

(De)judicializing the Political

*An Agonistic Practice of Constitutional
Rights Adjudication*

Joyce Esser LLM

Master Thesis

Philosophy: Ethics and Politics

Leiden University

January 2020

Supervisor: Dr. Thomas Fossen

Second Reader: Dr. H.W. Siemens

“We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”

The United States Declaration of Independence, 1776

“There is no law that can be fixed, whose articles cannot be contested, whose foundations are not susceptible to being called into question”

Claude Lefort 1986, 303

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1. Introduction

1.1. Introduction

In December 2019, the Dutch Supreme Court handed down judgement in one of the most anticipated cases of the year: the Urgenda-case (after the NGO instigating the procedure).¹ Contrary to common expectation, the Supreme Court affirmed the disputed judgement and held the Dutch government liable for not taking sufficient measures to restrict the emission of greenhouse gasses, thereby breaching the right to life and the right to family life of article 2 and 8 of the European Convention of Human Rights. This decision was warmly embraced by those who emphasize the unprecedented threat of climate change and has inspired a worldwide movement of urging governments to take climate measures by going to court.² Yet, the decision is also heavily criticized. Many scholars and politicians alike think the decision infringes too much on democratic freedom to determine government policy and accuse the judge of judicial activism.³

The Urgenda decision is a striking example of the increasing impact of rights on public policy, and its reception represents the worldwide debate this has evoked. The current political climate is characterized by an extremely diverse range of conflicting interests and political values, which increases the pressure on the judge to protect those who have lost out in political decision-making. Over the last decades, the judge has often been willing to do so, stretching the scope of many legal norms, including rights. This results in a growing number of policy questions being settled in court and hence to the ‘judicialization’ of the common good. At the same time, the rights discourse has received heavy fire over the last years. The rights project seems to have done little to eradicate the poverty, suppression and radical inequality that still characterizes our global world. Furthermore, with the rise of populist regimes all over the world, including those countries in which the protection of rights once seemed self-evident, an increasing anti-rights discourse is visible, where rights are framed as something ‘from the left’ or oppressive of the democratic powers of the people.

¹ Hoge Raad, 20 december 2019, ECLI:NL:HR:2019:2006.

² Schwartz, 2019.

³ Sommer 2020.

1.2. Problem introduction and gap in literature

These developments have a profound impact on more foundational issues, such as the balance of the *trias politica*, the legitimacy of law and its relation to democracy and the translation of different interests in the common good. Therefore, they are far from isolated within legal theory, but are also at the heart of political theory. One of the political theories that is intrinsically engaged in these issues - and therefore affected by their developments, is ‘agonistic democracy’. This post-modernist strand of democratic theory denies the existence of any foundational truth, but only acknowledges the provisional truth constructed through politics, of which it encourages the emancipatory pluralistic contestability. There is an apparent tension between this advocated absence of rational foundations and the primacy of political contest on the one hand and rights-based adjudication by the judiciary on the other hand. Therefore, there is a general aversion in agonistic theory against the legal, rights and the judge.⁴ At the same time, there is a strand of authors taking inspiration from agonistic theory to substantiate a theory of rights or of the judge.⁵ These two different approaches have not yet come together in a substantive consideration of the task of the judge in adjudicating rights within agonistic democracy. In general, Schaap notes that there ‘has been somewhat of an institutional and legal deficit in the agonism of the postmoderns’.⁶

1.3. Research question, approach and argument outline

In this thesis, I will therefore examine the role of the judge in adjudicating constitutional rights within agonistic theory. I will do so by complementing general agonistic theory with the perspective of legal theory and practice, because I believe that any viable political theory will have to be sensitive to the way those concepts it evaluates operate in practice. Instead of taking the inanimate concept of rights, this thesis explicitly focuses on the role of someone of flesh and blood: the judge. It does so, because agonistic theory is best understood and examined through the lens of someone who is himself engaged in the agonistic contest.

⁴ Gray 1995, 122 and Wenman 2013, 77-79

⁵ Zivi 2010, Hoover 2016, 137 et seq.; Henderson 2018.

⁶ Schaap 2009, 13.

This leads to the following research question:

What, if any, is the appropriate role of the judge in adjudicating constitutional rights within the framework of agonistic democracy?

To answer this question, I will answer the following sub-questions:

- *What are the foundational justifications for constitutional rights?*
- *How are constitutional rights currently adjudicated and how is this practice evaluated?*

I will answer these questions in chapter 2. The purpose of this chapter is to introduce the main legal topics of this thesis and to develop a useful framework to relate the agonistic perspectives to. In this chapter, I will argue that the contemporary practice of far-reaching rights adjudication fits best within a constitutionalist narrative, which values rights as independent from political decision-making. From the perspective of democratic legitimacy, however, this practice is regarded with more suspicion.

- *What is agonistic democracy?*
- *What is the place of law within agonistic democracy?*
- *What is the place of rights within agonistic democracy?*

These questions will be answered in chapter 3, which will examine the general role of law and rights within agonistic democracy. In this chapter, I will introduce the general paradox of agonistic theory: it encourages the constituent power to contest discourse as constituted power, while at the same time recognizing that we need it to enable such a practice. This paradox informs the agonistic attitude towards anything legal and institutional, including the position of the judge, and will therefore be the common thread to the entire thesis. I will argue that rights, although thoroughly anti-agonistic if used to externally constrain political debate, can also be an agonistic device, if perceived as constructed and contested within this debate itself.

