

FURTHER THOUGHTS ON A-LEGALITY, EXEMPLARITY AND CONSTITUENT POWER: RESPONDING TO HANS LINDAHL

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ABSTRACT

The paper is a response to H.Lindahl's extensive reply to Ferrara's critical remarks. This reply was published as part of a larger symposium (in *Etica & Politica/Ethics & Politics* XXI, 2019, 3) on Lindahl's recently published *Authority and the Globalisation of Inclusion and Exclusion*. In an effort to push the dialogue further, new reflections and counterarguments are here put forward in relation to four thematic areas: a) the notion of a-legality, revisited in light of a distinction between foreground and background assumptions of a practice; b) exemplarity, positive and negative, in law, c) the paradox of constituent power, and d) the relation of Lindahl's notion of "collective self-restraint" to the later Rawls's paradigm of "political liberalism".

KEYWORDS

A-legality, Exemplarity, Constituent power, Political Liberalism, Rawls.

1. INTRODUCTION

As a commentator to the recent work of an author, I could not expect a reply to be more generous and perspicuous than the comprehensive article written by Hans Lindahl for the journal *Etica & Politica/Ethics & Politics*.¹ Lindahl has done much more than just reply: he has gone out of his way to reconstruct the background of the objections in the commentators' previous publications, in order to make better sense of them and to reply in the most constructive way. From reading his text, I've

¹ H.Lindahl, "A-Legality, Representation, Constituent Power. Reply to Critics", *Etica & Politica / Ethics & Politics*, XXI, 2019, 3, pp. 417-501. Page numbers of quotations from this text are hereafter noted in the main text within brackets.

learned a lot about the unclarity and unsolved tensions within my own work. The notes collected in this rejoinder are an attempt to respond to some of his points and to push the dialogue a bit further, in the common interest of advancing philosophical inquiry. I will divide up this rejoinder in four brief sections, sequentially focused on a) defining a-legality, b) exemplarity in law, c) the paradox of constituent power, and d) the relation of Lindahl's notion of "collective self-restraint" to the later Rawls's paradigm of "political liberalism", as I have tried to expand it in *The Democratic Horizon*.²

2. ON A-LEGALITY, AGAIN

My main question, concerning Lindahl's notion of "a-legality", concerned his conflating two kinds of conduct under this concept, that in my opinion are best kept distinct and were described by me as a) "the idiosyncratic violation of the background assumptions on which law, like any other practice in a given society, rests" (377) and b) "the intentional violation of legal provisions perceived as inconsistent with higher norms or worth reconsidering" (377-378). As an example of the former, I quoted Lindahl's example of a clochard's irrupting into a restaurant, demanding a free meal and inviting the waiter to share it with him. As an example of the latter, I mentioned Homer Plessy's and Rosa Park's intentional violation of segregation laws in 1892 and 1955. I argued that in the first case we observe the violation not so much of legal provisions or any strictly legal notion, but the violation of life-world assumptions that undergird *all* social practices, not just specifically legal ones.

Lindahl, in his reply, lists 6 reasons that should corroborate the legal significance of the first case of a-legal conduct on 6 reasons, but some of these reasons remain dubious to my eyes. *First*, Lindahl claims that the clochard incident would indicate "that legal rules are only half of the story of how the law orders; the other half is the pragmatic order to which those legal rules are correlative" (419), but that observation holds for *any* set of rules, legal or non-legal, that delimit a practice or a game. One needs only to recall Wittgenstein's thesis that determining whether a rule has been followed cannot be disjoined from full membership in the lifeform wherein the practice defined by rule is immersed.³ Thus the need to take a larger pragmatic order into consideration, being applicable to the understanding of *any* set of rules, does not do the job of corroborating the specific *legal* relevance of the clochard incident. That incident might just consist of the unsettling of social conventions of no legal significance.

² See A.Ferrara, *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism* (New York: Cambridge University Press, 2014).

³ L.Wittgenstein, *Philosophical Investigation* (Oxford: Blackwell, 2003), § 217.

