## *Essays*

# Political Conflicts and the Transformation of Legal Orders. Phenomenological Insights on Democratic Contingency and Transgression

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**Abstract**

By deploying phenomenological categories mainly introduced by the German philosopher Bernhard Waldenfels, in this paper I seek to offer an analysis as to how contingency should be understood in order to adopt an adequate model for a democratic transgression of legal orders. To reach this interpretive goal, I articulate my argument along the following trajectory: Taking a cue from the current influential theory of a democratic agonism developed by Chantal Mouffe, I argue that a conflictual design of politics based on the appropriation of Schmitt's absolutistic depiction of antagonism does not offer an apt account of radical democratic contingency and conflict. Consequently, a more appropriate configuration of a politico-legal transgression is required, such that it can be capable of expressing strong manifestations of conflict and transformative impulses, on the one hand, without collapsing into exorbitant configurations thereof, on the other. In the last section of the paper I submit that such an account of a politico-legal transgression is possible by dint of combining Hannah Arendt's notion of natality and Hans Lindahl's insights on a-legality.

## I.   Introduction: Phenomenological Motives for Thinking the Transgression of Legal Orders

'*Kein Rechtssystem ist für immer*'[1] – 'no legal order lasts forever': so reads a pivotal utterance expressed, in his essay *Recht und Zeit*, by Gerhard Husserl, one of the most prominent authors in the realm of phenomenological legal studies. Through such a statement, Husserl aims manifestly to deliver the very sense of what one may define the unavoidable historical character inherent in

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[1] G. Husserl, *Recht und Zeit* (Frankfurt am Main: Vittorio Klostermann, 1955), 26. The translation into English of Husserl's passages are mine.

all legal orders. Indeed, he continues:

> 'We do not know which laws regulate the life rhythm of States, nations, supra-national organizations, and all other imaginable political organisms, which deem themselves to be legal orders. One thing we do know, however: their existence does not possess the character of a "for ever" '.[2]

Husserl however, in the same context, adds another element essential for the configuration of any imaginable legal order, ie validity. This is an element which immediately introduces complication into the picture. For if it is certain, on the one hand, that all legal systems are historical, it is as much true, on the other, that no legal order would work at all if it could not generally count on 'laws claiming to possess an everlasting validity'.[3]

Hence, the *scenario* coming out of such a double rhythm made of meta-temporality and historicity is one of a legal system caught up in a constitutive discrepancy between the aspiration to order and stabilize the political space to which it adheres and the concomitant impulse to give expression to transformative instantiations thereof.

To be sure, such a contrastive nature of legal orders mostly expresses itself in an unobtrusive way, such that institutions generally tend to adhere to the pole of stabilization, thereby presenting themselves as smoothly and unproblematically running along the path of their – as it were – normal course.[4] This does not imply, however, that the opposite case may also emerge. Normalization, in fact, can always be put into question by transformative claims, such that what constitutes the unobtrusive and unquestioned functioning of order – thereby articulating its historical trait – becomes obtrusive. This is especially true when political conflicts arise in the midst of polities, thereby bespeaking the experience of a transgression of legal boundaries.

While this description puts *nihil novi sub sole*, as it depicts no more and no less than the typical historical dynamic pertaining to all legal orders, it nonetheless engenders a conceptual interrogation as to how exactly one has to conceive of the relationship between transformation and stability.

In what follows, I will attempt to show that some lines of phenomenological thought may shed light on the matter.

The background in which I want to set my investigation is that of the numerous and remarkably vibrant popular demonstrations and mobilizations

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[2] ibid 11.

[3] ibid 27.

[4] For an insightful phenomenological investigation on the character of unobtrusiveness of concrete legal orders see H. Lindahl, *Fault Lines of Globalization. Legal Orders and the Politics of A-Legality* (Oxford: Oxford University Press, 2013), 25, 122; and Id, 'Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality', in T. Bedorf and S. Herrmann eds, *Political Phenomenology: Experience, Ontology, Episteme* (Abingdon: Routledge, 2019), para 2.

that have taken place in recent years around the world. Just to name a few which come to mind are instantiations as diverse as:

- the struggles against the authoritarian regimes of the Arab Spring;
- the uprisings across Turkey triggered by the eviction of Instanbul's Taksim Gezi Park sit-in;
- the student protests and riots in Chile, England, Quebec;
- the various Occupy movements in North America and Europe, protesting with their slogan 'We are the 99%' against the global financial institutions; and more broadly speaking, against the hegemony of neo-liberal rule;
- many other alter-globalization organizations striving for an alternative and radically democratic design of emerging global settings;
- the *Indignados* encampments in Spain with their claim for '*Democrácia real ya* (real democracy now)' which gave rise to the *Podemos* movement;
- the *Aganaktismenoi* protest movement in Greece;

and finally:

- the Italian citizens' Five Star Movement which, animated by an anti-establishment protest and the project of eradication of the oligarchic party system through absolute horizontal democratic procedures, recently won the elections and is now running the country.

To be sure, all these political endeavors, if compared, show heterogeneous structures, particular goals and outcomes. Nonetheless, they provide evidence for the same renewed interest in and demand for radical democratic forms of expression within political collectives and, subsequently, for trajectories of critique and transgression within the extant politico-legal configurations.

