1. Introduction

Though this book is inspired by Rousseau's politico-legal philosophy, it is driven by contemporary concerns. The latter will be addressed in Part III of the book, while Part I (Chapters 2 and 3) is devoted to an in-depth discussion of the tenets submitted by an author who is considered by some as the founder, by others the foe, of democracy under the rule of law. Part II explores a number of conceptual topics not just inspired but even tabled by Rousseau's thought – topics which I deem to be relevant in dealing with the issues of Part III. Thus, Part II provides the hinge between the close reading exercise of Part I and the debates in Part III. The contemporary issues with which I chose to deal – issues such as the legal status of an embryo under conditions of undistorted competition, the rights of migrants, the rise of populism and nationalism in western states (Chapters 7, 8 and 9, respectively) – have this in common: they crucially hinge on an account of what a democracy under the rule of law amounts to. I submit that we will be better equipped to face the challenges of such an account if we first go to the trouble of carefully revisiting the controversy over Rousseau and his ideas about constituting a polity on the basis of a puzzling idea commonly rendered as 'popular sovereignty'. However, linking Rousseau's eighteenth-century texts to contemporary problems is not without obvious methodological problems. Let us address them right at the start of the argument, so as to avoid misunderstandings.

Two fallacies at least are to be avoided: the fallacy of direct applications and the fallacy of random annotations. With the former, we would proceed as if we could impersonate Rousseau's voice and make it heard in the debates of our time. We second-guess what he would have had to contribute to these matters, taking his philosophy as an all-encompassing view from which we can infer certain answers for the specific situations we have to cope with. With the latter we would walk in the opposite direction, using as our starting point the controversies in which we are involved and the ways in which we try to argue our way out. We would adorn our own discourse with footnotes from Rousseau to prove ourselves right through the prestige of a celebrated author. It is particularly tempting to take this road since the language of constitutional law as we know it today features a notable number of terms that seem to be calibrated on Rousseau's treatises, such as 'legislator', 'government', 'democracy', and even more dubitable ones such as 'censorship' or 'civil religion'.

However, this verbal resemblance does not entail any conceptual similarity, as we will see.

Both of these fallacies suffer from the same kind of philosophical telepor-tation: whether we make ourselves the contemporaries of Rousseau or make Rousseau a contemporary of ours, we assume that we can transfer either his or our concepts without really traversing the temporal space that holds them apart by developments of facts and norms, changing over time under the pressure of discoveries, technologies, economics and ideologies. Steering away from such philo-fiction, I thought it wise to propose an *intermezzo* between Part I and Part III. Here I pause to take stock and translate Rousseau into a vernacular that is purely conceptual, on the one hand, but not yet contextualized by contemporary issues, on the other. What is the focus of the conceptual analyses that I selected to demonstrate the pertinence of Rousseau's seminal thinking to the legal architecture of a polity? In retrospect, they all have to do with what it means to say that a democracy under the rule of law *exists*. Presumably, democracy under the rule of law does not exist in the same way as the river Rhine, the average tax payer, Santa Claus or the Golden Ratio. To understand in what way it does exist, one should inquire into the various uses of the index-ical term 'we' in political discourse. One should dig into the ways in which people can deliberate, decide and act 'jointly'. One should unravel the logic of representation and ask whether or not it stands in the way of 'the people' being really 'present' in the scramble for power over the polity. One should scrutinize, indeed, the very nature of a polity, its core and its limits, its heart and its limbs, the 'body' of its laws as well as their 'spirit'. I do this in Part II through three exercises: in the theory of reference (Chapter 4), in the theory of social action (Chapter 5) and in the theory of social ontology (Chapter 6).

I will elucidate the specific stakes of Parts I, II and III in their respective introductions. In this introduction to the book as a whole, however, I would like to do two things. In Sections 1–3, I present a few snapshots that are para-digmatic of the problems wrestled with in different parts of the world when it comes to democratizing the rule of law or, for that matter, receiving guidance from such a rule under democratic conditions. I start at home, with the problem of democracy in the European Union; then turn to the Asian discussion on imposed constitutions; then consider the debate on popular constitutionalism in the USA. Section 4 offers a preliminary glance at the philosophical ground which I use as my basis for the work.