Lindahl's *second* point is that the clochard incident shows that the "own/strange" opposition, which undergirds a-legality, cannot be reduced to the "domestic/foreign" opposition: that makes certainly sense, but again does not contribute to establish the *legal* significance of the clochard incident. In his *third* and *fourth* points, Lindahl contends that "modest and discreet", "micro-political" events like the clochard episode constitute the basis for larger institutional change in due course, and theory has no way of predicting the ordinary or constitutional significance of any a-legal act, a significance which can only be discerned *ex post factum*. While one can certainly agree with the fourth claim – which, however, once again contributes little to lending *legal* significance to the clochard incident – the third is, in my opinion, more dubious.

Constitutional amendments of historical import, and especially groundbreaking judicial pronouncements, are rarely the culmination of micro-political practices, which instead often continue to follow conservative patterns in the larger society. There were no "micro-political practices of integration" in the South of the United States prior to *Brown v. Board of Education*, which in a way forced de-segregation onto a recalcitrant racist civil society. And it took 33 years for the right to interracial marriage, established by *Loving v. Virginia* in 1967, to be recognized as binding by the State of Alabama in 2000! Thus there is little support for the claim that constitutional progress proceeds "bottom-up" from accretion of micro-practices on the ground, so to speak, and not the other way around, as a result of institutional processes of constitutional adjudication or amendment.

Lindahl's *fifth* point somehow reiterates the first one from an Arendtian angle: "the incident intimates that there can be no collective action absent a world in which we are always already situated, and which is itself called into question, in one way or another, in the face of a-legal acts" (421). The restaurant table usually partitions the space between waiters and customers in a way that results totally upset by the clochard's gesture. The world subjected to that upsetting move, however, is only one subsection of one social practice, "eating at a restaurant", and it is hard to see how such upsetting corroborates the *legal*/relevance of the incident over and beyond what already said in response to the first and the third points.

Lindahl's *sixth* and final point, instead, hits the mark: indeed, there cannot be a priori criteria that help us sort out idiosyncratic conduct bearing no political significance (the clochard's conduct at the restaurant) and intrinsically "political" conduct (Plessy's and Park's infringement of segregation laws). In my formulation, repeated above, the adjective "idiosyncratic", as a qualification of the clochard's conduct in the restaurant, should be eliminated. It's a slip into a commonsense (and ungrounded) judgment about the likely social and political significance of the act for the Dutch legal order as a whole. The fact that *ex post* nothing has really changed, as Lindahl points out, cannot be predicted in advance, as my sentence misleadingly suggests.

Having said this, however, I believe my main point remains standing. Even if the “legally or politically significant” or “idiosyncratic” quality of an a-legal episode cannot be empirically detected in advance, and even if one questions the exact nature of Plessy’s and Park’s conduct, there is a conceptual difference, blurred by the notion of a-legality, between on one hand rule-violations that still leave intact, and operate within, the web of shared assumptions summed up by the terms background (Searle), life-world (Husserl, Schutz) or lifeform (Wittgenstein) and, on the other hand, rule-violations that tear that web apart. One thing is a foul *within* the practice of football – say, intentionally touching the ball with your hands, or tripping an attacking player about to score a goal – and completely another thing is an action that subverts the entire frame of meaning within which the practice takes place: say, tearing down the goal in one’s own field, so that it becomes impossible for the other team to score at all. In the realm of politics, Frost famously observed that nation-states, even the most expansionist ones operating in a Westphalian world, always shroud their aggressive acts legitimacy-claims ultimately grounded in a (however biased) view of justice, and when confronted with the accusation of having acted unjustly they offer (however weak) justifications but never rebut the accusation as being *pointless*: all of this for the purpose of appearing as legitimate players in the arena of Westphalian world politics.⁴

