Enduring Contingency

Remarks on the Precariousness of Liberal Democratic Law

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1 Introduction

Johan van der Walt introduces his essay, 'Rawls, Habermas and Liberal Democratic Law' (hereafter RHL) by noting that both Habermas and Rawls aspire to explain and promote 'the Enlightenment ideal of reason reflected in the idea of liberal democracy' (RHL, 16). While sharing this aspiration, he adds that his book, *The Concept of Liberal Democratic Law* (hereafter *CLDL*) goes further than them in emphasising 'the precariousness of this ideal of reason' (RHL, 16). But what is the ideal of reason that animates the Enlightenment? In what sense or senses might modern reason be precarious? Does Van der Walt go far enough in emphasising such precariousness, when taking issue with Rawls and Habermas?

In response to these questions I offer a reconstruction and radicalisation of what I take to be the core insight guiding Van der Walt's essay and book, which I summarise with the expression 'enduring contingency.' Precariousness refers to the experience of radical contingency Western modernity inherited from the Middle Ages, and to which the modern concept of reason – the principle of self-preservation – is a response. Rawls, Habermas, and Van der Walt all stand within the horizon of this experience when interpreting democratic lawmaking as collective self-rule. But whereas Habermas, in particular, understands modern reason as the historical process of *overcoming* radical contingency, Van der Walt, in my reading, suggests that what he calls liberal democratic lawmaking *deals* with contingency, without being able to overcome it – not in fact, not in principle. It is for this reason that I title my commentary 'Enduring Contingency,' in the twofold sense of an enduring state of contingency and of contingency as what needs to be endured. This twofold reading of enduring contingency is, I argue, inscribed in Van der Walt's reading of the democratic majority-minority principle. While I concur with Van der Walt regarding this reading of contingency, what about those cases in which a group refuses to understand itself as a disaffected minority in conflict with a majority, hence as part of a unity, even if only the unity of a legal order? At issue is a group that demands *exclusion* from a polity rather than demanding its recognition and inclusion as a minority entitled to be treated as equal to, even if different from, the majority. In such cases, not merely *what* 'we' are as a collective but rather *that* 'we' are a collective is contested. It is this more radical modality of contingency I want to probe when assessing Van der Walt's defence of liberal democratic law.

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2 Self-preservation

Van der Walt's essay and book reject what he takes to be the metaphysical reading of law as 'an existential expression of the "life" of a people.' He adds that '[m]etaphysical conceptions of law [...] have always [...] presented or represented life as essentially whole and united.' He views law as 'the reflection of the dividedness of life,' refusing 'to understand law as an expression of social unity, but [rather as] the exact opposite of such unity' (RHL, 18). The acceptance of this condition of irreducible plurality, a plurality that endures and is to be endured, determines what Van der Walt calls the precariousness of liberal democratic law. But in what sense are this irreducible condition and its acceptance the manifestation of modern reason? How to understand modern reason as giving voice and responding to a condition of existential precariousness?

At issue here is the problem of radical contingency, masterfully described by Hans Blumenberg. Against the secularisation theorem proposed by Karl Löwith and Carl Schmitt, which assumes that key modern concepts are theological concepts in a new guise, Blumenberg views the modern concept of reason as the reoccupation of an answer position to a problem modernity inherited from the crisis of Scholastic philosophy at the end of the Middle Ages: contingency. In its radical, late Scholastic formulation, '[c]ontingency expresses the ontic constitution of a world created from nothing and destined to disappearance, a world conserved in being only through the divine will, [a world] which is measured against the idea of an unconditioned and necessary being.'[1] In the face of the extreme pressure to which contingency submits Western humankind's interpretation of itself and its relation to the world, the theological solution of transitive conservation of the world in being by a fickle and unreliable God is no longer either plausible or acceptable. Modern reason has to be understood, according to the framework provided by the reoccupation theorem, as a 'breaking out' from the challenge of theological absolutism: not transitive but intransitive conservation – *self*-preservation – is the modern concept of reason. In a footnote adjoined to the closing pages of the essay 'What is Orienting Oneself in Thinking?,' Kant indicates that Enlightenment is the maxim of always thinking for oneself. For, he adds, those who serve themselves of their own reason do nothing other than avail themselves of the 'maxim of the