1. DEMOCRATIC DEFICIT IN THE EU

The European Union invites its citizens emphatically to take part in policy making. There are some 11 consultations open to the public at large at the

time of writing.¹ There are online forums, blogs, opinion polls, test panels, advice and information services, prizes and competitions, and so on, most of this under the heading of ‘Your Voice in Europe’. Modern media are used to amplify both weak and strong voices: the EU is present on social networking sites, microblogging services and photo and video sharing sites.² There are registers of EU lobbyists for those who want to influence EU policies, published for the sake of transparency. Last but not least, there are the newly established constitutional rights of the European Citizens’ Initiative and of Petition to the European Parliament. All of this comes on top of already well-established institutions of democracy: periodical elections under a multiparty system; majority votes in Parliament, Commission and Council; exclusive parliamentary competences with regard to the budget of the Union and the credentials of the Commission as a whole, as well as shared competence regarding a number of important decisions; separation of powers, in particular an independent judiciary; and an explicit commitment to the rule of law and human rights. In short, one may wonder what is meant by the famous, or infamous, ‘democratic deficit’ in the face of so many possibilities for citizens to be present rather than to be represented in the debate.

The answer seems straightforward enough – what is missing is a parliamentary legislator: there is a European Parliament that is all but a full-blooded legislator and there is a legislator, by the name of the European Council, who is all but parliamentary. If one wants to adhere to the principle of the people being sovereign, and if Parliament is regarded as the privileged representative of the people, it seems that there is quite some scope for institutional reform. But suppose that such reform were embarked upon, with all the determination, imagination, efficiency and resources this would require. I submit that this would aggravate rather than solve the problem of democracy in the Union. It would immediately reveal that, at bottom, the much criticized democratic deficit is not an institutional problem but a truly political one. One way of putting it is this:³ what would a democracy of democracies look like? Would it just be a democracy on a larger scale, absorbing the smaller democracies of national Member States within a federal hierarchy? Or would it collapse into a classical inter-national treaty between states that retain their sovereignty

¹ See, http://ec.europa.eu/yourvoice/consultations/index_en.htm#open; accessed on 28 January 2020.

² Facebook, Twitter, Flickr, YouTube, and their ilk.

³ Reminding of Kant’s problem of a legal order of legal orders: cf. (Kant 1964 [1796]).

in the final analysis? Or is there a third option, as Joschka Fischer famously suggested some decades ago?⁴

Whatever one may think of the view taken by the German Federal Constitutional Court, it at least deserves credit for having kept this principled issue in view, most explicitly in its *Lisbon* decision. On 30 June 2009, the Second Senate of the *Bundesverfassungsgericht* had to decide whether the Act Approving the Treaty of Lisbon was compatible with the German Basic Law.⁵ Concluding a lengthy argument of 147 pages, the Court decided that Germany could ratify the Treaty, but only ‘as long as’ the Treaty is applied within the inalterable limits set by the German constitution. This condition made it necessary to change the German implementation law. The legislative bodies of the Bundestag and Bundesrat had not been accorded sufficient legal competence in matters bringing about the transfer of greater powers to the EU institutions. The *Bundesverfassungsgericht* wanted this law to counter in particular those provisions in the new Treaty that introduced a new simplified procedure for amending the European Treaties and their ‘passerelle’ clauses. Pursuant to these, the Member State governments would be able to give up their veto in the Council and move to qualified majority voting on certain matters without particular treaty amendments requiring ratification by the Member States. In other, harsher words, the Treaty did not sufficiently respect the very principle by which a polity can claim to be a democracy: self-determination of the people. As long as there is (still) ‘no independent people’s sovereignty of the citizens of the Union in their entirety’,⁶ said the Constitutional Court, the peoples of the Member States are the holders of constituent power.⁷ Thus there

⁴ At the beginning of the decade that would lead to the Lisbon Treaty, Joschka Fischer, a prominent member of Die Grünen and the German Minister of Foreign Affairs at the time, gave an important speech at Humboldt University (Berlin, 12 May 2000). He addressed the question that has haunted the European integration process from its early beginnings: is Europe moving from intergovernmental cooperation to full-fledged federative unification, or will it remain the ‘Europe des patries’ that the French president Charles de Gaulle once advocated? Though it sounds like a matter of fact, the question, of course, is a normative one: which focus should Europe take and what should Europeans do to bring this about? Fischer suggested a third way of ‘shared sovereignty’, which triggered a lively debate, part of which is reflected in (Walker 2003).

⁵ Zustimmungsgesetz zum Vertrag von Lissabon.

⁶ Judgment 30 Jun 2009, 2 BvE 2/08, para 251.