This distinction between a) violating a rule within a practice and b) upsetting the conditions of possibility of a practice, however, dovetails with Lindahl’s own IACA-model of law, as he acknowledges when he elucidates the “Umwelt” or a circumambient (422)⁵ as a narrative that represents how the legally regulated action of a collective fits a world of meanings, what it is about. Such a narrative must be presupposed and yet “can never be rendered fully transparent to participants in collective action in the mode of a knowing-that” (422). If so, then my question is: shouldn’t we distinguish between violations of practices intelligible as violations of *foreground assumptions* in the lifeworld (e.g., a promise that remains unfulfilled, a secret that gets divulged, a private space that gets intruded, a prohibition that is ignored, as in the case of Plessy and Park) and violations that reach much deeper insofar as they undermine the *background*, the “Umwelt” or circumambient that enables us to make sense of the practices? Doesn’t the notion of a-legality risk conflating the background and the foreground, as though in science we failed to distinguish the validity of single theoretical hypotheses, susceptible of being falsified by experiments, and the overall promise or *sui generis* validity of a paradigm, which cannot be falsified by a single crucial experiment, but is best assessed in terms of judgment on the “future promise” of the paradigm itself? Granted that one may not be able

⁴ M.Frost, *Ethics in international relations. A constitutive theory* (Cambridge: Cambridge University Press, 1996), 46.

⁵ See also H.Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 52-53.

to state in advance what is “idiosyncratic” and what instead is “sensible” antagonism, as Lindahl correctly points out, it is a long shot to claim that we need to give up the distinction between *presently foregrounded practices* and *implicit background assumptions*, along with the distinction between forms of conduct that challenge either of these kinds of normativity.

3. EXEMPLARITY, CIVIL DISOBEDIENCE AND THE LAW

The relation of a-legality to civil disobedience and exemplarity, discussed in Sections 1.2 and 1.3 of Lindahl’s reply, offers me the occasion for further clarificatory remarks. Let me begin with a word on *exemplarity*. Nothing could be further removed from exemplarity than exemplification: a “Beispiel”, an example, is the opposite of an exemplar.⁶ In that sense, I’m not sure that the exemplary is a modality of what Heidegger calls a “sign,” a *Zeichen*: the turn signal of a car leaves nothing to the imagination and to interpretation, is a dead sign like the proverbial metaphor of the leg of the table. It merely stands for the driver’s intention to turn left or right. The exemplar, instead, opens up a new vista on the world, by being “a law unto itself”. In Heidegger’s terminology, it “erschließt” or *discloses* a *world*, not merely the intention of a car driver.

A legal example of the working of exemplarity in law is provided by *privacy*. As a legal concept it was born in 1890, in a famous *Harvard Law Review* article⁷ in which Samuel D. Warren and future justice Louis Brandeis grappled with conceptualizing what was then still an instance of a-legality – a not yet sanctioned intrusion of invasive flash-blinking local reporters who wanted take pictures of the wedding a Boston prominent person’s daughter and disrupted the atmosphere of a private event. The creation of the new exemplary concept of privacy was spurred by the conceptual shortcomings of the available legal concepts for making sense of the facts of the matter. As W.L.Prosser eloquently sums up,

Piecing together old decisions in which relief had been afforded on the basis of defamation, or the invasion of some property right, or a breach of confidence or an implied contract, the article concluded that such cases were in reality based upon a broader principle which was entitled to separate recognition. This principle they [Warren and Brandeis] called the right to privacy; and they contended that the growing abuses of the press made a remedy against such a distinct ground essential to the

⁶ For a more extended discussion of this point, see A.Ferrara, “Exemplarity in the Public Realm”, *Law & Literature*, 2018, 30, 3, 387-399.

⁷ S.D.Warren and L.D.Brandeis, “The Right to Privacy” (1890), in F.D.Schoeman (ed.), *Philosophical Dimensions of Privacy* (Cambridge: Cambridge University Press, 1984), 75-103.

protection of private individuals against the outrageous and unjustifiable infliction of mental distress.⁸

Initially contested as a legal concept lacking a clear reference if compared to libel, defamation and other established notions, which however failed to grasp the disturbing side of this new of invasive a-legality, subsequently “privacy” grew to become one of the most important conceptual legal innovations of the 20th century. Yet, “privacy” was not a *Zeichen*, a sign pointing to something already identified, but a legal exemplar that – like an artwork – opened up a new vista on how the law *might* relate to the sphere of the private, self-constituting circumstances of the person. Then by the 1930’s privacy was accepted as a major legal category in most State legislations and State jurisprudence in the United States and later became, in the 1970’s, the focal point of fundamental opinions of the Supreme Court, in *Roe v. Wade*. Thus while I agree that Plessy’s and Park’s acts were exemplary insofar as they opened up a new understanding relations among white and African-American citizens in the context of Southern society, and *Roe v. Wade* disclosed the potential of privacy for safeguarding constitutional rights, I believe that these exemplars were able to play such role because they embedded richer symbolic resources than indicative signs.