1 Hans Blumenberg, 'Kontingenz,' in *Die Religion in Geschichte und Gegenwart: Handwörterbuch für Theologie und Religionswissenschaft*, vol. III, ed. Hans D. Betz et al. (Tübingen: J.C.B. Mohr, 1959 [1794]). See also Hans Blumenberg, *The Legitimacy of the Modern Age*, transl. Robert M. Wallace (Cambridge, MA: The MIT Press, 1986); Hans Blumenberg, 'Ordnungsschwund und Selbstbehauptung. Über Weltverstehen und Weltverhalten im Werden der technische Epoche,' in *Das Problem der Ordnung. Verhandlungen des VI deutschen Kongresses für Philosophie*, ed. H. Kuhn and F. Wiedmann (Meisenheim: Verlag Anton Hain, 1962); Hans Blumenberg, 'Self-Preservation and Inertia: On the Constitution of Modern Rationality,' in *Contemporary German Philosophy*, vol. 3, ed. D.E. Christensen et al. (University Park, PA: The Pennsylvania State University Press, 1983). See also Dieter Henrich's excellent essay, 'Die Grundstruktur der modernen Philosophie,' in Dieter Henrich, *Selbstverhältnisse. Gedanken und Auslegungen zu den Grundlagen der klassischen deutschen Philosophie* (Stuttgart: Philipp Reclam jun., 1982), 81-108.

self-preservation of reason.'[2] Enlightenment: the self-preservation of reason, or more properly, reason *as* self-preservation. For Western modernity, ordering becomes a *self*-ordering and *self*-grounding; democracy becomes the collective self-rule of human groups, or even, in universalising interpretations of democracy, of humanity as a whole.

A new criterion of social ordering becomes imperative when its transcendent grounding loses plausibility. Reciprocity is the answer: social order is generated immanently, through interaction between participants in that order. It fell to Hobbes, in an epochal but not oft-noticed footnote of *De Cive*, to offer the first conceptualisation of reciprocity as the political modality of self-preservation: 'the whole breach of the laws of nature consists in the false reasoning, or rather folly of those men, who see not those duties they are necessarily to perform towards others in order to their own conservation.'[3] The passage from transitive to intransitive preservation continues to reverberate, three centuries later, in Rawls' appeal to reciprocity as the key to the self-grounding of a polity:

> [T]he question of reciprocity arises when free persons, who have no moral authority over one another and who are engaging in or find themselves participating in a joint activity, are among themselves settling upon or acknowledging the rules which define it and which determine their respective shares in its benefits and burdens.[4]

So, too, reciprocity is at the root of the democratic identity principle as formulated by Habermas: '[T]he idea of self-legislation by citizens demands […] that those who are subject to the law as its addressees can also understand themselves as the authors of the law.'[5] In Habermas' discursive reading of self-preservation, a practical discourse demands that 'everyone […] take the perspective of everyone else, and thus project herself into the understandings of self and world of all others.'[6]

Certainly, there are significant differences between Rawls and Habermas. So, for example, whereas Rawls' development of the concept of reciprocity is particularistic, favouring a closed political collective as a prior condition for reciprocity, Habermas' discursive reading of practical reason explicitly understands itself as universal. But beyond their differences, both philosophers articulate a concept of liberal democratic lawmaking in which collective self-rule entails that individuals recognise one another as free and equal citizens. A collective that meets this condition is well and truly one, identical to itself. Collective unity obtained through reciprocal recognition is the criterion of necessary existence; it overcomes

2 Immanuel Kant, 'Was heißt: Sich im Denken Orientieren?,' in Immanuel Kant, *Werke*, vol. 5 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983), 329.
3 Thomas Hobbes, *Man and Citizen* (Indianapolis, IN: Hackett Publishing Company, 1991), 123.
4 John Rawls, 'Justice as Reciprocity,' in John Rawls, *Collected Papers* (Cambridge, MA: Harvard University Press, 1999), 208.
5 Jürgen Habermas, *Faktizität und Geltung* (Frankfurt: Suhrkamp, 1992), 153.
6 Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls' "Political Liberalism",' *Journal of Philosophy* 92 (1995): 117.