⁷ Thus the *Bundesverfassungsgericht* (BVerfG) reiterated its ‘no demos’ thesis, voiced in its 1993 Maastricht decision (BVerfG 89,155 (171)) to the effect that Europe’s aspirations regarding democracy can be ventured only modestly since there is no such thing as a European ‘demos’ to which sovereign power could be attributed, let alone that it could be represented. For the earlier BVerfG decision on the Maastricht Treaty of 12-10-1993, see Eur. Gr. Z. 1993, p. 429vv.

should be a warrant that the Union would respect democratic institutions of Member States.⁸ As one commentator summarizes it:

The intellectual core of the judgement consists of two premises that arise from a common basis. The first premise is that of electoral democracy as a classical form of legitimization for the self-determination of citizens under the condition of equality (I). The second premise is that of constitutional identity, understood as establishing a political community of a specific – although alterable – form (II).⁹

The former premise is an institutional one; it responds to the question how best to give form to the principle of popular sovereignty. The latter premise concerns this very principle. The ratified Treaty contains an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany. But the question whether the principle of self-determination of the people can somehow inform and format a democratic constellation of democracies was left unanswered. This book proposes to ask again what the principle means, before matters of institutionalization are embarked upon.

2. IMPOSED CONSTITUTIONS IN ASIA

The European Union is by no means the only polity wrestling with this question. Scholars in East Asian countries are currently addressing the very same issue, though in a different context. With remarkable academic independence from their respective governments and an open mind regarding their often divisive political histories, they question the constitutional charters that have allegedly been ‘imposed’ on their countries from the outside: by an ideological party, by the victor of the latest war in which they were involved, or by their former colonial oppressor. Their basic intuition is that such constitutional imposition is ‘improper, impractical, and unsustainable because the local people were not given an active role in drafting the fundamental law of their own land’.¹⁰ Indeed, as another commentator put it, ‘(f)rom a liberal perspective, there is no greater sin than lack of consent, and therefore, an imposed constitution – born in sin – lacks legitimacy from the outset’.¹¹

⁸ BVerfG, 2 BvE; 2/08 from 30 June 2009, available at: <http://www.bverfg.de/entscheidungen/es20090630>, accessed 30-05-2010.

⁹ (Schorkopf 2009) 1221.

¹⁰ I take this quote from a conference paper (Hahm and Kim 2010a). For an elaborate presentation and further literature see (Hahm and Kim 2015).

¹¹ (Law 2018a) 2. I refer to the page numbers in the SSRN edition of the paper. It was officially published as (Law 2018b).

In order to stop new ideologies claiming ground for an ‘unimposed’ constitution, it seems important to consider the relationship between the people and the constitution as a matter of principle. Some participants in this debate want to critically review the idea of the people’s authorship of the constitution. Don’t pretend, they say, that the people were endowed with an ‘eternal’ quality as a constituent agent, the creator of a new world, the perfectly free genius unbound by any preceding law. They take issue with the idea of a people that is ‘simply assumed to exist at the moment of constitutional founding in a readily identifiable form and shape, with readily identifiable interests and values’. They notice that

Questions such as ‘Where do they come from in time?’ or ‘Who were they before they made the constitution?’ seldom figure prominently in theoretical discussions. The identity of the people as such is assumed to remain constant over time despite the deeply transformative politics entailed in the historic act of constitutional founding ... On this view, the priority of the people over the constitution is not only natural (as a matter of logic) but also necessary (as a matter of normative reasoning).¹²

This picture of a constitution as an ‘immaculate conception’¹³ is certainly false from any empirical perspective (including a historical one). But does this mean that it collapses into a ‘romanticizing narrative’,¹⁴ and its mirror image of an imposed constitution likewise into a ‘delegitimizing narrative’? David S. Law is keen to stress this point:

Viewed from one angle, a constitution can satisfy our desires for self-expression, nationhood, community, identity, recognition, legitimacy, and approval. Viewed from another angle, a constitution is an instrument of coercion, imposition, oppression, and alienation from the community and the state. Which aspect we see is a function of the narrative that we choose to tell about the constitution and the aspects that we choose to emphasize. But the materials needed to construct either narrative are always close at hand.¹⁵

I submit that there is more to it. There is no point in denying that constitutions function against a narrative backdrop. But one should not underestimate what it requires to tell good stories or to tell a story well.¹⁶ From an agential perspective, that is, from the viewpoint of those who take a first person perspective on the polity in which they intend to exercise power, one cannot

¹² (Hahm and Kim 2010b) 802.