I found interesting Lindahl’s point that the exemplar, as Arendt’s example of the table, both unites and separates those with whom it comes in contact. The two exemplars mentioned above, civil disobedience that challenged segregation and a Supreme Court opinion that grounded abortion rights on privacy rights, function in a similar way: for some citizens they display the force of exemplarity, of things being *as they should be*. For the segregationist constituencies of the South and the followers of the Moral Majority or the Religious Right, instead, the same two exemplars convey the “force of what is *as it should not be*” (425), “exemplary violence” in Lindahl’s words.

Lindahl draws then the conclusion that the exemplar is intrinsically *ambiguous*. It “can call forth self-incongruency, even radical self-incongruency (meaning by that irreconcilable visions of collective identity), because it enables self-congruency”. Furthermore, the exemplar “signals a circumambient world; the counter-exemplary, as rendered manifest in a-legality, signals the limits and, to a lesser or greater extent, the fault lines of collective action and its circumambient world” (425). Two comments are in order here, from the angle of my theory of exemplary normativity.

First, positive and negative exemplarity are *not* symmetrical. Negative exemplarity – things that repel us as reflections of “us at our worst” – only displays the characteristics of exemplarity (among other things moving the imagination, eliciting a sense that our whole life is affected) when it stems from *radical*, as opposed to

⁸ W.L.Prosser, “Privacy [A Legal Analysis]”, in F.D.Schoeman (ed.), *Philosophical Dimensions of Privacy*, cit., 105.

ordinary, evil – evil on the scale of the Holocaust. All existing legal orders and societies fall short of matching their constitutional ideals, and we should be parsimonious in attributing negative exemplarity to these shortcomings. They are like anomalies in a paradigm or ordinary mistakes in an argument: they fail to unleash inspiration, in this case negative inspiration.

Second, the standpoint from which exemplarity is to be assessed, in matters constitutional and especially when rights are concerned, is the standpoint of a constructed, but not fictional, political subject – the *demos* as the author of the constitution. Just as it would make little sense to imagine that the conflicting opinions that inhabit the democratic public sphere give rise to a plurality of insulated public spheres (rather, this risk materializes in polarized societies where populist forces challenge constitutional democracy), so the exemplarity of provisions and judicial pronouncements, though obviously contestable, must be assessed from *one* point of view. Should *that* point of view – i.e., the point of view of the “political values” inscribed in the constitution and equi-compatible with a plurality of comprehensive conceptions affirmed in society – give way to a polarity of mutually de-legitimizing value stances, the agency of the “author of the constitution” would be undermined.

Therefore, for the purpose of assessing the legitimacy and exemplarity of political action, legal and “a-legal in the guise of civil disobedience”, I see no alternative to assuming, as an evaluative benchmark, the furthering of the project of a democratic order of free and equal citizens who do not oppress each other. Lindahl objects that the Sioux and possibly other indigenous constituencies, who identify with the 2007 Lakota Sioux Indian Declaration of Sovereign Nation Status, might perceive inclusion in a political community, which they do not wish to be part of, as oppressive, even if such inclusion is conceived in equal terms with the rest of the mainstream citizenry. In his opinion, while exemplary civil disobedience of the kind exercised by Plessy and Park amounts to a form of a-legality focused on the *limits* of the legal order, i.e. remediable insofar as it is aimed at gaining recognition of the other as “one of us”, a *more radical* form of a-legality is exercised by the indigenous people who refuse recognition as equal members of a community they reject, and demand instead *not* to be integrated in that community. I find that this more radical a-legality, described by Lindahl as addressing a *fault line*, i.e. as challenging the boundaries of the collective unity and being “unordered and unorderable within the legal order it challenges” (430), poses a kind of political but not philosophical challenge.

