important to stress this point for purposes of ridding Rawls' LPL scheme of a 'weak moment,' a moment in which he appears to shy away or retreat from the truly profound and exacting insights that the 'call to civility' and 'appreciation of burdens of judgement' introduce into his LPL scheme. This weak moment in Rawls' LPL scheme evidently tends to shift the respective weights carried in the relation between the onto-institutional 'logic' or 'logistics' of the LPL scheme and the ethics of civility pointed out above. It tends to shift most of the weight away from the latter and onto the former. The more those served by an LPL scheme are told that they only need to tolerate that which is still reasonable enough to tolerate, the more are they effectively instructed that the logic or logistics of the LPL scheme rolls largely on its own steam. It effectively keeps us in the zone of the tolerable. It does not exact that much of an ethical commitment. Again, the events of 6 January have sent political liberals a disturbing reminder that this is not the case and has

probably never been the case in the United States. And who will realistically suggest that it has ever been the case anywhere else?

It is also important to note, moreover, that the notion of the 'at least reasonable' is devoid of any pertinent substance in the context that is proposed. A quick look at the only scene in Rawls' LPL scheme in which one may be tempted to raise it as a significant term of engagement makes this abundantly clear: someone raises a constitutional complaint that some or other governmental policy imposes terms of social cooperation that interfere unduly with his or her separate moral agency. Let us say the Government introduces a scheme of compulsory COVID-19 vaccination and the plaintiff is a committed anti-vaxxer. The forum called to decide the matter faces two options: it is either going to grant the claim and tell the government (and the majority of voters that put it in power) that its terms of social cooperation are unreasonable.[32] Or it is going to dismiss the claim and tell the plaintiff that his or her claim to separate moral agency is unreasonable. Under these circumstances, neither of the two parties ending up with a verdict of 'unreasonableness' against them can be realistically expected to tolerate the adverse position of the other as 'reasonable enough.' Accepting the claim of the other as 'reasonable enough' would imply an admission that one's own claim is 'not reasonable enough.' There is no third way out. What would remain of the real sting of 'separate moral agency' and the 'severalty of persons' in Rawls' or any other LPL scheme if it were to endorse this implication?

There is no third way out of this dilemma. But there is a third way into it, a way of staying in it and living with it. This is the exactly what the insertion of a call to civility and appreciation of burdens of judgement into Rawls' LPL scheme offers one, provided one squares up to this insertion, and does not shy away from it. The nuclear essence of that which is as stake when one heeds a call to civility and appreciates burdens of judgement reveals itself when one accepts to live graciously enough with terms of social cooperation that one's moral autonomy (one's separate moral agency) relentlessly prevents one from considering 'reasonable enough.' Once one grasps and accepts this nuclear civility at work in the heart and gut of Rawls' LPL scheme, one can also take leave of two other weak moments in that scheme that accompanies the notion of the 'at-least reasonable' or the 'reasonable enough.' These other two weak moments march under the banner of 'central ranges

32 As the United States Supreme Court has just done in *National Federation of Business/Ohio v. Department of Labor, Occupational Safety and Health Administration, et al* (595 US 2022). I am grateful to Frank Michelman for cautioning me to consider whether my explication of the vaxxer/anti-vaxxer case above does not present the stand-off between the two parties in terms of a logical contradiction (i.e., if the court selects the position of the one party as the 'reasonable' or 'most reasonable' stance, it is, logically speaking, rejecting the other party's position as 'unreasonable.' I fear it does appear to do that, and to the extent that it does, that is clearly a mistake. In other words, I will have to rephrase this point (nevertheless only slightly, I believe) in future and have already done so in my 'Reply to Critics' in this volume. I have not done so here because I considered it fairer to my interlocutors in this volume to just leave it as it is, and indeed fairer to Stefan Rummens. His engagement with my vaxxer/anti-vaxxer test case does not make this quite clear, but if this is what he ultimately finds bothering in it, I must concede that he has a point.

of agreement'[33] and 'overlapping consensus not based on compromise.'[34] Once it has become clear that the idea of the 'at-least reasonable' does not hold up to close scrutiny, the ideas of 'central ranges of agreement' and 'overlapping consensus' evidently cannot be expected to do so either. The latter two ideas pivot on the former. If the first falls the other two also fall.

Ridding Rawls' LPL scheme of these three weak moments need not amount to removing them entirely from the LPL scheme. The same caveat already articulated above once again applies here. All three these ideas can be understood to reflect the underlying assumptions of institutional achievements that raise instead of lower the prospects of the ethics of civility on which these institutions depend in the final analysis. In other words, one can retain the ideas of central ranges of agreement and an overlapping consensus as working assumptions – but no more than working assumptions – regarding stabilised and institutionalised political and legal procedures (describable as *presupposed* pockets of consensus à la Kelsen) without which no society can consider itself well-ordered, and without which the ethics of the political will undoubtedly be unduly overburdened, and most likely disastrously so. One should nevertheless not invoke them as established goods that either conclusively or significantly displace the on-going ethics that sustain them. Put in terms that Rawls used in this regard, they do not replace the historical *modi vivendi* on which all well-ordered societies pivot with something categorically more stable (let alone more stable for the 'right reasons').[35] They continue to depend on historical *modi vivendi* that remain fundamentally precarious, notwithstanding their contribution towards rendering these *modi vivendi* more rather than less stable.

The reading of Rawls offered above endeavours to shift the weight carried by his LPL scheme squarely onto the shoulders of the ethics that sustains this scheme in the final analysis. Any reading of Rawls that would do the opposite, that is, shift the critical achievement of his LPL scheme away from the ethics of civility back to the onto-institutional logic of the scheme, would thereby effectively be portraying the LPL scheme as the essential conceptual framework of a relatively established *form* of liberal political life. In other words, it would effectively be portraying Rawls' LPL scheme as a liberal version of the very conservative historical metaphysics that Savigny once articulated. Were one to accept this portrayal, one would have to conclude that Rawls' understanding of LPL ultimately falls back into the bubbling cauldron of the ancient metaphysics of life from which *CLDL* endeavoured to distil liberal democratic law. One would have to conclude that Rawls, notwithstanding inspiring signals to the contrary, also returns to the ancient link between law and life that has always been a standard feature of Western metaphysics. The more one can bring oneself to ignore the 'weak moments' in his LPL scheme in which ethics gives way to logic, the more one can conclude that Rawls offers one, alongside

33 Rawls, *Political Liberalism*, 156, 167.
34 Rawls, *Political Liberalism*, 170-172.
35 Rawls, *Political Liberalism*, xlii, 388, n. 21, 392.