In effect, along with the feature of an aspiration for a revival of constituent power as the quintessence of the historical trait underlying legal orders, these recent and quite spread-out popular uprisings display concomitantly three characters intrinsic to all attempts to engage in radical democracy; those of alteration, contingency and conflict. All seminal forms of democratic insurgence, in fact, by questioning and demanding a change of extant political rule (alteration), inevitably revive the, in principle, open determination (contingency) of any democratic order, thereby implying conflict as their fundamental feature.[5]

This idea notably constitutes the conceptual mainstay of several contemporary perspectives on agonistic democracy and revolves around the firm conviction that political conflict is not to be understood as what democratic space must eschew as its disturbing or disquieting element, but rather as what a radical democratic project must acknowledge and welcome as its driving force, because only conflict reminds democratic orders of their contingent configuration and,

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[5] Cf A. Keenan, *Democracy in Question. Democratic Openness in a Time of Political Closure* (Stanford: Stanford University Press, 2003). In a more specifically globalized setting, this point is made clear by H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 391.

therefore, of their alterability.[6]

Accordingly, conflict – by being comprehended by agonistic approaches as the very *topos* for questioning and challenging the extant politico-legal order – marks immediately both the appropriate space for the articulation and re-articulation of democratic transgression and, co-extensively, the claim for democratic justice. Democratic justice is implied, here, not only in terms of an always possible extension of political participation entailed in the instantiations of conflict, but also in the fact that insurgences of conflict may enable possible radical renegotiations and reconfigurations of the very traits that shape politico-legal collectivities.

However, although conflict may appear productive in disclosing the very condition for a genuine articulation of a democratic project, it also entails the source of an opposite outcome. This outcome emerges as soon as the elements that compose the contingency/conflict/alteration connection, instead of being comprised within the appropriate form of a radical expression accordable with a democratic dynamic, experience a hyperbolic enhancement which bespeaks an absolutistic configuration, unbearable for any democratic design. Importantly, it is exactly when absolutistic drives for transformation take the upper hand that legal orders experience their inability to conciliate impulses of transgression with the concomitant need for stability.

The German phenomenologist Bernhard Waldenfels has devoted explicit attention to this pivotal distinction between radicality and absoluteness when framing the space for an appropriate understanding of contingency and alteration.[7] A radical form of contingency, he argues, does imply the articulation of an otherwise from the extant order, which, however, does not entail only the experience of break or alteration pushing outside order, but also a minimal form of adherence within order.[8] For, were this experience of break totally to transcend order's reach, it would not even have the possibility of emerging and consequently of being managed as such. In short, if contingency means transgression of an extant order, then a minimal form of its registration within order itself must be given for this transgression effectively to be perceived (and signified) as such.[9] As one can easily grasp, it is exactly this minimal adherence to order which makes a radical articulation of contingency and alteration still adjustable to democratic

[6] For a comprehensive analysis and discussion of the contemporary theories of agonistic democracy – with particular focus on the discourses by Connolly, Tully, Mouffe and Honig – see, at least, the remarkable volumes by M. Wenman, *Agonistic Democracy. Constituent Power in the Era of Globalization* (Cambridge/New York: Cambridge University Press, 2013), esp part II. Important remarks can be drawn also by A. Norval, *Aversive Democracy. Inheritance and Originality in the Democratic Tradition* (Cambridge: Cambridge University Press, 2007); O. Marchart, *Thinking Antagonism. Political Ontology after Laclau* (Edinburgh: Edinburgh University Press, 2018).

[7] Cf B. Waldenfels, *Topographie des Fremden* (Frankfurt am Main: Suhrkamp, 1997), 36.

[8] Cf B. Waldenfels, *Bruchlinien der Erfahrung* (Frankfurt am Main: Suhrkamp, 2002), 265.

[9] ibid 268-269.

designs. The form of an absolute contingency, instead, corresponds by no means to the dynamic of an otherwise but rather to that of total otherness.[10] This implies an irreducible externality from order which, far from providing order with the space for experiencing alterity, deprives order from the very access to experience as such. This form of total contingency, therefore, instead of enabling experimentation with radical novelty or transgression, simply approximates the form of an alteration which entails the paralysis or even annihilation of the very subject – be it political or otherwise – supposed to experience transgression.[11] Crucially, the consequence of such an excessive confrontation or totalistic transgression is that it makes any kind of accommodation with the democratic life of an enduring collective subject impossible.[12]

Just as interesting as this pivotal phenomenological distinction is the fact that Waldenfels notes a certain tendency which operates in many political-philosophical theories, in mingling one configuration of contingency with the other.[13] It is as if, in such theories, the absolute version of contingency would precisely and more or less unwittingly, come out as the perverse result of the very aspiration to emphasize its radical form, and this in light of the significance of the political implications which contingency embodies, namely the demand for democratic renewal, the reactivating of constituent power or revolutionary change, the effective realization of strands of political critique.