From a political-philosophical perspective, the “radical a-legality” of the Sioux’ demand to be no longer included in the democratic polity known as the United States is no different from claiming secession – in fact, a claim based on strong normative arguments, insofar as the indigenous populations involved suffer ongoing impoverishment and the risk of cultural annihilation within the present political context. It is as cogent an argument for secession as one could imagine. The fact

that *politically* it is unrealistic that any US administration will accommodate the demand for creating an autonomous enclave within its territory is a separate question, that does not detract from the clarity of the theoretical issue. To affirm that the indigenous a-legality addresses a fault-line “unordered and unorderable within the legal order it challenges” sounds to my political liberal ears as a rhetorical strategy: redesigning membership in the “American Republic” is a demand “unordered and unorderable” only from the angle of *political realism*. In philosophical terms it is very “orderable”: it is a sound demand for secession and recognition as an independent political community.

4. THE PARADOX OF CONSTITUENT POWER

In the section of his reply that focuses on judgment and constituent power, Lindahl correctly reconstructs my diagnosis of a turn toward the reflective judgment model within the political philosophy of the last third of the 20th century. In the work of some highly representative authors – Rawls, Habermas, Dworkin, Ackerman, Michelman – a transition can be observed from earlier more foundationalist models of normative political philosophy to more hermeneutical models that give pride of place to an understanding of normativity centered around situated reflective judgment. This transition is more clear-cut in the cases of Rawls (from a. the original position, and rational choice under a veil of ignorance, as the normative ground of justice as fairness, to b. the reconceptualization of the normative credentials of justice as fairness as its being “the most reasonable political conception of justice for us”) and Ackerman (from a. the model of the constrained conversation over decontextualized distributive justice, to b. the situated appraisal of constitutional change in one historical context as entailing a better approximation to the republic of free and equal citizens). It is a more nuanced transition in the cases of Habermas, Dworkin and Michelman, but it is still detectable in ways that I cannot detail here.⁹

Lindahl also correctly identifies (and endorses) my questioning of Kant’s dichotomy of determinant and purely reflective judgment. I would fully underwrite Lindahl’s point that “judgment is neither simply determinative nor simply reflective because it always finds itself somewhere between the unattainable extremes of the pure production and the pure reproduction of meanings” (433). I could not agree more wholeheartedly. However, our strategies for narrowing a gap that cannot be entirely bridged remain somehow different. Building on Makkreel’s ground-breaking interpretation of Kant’s *Critique of the Faculty of Judgment*,¹⁰ I see much

⁹ See A.Ferrara, *Justice and Judgment. The Rise and the Prospect of the Judgment Model in Contemporary Political Philosophy* (London: Sage, 1999), 13-149.

¹⁰ See R.Makkreel, *Imagination and Interpretation in Kant. The Hermeneutical Import of Kant’s Critique of Judgment* (Chicago: University of Chicago Press, 1994).

promise in trying to construct an intermediate form of judgment – “oriented reflective judgment”. Typical of this kind of judgment is the fact that the search for “a universal” (of which the object of our judgment is an instantiation) is oriented by *guidelines* that even if unable to bring about full closure or subsumption of an object under a concept, still reduce the total openness of Kant’s pure reflective judgment. The orienting guidelines may of course be different, depending on the domain of our judgment – from the idea of the purposeless purposefulness of nature, to the ideal of equal respect, to dimensions of coherence, vitality, depth and maturity for the flourishing of individual or collective subjects, and many other. Lindahl, instead, chooses to impress somehow a *diachronic* twist to his bridging strategy. He starts from the idea, built into judgment *qua* representation of a particular under the heading of a “universal”, that to represent something always means “to represent something *as* something” (433). Then the “as”, in his bridging strategy, plays a different function: instead of leading to another form of judgment, it leads us to “positing something as something *anew*, such that the ‘anew’ always hovers between ‘again’ and ‘new’. Judgment rejudges” (433).