¹³ (Law 2018a) 6.

¹⁴ Ibid.

¹⁵ Ibid., 8.

¹⁶ See (van Roermund 1997) for examples from law and politics.

afford to ‘romanticize’ or ‘delegitimize’ a constitution at will. Stories, including those establishing public power, have to be ‘credible’ in the first place. This entails that their narrators must take into account a specific audience’s preferred parameters of trust and truth (regarding, for example, threats and opportunities). To a certain extent, these parameters will be based on rational argumentation. However, credibility in politics is not merely contingent on the convincing force of argument. As we will learn from Rousseau, it is also, and inevitably, based on the persuasive force of the story. People are persuaded by becoming ‘fascinated’, that is, drawn into a new realm, through involving them as potential agents rather than actual auditors. This is what electoral promises do when they appear to take effect. Good stories, well-told stories, open a space in their narration that allows the audience to take the initiative and coproduce the very event that the story was supposed to be about. Choruses in the genre of classical drama are meant to do exactly this: involve the audience as a virtual protagonist.

Without such distinctions it becomes difficult to make sense, not only of the East Asian debates, but also of constitutional language in general. Let me briefly point to two examples derived from the thought of David Law. The challenge is, for instance, to understand why in Japan the 1947 Kenpo constitution was clearly adopted under heavy political pressure from the Allied Forces after the Second World War, and why it may nevertheless currently be said to be unimposed, now that generations of Japanese people of flesh and blood have left the constitution unaltered despite having had the power to change it in the course of permanently changing economic, social, technological, and other constellations. In the present Japanese situation, speaking critically of the constitution’s being imposed counts as a clear indication that the speaker has a right wing political agenda. David Law submits that, after the Second World War, ‘the Kenpo was imposed upon the Japanese political leadership, but not on the Japanese people’.¹⁷ However, a first point is that there is no ‘Japanese people’ – there are even no Japanese people in the plural – without a constitution establishing ‘the Japanese’ as ‘a people’ in the political sense, and a specific set of people as ‘the Japanese’. A second point is that Japanese ‘leadership’ can only be identified by virtue of a logic of representation that somehow attributes to the people the acts of the leaders or representatives. Thus, the discourse of a people coming to a constitution by self-imposition as opposed to foreign imposition is to be understood in terms of credible representation. Whether in specific cases, such as the case of the MacArthur constitution in Japan, credible representation is served over the years by mere romanticizing rhetoric is dubitable. A more acceptable hypothesis is that, time

¹⁷ (Law 2018a) 19–20.

and again, most people in Japan have found better prospects for themselves and their children in the imposed constitution than in the traditional Meiji constitution. The latter rather than the former remains ‘foreign’ to them.

Law also discusses the case of Taiwan as one of ‘constitutional dissonance’.¹⁸ Currently, Taiwan continues to live under the pre-communist constitution of the Republic of China (since 1947), a remnant of the nationalist Kuomintang regime. Even if this constitution has become increasingly alien to Taiwanese society over the years and can easily be criticized by commentators as ‘imposed’, the republic itself is anxious to avoid such predicate and its delegitimizing overtones. As Law observes, any Taiwanese effort to design a more homemade constitution for itself would probably trigger a violent attempt by the current People’s Republic of China to factually incorporate its disobedient ‘province’. Paradoxically, Taiwan feels coerced into living under an imposed constitution in order to curb domination and retain its freedom. For Taiwan as a part of the Republic of China, however, the coercion by which the imposed constitution is imposed comes from the People’s Republic of China in the present, rather than from the Kuomintang regime in the past. Apparently, those who are able to sustain this paradoxical warrant of liberty, neither romanticizing nor debunking their constitution, are credible representatives, worthy of upholding the various institutions that are commanded by a democracy under the rule of law.

To sum up, imposed constitutions are not problematic because of the widely shared preference for ‘unimposed’ constitutions. How could they be unimposed if it is characteristic of law to be imposed in the first place? As becomes apparent from the examples of Japan, Taiwan and many others, the relevant distinction is between self-imposed and other-imposed constitutions. Then, however, the question arises of what it means to impose a constitution on ‘oneself’. The emphasis in this question is slightly different from that which concluded the snapshot of the democratic deficit of the EU. Where the EU wrestled with the problem of capturing ‘the people’ of the Union, the discussion of other-imposed constitutions addresses the problem of what ‘the self’ of a people would mean. Both questions are equally important, and equally puzzling.