Subsequently, by means of a sort of invitation to a genealogical-deconstructive reading, Waldenfels solicits one to detect a disquieting ambivalence emerging within the *corpus* of a democratic discourse when these two configurations of

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[10] B. Waldenfels, *Idiome des Denkens* (Frankfurt am Main: Suhrkamp, 2005), 215.

[11] Cf B. Waldenfels, *Bruchlinien* n 8 above, 63.

[12] Holding on this phenomenological reading, I view Mark Wenman's bi-partition of the manifestations of democratic transformation between 'augmentation' and 'revolution' (M. Wenman, n 6 above, 9, 65) as problematic. Indeed, whereas I concur with the fact that 'augmentation' might correspond to a milder (or less radical) form of democratic transformation, I contest that 'revolution' as 'absolute initiative' and 'fundamental transformation' that reactivates 'constituent power' (ibid 11) would articulate the very form of radical democratic change. I believe, instead, that the kind of radicality that Wenman ascribes here to the latter form of radical politics corresponds exactly to the logic of absoluteness, from which Waldenfels so vehemently warns. Unlike Wenman, I maintain that a genuine form of radical democratic change should to a greater extent be detected in the logic of a boundaries transgression or deviation. This logic, abandoning the mere opposition between a too weak form of change – as 'augmentation' – and a too hyperbolically absolutized form of break – as 'revolution' –, is best able to capture the possibility of depicting transformation in terms of a radical democratic experience. On the one hand, in fact, transgression, as an effective experience of othering, means experimenting with change which goes beyond the mere extension or expansion of the extant order – a transgressed order, in other words, is not simply bigger but it becomes other or otherwise. On the other hand, transgression, as an experience which still presupposes a determinate endurance of the exceeded order, implies less than a totalistic rip. For a recent politico-legal perspective which, I believe, goes in this direction of order's alteration as order's transgression, see Hans Lindahl's outstanding insights on 'a-legality' (cf H. Lindahl, n 4 above). I will deepen this topic in the last section of this paper.

[13] Cf B. Waldenfels, *Topographie* n 7 above, 28, 45; Id, n 10 above, 221; Id, *Hyperphänomene. Modi Hyperbolischer Erfahrung* (Berlin: Suhrkamp, 2012), 308.

contingency – radical and absolute – operate entangled and undistinguished.[14]

It is not the task of this paper extensively to follow Waldenfels's indication. Rather, the aim of the following pages is to explore the aforementioned relation between radicality and absoluteness, by means of an analysis of a single representative example.

To that end I would choose to devote my investigation to Chantal Mouffe's influential theory of an agonistic democracy, for I believe that the reach of the aforementioned ambivalence can be traced in her theory in an extremely significant way. More precisely, harking back to Waldenfels's paradigmatic distinction, I will attempt to show how her theory can be viewed as the site of a remarkable polarization between two simultaneously opposite inclinations. On the one hand, Mouffe's theory can be considered as the space articulating a fruitful and promising project of democratic contingency and democratic transgression of politico-legal boundaries; on the other, as the place in which the spectres of an absolutistic form of contingency cast their shades, thereby running counter to an effective realization of a radical democratic project.

In order to accomplish my task, this paper will fall into three extremely condensed sections. In the first section, I will vigorously defend Mouffe's depiction of conflict as democratic agonism and her insistence on the fact that configurations of radical democratic strives do not imply forms of absolute contingency as those embraced by some currently influential theorists in the field of political activism (such as Hardt and Negri). In the second section, however, I will part ways with Mouffe, arguing that her account of conflict falls prey, nonetheless, to the ambivalence noted above, as it attempts to connect two irreconcilable poles, namely a radical design of contingency proper to democracy, on the one hand, and the Schmittian absolutistic configuration of an antagonistic politics on the other. Subsequently, the closing section will attempt to find a possible way out of this predicament by advocating an agonism freed from the bonds of antagonism. Such a depiction of agonism, I will argue, is best able to accommodate promising and vibrant forms of democratic challenge without having to collapse into anti-democratic degenerations. As I will attempt to show, such a perspective can find its political inspiration in Hannah Arendt's theory of plurality and its legal orientation in Hans Lindahl's phenomenology of a-legality.

## II.  The Fruitful Elements of Mouffe's Theory of Agonistic Politics

The first section concentrates on what is to be capitalized by drawing on Mouffe's perspective. Yet, before delving into her theory, let me start by presenting the general framework in which she positions her analysis.

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[14] I have made a first attempt to put in practice such a deconstructing invitation in another paper devoted to Arendt's thought. Cf F.G. Menga, 'The Seduction of Radical Democracy. Deconstructing Hannah Arendt's Political Discourse' 21(3) *Constellations*, 313-326 (2014).