I see these two strategies as not necessarily opposed to one another. In fact, their point of intersection is located in the very idea of constituent power as a power that gives birth to a legal order new and yet never really built from scratch or without responding, more or less adequately, to something prior. Lindahl emphasizes the “paradoxical temporality” at work here – i.e., “a polity with a distinct cultural identity is the *effect* of a successful retrojective anticipation, not an aborning of our better political self that unfolds who we already are, culturally speaking” (435) – and attributes to me a sort of linearity tinged of essentialism, according to which what previously was only a cultural form of identity coalesces into a legal order and remains the touchstone of the authenticity of that order. The evolution of the institutional and legal order becomes then the realization of a previous potential – in Aristotelian terms, a transition from potentiality to actuality.

I am grateful to Lindahl for having unearthed my formulations of 20 years ago, not sufficiently explicit in ruling out such a reading. I still would stand by the basic idea outlined in *Justice and Judgment*, but would give it a different twist. First, “people” is an ambiguous term in English and other languages. It covers a very broad semantic field, best differentiated by using the two Greek terms *ethnos* and *demos*. Both designate aggregates of individuals. In the case of an *ethnos*, individuals are related on the basis of non-political characteristics – for instance, but not exclusively, the use of a language, patterns of conduct, lifestyles, shared codes of politeness and civility, dietary habits, historical memories, clusters of shared preferences in broad areas of life. Considering only languages spoken by thousands of speakers, about 700 to 800 languages can be counted and to each of them supposedly corresponds *at least one ethnos* – strong and widespread languages such as English, Spanish, Arabic, being obviously spoken by more than one *ethnos*. A *demos* is instead an

ethnos about which it can defensibly be stated, by members or external observers, that at a certain juncture it has taken the form of a body-politic or of a political order, and that thereafter its members have been living within common structures of legal authority, democratic or non-democratic.

Both the conflation of *demos* and *nation* – the ultimate legacy of Jacobinism and the seed of all sorts of nationalism – and also the conflation of *ethnos* and *nation* have to be avoided. It is between 1748, when Montesquieu introduced the term “general spirit of a nation”, and some decades later, when Herder theorized *Volksgeist*, that an *ethnos* came to be attributed a sort of naturally “national” magnitude. In the ancient world, in the Middle Ages and early modernity many *ethnoi* have existed on a more local scale: the so-called *nationes* of Roman antiquity, and city-states as *demoi* premised on a sub-national scale, not to mention the *aboriginal nations* of today’s multiethnic democratic states. Thus a *demos* originates in an *ethnos*: as in an iceberg, it constitutes the politically visible tip of it. Not every *ethnos* gives rise to a *demos*, but all *demoi* are also *ethnoi*, which does not mean that to each structure of authority a *demos* (and also an *ethnos*) corresponds: the EU lacks a unitary *demos*, and even more a unitary *ethnos*, though it regulates the life of half a billion individuals who are citizens of a plurality of *demoi*.

Now, how does an *ethnos* become a *demos*? Exceptionally in the late 18th century, often in the 19th and even more frequently in the 20th century, enacting a written constitution became the paradigmatic political act through which an *ethnos* turns into a *demos*. By no means a necessary condition, as the case of UK attests, a population’s endorsement of a constitution is a sufficient condition for transforming an *ethnos*, or a collection thereof, into a *demos*. An *ethnos* becomes a *demos* – it takes on a *political* identity – through the act of ratifying or accepting a constitution.

However, this picture is still not sharp enough. How should we make sense of this transformation from *ethnos* to *demos*? In 1580 Montaigne, in his autobiographical *Essays*, wrote a groundbreaking and wonderfully concise sentence: “I have made this book to no greater extent than this book has made me”.¹¹ Theories of self-constitution by Korsgaard, Frankfurt and Larmore¹² remind us that even without postulating an internal essence that realizes itself through our actions (knowing which is as impossible as for the eye to see itself), nonetheless we achieve self-unity

¹¹ “Je n’ay pas plus fait mon livre que mon livre m’a fait”, Montaigne, *Essais*, Paris, Garnier-Flammarion, 1969, Livre II, 326.