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contingency because the collective has cast aside any external – transitive – ground required to secure its existence. In its own way, the principle of self-preservation carries forward and drastically sharpens the Medieval theory of the transcendentals: *quodlibet ens est unum, verum et bonum*. For, confronted with the Scholastic challenge of radical contingency, the modern principle of self-preservation calls forth an equally radical response: only a collective the participants of which can view legal rights and obligations as expressing their reciprocal recognition qua free and equal beings is fully one, just, and good. If Löwith's secularisation theorem views the modern concept of history as eschatological because an event irrupts into the world, announcing the end of time, and if Schmitt's politics of the *katechon* seeks to hold the *eschaton* in abeyance, Blumenberg's reoccupation theorem inverts these accounts, such that the meaning of history, for modernity, plays out as an immanent process of possible unification, the endpoint of which is autonomy.[7] If collective self-rule gives meaning to history as the *telos* towards which humanity progresses, or from which it deviates, its realisation would mark the end of historical time: as the expression of necessary existence, an autonomous collective would cease to be contingent, hence no longer vulnerable to either change or disappearance, having become a self-grounding, hence self-sustaining, existence. Having extricated itself from the vicissitudes of history, autonomy, once achieved, is timeless.

This, returning to Van der Walt, is the 'Enlightenment ideal of reason.' It is precarious for Rawls, Habermas, and other modern thinkers because overcoming contingency in history and overcoming history as the domain of contingent existence haunted by the *nihil*, bespeaks a *possible*, but not inevitable, process of collective unification.

3 The majority-minority principle

That the concept of liberal democratic law holds fast to this Enlightenment ideal of reason means, according to Van der Walt, that it embraces collective self-rule as the politico-legal modality of the modern principle of self-preservation. As we have seen, this principle amounts to the imperative of unification, an ever greater inclusiveness. Habermas, in particular, argues that, as a desideratum, practical reason is 'the injunction to complete inclusion.'[8] Yet it is precisely with regard to this injunction that Van der Walt secerns a properly liberal democratic concept of law. To repeat his thesis, law is 'the reflection of the dividedness of life […] the exact opposite of [social] unity' (RHL, 18).

Here, Van der Walt follows Kelsen, who, he argues, offers 'the most rigorous theory of liberal democratic law articulated to date' (*CLDL*, 203). The crux of the matter is

7 Karl Löwith, *Meaning in History* (Chicago: University of Chicago Press, 1957); Carl Schmitt, *Nomos der Erde* (Berlin: Duncker & Humblot, 1950).

8 Jürgen Habermas, *The Postnational Constellation*, trans. Max Pensky (Cambridge: Polity Press, 2001), 148.

the concept of the people. While acknowledging that 'the unity of the people [is] an ethico-political postulate,' Kelsen is quick to note that, sociologically speaking, the people is split into groups that oppose each other on national, religious, and economic grounds; a people is only a unity in a normative sense, namely, as the unity of a legal order.[9] If, according to its idea, democracy means that the people are self-ruling insofar as they are not only the object of rule but also its *subject*, the reality of democratic rule is that it is always only as the object of rule – in the form of a posited legal order – that the people can appear as a unity. This insight underpins Kelsen's sagacious defence of the democratic majority principle. Like Carl Schmitt, Kelsen argues that it is impossible to justify the majority principle merely on the ground that more votes carry the day because they weigh more than less votes; this would amount to acknowledging that the majority is stronger than the minority, hence collapsing right into might. But whereas Schmitt seeks to avoid this collapse by postulating a substantive unity of the people as the basis of the democratic majority principle, Kelsen justifies the majority principle by appealing to the concept of freedom: 'Only the thought that as many human beings as possible – even if not all – are free, i.e. that as few people as possible should find their will in conflict with the general will of the social order, leads rationally to the majority principle.'[10] This justification also explains why the simple majority principle is the closest approximation to the idea of collective self-rule; indeed, a qualified majority principle allows a minority to block the majority view, as a result of which the minority, not the majority, is free.

While in some ways this defence of the minority principle is close to Habermas,' it diverges decisively from the latter. Kelsen is uncompromising in his *agonistic* account of democracy. Even though, as Kelsen puts it, 'the unity of the people is the ethico-political postulate of the solidarity of interests,' he views political plurality as irreducible. For Habermas, by contrast, 'solidarity with the other *as one of us* refers to the flexible "we" of a community that resists all substantial determinations and extends its permeable boundaries ever further.'[11] Notice that the idea of ever-expanding boundaries, hence of an ever greater inclusiveness, is informed by the Hegelian dialectic, whereby the experience of a limit is to already have moved beyond it.[12]

This divergence is none other than the difference between two approaches to the problem of contingency. Habermas, for the one, appeals to the ideal speech situation as the necessary presupposition that must be entertained by parties in conflict who seek to sort out their differences and who aim to generate rules that allow them to view each other as free and equal citizens. To repeat an earlier quote:

9 Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Aalen: Scientia Verag, 1981 [1929]), 15.