Mouffe adopts a hermeneutical strategy whereby she detects two major conflicting approaches within the structural range of positions in the current debate on radical democracy. These two approaches, as she puts it, by drawing on two respective divergent 'philosophical frameworks', necessarily result in the opposing form of two incompatible political 'proposals'.[15] As a result of such a polarized scheme, one finds, at the one extreme, the approach of those theorists – from whom Mouffe distances herself – envisaging the realization of a radical democratic project only in terms of an exit from the modern political-philosophical itinerary. At the antipodes, one detects the approach of those – in whose trajectory Mouffe also inscribes her philosophical stance – who, far from acclaiming an exit of the sort, advocate instead the very possibility of radical democracy exactly by insisting on the modern paradigm, more precisely on a kind of re-discovery and re-actualization of its political constitutive premises.[16]

The first approach, which counts on high support within numerous groups of political activists,[17] is represented, as one can easily appreciate, by the position of those whom we may call 'absolutist democrats', such as Michael Hardt and Antonio Negri.[18] These authors view the possibility of enacting a real democratic project – 'absolute democracy'[19] in their terminology – exclusively under the condition of a radical transgression of (and overcoming) the modern political paradigm and its respective institutions. According to them, such a paradigm, in fact, far from 'establishing democracy'[20] as the effective realization of societal self-organization and self-governing, which is to be conceived of as a multitude 'act(ing) in common'[21] in its horizontal, immanent, multiple and creative

[15] Ch. Mouffe, *Agonistics. Thinking the World Politically* (London/New York: Verso, 2013), 65.

[16] In quite a similar vein, Kioupkiolis and Katsambekis also define this opposition in the debate in terms of 'competing approaches' (A. Kioupkiolis and G. Katsambekis, 'Radical Democracy and Collective Movements Today: Responding to the Challenge of *Kairos*', in Id eds, *Radical Democracy and Collective Movements Today. The Biopolitics of the Multitude Versus the Hegemony of the People* (Farnham: Ashgate, 2014), 5.

[17] Cf ibid 1.

[18] Cf by M. Hardt and A. Negri, *Empire* (Cambridge: Harvard University Press, 2000); Id, *Multitude. War and Democracy in the Age of Empire* (New York: Penguin Books, 2004); Id, *Commonwealth* (Cambridge: Harvard University Press, 2009); and Id, *Declaration* (New York: Argo Navis, 2012). In quite a similar (though not identical) line, see – just to name a few – also: P. Virno, *A Grammar of the Multitude* (Los Angeles: Semiotext(e), 2004); R. Day, *Gramsci is Dead. Anarchist Currents in the Newest Social Movements* (London: Pluto Press, 2005); J. Holloway, *Change the World Without Taking Power* (London: Pluto Press, 2005); I. Lorey, 'On Democracy and Occupation. Horizontality and the Need for New Forms of Verticality', in P. Gielen ed, *Instituting Art in a Flat World* (Amsterdam: Valiz, 2013), 78-99; S. Newmann, *The Politics of Postanarchism* (Edinburgh: Edinburgh University Press, 2011). For an excellent political-philosophical presentation and discussion of issues and problems related to these (and other) influential theories for recent political activism see the volume by A. Kioupkiolis and G. Katsambekis eds, n 16 above.

[19] M. Hardt and A. Negri, *Empire* n 18 above, 410; Id, *Multitude* n 18 above, 93, 242, 351, 353.

[20] M. Hardt and A. Negri, *Multitude* n 18 above, 353.

[21] ibid 356.

articulation,[22] is to be considered as the main factor responsible for 'blocking (any) democratic expression'.[23] The reason for this outcome is that it relies on hierarchical-based and society-transcending devices such as the 'state (...) considered (as) the primary locus of sovereignty (and) authority'[24] and the correlative concept of a unitary will of the people necessarily mediated through representative mechanisms.[25] Following this approach, it appears as no surprise that these theorists view the very accomplishment of democracy by means of a 'decisive break'[26] or 'profound rupture with modernity'[27] and, therefore, through the undertaking of a sheer 'altermodern' endeavour,[28] which displays the political traits of an '*exodus*'[29] from the modern institutional design. As Mouffe describes it, we are dealing with a ' "withdrawal" from existing institutions so as to foster the self-organization of the Multitude'.[30]

Opposed to this approach, I hold that Mouffe raises a major point that should be vigorously defended. It is her insistence on the fact that a radical democratic depiction of conflict demands precisely eschewing such an '*exodus*' from the modern institutional paradigm,[31] as insistently advocated by the aforementioned currently influential theorists in the field of political activism.[32] Crucially, she expressively counters all recent activist perspectives because, in her view, they advocate an exasperated form of political contingency in terms of

[22] Cf ibid 348-358; M. Hardt and A. Negri, *Declaration* n 18 above, 5.

[23] M. Hardt and A. Negri, *Multitude* n 18 above, 353.

[24] ibid.

[25] Cf M. Hardt and A. Negri, *Empire* n 18 above, 103; Id, *Multitude* n 18 above, esp ch 3; as well as Id, *Commonwealth* n 18 above, 169. Expressively inspired by Hardt's and Negri's theory, Lorey offers quite an explicative and condensed illustration of their critical stance towards the modern political discourse and institution's design: 'Discourses of legal and state theory on the "sovereignty of the people" resemble one another in the thrust of their arguments: constituent power is only imaginable as uniforming and unifying the many into one "people", a people that presumably cannot be assembled in its multitude and heterogeneity and must therefore be represented. The "will" and the representatively conveyed agency that are associated with the constructions of the one "people" conform to the logic of juridical sovereignty. In the occidental tradition of democracy, there obviously has to be a nexus, no matter how it is weighted, between the people, law, sovereignty and representation, which has to construct the multitude as a threat in crucial places and ward it off. A constituent power of the many, not tamed into a 'people', beyond sovereignty, law, and representation, is thus excluded from the realm of the imaginable, because it is associated with non-governability, disorder and chaos' (I. Lorey, n 18 above, 80-81).