Netherlands Journal of Legal Philosophy 2023 (52) 1
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H.L.A. Hart and Hans Kelsen, a theory liberal political legitimacy that severs the ancient metaphysical link between law and life.

4 Habermas and liberal democratic law

Habermas' discourse theoretical analysis of both communicative action in general and of law in particular turns on two key terms: facticity and validity, *Faktizität* and *Geltung*. In what follows, we shall first take a brief look at his general theory of communicative action and then turn to a more extensive engagement with his discourse theoretical analysis of modern law. It is nevertheless important to note from the very beginning the close connection that Habermas discerns between these two fields of inquiry. As he puts it, the first two chapters of *FG* endeavour to explain why the general theory of communicative action awards a central place – *einen zentralen Stellenwert* – to law, and why it furnishes, in turn, a discourse theoretical understanding of law with an appropriate context, 'einen geeigneten Kontext.'[36]

Central to Habermas' discourse theoretical understanding of communicative action, as expounded in *FG*, is a conception of the 'linguistic turn' that is ultimately remarkably different from the understanding of this term that one usually associates with 'postmodern' social and cultural critiques, critiques that stress cultural and social specificities that resist translation and consequently give rise to hermeneutic and communication deficits, all of which invariably lead to 'blindly' agonistic social and intercultural relationships.[37] This 'postmodern' version of the linguistic turn features only for a brief moment in Habermas' theory of communicative action before it gets transformed into a rather typical 'modern' concern with universal meaning.

Habermas' epistemological narrative begins with the demise of Kantian and Hegelian idealism and the rise of empiricist theories of knowledge in the course of the nineteenth century. These empiricist theories of knowledge commenced to explain all elements of meaning not directly explicable with reference to empirical observation – all general concepts, in other words – in terms of psychological processes of representation. It is against this rise of psychologism in the theory of language and meaning that philosophers like Peirce, Frege, Russel, Moore and Husserl reacted by stressing the ideal content of concepts that transcends the psychological processing of perceptions by individual minds. Frege is the first key figure whom Habermas considers before turning his attention to Peirce. Frege insisted that a linguistic proposition regarding factual reality is not an expression of some or other individual representation of that reality, but a statement with an ideal meaning that everyone involved in that linguistic exchange understands in

36 Habermas, *Faktizität und Geltung*, 21.

37 See Allan Janik & Stephen Toulmin, *Wittgenstein's Vienna* (Chicago: Ivan R. Dee, 1996) for a profound illumination of the historical roots of this 'postmodern' understanding of the linguistic turn.

the same way. This insistence eventually paved the way to an understanding of ideal meaning as a product of shared linguistic practices and rules.[38]

This breakthrough, however, only constituted the first significant development as far as the 'linguistic turn' is concerned. The insight that the ideal meaning of phrases (meaning that everyone in a linguistic community more or less understands in the same way) is a product of linguistic practices and rules (which became the field of study of general semiotics) does not yet suffice to explain the truth content – or lack of it – of linguistic statements. According to Habermas it was Peirce who made the essential breakthrough with regard to this further element of communicative action. Someone who makes a linguistic statement, argued Peirce, not only partakes in the general rules of language (semiotics) that render common meaning possible. The person who speaks takes a performative stance vis-à-vis the addressees of his or her communication that invites them to affirm or deny the veracity of her statements. This invitation always takes place in a specific linguistic community and therefore only allows for assessments of validity within specific contexts of cultural knowledge and understanding – *factual* standards of argumentation, in other words – that effectively reduce the truth content of a statement to a validity that is conditioned by inevitable elements of sociocultural facticity. As Habermas puts it, the universal validity or *Gültigkeit* of the statement thus always gets reduced to that which is valid within a specific linguistic community. *Gültigkeit* thus always gets reduced to *gelten* (that which is valid for a specific individual or group) in concrete instances of communication.[39] This is the brief moment in which Habermas' conception of the 'linguistic turn' is more or less on the same page as 'postmodern' understandings of this term.

The performative stance of a speaker can nevertheless not be reduced to the elements of facticity with which concrete speech always compromises, argued Peirce. The speaker always assumes a context of absolute validation when he/she speaks seriously. She is not claiming that her statement is only valid 'for us, now' and not 'for everyone, always.' She invokes a context of complete, absolute or final validation, notwithstanding the fact that this context of final validation never materialises and therefore remains a counter-factual ideal.[40] The key point that Habermas makes in this regard is this: the use of language that is aimed at mutual understanding – *verständigungsorientierter Sprachgebrauch*[41] – is always conditioned by the counterfactual assumption of universal validation. Hence the irreducible exposure of factual instances of validation to learning processes – *Lernprozesse* – that effectively resist and transform the constraints that the facticity of validation imposes on existing knowledge.[42]

38 Habermas, *Faktizität und Geltung*, 25-29.
39 Habermas, *Faktizität und Geltung*, 29.
40 Habermas, *Faktizität und Geltung*, 30-31.
41 Habermas, *Faktizität und Geltung*, 33-34.
42 Habermas, *Faktizität und Geltung*, 31.

Netherlands Journal of Legal Philosophy 2023 (52) 1
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This brief exposition of Habermas' discourse theoretical understanding of communicative action brings together the key lines of thought that inform his discourse theoretical analysis of modern law. Central to this analysis is a thesis about the way in which the two key terms at stake in his discourse theory of law, facticity and validity, actually only became two separate terms under conditions of secularisation (predominantly associated with modernity but first signs of which can be traced to Roman law[43]) that disrupt the immediate validity of factual social arrangements in societies still fully in the grip of archaic religious authority. Secularising disruption of religious authority exposes factual social arrangements to a *questioning* of validity that simply does not occur as long as religious authority prevails. Under the latter conditions, facticity enjoys an immediate and unquestioned claim to validity that basically guarantees social cohesion and integration without much further ado. Dissent, disagreement, division and difference simply do not constitute real or significant concerns under these circumstances. They only become significant concerns under circumstances of secularisation that disrupt and terminate the immediate validity of the factual. Hence the rise of serious social integration concerns in societies that embark on routes of secularisation. Habermas' discourse theory of modern law aims to show how modern legal systems managed to sustain adequate social integration (adequate coordination of conduct) under circumstances where factual social relations could no longer claim the immediate and unquestioned validity of religious authority.