10 Kelsen, *Vom Wesen und Wert der Demokratie*, 9-10. Carl Schmitt, *Legitimität und Legalität* (Berlin: Duncker & Humblot, 1993 [1932]), 28-30.

11 Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, trans. Ciaran Cronin and Pablo de Greiff (Cambridge: Polity Press, 2005), xxxv-xxxvi.

12 '[T]he very fact that something is determined as a limitation implies that the limitation is already transcended.' Georg Friedrich Wilhelm Hegel, *Science of Logic*, trans. John Niemeyer Findlay (London: Allen & Unwin, 1969), 134.

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'[E]veryone is required to take the perspective of everyone else, and thus project herself into the understandings of self and world of all others.'[13] The imperative of practical reason is, therefore, to overcome contingency. And, in a Kantian riff, one cannot be obligated to overcome contingency unless one can do so. Complete inclusion is possible, even if not ineluctable. Kelsen, for the other, rejects this 'transcendental' move: the majority principle aims to foster a *compromise* between the parties in conflict, a compromise that falls short of the 'complete inclusion' of interests demanded by reciprocal recognition. For Kelsen, what renders the majority principle democratic is not that it seeks to overcome contingency but rather that it renders contingency bearable, endurable. *Peace*, not justice qua complete inclusion, is the injunction governing democracy in light of the irreducibly fractious nature of politics.[14]

It is to this second, agonistic reading of modern reason that Van der Walt appeals, when advocating a more 'precarious' understanding of the modern ideal of reason than that championed by Habermas or Rawls. 'A clash between irreducibly incongruent constellations of social facticity [renders] the idea of a common validation process guided by the language we speak fundamentally implausible' (RHL, 44). This insight guides his analysis of the anti-democratic coup attempt of 6 January 2021, in which a minority group of the American Republic sought to prevent the congressional certification of the results of the presidential elections of 2020. Van der Walt does not censor the coup attempt for falling short of the ideal speech situation; he rues that it betrays the democratic ethos undergirding what he refers to as the majority-minority principle: the attempted coup fails to acknowledge a plurality that endures and is to be endured.

4 The anarchist

Van der Walt's is a perceptive and courageous defence of liberal democratic law, one which indeed takes him beyond the theories of democratic law available to either Habermas or Rawls. Against both theorists, Van der Walt argues for a 'diffuse "we" that one may call a liberal democratic constituent power.' It is not a power that seeks to posit or bring about a 'singular collective subject,' but rather 'the diffuse power that sustains the minimum communality required for civilized social operation' (RHL, 45). It speaks to a form of magnanimity by the minority in the face of irresolvable disagreement and division, and which manifests itself in 'the elementary acceptance of an adverse vote count' (RHL, 45). It is in such acceptance that contingency endures and is endured.

But does this endorsement of liberal democratic law go far enough in accounting for the radical challenge of contingency? To put it another way: is Van der Walt's

13 Habermas, 'Reconciliation through the Public Use of Reason,' 117.

14 Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley CA: University of California Press, 1957), 1-24.

defence of political plurality sufficiently pluralising? Does he not, in the end, espouse an agonistic defence of political and legal *unity*?

This question arises not despite but because of the majority-minority principle. Certainly, as Van der Walt avers, democracy is marked by variable constellations of irreducible conflict between groups. To this extent, democratic politics is irreducibly plural. But it remains a *plurality within unity*: the unity of a legal order, absent which it makes no sense to speak of a majority and a minority. Here, Kelsen, Rawls, Habermas, and Van der Walt stand shoulder to shoulder: a closure into a unity, even if no more than the unity of a legal order, has already taken place in the past, such that what is at stake in democratic politics is, as Kelsen puts it, the process of giving shape, of transforming, this order. Without a prior closure, there is neither a majority nor a minority. In this minimal sense at least, the majority-minority principle is premised on a form of reciprocal recognition: it governs democratic decision-making between individuals who view each other as equal members of a legal order to which they each profess allegiance, even if they are at loggerheads about what joins them together as a collective. Thus, a majority decision, when accepted by the minority, is the *affirmation* of unity, not, as Van der Walt holds, 'the exact opposite of unity.' It means that 'we' remain committed to act as one, despite our differences. Van der Walt acknowledges as much *ex negativo*, when observing that '[t]he 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' (RHL, 38). In brief, Van der Walt's concept of liberal democratic law lauds the unity articulated by the principle of self-preservation, a unity that is ultimately political and not merely legal: *e pluribus unum*.

This finding calls forth a yet more fundamental query about the majority-minority principle: what about the closure that gives rise to a collective if, by definition, it cannot be the outcome of a majority decision?