¹² See Ch.Larmore, *Les pratiques du moi*, (Paris: PUF, 2004); Chr.Korsgaard, *The Sources of Normativity*, (Cambridge: Cambridge University Press, 1996) e *Self-Constitution*, (Oxford: Oxford University Press, 2009); H. Frankfurt, *The Importance of What We Care About. Philosophical Essays* (1988), (Cambridge: Cambridge University Press, 2007). For a discussion of how Rousseau’s implicit theory of the authenticity of the self has something to teach to these theorists, see A.Ferrara, *Rousseau and Critical Theory*, Boston-Leiden, Brill, 2017, 34-45.

through the *commitments* we make and the defining actions that we perform.¹³ To put it with Montaigne, the commitments we undertake, the actions we accomplish, make us no less than we make them.

It is then inaccurate to imagine that an *ethnos* or, in this case, a pre-existing *demos* – for example, the Italian *demos* – used to ground interaction among its members “on labor” and then, after a change of regime, in 1948, decided to found its republican life “on labor”.¹⁴ Rather, regime-change resulted in a democratically elected constitutional assembly which, in turn, produced a new constitutional charter premised, among other principles, on the priority of labor over property. Through Article 1, that priority is then posited as a principle inspiring the common political life of a republican community, a *demos* distinct from others also, among other things, because it affirms such principle. In sum, the political identity of a people-*qua*-*demos*, differently from its identity-*qua*-*ethnos*, emerges not *prior to* but *from* the constitutional principles through which the people decides to regulate its political life. As elsewhere Lindahl has put it, we observe “the constitution *of* a political unity *through* a legal order” not “the constitution of a legal order *by* a political unity”.¹⁵

Between these two moments the maturation unfolds, within an *ethnos*, of what – paraphrasing Arendt on rights – I would call a willingness to “commit to making communal commitments”. But constitutions, here following Montaigne again, through the commitments they embed – for example “to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person”,¹⁶ or to reject war¹⁷ – make a *demos*, no less than a *demos* makes a constitution.

Having said this, let me go back to the allegation that I would presuppose a core cultural identity of the *ethnos*, to be later actualized in the formal constitution of a *demos*. Lindahl’s “retroactivity”-hypothesis is suggestive, but invites the following observation. Montaigne’s dictum – “I have made this book to no greater extent than this book has made me” – evokes a *bi-directional* effect. The retroactive effect of the book on its author does not *eliminate* the authorial moment, it *supplements* it. Similarly, Art. 1 of the Italian Constitution – “Italy is a democratic Republic

¹³ This term is used here as a common denominator standing for what Korsgaard calls “reflexive endorsement”, Larmore calls “engagement” and Frankfurt calls “wholehearted identification”. Significantly, Korsgaard reformulates in terms of individual self-constitution the same paradox highlighted by Rousseau in *The Social Contract*: “How can you constitute yourself, create yourself, unless you are already there?”, *Self-Constitution*, cit., 1.

¹⁴ “Italy is a democratic Republic founded on labour”, Art.1, Italian Constitution 1948.

¹⁵ H.Lindahl, “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Self-hood”, in M.Loughlin e N.Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007), 22.

¹⁶ Article 3, Italian Constitution.

¹⁷ Article 11, Italian Constitution.

founded on labour” – retroactively firms up a national self-perception of cultural, not just legal, significance. However, the article did not come “out of the blue”, so to speak, and is present only in the Italian Constitution. Thus, for all our shared aversion to essentialistic notions of identity, or to culturally authentic ethical substance that only awaits formal expression in a constitution, one has to clarify why just that particular feature – call it a propensity, nourished by the diverse political cultures present in the country, to give priority to labor over property, to achieved over ascribed status, to merit over privilege – was singled out as worthy of informing Article 1 of the Constitution in this particular country and in no other. There is a lot of contingency in this encoding, as shown by the minutes of the Italian Constitutional Assembly, but there is also something else.