According to Habermas, 'the trick' – *der Witz*[44] – of modern law was to liberate moral consciousness from the self-evident and immediate validity claim of any factual arrangement characteristic of unsecularised law, while sustaining adequate levels of social integration through factual legal coercion and sanctioning, the validity of which was not self-evident and therefore surely subject to critical reflection and questioning, but not immediately so. On the one hand, modern law created a system of subjective rights that unleashed individuals from the claims of religious authority and allowed them considerable scope for engaging in modes of conduct the moral acceptability of which was for them alone to decide. On the other hand, it retained an adequate array of 'expectation-stabilising' coercive rules with which social conduct simply had to comply at first, *as if* these rules still enjoyed the unquestioned validity of sacred authority (*'ein funktionales Äquivalent für die Erwartungsstabilisierung durch bannende Autorität'*).[45] These two dimensions of modern law found expression in positive systems of private law. The validity of any coercive elements in this field of law could only be questioned indirectly. At a first level of conduct, one simply had to comply with them. At a second level, however, the validity of these coercive elements of law could be questioned and re-assessed

43 See Habermas, *Zur Verfassung Europas. Ein Essay* (Berlin: Suhrkamp, 2011), 44.
44 Habermas, *Faktizität und Geltung*, 49.
45 Habermas, *Faktizität und Geltung*, 44-56.

by means of collective legislative procedures. Thus, argues Habermas, did modern legal systems accomplish three essential achievements:

i It allowed for factual coercion that sustained adequate social integration.
ii It granted no immediate validity to this coercion, thereby creating the scope for an independent moral autonomy that could choose either to consider legal rules morally binding, or to adopt a merely instrumental attitude to them that effectively suspends questions of their validity.
iii It created institutional platforms on which the validity of coercion could eventually be considered collectively for purposes of legislative legal reforms.

This splitting or polarisation of facticity and validity in modern law evidently did not amount to a complete eradication of questions regarding the legitimacy or validity of law. Questions regarding the validity of positive rules of law were only suspended until such time as collective democratic deliberation commenced to reflectively subject existing law to questions of validity and legitimacy. This is the essential role that Habermas attributes to legislative processes in modern societies. As a legislator – or as one who votes for a legislator – legal subjects are called upon to suspend their merely instrumental attitude to the law for purposes of adopting the perspective of a member of a free society that is actively concerned with the legitimacy of the laws that govern his or her society.[46] Of concern here is the key 'democratic thought' that informs modern law, *der demokratische Gedanken* that Habermas traces to Rousseau's and Kant's insight that the orderly egoism (*rechtlich geordneter Egoismus*) for which the system of subjective rights in modern legal systems provides the essential framework, needed to be supplemented by a set of subjective rights of a different kind (*subjektive Rechte eines anderen Typs*). These other subjective rights are citizens' rights (*Staatsbürgerrechte*) aimed at the exercise of political autonomy, and not at the arbitrary exercise of the will for private purposes for which private law rights provide.[47]

This nexus between citizens' rights, on the one hand, and the reflective democratic validation and revalidation of the facticity of positive legal rules, on the other, is the pivot on which Habermas' thesis regarding the co-originality of political and private autonomy (*Gleichursprünglichkeit von politischer und privater Autonomie*) and the intrinsic connection between popular sovereignty and human rights (*Volkssouveränität und Menschenrechte*) turns.[48] It is important to note here that Habermas reverts to the word co-originality or *Gleichursprünglichkeit* only with reference to political and private autonomy, and not with regard to human rights and popular sovereignty. With regard to the latter pair, intrinsic connection (*interne Zusammenhang*) or mutual belonging (*Zusammengehörigkeit*) remains the consistent formulation. We return to reflect further on this point below. Suffice it here to look at the brief history of modern political thought with reference to which Habermas develops the point. The history runs through the work of Hobbes, Kant and Rousseau. According to Habermas, Hobbes was fundamentally precluded from

46 Habermas, *Faktizität und Geltung*, 50.
47 Habermas, *Faktizität und Geltung*, 51.
48 Habermas, *Faktizität und Geltung*, 123, 134-135, 161.

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understanding the relation between popular sovereignty and human rights because of the reduction of rights to private law rights that permeates his whole conception of the social contract. Hobbes evidently considered the move to enter the social contract as one that was motivated strictly by a pursuit of private interests. His social contract is basically modelled on a private law contract.[49]

The realisation that the foundation of a polity requires a different kind of interest and concern, namely a public concern with the establishment of *equal rights for all*, only came forward in the political theories of Kant and Rousseau, claims Habermas. However, both of them understood this public concern in terms that ended up pitching individual rights against public sovereignty. Kant considered the basis of the equal rights of all to be based in a moral conception of natural or innate individual rights that exist prior to and independently of any exercise of political will-formation. The sovereign had to respect these rights on moral grounds and had nothing to do with their articulation.[50] Rousseau grasped the intrinsic relation between political will-formation and individual rights better, continues Habermas. However, Rousseau's predominantly 'republican' conception of equal rights pitched the public deliberation of human rights so starkly against private concerns that it again obstructed the insight into the intrinsic connection between human rights and popular sovereignty and the co-originality of private and public autonomy. Rousseau's ethical-republican (as opposed to Kantian-moral) understanding of this connection basically eclipsed private autonomy and therefore failed to grasp the communicative relation between private and public autonomy.[51]

A proper understanding of the relation between private and public autonomy only becomes possible, insists Habermas, when one adopts a discourse-theoretical regard for the tension between facticity and validity that conditions *all* communicative acts. Statements about the proper scope of modern individual rights are not subject to reflective scrutiny because of the moral reasons or natural law conceptions of innate rights that Kant contemplated. To the contrary, the decoupling of law and legal obligation from transcendent conceptions of moral or natural law authority (which effectively liberated individual moral autonomy from legal coercion) was exactly one of the key achievements of modern law. The scope of modern subjective rights is therefore not subject to reflective scrutiny because of moral considerations, but because their linguistic and argumentative terms are always embroiled in elements of facticity that invite ongoing reflection on their validity. This is true of al linguistic statements, also statements about private interests and private law rights which Rousseau basically dismissed as devoid of public concern. Statements about private interests and private law become matters of public concern whenever and *as soon as* they are articulated as performative statements that invite reflection on their validity. Hence the co-originality of private and public autonomy and the intrinsic connection between human rights and popular sovereignty, according to Habermas.

49 Habermas, *Faktizität und Geltung*, 119-121.
50 Habermas, *Faktizität und Geltung*, 121-122, 130-131.
51 Habermas, *Faktizität und Geltung*, 131-133.