This is, of course, the conundrum of constituent power, albeit one quite different to that evinced by Van der Walt. I want to argue that Van der Walt's interpretation of constituent power operates a certain – *liberal* – neutralisation of radical contingency, and to this extent of the politics of constituent power. For contingency is not only the question about *what* 'we' are as a collective, a question the majority-minority principle seeks to address by rendering it possible, at least in principle, for the minority of today to become the majority of tomorrow. It is also always the question about *whether* we are at all a collective, a unity. Here, contingency irrupts into a legal order by way of what I elsewhere call *a-legality*, that is, behaviour by individuals or groups who the legal order includes as a minority but who, through their behaviour, *refuse* to view themselves as a minority. These are individuals or groups for whom achieving inclusion, through the operation of the majority principle, is not the solution to the problem, but the problem itself.[15]

15 See Hans Lindahl, 'A-legality: Postnationalism and the Question of Legal Boundaries,' *Modern Law Review* 73, no. 1 (2010): 30-56.

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Such is the case, amongst others, for colonised peoples. Van der Walt's critique of the insurrection of 6 January 2021 offers a powerful illustration of his defence of the majority-minority principle. But does it hold for, say, 'Native Americans' who refuse to participate in American politics because they view this characterisation as oxymoronic, identifying themselves as sovereign indigenous peoples, not as 'Americans'? Does it hold for the Aboriginal activists who pitched a Tent Embassy on the lawns of Old Parliament House in Canberra back in the 1970s and who, today, demand Aboriginal sovereignty over what settler law calls Australia? Or does the majority-minority principle hold for Mohawk traders accused by the Canadian government of smuggling cigarettes across the US/Canada border, one of whom, when asked in an interview where the cigarettes were sold, responded, in 'Canuga Hogga territory, indigenous to the people of this country – the Americas'?[16] Why should they, or other colonised peoples, be 'magnanimous' and acquiesce to 'an adverse vote count' in the settler community into which they have been forcefully integrated? Would their refusal to participate in decision-making under the majority rule, perhaps even to forcefully resist its application, qualify as 'heroic,' in the sense adverted to by Van der Walt? If they do acquiesce, might not the 'elementary acceptance' of the majority-minority principle be the expression of pragmatic resignation to an overwhelming power imbalance they cannot reverse, rather than an affirmation of the political and legal unity they disavow?

This is the precise point at which Kelsen's thesis about the anarchist returns to haunt the concept of liberal democratic law. *CLDL* mentions anarchy on various occasions, but invariably regarding Schmitt and Villey's discussions about the purported anarchy of the Middle Ages. Van der Walt does not, however, advert to the role of the anarchist in the Pure Theory of Law, despite his endorsement of Kelsen's approach to democratic lawmaking. Anarchy, for Kelsen, is systematically related to the problem for which the basic norm is a response; as my colleague, Bert van Roermund, has pointed out, the notion of the first constitution is an oxymoron.[17] Because a legal norm, to be legal, must be derived from a higher-order legal norm, there can be no first constitution. If, on the one hand, a norm is to be the first *constitution*, it must be derived from an earlier constitution, hence cannot be first; if, on the other, a norm is to be the *first* constitution, then it cannot be a constitution, being no more than a subjective act of will. Qua presupposed norm, the *Grundnorm* dissolves the oxymoron from a *juristic* point of view,[18] while also

16 Gary Foley, Andrew Schaap, and Edwina Howell (eds.), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Abingdon: Routledge, 2014); Audra Simpson, 'Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent,' *Law and Contemporary Problems* 71 (2008): 191-216.

17 See Bert van Roermund, 'Kelsen under the Low Skies. Recognition Theory Revisited and Revised,' in *Hans Kelsen anderswo / Hans Kelsen Abroad. Der Einfluss der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, Teil III*, ed. Robert Walter, Clemens Jabloner and Klaus Zeleny (Vienna: Manz Verlag, 2010), 259-279, 27ff; Bert van Roermund, 'Norm-Claims, Validity and Self-Reference,' in *Kelsen Revisited. New Essays on the Pure Theory of Law*, eds. Luis Duarte d'Almeida, John Gardner and Leslie Green (Oxford: Hart Publishing, 2013), 11-42.