3. CONSTITUTIONAL REVIEW AND THE POWER OF PARLIAMENT

Another context in which the principle of self-determination of the people plays a crucial role is the relatively recent discourse in the United States on

¹⁸ Ibid., 9f.

‘popular constitutionalism’. One of the purported evils targeted in the debate is judicial supremacy in interpreting and guarding the meaning of the constitution – a task that is to be performed on a daily basis for the constitution to remain the source of legal life in the polity. The question is, who should perform this task? From a European vantage point it is quite surprising to see that some US citizens are adamant about adumbrating the principled ban on judicial constitutional review at the moment at which some countries in Europe are about to lift it. It is even more surprising to observe that they choose to ignore the vehement debates on the guardianship of the constitution that kept legal Central Europe in awe during the Weimar period. Be that as it may, these US citizens wish to challenge the Supreme Court’s claim to be the final guardian of constitutional meaning, saying that this is an usurpation of power that rightfully belongs to the people. As the author of the constitution, the people should be the ultimate authority in its interpretation as well.¹⁹ This is precisely the view behind the constitutional prohibition of judicial review of parliamentary legislation that has survived for two centuries in, for instance, the Netherlands, up to the present day.²⁰

Kramer observes that the alleged bias of judicial supremacy results from a cleft between politics and law, where the constitution is the fringe of the law rather than the hinge between law and politics, thus falling squarely on the law side of the divide.²¹ It is said that law is the business of judges immersed in it by years of training, while politics is the domain of the people. Moreover, citing Gerald Leonard,²² Kramer submits that we are inclined today ‘to see politics as *working within* a constitutional order rather than *working out* that constitutional order’. He even goes as far as diagnosing that ‘[a] profound mistrust of popular government and representative assemblies is, in fact, one of the few things (perhaps the only thing) that the right and the left share in common’.²³ This distrust is rooted, he thinks, in ‘deep-seated misgivings about [the

¹⁹ See, e.g., (Kramer 2004); (Tushnet 1999); (Parker 1999).

²⁰ The prohibition of judicial constitutional review under Art. 120 of the Dutch Constitution is to a large extent outdated, as there is the possibility for Dutch judges to review legislation by reference to international treaties that harbour the same rights as the Dutch Constitution. But with regard to state organization and legislative procedure, for instance, the prohibition is still quite effective. A legislative initiative by (then) Member of Parliament Mrs Halsema to alter the constitution in favour of constitutional review was carried out in the period 2003–13 in the Dutch Parliament, but was eventually abandoned in 2018. See www.eerstekamer.nl/wetsvoorstel/32334_initiatiefvoorstel_buitenweg, accessed 29-01-2020.

²¹ (Kramer 2004) 8.

²² The Invention of Party Politics (2002) at 15.

²³ (Kramer 2004) 244.

capacity of] ordinary citizens [to govern responsibly]'.²⁴ In restoring control over the Supreme Court as the guardian of the US constitution, Kramer says, 'we must first lay claim to the Constitution *ourselves*'.²⁵

This last phrase, which in a sense preempts the title of the present book on the first person plural in law, deserves further thought. How exactly should 'laying claim to the constitution' be conceived? Kramer points to a variety of actions, from protests and boycotts, through citizens' initiatives and parliamentary votes, to the President as the constitutional Tribune.²⁶ In fact, his impressive journey through the legal history of constitutional review by 'the people' is exactly that: an amalgam of all sorts of interferences in word and deed by citizens, denizens and (sometimes self-proclaimed) representatives of both. They interfere with the sense and reference of constitutional rules, written and unwritten, in specific questions. It is fair to say that the better part of such interfering actions is performed by institutions that count or that counted as representative agents at the time. But representative institutions aside, the question is: what makes this amalgam an action of 'we, ourselves' at a certain point in time? More specifically, in what sense and why is such amalgam the joint action of 'laying claim to the constitution'? In other plain words, why is it a case of 'acting together'? This question becomes particularly incisive when 'guarding' the constitution appears to be a matter not only of verbal interpretation but also of coercive enforcement. What does this amalgam of interferences amount to when it comes to enforcement?