Both Lindahl and I are at pains at finding a suitable description for this “something else”, and I won’t venture here into giving it. I’ll be happy with restating my point: it is hard to imagine that this unnamed “something” can be eliminated from the Italian Constitution with the same ease as the number of 20 Regions, the number of 315 Senators, or other similar aspects of the Constitution can be amended through the procedure detailed in Article 138, without thereby arousing a sense of loss or of a significant alteration. It is incumbent on us, who reflect on politics and law, to find proper terms to capture this sense, described by Bernard Williams as the feeling that “some things are in some real sense really you, or express what you are, and others aren’t”.¹⁸ It seems to me that Lindahl somehow recognizes this point, when he feels the need to add the proviso “as far as that goes” to his case for “collective self-restraint” (discussed below) and to specify that restraint should not, in any event, endanger “what we are *really* about as a collective” (439, italics mine). Much of the art of philosophical conversation consists in not letting oneself be misled by terminological and lexical differences under which similar trains of thought can be found.

Constituent power then is the power to single out, from the continuum of a lifeform, those aspects that we – through our representatives and through a constituent process – are willing to declare the focal core of our communal normative commitments for a life self-consciously regulated by law. Our creation will retroact on us and will shape our perception of ourselves henceforth, “making us no less than we have made it”. There is, however, a difference between a general willingness to share commitments together, and *actually making them*. That step from time one, when we are still a willing *ethnos*, to the next moment, when those commitments are made and we become a *demos*, is the work of constituent power. The powerlessness that Lindahl suggests to connect it with, is to me only a no-longer-

¹⁸ S.Jeffries, “Bernard Williams: The Quest for Truth,” *The Guardian*, November 30, 2002, accessed online at <https://www.theguardian.com/books/2002/nov/30/academicexperts.highereducation>, 12/01/2020, p. 4.

existent, or “never existed” willingness to share commitments, that any portion of the *demos*, or those who were forcibly included into the *demos*, may manifest at a later time.

5. COLLECTIVE SELF-RESTRAINT AND POLITICAL LIBERALISM

Finally, let me say a word on the relation of Lindahl’s concept of “collective self-restraint” to the liberal tradition as innovatively renewed by the later Rawls of *Political Liberalism*. The difference between his IACA-model of law and political liberalism is summed by Lindahl in the fact that insofar as political liberalism aspires to realize “collective identity and unity” and to be “able to distinguish between legitimate and arbitrary power” (438), then both in its original Rawlsian and in my own version, expanded to accommodate hyperpluralism, political liberalism falls prey to forgetfulness of the fact that “no legal order can justify how it draws this distinction [between legitimate and arbitrary exercise of power] without ultimately falling prey to a *petition principii*. No collective self-congruency without a blind spot as to what counts as collective self-congruency” (438).

Then Lindahl describes his own version of “collective self-restraint” as consisting in “not applying the law that is applicable in those cases in which including the other *cannot but* assimilate her to one of us” (438).

In his response to Owen, he further clarifies what this means: it means that “the authoritativeness of an authoritative politics of boundaries turns on asserting ourselves as a collective by including the strange (in ourselves) as one of us in a way that also makes room for preserving the strange (in ourselves) as other than us” (467).

The legitimacy of authority, from this perspective, stems for an *asymmetrical*, as opposed to the liberal *reciprocal*, recognition. That makes perfect sense, but still it offers a homologous but only differently described view of authority: to quote Lindahl, authority “properly understood” ought to let the collective self-assertion of which it is the expression be tempered “by the injunction to preserve the strange as strange, hence to preserve the ‘inter’ of intersubjectivity as *beyond our control*”, and ought to acknowledge that the collective has an outside “that eludes the collective’s self-assertion and which *ought* to be preserved as its outside”. Like in Rousseau’s ethics of authenticity the self should not assert mastery over inner nature by repressing the recalcitrant impulses that violate what Kant would later call “the moral law”, but should acknowledge them and first of all understand them as *its own* deviations from the norm that it has self-legislatingly chosen for itself,¹⁹ so collective self-assertion should refrain from ostracizing the strange as strange.

¹⁹ See A. Ferrara, *Modernity and Authenticity. A Study of the Social and Ethical Thought of Jean-Jacques Rousseau* (Albany: State University of New York Press, 1993), 84-85.

To conclude, it seems to me that we're still in the realm of the normative, albeit of a *situated* kind of normativity, fully aware of contingency, and that we have affirmed, not rejected, the normative assumption - scripted at the core of political liberalism - of an irreducible distinction between legitimate authority and arbitrary power.