Towards the end of his initial or introductory exposition of his discourse theory of modern law in the first chapter of *FG*, Habermas returns to Frege and Peirce to link the essential elements of this theory of law expressly to the elements of facticity and validity that inform every communicative act.[52] The tension between facticity and validity that conditions every performative speech act necessarily also conditions the quotidian communicative practice (*kommunikative Alltagspraxis*) through which life forms reproduce themselves. Social structures are therefore subject to the same tension between facticity and validity that conditions every performative linguistic statement aimed at understanding.[53] The tension between the positive system of private law rights aimed at the stabilisation of expectations in the private sphere, on the one hand, and the reflective legitimacy concerns for which citizens' rights and collective democratic deliberation offer an institutional platform, on the other, not only mirrors (*spiegelt*) the tension between facticity and validity intrinsic to every communicative act. It also constitutes an intensified (*intensivierte*) manifestation of this tension because of the way it pits the concern with coercive stabilisation of expectations (*Rechtszwang*) against the concern with self-legislation (*Selbstgesetzgebung*). The constitutional state, contends Habermas, answers to this essential societal concern with both coercive law and the institutional transformation of coercive law into self-legislation (*'[auf] das Desiderat der rechtlichen Transformation der vom Recht selbst vorausgesetzten Gewalt antwortet die Idee des Rechtstaates'*).[54]

It is important to highlight at least three specific ways in which the relation between facticity and validity plays out in and around the law, according to Habermas. The first way concerns the juridically *internal* relation between facticity and validity already expounded above, namely, the relation between positive private law rights and a reflective exercise of citizens' rights that allows for a constant subjection of the facticity of the former to the validity concerns pursued by the latter. The second way concerns an *external* facticity – not yet discussed above – that always imposes itself from the outside on the internal validity concerns that citizens' rights mobilise inside the law – *'[eine] von außen ins Recht eindringende Faktizität.'*[55] This *external* relation between facticity and validity (Habermas stresses*: 'externes Verhältnis von Faktizität und Geltung'*) concerns the way in which two systemic forms of social integration, money and administrative power, constrain and undermine the validity concerns mobilised through citizens' rights. Not only do the machineries of markets and state administrations wield power that is juridically untamed (*'rechtlich nicht gezähmter Macht'*), they also make use of the legitimating power of the law to adorn their factual force with a juridical coat – *'[sie bedienen sich] der legitimierenden Kraft der Rechtsform, um ihre bloß faktische Durchsetzungsfähigkeit zu bemänteln.'* Modern law therefore remains a deeply ambiguous medium of social integration. It often provides an appearance of legitimacy to illegitimate power and it is never entirely clear to what extent it is

52 Habermas, *Faktizität und Geltung*, 53.
53 Habermas, *Faktizität und Geltung*, 54.
54 Habermas, *Faktizität und Geltung*, 58.
55 Habermas, *Faktizität und Geltung*, 58.

truly an expression of the self-government of reflective citizens engaged in the normative validation of all social relations, and to what extent it merely offers a coat of legitimation to systems of power that remains fundamentally unvalidated.[56]

The external facticity of economic and administrative power that continues to accompany and constrain the validity concerns that citizens' rights mobilise inside or through the law is exacerbated by a third relation between facticity and validity that is *internal* and intrinsic to law. Of concern is the positivity of citizens' rights themselves. Just like private law rights, citizens' rights are also positively articulated as a set of subjective rights. They can therefore also be exercised in the same way that private law rights are predominantly exercised, namely, in pursuit of private interests. Citizens' rights facilitate the reflective democratic engagement of citizens concerned with the validity of law, but they cannot and do not compel citizens to use their citizens' rights democratically for purposes of approving and improving the validity of law.[57] Moral considerations may motivate them to exercise their rights in a truly democratic fashion, but these rights remain *legal* rights. They are the reflection of *legal* rules that are only legally and not morally binding. As in the case of private law rights, every legal subject remains free to use them in a purely self-interested fashion. Habermas concludes his observations in this regard with a most remarkable comment that warrants quotation:

> The emergence of legitimacy from legality admittedly appears as a paradox only on the premise that the legal system must be imagined as a circular process that recursively feeds back into and legitimates itself. This is already contradicted by the evidence that democratic institutions of freedom disintegrate without the initiatives of a population accustomed to freedom. Their spontaneity cannot be compelled simply through law. It is regenerated from traditions and preserved in the associations of the liberal political culture.[58]

This passage must strike one as most remarkable because it evidently contradicts the key claim in *FG* regarding the co-originality (*Gleichursprünglichkeit*) of private and political autonomy and the intrinsic connection or mutual belonging (*interne Zusammenhang/Zusammengehörigkeit*) between human rights and popular sovereignty pointed out above. Habermas seems to retreat here from his critique of Rousseau's excessively 'republican' understanding of the relation between human rights and popular sovereignty which ultimately ends up pitching the former against the latter. He himself clearly acknowledges that citizens' rights can be exercised instrumentally in pursuit of private interests. They do not secure or guarantee a democratic or public spirit or ethic. To the contrary, he clearly suggests the opposite: when citizens' rights truly and effectively function as *citizens'* rights – *political* rights, in other words – and not just as a supplementary

56 Habermas, *Faktizität und Geltung*, 59-60.
57 Habermas, *Faktizität und Geltung*, 164.
58 Habermas, *Faktizität und Geltung*, 165.

constitutional entrenchment of private law rights, they do so because they are sustained and mobilised by a democratic or public ethic. 'Democratic institutions of freedom disintegrate,' he says, 'without the initiatives of a population accustomed to freedom, [the spontaneity of which] cannot be compelled … through law' – *'[R]echtliche Institutionen der Freiheit [zerfallen] ohne die Initiative einer an Freiheit gewöhnten Bevölkerung, [d]eren Spontaneität … sich eben durch Recht nicht erzwingen [lässt].'*[59]

One might wonder for a moment whether the insight articulated in this remarkable passage may have been the reason for Habermas' consistent selection of *Zusammenhang* and *Zusammengehörigkeit* instead of *Gleichursprünglichkeit* for the characterisation of the relation between popular sovereignty and human rights. One should nevertheless not do so for long. The observation that Habermas articulates in this passage evidently also ruins the idea of the *Gleichursprünglichkeit* of private and public autonomy. The quoted passage clearly suggests that public autonomy comes first and private autonomy second. If one accepts this suggestion, one must also accept that the *Zusammenhang/Zusammengehörigkeit* of popular sovereignty and human rights is also conditioned by this 'first' and 'second.' The observation in the passage quoted evidently ruins Habermas' *Gleichursprünglichkeit*-thesis. It ruins more than this, in fact. It ultimately also ruins the transcendental guarantees that Habermas claims to obtain from his Peircean conception of performative communication that always invites validation or invalidation. If citizens' rights – of which the very rationale is to allow for performative communication aimed at collective validation and reflective understanding – can be used in an arbitrary instrumental fashion, in the way private law rights are often or generally used, all collective uses of discourse can be instrumentalised and privatised thus. Once one arrives at this insight, it no longer makes sense to invoke the contrafactual idealisations *intrinsic* to language – *'[d]iese die Sprache selbst innewohnenden Idealisierungen'*[60] – that underpin Habermas' discourse theory of law.