So here we are with three snapshots of discussions all revolving around the meaning of 'the people', in the first person plural 'we', that one should somehow come to see as the agent of law making. The discussions pertain to the people as an acting subject, to the plural 'self' of this subject and to the joint action it is supposed to perform. I will not add to these debates. In the context of this book they are just evidence that there are questions looming large under the surface. Stemming from different parts of the world, they provide plenty of reason to revisit the principle of self-determination as what Hart would call 'the rule of recognition' of law in our time. We should ask: what kind of 'self' is involved in self-determination of this plurality, 'the people'? How is plural selfhood involved in self-preservation, self-determination, self-respect? In what sense should self-determination characterize our account of legislation? How does it relate to representation? These are the questions this book seeks to address. Thus, it will focus on people and sovereignty, on representation and

²⁴ Ibid.

²⁵ Ibid., 247 [my emphasis].

²⁶ Without any reference to the debates over the Weimar constitution, most notably those between Schmitt and Kelsen on 'Der Hüter der Verfassung'.

public power, on laws and the common wealth, on willing and knowing in politics. Obliquely we will hit on other problems that matter for those who want to think about law and state: the right of the state to exercise coercive power, the place of fundamental rights in a democracy, the problem of boundaries separating and linking the inside and outside of a polity and even the question how the Court of Justice of the European Union (CJEU) can hold that the concept of an embryo is ‘an autonomous concept of European law’. But the question that takes centre stage will remain what the sovereign power of ‘the people’ means in a law-ruled representative democracy, in particular where it wishes to pose as a democracy of democracies.

It cannot come as a surprise that this investigation coincides, to a considerable extent, with the need to reread a book that is virtually inexhaustible when it comes to issues of popular sovereignty: Rousseau’s *Social Contract*. This short treatise is commonly believed to be the basis of our ideas about a democratic state under the rule of law, even where these ideas acknowledge a certain tension between democracy and the rule of law. So firm is this belief that the *Cinque Stelle* Movement in Italy decided to name its website *Rousseau*.²⁷ My simple proposal is to read this text again in light of the foregoing challenges, not in order to find solutions to our problems but in order to reflect on what problems we actually have. Indeed, we shall see what is in this political book of books. But less innocently put, we shall see if what is in the book is identical to what we *think* is in the book, what we *want* to be in the book, what there *has to be* in the book if the clear and distinct language needed to preach the rule of law should not be obscured. The challenges I mentioned above substantiate the claim that this is neither an entirely academic exercise nor an exercise in philosophical close reading. The stakes are higher. We are about to investigate a discourse that hampers or enables people to wield power in politics; thus also one that causes people to become or make victims.

4. PHENOMENOLOGY AND LEGAL THEORY

As has often been argued, it is difficult to tie the kind of truth that philosophy is after to ‘a method’, whether method in general or a specific method.²⁸ It is equally dubitable if one can give an account of a philosophical approach in terms that stay at the meta level of description without applying the approach itself. In other words, such approach can be demonstrated rather than described. The flag under which I sail is usually categorized as ‘phenomenology’ – rather

²⁷ <https://rousseau.movimento5stelle.it/>, accessed 15-02-2018.

²⁸ Despite excellent expositions such as (Castañeda 1980). See however (Gadamer 1975 [1960]).

a mouthful, as J.L. Austin famously put it.²⁹ Indeed, not much depends on this predicate. It covers a heterogeneous freight, including doubts as to whether it is anything near a method, as well as claims that it is much more than a method. I will not even try to enter the debate on what my advances entail at this meta level of 'philosophy on philosophy'. Instead, let me just try and give a core idea of the lodestar I propose to follow, also quenching a few misleading fires.

Refraining from established phenomenological jargon and putting technicalities aside, I would submit that it is characteristic of the philosophical approach called 'phenomenology' to take what Charles Taylor calls 'the first person stance'. In his terms, it is a form of 'radical reflexivity' in philosophy.³⁰ Philosophical reflection, he maintains, has to start at the point where experience starts; and even the most superficial and oblique experience involves a first person position. Experience starts out as 'agent-relative knowledge'.³¹ To put it in slightly different terms:³² experience is impossible without basic forms of indexicality ('pain, HERE'; 'food, THERE'; 'danger, CLOSEBY'; 'pull, NOW') involving a first person position 'I' or 'we'. The individual or collective person in this position cannot make sense of whatever she believes, or says, or does, without acknowledging that she is immersed in a world that is, thus, never completely 'out there'. The tangent point between agent and world is what philosophy calls 'a self'. In referring to 'oneself' one captures the subjective experience of one's agency as an object of thought, thus finding an anchor point for various experiences over time and gradually learning about one's identity. Legal discourse provides ample evidence of this 'self-based' conceptual geography. Without silently recalling the experience of one's *own* existence, it is incomprehensible why certain rights should be regarded as 'fundamental'. Without the internal view of a legal order as 'one's own', there is no reason why some assertions should count as 'normative' or some form of authority as 'supreme'. Without appreciating the reflexive overtones

²⁹ (Austin 1970) 182, where he reluctantly presents his method of doing philosophy as 'linguistic phenomenology'.