[26] M. Hardt and A. Negri, *Commonwealth* n 18 above, 103.

[27] ibid 114.

[28] Cf ibid 101-118.

[29] For the theme of '*exodus*' see M. Hardt and A. Negri, *Multitude* n 18 above, 333, 341-342, and throughout Id, *Commonwealth* n 18 above. Under the perspective of a 'presentist and horizontal democrary' see also I. Lorey, n 18 above, 84, 90, 96-98.

[30] Ch. Mouffe, *Agonistics* n 15 above, 71. In the same vein see also Ch. Mouffe, 'Institutions as Sites of Agonistic Intervention', in P. Gielen ed, *Institutional Attitudes*, 65-66.

[31] Cf Ch. Mouffe, *Agonistics* n 15 above, 66, 109.

[32] In a slightly distinct way, this mainstay is still reaffirmed in M. Hardt et A. Negri eds, *Assembly* (New York: Oxford University Press, 2017).

an explicit fostering of event, multitudinary commonality, diffuse presentism, 'immanentist ontology'³³ and immediate self-rule.³⁴ Her critique is that such forms slip into an absolutized politics and unwittingly restage a form of political foundationalism in terms of a 'tak(ing) for granted the pre-given unit of a "we" ' (such as the one echoing in the call 'We are 99%').³⁵ It is not by chance that Mouffe shows quite striking carefulness in stressing the fact that these forms of democratic project, by presenting themselves through such features, may present themselves as 'absolute'³⁶ but not as radical. On the contrary, for Mouffe, securing the possibility of radical democratic conflict requires looking more closely at what the modern democratic discourse already has on offer, namely, following Lefort's insights,³⁷ the genuine discovery of contingency and consequently, the express acceptance of plurality and conflict as its undeniable co-implication.³⁸

The framework of radical conflict resulting from this stance is what she calls 'democratic agonism', ie a conflict between adversaries who, no matter how conflicting and aware of the impossibility to reach a rational resolution to their conflict, nevertheless do not slip into sheer antagonism but rather acknowledge the legitimacy of their opposing party. Mouffe writes the following:

> 'While antagonism is a we/they relation in which two sides are enemies who do not share any common ground, agonism is a we/they relation where the conflicting parties, although acknowledging that there is no rational solution to their conflict, nevertheless recognize the legitimacy of their opponents. They are "adversaries", not enemies'.³⁹

## III. Criticizing Mouffe's Appraisal of Democratic Conflicts

The critical point which I wish to raise, however, is that Mouffe does not stop at this stage of analysis; rather, she takes a further problematic step. In fact, in order to distance herself from the deliberative approaches which, in her view, endorse a too weak form of conflict (a conflict already imposed onto the horizon of an intersubjective agreement),⁴⁰ she deploys the strategy of radicalizing and emphasizing conflict as the ontological (and ineradicable) trait of all political space. From this perspective, then, it is relatively easy to comprehend the reason why Mouffe cannot regard agonism as the primary form of conflict any longer, but

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³³ Ch. Mouffe, *For a Left Populism* (London: Verso Books 2018), 55.
³⁴ Cf Ch. Mouffe, *Agonistics* n 15 above, 78, 109.
³⁵ ibid 117.
³⁶ ibid 78.
³⁷ Cf C. Lefort, *Democracy and Political Theory* (London: Verso Books, 1988).
³⁸ Cf Ch. Mouffe, *The Democratic Paradox* (London: Verso Books, 2000), 1, 18; Id, *For a Left Populism* n 33 above, 42.
³⁹ Ch. Mouffe, *On the Political* (London: Verso Books, 2005), 20.
⁴⁰ Cf Ch. Mouffe, *Agonistics* n 15 above, 10, 22-31, 83-98.

rather only as the result of a sublimation process,[41] tapping from a deeper or more radical form of conflict. Mouffe, notably, drawing on Carl Schmitt's political theory, defines such a form of ineradicable conflict in terms of an antagonism – a friend/enemy divide – lying at the basis of democratic life.[42] As she puts it:

> 'I submit that Schmitt's emphasis on the ever present possibility of the friend/enemy distinction and the conflictual nature of politics constitutes the necessary starting point for envisaging the aims of democratic politics. Only by acknowledging "the political" in its antagonistic dimension can we pose the central question for democratic politics'.[43]

Exactly at this point, I part ways with Mouffe. Drawing on the aforementioned distinction between a radical and absolute design of contingency and conflict, I argue, in fact, that one cannot adequately unfold the kind of conflict required by the contingency proper to democracy by following her strategy of anchoring the configuration of agonistic conflict to Schmitt's design of antagonism among enemies. The point I wish to raise is that Schmitt's theory only accommodates an absolutistic configuration of conflict, thereby remaining irreducibly inadmissible for any radically contingency-based and jointly democratic understanding thereof. As a consequence, by keeping these two paradigmatically opposite forms of conflict connected, Mouffe, far from deepening the articulation of democratic conflict, inevitably falls prey to accentuating exactly the above illustrated ambivalence, by delivering a political theory climaxing into two irreconcilable poles, one adhering to the Schmittian absolutistic design of politics, the other adhering to the condition of radical contingency proper to democracy, in which, however, the proper form of conflict as a sublimation of antagonism remains necessarily obscure. It is my conviction, in fact, that Mouffe never clearly explains how the alleged transfiguration from basic antagonism into agonism is made possible; this is because such a transformation is impossible.