From the perspective of *CLDL*, this general ruination of the transcendental guarantees in Habermas' discourse theory is a welcome ruination, because these guarantees are exactly that which adorns his theory with an allure of the miraculous that obstructs the invaluable insights that it can make to a realistic understanding of liberal democratic law. As the theory stands, it rests on a blue-eyed conception of a communicative civil society and public sphere that obscures the crisis of communication that always constitutes the very threshold of liberal democracy. The advanced breakdown of common public spheres and collective communicative action fuelled by social media group formations – giving rise, for example, to whole ranges of 'woke culture' and 'proud boys' bubbles that exist next to one another as if on different planets – has recently received a more realistic assessment from

59 Habermas, *Between Facts and Norms* (Cambridge/Maiden MA: Polity Press, 1997), 130-131. For the passage in the German text, see Habermas, *Faktizität und Geltung*, 165.

60 Habermas, *Faktizität und Geltung*, 33.

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Habermas.[61] In *FG*, however, we still find the following description of the higher-level intersubjectivity (*höherstufigen Intersubjektivität*) of processes of understanding in civil society and the public sphere:

> The one text of "the" public sphere, a text continually extrapolated and extending radially in all directions, is divided by internal boundaries into arbitrarily small texts for which everything else is context; yet one can always build hermeneutic bridges from one text to the next.[62]

The 'harmony and balance' of 'fully achieved' public and private autonomy that Rawls could not fail to discern in Habermas' discourse theory of law and the constitutional state,[63] was, at the time, evidently underpinned by an astoundingly optimistic vision of a healthy and cooperative social hermeneutics. His whole dynamic framework of new problems that arise on the periphery of a decentralised society, find their way into the centre of the public sphere, and eventually lead to legal reforms that reflect the learning process of modern law, pivots on this vision of an essentially always-cooperative social hermeneutics.[64] Or an *almost* always cooperative social hermeneutics. To be sure, toward the end of this remarkable chapter, Habermas acknowledges occasional crises in this world of performative communication. But these crises, he contends, can always be attributed to specific historical factors which have never culminated in an *a priori* negation of the self-empowering project of a society – '*[s]olche Krisen lassen sich allenfalls historisch erklären [und desavouierten nicht von vornherein] das Projekt der Selbstermächtigung einer Gemeinschaft*.'[65] In other words, they do not prevent discourse theory from generally *counting on* the higher-level intersubjectivity of processes of understanding in the public sphere – '*[d]ie Diskurstheorie rechnet mit der höherstufigen Intersubjektivität von Verständigungsprozessen … im Kommunikationsnetz politischer Öffentlichkeiten*.'[66]

The social vision (or lack of it) that informs the line of thinking in *CLDL* is fundamentally different from the one Habermas puts forward here. Notwithstanding the rather gloomy prospects with which it is currently confronted, it has no specific expectations regarding the overall balance or imbalance between felicitous and failed social interaction and the vicissitudes of empowerment and disempowerment in the ways of the world. It just insists, contra Habermas, that *both* felicitous and failed social interaction can invariably be traced to very specific historical factors. Felicitous social interaction can invariably be traced to concrete (institutionally at

61 Habermas, 'Überlegungen und Hypothesen zu einem erneuten Strukturwandel der politischen Öffentlichkeit,' in *Ein neuer Strukturwandel der Öffentlichkeit? Leviathan Sonderband 37*, eds. Martin Seeliger & Sebastian Sevignani (Baden-Baden: Nomos, 2021), 470-500.

62 Habermas, *Between Facts and Norms*, 374. For the German text, see Habermas, *Faktizität und Geltung*, 452.

63 See Rawls, *Political Liberalism*, 378-379, 382, 411.

64 Habermas, *Faktizität und Geltung*, 460-467.

65 Habermas, *Faktizität und Geltung*, 467.

66 Habermas, *Faktizität und Geltung*, 362. The emphasis on *rechnet* is mine.

best facilitated but not guaranteed) historical gestures of cooperativeness and civility that manage to keep the always present threat of an obstinate unwillingness to cooperate at bay. In the discussion of Rawls above, the cooperativeness and civility at work in the former gestures have been put forward as the essential ethics that conditions liberal democracy. The adamant refusal to cooperate invariably presents itself in terms of the sublime 'heroism' that *CLDL* identifies as the most worrying threat to liberal democracy today. This 'heroism' – thus far only briefly introduced in Section 2 above – still demands further explication. We shall turn to this explication below. Suffice it to observe for now that *CLDL* is an investigation into ways in which one's understanding of the law might raise the historical odds in favour of civil cooperativeness and against uncooperative heroisms. It entertains no transcendental conditions on which one can count in this regard.

However, there is one regard for a significant lack of integration in Habermas' discourse theoretical framework of law that a theory of liberal democratic law must take seriously. Of concern are his analyses of the way in which the systemic logics of money and administrative power not only constrain, undermine and invade the discursive reflection on validity claims that the law offers, but also co-opt the law as a façade of legitimacy that covers up the raw untamed power that these systems wield. This is indeed a huge problem that any serious theory of liberal democratic law must take seriously. But here too, Habermas' response to the question appears far from realistic enough. He offers us a view of the law as a medium that effectively regulates the relation between the systems of money and power, on the one hand, and the lifeworld on the other, thereby preventing the logistics of the former from undue interference with the reflective rationalisation processes in the latter. Here again he appears to contemplate a unitary lifeworld and to ignore the way in which an unfathomable proliferation of different group formations in 'the lifeworld' position themselves very differently vis-à-vis the systems of money and power. It seems down-right impossible to consider all these different groups configurations engaged in something that one can persuasively call a unitary resistance to the invasion of systemic logics into common processes of learning and rationalisation in the lifeworld.