³⁰ (Taylor 1989): 'The world as I know it is there for me, is experienced by me, or thought by me, or has meaning for me. Knowledge, awareness is always that of an agent ... This is what I call a stance of radical reflexivity or adopting the first-person standpoint.' Cf. 176: 'Radical objectivity is only intelligible and accessible through radical subjectivity. This paradox has, of course, been much commented on by Heidegger, for instance, in his critique of subjectivism, and by Merleau-Ponty. Modern naturalism can never be the same again once one sees this connection, as both these philosophers argue.'

³¹ The term is John Perry's, cf. (Perry 1998). Similar views are to be found also in (Strawson 1959) (cf. the way Ricoeur revisits this seminal book in (Ricoeur 1990) and (Hampshire 1959).

³² Cf. (Castañeda 1968; 1980; 1989; 1990).

of ‘proper’, one would be unable to understand the concepts of ‘property’ or of ‘trespassing’. Phenomenology basically explicates this starting point as it pervades all our thinking, speaking and acting.³³

This point of departure has often been misunderstood. It was believed, for instance, to imply an untenable subjectivism. By giving an account of both theoretical and practical thinking from a first person viewpoint one would allegedly arrive at the view that ‘reality’ is the sheer internal object of thought, hence construed from sense perceptions and/or primary needs. Subjectivism would hold that the point of departure is all there is to experience and reflec-

³³ Students of the history of legal philosophy will remember that the influence of Husserlian phenomenology on jurisprudence has been limited. After the Second World War, Adolf Reinach had his book *Die apriorischen Grundlagen des bürgerlichen Rechts* (1913) reprinted under the title *Zur Phänomenologie des Rechts* (1953), paying tribute to Husserl in many places. I am indebted to my colleague Anthonie Meijers (Eindhoven University) for bringing it to my attention (again) in the framework of a project on collective speech acts. I found it a remarkably original and interesting work that could certainly be reread with the benefit of hindsight (in particular with regard to contemporary speech act theory). But at the time, soon after its reprint, it was swept aside by the first exercises in ‘legal logic’ (Klug, 1953), on the one hand, and the much more ‘practical’ accounts of legal argumentation by Viehweg and Perelman (1958) on the other. In these days German legal scholarship was reluctant to welcome highbrow transcendental philosophy to legal theory, except if it committed the legal enterprise to the language of morals. In Husserl’s case, too much of his approach was reminiscent of Kelsen’s transcendental formalism (cf. Fritz Schreier, *Grundbegriffe und Grundformen des Rechts* (1924) and Felix Kaufmann, *Logik und Rechtswissenschaft* (1922) and *Die Kriterien des Rechts* (1924). See H.J. van Eikema Hommes, ‘De betekenis van Edmunds Husserls transcendente fenomenologie voor de rechtswetenschap’. *Handelingen Vereniging voor de Wijsbegeerte des Rechts*, 1966), while Kelsen was expelled from many jurisprudential circles both in Germany and abroad for uncritical reception of Nazi ideas about law, in spite of his vehement and timely critique of Carl Schmitt’s ideas. To me Husserl has always seemed to be better company for Kelsen’s Pure Theory of Law than (neo-)Kantianism, but it must be granted that there are very few explicit acknowledgements by Kelsen himself. On top of that, Kelsen was far from pleased (see *Österreichisches Zeitschrift für öffentliches Recht*, 1965, pp. 353ff) with the way Paul Amselek had interpreted his Pure Theory (largely ignoring the 1960 second edition of the book with the corresponding title) in the latter’s *Méthode phénoménologique et Théorie du Droit* (1964). Indeed, Husserl himself would probably have been unpleasantly surprised by Amselek’s ill-conceived idea of transcendental reduction as a sort of psychological description, on the one hand, and his almost naive defence of legal positivism on the other. By the time these sensitivities diminished, phenomenology in general had vanished from the philosophical scene, debunked by linguistic analysis, structuralism and critical social theory in the Marxist vein. However, all these rather external factors for the poor performance of phenomenology in legal theory may well have a much deeper cause, for instance, one pointed to by (Gehring 2006): it is extremely difficult for phenomenology to identify the ‘form’ in which modern law appears in society.