My critique of Mouffe's theory, however, is not goal in itself. It is instead intended to show how an antagonistic-based model of agonistic conflict jeopardizes the very delineation of an ethic of transformative democratic conflict or, better, an ethic of a democratic transgression of politico-legal boundaries. The point I wish to defend here is that Mouffe, by placing exclusive weight to the moment of antagonism for the purpose of endorsing the ineradicability of conflict, not only transgresses the effective articulation of democratic conflict as such, but also misses the potentialities inherent in agonism itself. In fact, agonism, once freed both from the ballast of antagonism and being relegated to the mere conservative role of taming or sublimating political inimicalities, is best able to take up very

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[41] Cf Ch. Mouffe, *The Democratic Paradox* n 38 above, 107; Id, *Agonistics* n 15 above 9.
[42] Cf Ch. Mouffe, *The Democratic Paradox* n 38 above, 22; Id, *On the Political* n 39 above, 13, 17.
[43] Ch. Mouffe, *On the Political* n 39 above, 13.

promising and vibrant forms for democratic life – forms which can thoroughly express enhanced articulations of conflict without having to decay into anti-democratic degeneration.

As I will shortly indicate, a good candidate for outlining such a form of heightened agonism can be traced in all its political weight and normative concreteness by combining two trajectories of political alteration, one inspired by Hannah Arendt's notion of plurality and natality, the other drawing on Hans Lindahl's phenomenological insights on the dynamic of a-legality.

## IV. Arendt's Natality and Lindahl's A-Legality: Conceptualizing a Democratic Transgression of Legal Orders

To begin with, I assume that Mouffe's model as it stands – contemplating, on the one hand, a democracy-deficient antagonism on stand-by for its democratic transfiguration and, on the other, an agonism that has already been rendered appropriate for democracy – condemns one to a perverse alternative. Polities are either exposed to violence or delivered over to a conservative position incapable of really perceiving, let alone embracing, transformative politics. In fact, if we endorse Mouffe's characterization of agonism, that is, if we consider that democratic agonism takes place only once antagonistic conflict has been sublimated into conflicts which will not really endanger the political association, then we are inevitably caught up in one of the two following situations: either we have to assume, as Keith Breen brilliantly suggests, 'an overly optimistic view of agonistic conflicts',[44] in which, ultimately, 'agonistic democracy appears as a partisan politics with no real partisans'.[45] However, this would serve to advocate a conservative position which 'spurns transformative politics'.[46] Alternatively, if we really want to endorse a truly conflictual and transformative position, where contestations and challenges deeply question the extant politico-legal order, then the only other device we dispose of in Mouffe's theory is antagonism, which implies sheer enmity.

Consequently, Mouffe's strictly dichotomous model only seems able to account either for situations in which conflicts are already unproblematically taking place within the democratic sphere or for situations in which they are granted no possible access therein. We are dealing, in other words, either with conflicts which are already sublimated and, subsequently, not really conflictual, or with conflicts which are not even allowed to enter the democratic public realm, since they are, strictly speaking, conflicts which cannot be dealt with democratically.

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[44] K. Breen, 'Agonism, Antagonism and the Necessity of Care', in A. Schaap ed, *Law and Agonistic Politics* (Farnham: Ashgate, 2008), 139.

[45] ibid.

[46] ibid. Although in slightly different terms, Wenman too detects and sharply criticizes the remarkable 'conservative' trait entailed in Mouffe's 'agonistic matrix' (cf M. Wenman, n 6 above, 197, quotations at 215 and 211).

In one way or the other, what Mouffe's conflict paradigm fails to address is the topical place where transformative conflicts and genuine instantiations of critique really take place: not inside and not outside but on the border – on the threshold – of the public sphere and legal order.

I submit that this is exactly what Arendt's model of plurality enables one to conceive of, especially if one capitalizes on her notion of natality.

Arendt's characterization of plurality, in effect, if one follows what she expressively maintains of it, asserts the irreducible and originary contingent dynamic of inter-action between equal and distinct individuals which cannot give rise to any final unitary formation of common space or collective order, but only to realms of commonality displaying traits of conjunction and disjunction and, therefore, of accord and conflict.