18 See Joseph Raz, 'Kelsen's Theory of the Basic Norm,' *The American Journal of Jurisprudence*, 19 (1974) 1: 94-111.

highlighting that no legal order can ground itself. Kelsen asks: 'Who presupposes the basic norm?' His answer: 'Whoever interprets the subjective meaning of a constituent act and all acts posited in accordance with the constitution as their objective meaning, i.e. as [an] objectively valid norm.'[19] Whoever presupposes the basic norm views a set of norms as a legal order, as an objectively valid coercive order, rather than as an order of violence; right, not might. But, as Kelsen insists time and again, it is, but not necessary, to presuppose the basic norm. Along these lines, he notes that insofar as the *Grundnorm* speaks to a theoretical stance, even an anarchist, as a jurist, may be prepared to presuppose it to describe positive law as a system of objectively valid norms. But he also avers that when taking up a practical, political, stance, the anarchist is whom refuses to presuppose the basic norm. For political anarchists, the first constitution is and remains an oxymoron, and is, as such, an act of violent conquest that continues to hold sway in all further acts of norm-setting, *including those norms enacted on the basis of the majority principle*. The Aboriginal activists and the Mohawk traders in cigarettes are, in Kelsen's terms, political anarchists. It is the majority principle itself as the expression of unity, both political and legal, not one or other instance of its adverse application, which they oppose. They evoke another – a *strange* – order that refuses integration into a given order and its majority principle.[20]

These considerations suggest that there is a stronger sense of political plurality than contemplated in Van der Walt's treatment of the concept of liberal democratic law, a stronger sense of social division and conflict than what can be accommodated by the majority-minority principle. To be sure, Van der Walt notes at the outset of *CLDL* that even though liberal democratic theories are usually uncomfortable with endorsing revolution, 'it is at least sometimes possible to consider revolutionary transformations of legal systems as re-enactments of essential principles of law that have 'fallen into decay according to the revolutionaries' (*CLDL*, 2). But what would be those principles? Ultimately, he argues, and here he draws on Rawls, either 'law reform or revolutionary refoundations of law that violate Rawls' principle of reciprocity would surely no longer be reconcilable with the idea of liberal democratic law' (*CLDL*, 3).

What I take to be the political import of Kelsen's insight about the oxymoronic status of the first constitution is that reciprocity gets kick-started with non-reciprocal acts that are never fully redeemable. The non-reciprocal origin of legal reciprocity returns from ahead in the form of normative claims which refuse integration into the circle of reciprocity available to that legal collective, yet which the latter cannot discard as unreasonable other than by falling prey to a *petitio principii*. Acts of recognition of the Other (in ourselves) that institute relations of reciprocity are also always exposed to being acts of domination *because* they bring about and enforce relations of reciprocity. The contingency of legal orders means

19 Hans Kelsen, *Reine Rechtslehre* (Österreichische Staatsdruckerei 1993 [1960]), 208-209.

20 I draw here on the radical notion of strangeness put forth by Husserl: 'accessibility in its genuine inaccessibility, in the mode of incomprehensibility.' See Edmund Husserl, *Zur Phänomenologie der Intersubjektivität*, ed. Iso Kern (The Hague: Martinus Nijhoff, 1973), 631.

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that they are finitely questionable and finitely responsive, hence that legal orders have *fault lines* and not only transformable *limits*, demanding a range of responses to radical plurality that *suspend* the majority-minority principle.[21] Not only collective self-preservation, but also the preservation of *the strange as strange*; this, perhaps, is what enduring contingency is about as a democratic ethos. If so, what I have elsewhere characterised as restrained collective self-assertion belongs to a *modern* interpretation of democratic law, but not to the concept of *liberal* democratic law.[22]

21 See, amongst others, Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity,' in *Europe's Constitutional Mosaic*, ed. Neil Walker, Stephen Tierney and Jo Shaw (Oxford: Hart Publishing, 2011), 205-230. More generally, see Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013) and Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018).

22 For a powerful, phenomenologically inspired, contribution to democratic theory that insists on a 'second' reading of *modern* reason as dealing with, rather than overcoming, contingency, see Ferdinando Menga, 'Political Conflicts and the Transformation of Legal Orders. Phenomenological Insights on Democratic Contingency and Transgression,' *Italian Law Journal* 5 (2019) 2: 551-566, and 'Conflicts on the Threshold of Democratic Orders: A Critical Encounter with Mouffe's Theory of Agonistic Politics,' *Jurisprudence. An International Journal of Legal and Political Thought*, 8, no. 3 (2017): 532-556. Although Menga emphasises, with Lefort, that this second reading of democratic lawmaking is modern, Menga does not, in contrast to Van der Walt, interpret it as a modality of liberalism.