tion, and that claims about states of affairs, as well as claims about what ought to be done, can be reduced to functions of first person sensations and inclinations. Small wonder that, especially in ethics, subjectivism is often related to the widespread, though rather trivial, opinion that all moral judgements are prejudiced. Phenomenology tries to be faithful to the opposite of subjectivism: unfolding the conditions of true experience entails an attitude of setting reality free from impressions, vagaries and arbitrary interventions. However, precisely these efforts of pushing back arbitrariness in our sensations as well as our efforts require a point of departure from which such exercises can launch. For these reasons I will often use terms such as ‘the first person’ and ‘first person agency’ instead of ‘the subject’. Better than first person thinking, first person acting conveys the idea that subjectivism is a dangerous bet.

Phenomenology was also believed to amount to individualism. However, although the initial projects in phenomenology certainly had an individualist ring that reminds one of old-fashioned ‘philosophical psychology’, later developments appreciated the purely referential stakes of a phrase like ‘the first person’ and acknowledged the importance of reading both its plural and its singular mode.³⁴ I should add perhaps that, although first person references can be read in the plural as well as in the singular, this has little to do with the singularity of certain experiences, say, of an entity or event *E*. A shared, and in this sense plural, experience of *E* can be quite singular in the sense of *E* being ‘one of a kind’ or ‘once in a lifetime’. For instance, having heard a piano recital by Maria Joao Pires, our regular group of concert amateurs can jointly conclude that it was a unique event – not, obviously, in the merely numerical sense that there was just this one performance on the city calendar, but rather in the sense that it was non-substitutable in the way it expressed everything that music is about. In any case, I do not hold that subjects are paradigmatically individuals, let alone human individuals. Or that existence is primarily individual existence, put into jeopardy by individual death.³⁵

For some, phenomenology appears to come with the promise of self-transparency. This, too, is a misperception, probably read into its focus on reflexivity. By using referential devices in first person mode, we refer to *ourselves*, adding a ‘here’ and a ‘now’ that is linked up with such self-reference. It is commonly thought that these self-references converge in a sense of identity or selfhood that is increasingly calibrated by the ways in which others refer to such places and times. For instance, my primitive sense of ‘being here now’ is increasingly related to how others refer to the places and the times in which they find me. If I develop an identity crisis, this does not mean that I become

³⁴ (Taylor 1989): 168; one could refer to similar thoughts in Castañeda and Peirce.

³⁵ Cf. the plural interpretation of Heidegger’s notion *Dasein* in (Oudejans 2011).

unable to retrieve the data which third persons use to refer to me. It means that I am becoming desperate about how to tune into this web of references *qua* first person. Now, it is tempting to presume that mapping these two modes of references onto each other is a matter of reflective thinking. For instance, I simply have to ‘learn’ that I am the same person as the one who others call ‘the grey Sunday jogger’, still others ‘the lousy musician next door’ – and I will be fine as long as I don’t forget this. In this sense ‘reflection’ would back up reflexivity and warrant transparency to myself. Clearly, this is not how it works. Learning that *I* am the same person as ‘the only grey man who jogs on Sundays and does a lousy job as a musician next door’ presupposes a sense of identity to which I have access and which I am able to revisit and revise. However, in a pathological setting, this is precisely my problem: I have lost the key to myself. I have become a stranger to myself, or keep hovering between multiple selves, or have been cut off from others; and it will not help that others tell me who I am in their eyes, unless they simultaneously support me in regaining my selfhood in ways other than teaching me more about me. This and other forms of alienation are extensively discussed in contemporary philosophy, often to silence the claim that there is a subject completely transparent to itself – a claim ascribed to phenomenology. However, once more, this is a straw man. A radical liberation of experience will also reveal that there are things which first persons (either singular or plural) cannot reveal to themselves. As Visker has argued,³⁶ often the full meaning of even our most obvious properties – the colour of our skin, for instance – remains hidden to us. Some of these become perceivable for us only as an unrest that keeps moving back and forth between vantage points at which we never really land.³⁷

³⁶ (Visker 1999) 5ff.

³⁷ An intriguing illustration is provided by (Motha 2010).