Importantly, Arendt, although stressing the undeniable aspect of equality and conjunction within the common sphere, otherwise condemned to a too fragmented configuration, vehemently insists on the primacy of distinction as the very source for dynamism and participation within plurality. Such a primacy is best explained by the emphasis she puts on the notion of natality as a notion which, by breaking the logic of generalization, displays the very constitutive character of inequality of singular beings within plurality, along with their capability to act as beginning and therefore of inserting strands of innovation and conflict within the common space.[47] In other words, natality, by embodying the trait of singularity and divergence within plurality, precisely represents the element which may constitute the unprecedented claim, the transformative demand, the possible critical impulse for any established public space. As it is, such an element does not already have its place inside the order, for in this case, it would represent no real challenge or disturbance, nor is it irreducibly outside the order, for it would either remain absolutely unperceived or be immediately rejected, but rather it is placed exactly at the boundaries of the public realm and in the process of pushing to cross the threshold through its iterated and renewed demands for shared recognition.

Now, it is of crucial importance to point out how exactly such an articulation of political conflict, as revolving around the notion of natality, when confronted with Mouffe's model, entails something more than the mere condition of an already sublimated agonistic contestation, which leads to no real conflict and something less than a democratically untreatable sheer antagonistic challenge, which shows the traits of an unbearable conflict. It articulates, instead, what I would like to call a liminal conflictual dimension, namely a dimension of conflict which cannot be simply understood in terms of an altering demand to be placed

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[47] Viewed in such a perspective, it comes as no surprise that Arendt, in some passages, highlights exactly the capacity to act as 'the most dangerous of all human abilities and possibilities' (H. Arendt, *Between Past and Future* (New York: Penguin Books, 1977), 53). Concerning this point, see also H. Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), 177-178 and H. Arendt, *The Life of the Mind. Two: Willing* (San Diego/New York/London: A Harvest Book, 1978), 217.

exclusively inside or outside the order.

A more comprehensive understanding of such a peculiar topography implicated in this liminal dimension of transformative conflicts leads us directly to the extremely useful recent legal-phenomenological analysis developed by Hans Lindahl.[48] According to Lindahl, in effect, any genuine altering endeavor is to be conceived as one that, instead of finding its proper place either within or without order, derives from a normative claim of a behavior which simultaneously registers inside and outside the legal order. It registers inside since any altering behavior cannot be treated other than through the legal/illegal divide of any extant order; yet it registers outside, in that such a behavior, by questioning both poles of the distinction between the legal and illegal, opens up possibilities of the legal order which order could realize while it also intimates possibilities that lie beyond its scope of transformation. In order properly to seize and articulate such a liminal and conflictive dimension, which cannot be thoroughly embraced by the legal/illegal connotation, Lindahl fittingly deploys the notion of 'a-legality', which he circumscribes, in the context of a comprehensive definition, as follows:

> 'Legal orders structure the real as either legal or illegal. I dub "strange" behavior or situations the domain of a-legality, where the "a" of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organizes the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behavior'.[49]

Restricting our attention to how Lindahl, in this extremely rich passage, considers a challenging behavior, which is deemed as 'strange', hence, as neither legal nor illegal, by the legal order it questions, the realm of the 'a-legal' circumscribes eminently that peculiar *topos* in which a transformative demand shows itself as not yet part of the extant (politico-legal) order and which, however, could be part of it by having already set in motion, with its normative

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[48] Cf H. Lindahl, *Fault Lines of Globalization* n 4 above, ch 1.2-1.4, 5.3. For a comprehensive discussion of Lindahl's work see the symposium in the (open access) journal 16(2) *Etica & Politica/Ethics & Politics* 919-1015 (2014), edited and introduced by Ferdinando G. Menga with contributions by Emilios Christodoulidis, Fabio Ciaramelli, Martin Loughlin, Sofia Näsström, Stefan Rummens, Neil Walker, and a reply to critics by the author. Lindahl also devotes a specific insight on agonism and a-legality in H. Lindahl, 'The Opening: A-Legality and Political Agonism', in A. Schaap ed, *Law and Agonistic Politics* n 44 above, 57-70, and more recently in his volume: H. Lindahl, *Authority* n 5 above, ch 6 and 7.

[49] H. Lindahl, 'Inside and Outside Global Law (Julius Stone Address)' 41(1) *Sydney Law Review*, 1-34, 8-9 (2019).

pressure,[50] the open and altering process of collective recognition as responsive to it. It is what Lindahl precisely defines as 'the capacity of behavior to draw (politico-legal) boundaries otherwise'.[51]

Crucial for my discourse here, is to note that Lindahl, precisely in shaping the dynamic of this otherwise, does not omit to clarify that order's strands of alteration, for vigorous as they may be, cannot imply the articulation of a-legality in terms of an absolute alternative but only as a radically contingent modification 'which calls the boundaries (…) drawn by a legal collective (…) into question'.[52]

One would be wrong, however, to conclude that Lindahl's standpoint here necessarily suggests a framing of order only capable of dealing with mild or expanding forms of alteration, thereby eschewing strong instances of challenge and critique. On the contrary, Lindahl is quite attentive to delivering a spectrum of a-legality which is perfectly able to expand from 'weak' up to 'strong' dimensions of questioning of legal boundaries (from civil disobedience up to demands for secession).[53] What Lindahl's phenomenological thrust implies, therefore, far from being the mere exclusion of vigorous forms of transformation, is the cautious warning that alteration, inasmuch as it wants to emerge as a genuine transformative political experience, for radical and intense it may be, will not slip too easily into the seduction of absolutism and related claims of a total otherness and externality from order. Rather, such an alteration must register, however minimally, inside the realm of possible experienceability of order; and this in form of (so Lindahl) 'another possible ordering of behaviour which interferes with the realm of (extant) practical possibility(ies)'.[54]