We can end our overview of Habermas' discourse theory of law here. We surely have not covered all the important details of the theory, but those that we have covered are all we need for purposes of an assessment of the theory from the perspective of the theory of liberal democratic law developed in *CLDL*. It should already be clear that this assessment, to which we turn squarely in the next section of this article, is bound to focus on the key point that also emerged from our discussion of Rawls. That discussion also showed up a tension in Rawls' thinking between an institutional framework (respect-worthy constitution with a ledger of fundamental rights, a constitutional review forum with a reputation of consistency, an institutional platform for popular authorship of the laws, etc.), on the one hand, and a 'constituent' ethics of civility, on the other, without which the institutional framework cannot be sustained, however much this framework may come to facilitate and strengthen this ethical sustenance. There are surely important

Netherlands Journal of Legal Philosophy 2023 (52) 1
doi: 10.5553/NJLP/221307132023052001002

differences between Rawls' framework of political liberal legitimation and Habermas' discourse theoretical analysis of the framework of legitimation in modern legal systems and we will note some of them below. Both frameworks nevertheless evince a parallel constituent/constituted-power problematic and it is this problematic that I will now endeavour to assess from the perspective of the main lines of thought developed in *CLDL*.

5 Rawls and Habermas from the perspective of *CLDL*

The parallel constituent/constituted-power problematic that emerges from the discussions of Rawls and Habermas above concerns the way in which both of them ultimately make – albeit with considerable equivocation – the institutions of liberal democracy dependent on *practices* of liberal democracy. Both theoretical undertakings show that the latter remains a precondition for the former, notwithstanding the fact that the former can aid and strengthen the latter. This prompts one to invoke a constituent/constituted-power constellation that evidently makes the constituted dependent on the constituent, a constellation that makes all durable forms of life dependent on a 'lively' ethics, to invoke Michelman's phrase again. 'Spontaneity' is the new term that we can insert into this constellation in view of the passage quoted from *FG* above. We have already observed that the invocation of a 'formless liveliness' to portray Rawls' ethics of civility takes one worryingly close to the language of Carl Schmitt. The invocation of a 'spontaneous' constituent power that precedes and conditions constituted power evidently does this again. On both counts is one reminded of the description of constituent power in Schmitt's *Verfassungslehre* as a formless force or energy (*natura naturans*) that unceasingly negates and destroys the forms that it produces (*natura naturata*) in the course of time.[67] There is, however, a radical difference between the Schmittian articulation of constituent power on the one hand, and the Rawlsian and Habermasian articulations, on the other, to which we will briefly return below.

For the reasons elaborated above, 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. It considers this ethic the truly promising element of their respective theoretical engagements. What it does find deeply problematic, however, is the way in which they both embed this constituent ethic in a transcendental or quasi-transcendental framework that obfuscates it in a cloud of equivocation. It is interesting to note how both Habermas and Rawls, in the debate between them, notice this transcendental element in the other's work, but not in their own. Habermas takes issue with the transcendental philosophical vision in Rawls' thinking that appears to insulate the essential goods of liberal democracy from the pure democratic proceduralism that he contemplates in his own work.[68] Rawls discerns a comprehensive Kantian-Hegelian philosophy in Habermas' discourse

67 Schmitt, *Verfassungslehre*, 79-80.

68 See Habermas, 'Reconciliation through the Public use of Reason,' 118.

analyses of law and considers it incompatible with the 'freestanding' political conception of justice with which he is concerned.[69] Neither of them discerns the undeniable transcendental assumptions that inform their own respective theoretical undertakings: 'overlapping consensus' and 'central ranges of agreement about essentials' in the case of Rawls, 'transcendental elements of language' that found steady democratic learning processes in the case of Habermas.

In the case of both Rawls and Habermas, the more seriously one takes their recognition of the constituent ethic that ultimately holds their respective frameworks of legitimation together, the more does it become clear that this constituent ethic actually ruins the transcendental elements of these frameworks. The more one takes Rawls' emphasis on an ethics of civility and an appreciation of burdens of judgement seriously, the more do his claims regarding an overlapping consensus and central ranges of agreement that render liberal political arrangements stable for the right reasons appear devoid of intrinsic substance. The question pointed out in Section 3 persists: why would a framework of legitimacy that pivots on an overlapping consensus and central ranges of agreement be in need of an ethics of civility and an appreciation of burdens of judgement? The same question nags with regard to Habermas: why would one need to acknowledge the 'spontaneous initiatives of a population used to liberty' if the transcendental elements of linguistic communication effectively guide one towards increasingly legitimate forms of social integration? Habermas' remarkable invocation of *spontaneous* and therefore unprogrammable initiatives that ultimately sustain a liberal democratic culture not only ruins the neat constellation of facticity and reflective validation in terms of which he analyses modern law, as we contended above. It ruins his whole discourse theoretical understanding of language. It effectively acknowledges that language can or cannot be aimed at understanding (*verständigungsorientiert*). There are no essential elements of language that *necessarily* render it aimed at understanding.

From the perspective of the line of thought developed in *CLDL*, it seems to make much more sense to consider the constituent ethics – that Rawls and Habermas both acknowledge, but marginalise and obfuscate – the essential element that sustains the transcendental elements in their theoretical frameworks, *when* and *as long as* they sustain them, thereby obviously also ridding them of their transcendental status. Nothing is certain or guaranteed as far as this sustenance is concerned, not even in the country that Habermas associates with 'Jefferson's fortunate legacy' (*Jeffersons glückliche Erbe*) and 'the praised north-Atlantic development path of the constitutional democratic state' ('*der gepriesene nordatlantische Entwicklungspfad des demokratischen Rechtsstaates*'). If the election of Donald Trump as President of the United States in 2016 could not already make this abundantly clear, the events of 6 January 2021 surely did, to put it mildly. Looking back, one does not really understand what exactly motivated the confidence with which Rawls and Habermas articulated the transcendental

69 See Rawls, *Political Liberalism*, 378-379, 382, 411.

Netherlands Journal of Legal Philosophy 2023 (52) 1
doi: 10.5553/NJLP/221307132023052001002

elements of their respective theoretical undertakings as late in the day as 1993 and 1996 (Rawls) and 1992 (Habermas). It is not clear what warranted this confidence then.[70] It is abundantly clear, however, that this confidence is very definitely no longer warranted today. If a country with a more than two centuries long history of relatively stable democratic institutions and elections (ignoring for the moment April 1861 to May 1865 as one actually never should) can one morning wake up to the rude reality that a significant contingent of its population is refusing to accept the outcome of an election that warrants no sane suspicion of fraud and is prepared to stage that refusal with unlawful and violent revolt, any country can wake up to that reality. What purchase can notions such as overlapping consensus, central ranges of agreement, and language that is aimed at understanding (*verständigungsorientierte Sprache*) have under conditions such as these?