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[50] Not by chance I underscore, here, Lindahl's configuration of any transformative and altering endeavor as expressively anchored to a normative and consequently concrete demand. This anchoring, in fact, displays an extremely relevant adjunctive advantage; the possibility of realizing a perspective of agonistic conflict perfectly capable of integrating the aspects of 'lived social reality' and 'existential depth' otherwise so remarkably lacking, as Lois McNay has it, in Mouffe's political theory (cf L. McNay, *The Misguided Search for the Political. Social Weightlessness in Radical Democratic Theory* (Cambridge: Polity Press, 2014) ch 2, quotations at 82). In effect, I concur with McNay when she sharply reproaches Mouffe for falling prey to an excessively strong influence exerted on her by the post-structuralist and 'post-foundational political thinking' (ibid 93) – an influence which, based on sheer 'anti-essentialist' (ibid 82) premises, inevitably leads her agonistic design 'to reduce social experience to little more than a place-holder for linguistic indeterminacy' (ibid) and, concomitantly, to display a 'socially weightless paradigm closed off from the very practices that are supposed to give it its radical political impact' (ibid 79).

[51] H. Lindahl, *Fault Lines of Globalization* n 4 above, 37.

[52] ibid 158.

[53] Cf ibid 174.

[54] ibid 158. In light of this phenomenological delineation based on the articulation of a-legality, it appears now much more clear the extent to which, in my view, Wenman's distinction between 'augmentation' and 'revolution' does not really capture the very range of democratic transformative politics. A-legality, indeed, on the one hand, as a transformative othering (or transgression) of politico-legal order, implies much more than a mere augmentation thereof, and, on the other, as a transgression which nevertheless registers within extant legal order, implies something less than revolution. Adjunctively, a-legality permits one also to consider revolution for what it really is; not the real articulation of 'radical innovation' (M. Wenman, n 6 above, 68) in

At this point, a more attentive phenomenological analysis of Lindahl's distinction between weak and strong forms of a-legality would be in place. For reason of space, I cannot address such a discussion in detail. Yet, let me only indicate briefly the fact that Lindahl's theory too, in my opinion, is not free, here and there, from certain self-deconstructive motives or traits of incoherence. These motives are to be traced, exactly, between his explicit defense of a radical and not absolute configuration of contingency as related to a democratic dynamic of politico-legal orders, on the one hand, and the, at times, too strong depiction of a-legality forms, which instead nearly suggest the articulation of absoluteness, on the other. The critical point here should be to discuss in which terms, for instance, the alleged extremely enhanced forms of a-legality, as those implied in secession demands, still remain such when they finally find a way to be treated in their a-legal impetus by the same extant order which initially marked them as simply inadmissible; or whether these forms do not better need to be viewed as radical and no longer as absolute as soon as the extant order finds itself able to treat them. According to Lindahl such a feasible conduct of legal order implies what he defines as an 'ex-ceptional' or 'extra-ordinary' move of an 'holding back' in order to 'hold out'[55] or, more recently, as a 'restrained collective self-assertion'.[56] In short, here my suggestion would be to not stop at the sole distinction between 'weak' and 'strong' forms of a-legality but rather phenomenologically to broaden the spectrum of the distinction, thereby differentiating within the realm itself of strong forms of a-legality between those amenable to a democratic treatment and those resistant to such a treatment. By means of such a further differentiation it becomes possible, in my opinion, to expand the range of democratic contingency and conflictuality and, therefore, of order's democratic range of hospitality to alterity, without having to surrender too soon to the issue of order's menace and, subsequently, to conservative practices of its protection.[57]

However, leaving this phenomenological caveat aside, from this analysis inspired by Arendt's notion of natality and Lindahl's dynamic of a-legality can we now conclude the following: It is only by making recourse to such liminally articulating dimensions of agonism free from the paradigmatic ballast of antagonism that an appropriate view of a radically plural democratic space can emerge. Such a configuration of conflict is crucial, as it is able to accommodate

democratic terms, but rather an exorbitant and unbearable experience for democratic life as such.

[55] Cf H. Lindahl, *Fault Lines of Globalization* n 4 above, ch 7.5.

[56] H. Lindahl, *Authority* n 5 above, 287.

[57] Notwithstanding my critical remark, I cannot omit to register how Lindahl too considers times and again the problematic aspects of such a divide. On this issue cf H. Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders', in S. Prechal and B. Van Roermund eds, *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008), 291-313 and H. Lindahl, *Authority* n 5 above, 298-300. Especially in this latter work, Lindahl, sensitive to the problem I have raised, frames the issue of legal orders' transformability exactly in terms of a collective recognition of the 'other (in ourselves) [both] as one of us as other than us' (ibid 287).

true and proper transformative politics, on the one hand and protect a minimal condition of democratic articulation, on the other.

Exactly along the line of a thus conceived porous politico-legal boundary democratic orders may both genuinely display their historical transformative character and eschew the too simplistic critique of a falling prey to relativism.