Once one recognises and acknowledges the constituent ethic and power that sustain the constructive assumption of a valid system of law, one can easily entertain notions of 'overlapping consensus,' 'central ranges of agreement' and 'understanding-oriented language' without succumbing to equivocations and obfuscations. These notions indeed concern critically important constructive assumptions. Following Kelsen, one could call them essential *epistemological presuppositions* that render the language of law and constitutionalism possible. As such, they could come to inform, strengthen and facilitate the constructive constituent commitment to sustain them. They nevertheless remain fundamentally dependent on this commitment and are for this reason not co-original with it.

Habermas once articulated a critique of George Bataille's concept of the 'sovereign gift' that basically arrived at the same insight that we have been contemplating here. He criticised the 'verticality' of the gift on which Bataille's heroic conception of sovereignty turns. Bataille's conception of the gift, argued Habermas, focuses predominantly if not exclusively on the vertical relation that the gift effects between the human being and the sacred, thereby neglecting the horizontal dimension – the interpersonal and community creating effect – of gift exchanges that Marcel Mauss stressed in his *Essai sur le don*.[71] Rawls' conception of burdens of judgement and an ethics of civility can plausibly be read in terms of the community creating gift that Habermas discerned in Mauss' concept of the gift.[72] Perhaps one can do the same with Habermas' own conception of the reflective validation of validity claims. One can downplay the verticality – this last all too heroic element? – that is still all too manifest in his Peircean conception of an ideal discourse situation which language *necessarily* invokes. One can do so by considering this assumption of an ideal discourse situation fundamentally dependent on the historically

70 One should note that Habermas himself did not consider the mood (*Stimmung*) in the world conducive to this kind of confidence at the time *FG* was published. See Habermas, *Faktizität und Geltung*, 13.

71 Habermas, *Der philosophische Diskurs der Moderne* (Frankfurt a.M: Suhrkamp, 1985), 247-248.

72 This reading of Rawls' concept of the duty of civility surely gives it considerably more work to do than Rawls gives it, but does not bend it so far that leading readers of Rawls would necessarily dismiss it. Michelman, in any case, 'as a follower of Rawls,' indeed observes that this move 'is not so innocent,' but appears to find enough resonance between the idea of civility with which Rawls' begins and the one with which I end up. See Michelman, 'Civility to Graciousness,' 507.

contingent horizontal communal relations that result from the magnanimous willingness of members of a society to take the validation worthiness and sincerity of one another's validity claims seriously.[73] The magnanimity of concern here – we can call it a threshold magnanimity – would imply a twofold accomplishment with which every liberal democracy begins (hence the threshold) and without which no liberal democracy will ever stand a chance.

i It would effect a 'Protagorian' (rather than a 'Socratic') acknowledgment of the irreducible epistemic deficit that conditions all claims about proper communal and communicative relations and proper terms of cooperation.[74]

ii This Protagorian acknowledgment would itself render communal and communicative relations possible as *ethical* relations. It is precisely the recognition of this epistemic deficit that renders a communal ethics possible. Recall the point we have stressed with regard to Rawls: there is no need for civility or an appreciation of burdens of judgement when one can count on the epistemic security of an overlapping consensus and central ranges of agreement.

Between (i) and (ii), one is evidently turning in circles. One is talking about a threshold magnanimity that renders the recognition of an epistemic deficit possible, and vice versa. Indeed, the line of thought developed in *CLDL* appears to lead to its own version of a certain co-originality or *Gleichursprünglichkeit*. Unlike Habermas' discourse theory, however, it does not *count on* ('*rechnet mit*') this co-originality as something that is generally given and only occasionally disrupted by specific historical factors. It considers this co-originality itself the precarious outcome of highly contingent historical factors. Among these historical factors, *CLDL* specifically underlines the presence or absence of destructive heroisms that invariably ruin civilised cooperation. Of concern is the third definitive element of liberal democratic law listed in the introduction above, namely, the poetic fictions that sustain liberal democracy. *CLDL* invoked these poetic fictions as a definitive element of liberal democratic law precisely for purposes of sidestepping the romantic heroisms that at all times threaten to derail the ideal of liberal democracy. Let us briefly take a closer look at the sidestepping at stake here.

Habermas' invocation of the heroic unison with the sacred that Bataille's understanding of the sovereign gift privileged at the expense of the horizontal community creating aspect of the gift that is central to Mauss' *Essai sur le don* is

73 I borrow the term 'magnanimous' or 'magnanimity' from Michelman. See Michelman, 'Civility to Graciousness,' 506.

74 *CLDL* discussed this epistemic deficit with reference to Protagoras and not, as philosophers often do, with reference to Socrates. See Van der Walt, *The Concept of Liberal Democratic Law*, 64-68. For Socrates – quite understandably for one so closely associated with Plato's voice – the epistemic deficit that he acknowledged was never decisively severed from an implicit assertion of transcendent knowledge. Among the Greek philosophers, Protagoras was the one who – with reference to the myth of Epimetheus – linked inclusive democratic practices to an irremediable shattering of epistemic transcendence. I am grateful to Ricardo Spindola Diniz for prompting me to differentiate here between Socratic and Protagorian conceptions of epistemic deficits and to return more precisely here to the argument developed in *CLDL*.

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profoundly instructive for two reasons. On the one hand, it evidently echoes the horizontal community creating gift that we have identified above in Rawls' invocation of the appreciation of burdens of judgement and call to civility. On the other hand, it points our attention directly to that which *CLDL* considers the most worrying threat to liberal democracy today, namely the heroic visions of collective life evident in a whole array of political mobilisations aimed at 'making one's country great again.' It traces these endeavours to the ancient heroic spirit that we associate with the Homeric Greeks and contends that the human imagination will probably never be able to rid itself of this heroic spirit. The hope that latter day Agamemnon figures like Donald Trump, Vladimir Putin, Boris Johnson, Victor Orban, etc. (not hereby at all suggesting that anyone of them would have inspired Homer much), will one day simply disappear from the face of the earth, without the rest of us disappearing with them, is not a realistic one.

Hence *CLDL*'s postulation of the *definitive* need for poetic fictions through which this heroic spirit can or might be channelled – as far as feasible – to a zone of existence where it cannot threaten the cooperative ethics of decency, civility and truthfulness on which liberal democracy turns, and from where it may well also contribute to its endurance in the way a lightning conductor may contribute to the endurance of an all too inflammable substance. It is this heroic spirit that is written all over Schmitt's fascination with 'grand world politics' (*große Weltpolitik*[75]) and the miraculous sovereignty that creates law *ex nihilo*[76] that underpins this grand politics. It is this romantic fascination with heroic and grand politics that ultimately separates the constituent power contemplated by Schmitt from the constituent ethics of liberal democracy that we have distilled, above, from Rawls' framework of LPL and Habermas' discourse theoretical analysis of modern law. It is this romantic fascination with grand politics that also underpins the highly inflammable mix of poetry and politics that inspired Schmitt's political and legal thought. The identification of this romanticism as the most evident threat to liberal democracy today is key to *CLDL's* endeavour to separate poetry from politics in a way that may turn the former into a lightning conductor that safeguards instead of threatens the always inflammable substance of the latter.

75 Carl Schmitt, *Nomos der Erde* (Berlin: Duncker & Humblot, 2012), 271.

76 Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot, 1996[1922]), 43.

6 Conclusion: the community creating gift that sustains liberal democracy

CLDL does not refer to Mauss.[77] It does, however, turn squarely to the community creating gift invoked by Habermas in a passage that reflects upon the significance of voting procedures.[78] The historical exigency to reflect carefully on the significance of voting procedures and the acceptance of their results has been underlined symbolically by the events of 6 January 2021. Citizens of countries that consider themselves liberal democracies have been called in most dramatic fashion to reflect anew on the significance of voting procedures and the acceptance of their results. What do we say to one another when we say 'let's vote on it?'

When we say 'let's vote on it,' we basically tell one another that we do not have an answer to the question that we are trying to resolve. We vote on the matter because we are confronted with the necessity to accept that we are not able to convince one another on the right course of action to be taken. Put in Habermasian terms, we vote on the matter because we are making disparate validity claims coming from such different angles that they cannot be subjected to a shared process of reflective validation. Of concern is not just the contra-factuality of the ideal discourse situation that Habermas contemplates. Of concern is not just the fact that Peirce's completely validated 'final opinion' always eludes us. Of concern is something that is fundamentally more debilitating as far as Habermas' discourse theory of law and politics is concerned. Of concern is nothing less than a clash between irreducibly incongruent constellations of social facticity that renders the idea of a common validation process guided by the language we speak fundamentally implausible.

Voting procedures preserve the incongruity that confronts one here, they do not resolve it. Moreover, they are themselves 'distorted' by deep entrenchments of the systemic logics of money (consider exorbitant campaign financing) and administrative power (consider freshly gerrymandered or well-sedimented constituency designs that disempower instead of empower electorates) that Habermas brings so duly to our attention. These systemic logics always render election results deeply questionable and liberal democrats are certainly not oblivious to this elementary reality. The politically virtuous among them would always be adamantly inclined to subject voting procedures and constituency designs to critical reforms that may augment instead of diminish electoral empowerment. They nevertheless endorse them and stick to their results on the day of the count. This endorsement and sticking to are the two key instantiations of the constituent ethics to which they are committed, the ethics which preclude them from baseless fabrications of election fraud and the complete evaporation of

77 An essay on the deep difference between political liberalism and populism published in the same year that *CLDL* appeared did so extensively, though. See Van der Walt, 'The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics,' in *Law's Sacrifice: Approaching the Problem of Sacrifice in Law, Literature, and Philosophy*, ed. Brian Nail and Jeffrey Ellsworth (New York, Abingdon: Routledge, 2019). I am grateful to Michelman for alerting me to the need to link these two publications. See Michelman, 'Civility to Graciousness,' 496, 506.

78 Van der Walt, *The Concept of Liberal Democratic Law*, 242.

Netherlands Journal of Legal Philosophy 2023 (52) 1
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common factuality that such fabrications threaten to precipitate. The liberal democratic recognition of an epistemic deficit regarding the propriety of social relations and terms of cooperation may at first glance appear to spill over into a general negation of adequately secure factual knowledge, a negation that would lead one all the way back to the problem of solipsistic psychological representations of factual reality with which Habermas' discourse theory of language and law begins. But this is not the case. We have become witnesses in our own time – with a whole century separating us from the time when the problem began to bother philosophers like Frege, Husserl, Russel and Moore – of the way in which the transsubjective ideal content of factual observations evaporates when the magnanimous willingness to cooperate evaporates. Everyone who purposefully aims to cooperate knows that one has to begin with a common assessment of relevant facts.[79]

What sustains the 'we' at work in this constituent liberal democratic ethic on which the very communality of factual reality ultimately depends, this diffuse 'we' that one may call a liberal democratic constituent power if one is adequately alert to the diffuse and centrifugal condition of this power? Of concern is not a power that culminates in the heroic concentration of a singular collective subject, but the diffuse power that sustains the minimum communality required for civilised social operation.[80] Rawls' emphasis on the role that an appreciation of burdens of judgement and an ethics of civility plays in the process of political liberal legitimation stresses the essential ethical gestures that sustain this diffuse communality and the centrifugal power or force that holds it together. The essential constituent act of liberal democratic constituent power does not consist in the reflective validation of validity claims, as not only Habermas but also Rawls in his own way – when he invokes an 'overlapping consensus' and 'central ranges of agreement' – sometimes suggest. Reflective validation of validity claims always pivots on constituted power (positive institutions of adequately recognised knowledge), not constituent power. The essential constituent act of liberal democratic constituent power consists in the magnanimous act of civilised decency through which liberal democrats manage to live with the dire lack of shared validation practices that render social disagreements and divisions irresolvable. The magnanimity of concern here finds one of its most telling expressions – perhaps its *most* telling expression – in the elementary acceptance of an adverse vote count.

79 In the course of arguments that resonate firmly with the thoughts developed here and in *CLDL*, Jan-Werner Müller writes: 'As Hannah Arendt opined, opinions ought to be constrained by facts, but they are clearly partisan perspectives and that's a fine thing, too.' See Werner-Müller, *Democracy Rules* (New York: Farrar, Straus and Giroux, 2021), 99. In view of the point we are making above, one can switch the direction of the 'but' and rephrase slightly: opinions are clearly partisan perspectives and that is a fine thing, too, but they *must* be constrained by facts.

80 This is an appropriate place and moment to recall the *communauté [qui] assume et inscrit l'impossibilité de la communauté* that Jean-Luc Nancy (whose passing away on 23 August 2021 surely still leaves many who read his work with attention with an irreparable sense of *désœuvrement*) once articulated so exquisitely. See Jean-Luc Nancy, *La communauté désœuvrée* (Paris: Christian Bourgois Éditeur, 1986), 42.