- *What is the role of the judge within agonistic theory?*
- *How could the judge adjudicate constitutional rights in an agonistic way?*

I will answer these question in chapter 4, which will focus on the role of the judge. Although agonistic theory offers a powerful criticism against judicialization through adjudication, the judge also performs a necessary part: he affirms the order that is needed to create meaning. The role of the judge is found between the two extremes of confirming and creating and comes down in the moment of decision. In doing so, he performs a vital part in the conflictual process in which rights gain their meaning.

1.4. Methodology

The general approach of this thesis is to examine the role of the judge within agonistic democracy by complementing agonistic theory with a legal perspective. This has a number of methodological implications.

This thesis is first and foremost a conceptual project, in which I have tried to analyze and relate concepts from different backgrounds. This requires the alignment of two considerably different bodies of literature. To do so, I have tried to map out relevant ideas in such a way that they are mutually relatable and in a way that is manageable in the given time and space for this thesis. This means that this thesis will often only explicate the general characteristics of any concept, without being able to go into the details of its history or the different positions of different positions. This is especially the case for the general exposition of agonistic theory, which cannot even hope to do justice to its historical developments or the (at points very different) conceptions of the scholars who are its driving force. Where possible, I have tried to refer to further literature.

As a result of this approach, the added value I have aimed for is the analysis of different bodies of existing research. For chapter 2, I have relied mostly on handbooks and general introductions into the major topics. For chapter 3, I have made grateful use of the handbooks of Wenman and Wingenbach on general agonistic theory, and the extremely useful collection *Law and Agonistic Politics*, edited by Andrew Schaap. For chapter 4, I am indebted to the dissertation of Laura Henderson on the agonistic judge.

2. Constitutional rights adjudication in the 21st century

In this chapter, I will introduce the key topics which I will examine from an agonistic perspective in the rest of the thesis: constitutional rights and constitutional rights adjudication. To do so, I will first clarify some of the terminology used in this chapter and the rest of the thesis (section 2.1). I will then set out the relevant theoretical framework, which will primarily focus on the concept of constitutional rights (section 2.2). In section 2.3, I will turn to legal practice, in particular the way constitutional rights are adjudicated by the judge.

There is a nearly infinite body of literature on these topics, in which major questions are heavily debated and often approached differently within the different relevant disciplines. Because the aim of this chapter is only to set the stage for the rest of the thesis, I will limit myself to presenting a somewhat simplified narrative as relevant for the perspective of agonistic democracy.

2.1. Terminology

2.1.1. *Constitutional rights*

Although this thesis is not the place to develop an exhaustive rights terminology, I will shortly explicate what is meant by the phrase constitutional rights and how it relates to the concept of *human rights*.

The most natural approach to these topics is to acknowledge that the constitutional rights and the human rights discourse share strong historical roots, theoretical background and practical objectives, but are usually approached conceptually from different starting points.⁷ Within political theory, the language of human rights generally refers to rights as universal or moral concepts. From a legal perspective, this concerns those rights included in international treaties and applicable in international relations. Within political theory, the language of constitutional rights generally refers to the rights of a specific political community, most typically a state. From a legal perspective, these rights are generally laid down in the formal constitution of the state. They have a higher status than ‘regular’ law and therefore give its addressees remedies against violations by government action including law-making. When taken together, the phrase ‘fundamental rights’ is common. However, both phrases are

⁷ Here, I follow the terminology of Neuman 2003, 1865-1866.

commonly used interchangeably and the literature on the relationship between the two is often ambiguous. When talking about the theoretical foundations of rights below, I will shortly return to these concerns. Because agonistic theory examines political concepts from within the political context subjects are situated in (as explicated in chapter 3), I take the theoretical and practical perspectives of constitutional rights as a starting point. Yet, many of the insights from the human rights discourse for constitutional rights stay relevant, if only because much literature on rights does not distinguish between the two.

2.1.2. *The judge*

When talking about ‘the judge’ in general, this thesis refers to any judicial instance to which cases are submitted in which constitutional rights apply. For many contemporary legal systems this will be a Constitutional Court, being the only institution with jurisdiction over constitutional questions in general and/or over laws of parliament (which are often the cause of constitutional rights interferences). Nevertheless, this is not necessarily the case. For example, the Dutch legal system does not have a Constitutional Court and allows any judge to apply constitutional norms, although not even the Supreme Court is allowed to assess laws of parliament against the constitution. As these institutional questions are not of real concern in answering the research question of this thesis, I will refer to ‘the judge’, ‘the court’, or ‘the judiciary’ in general.

2.2. Theoretical background

How to understand and justify the concept of constitutional rights is one of the major debates of centuries of political and constitutional theory. As a starting point, I will examine them as part of *constitutional democracy* broadly understood. This tradition consists of two basic principles: it recognizes the power of the state as legitimate if based on the self-rule of the people (*democracy*), but it also restrains this power by the fundamental rules of the order, such as the separation of powers (*constitutionalism*).⁸ Rights are traditionally classified under the latter: they define a political space which limits the power of the state.⁹ However, the

⁸ Elster 1988, 2-3.

⁹ Elster 1988, 3-4.

relationship between these two principles can be perceived quite differently, which also informs the historical and theoretical discourse on rights.¹⁰

2.2.1. *Constitutional rights as independent from democracy*

On one side of the spectrum, constitutionalism can be perceived as a value independent of and sometimes in tension with the value of democracy.

This conception is traditionally associated with the political tradition of liberalism, which aims at enhancing the freedom and private autonomy of citizens. Rights take a central place here, because they formulate a sphere of freedom for individuals in which no state intervention is allowed.¹¹ Historically, this conception relies on the natural rights and social contract theories of theorists like John Locke.¹² The reason why people enter into a political community, and therefore the function of the state, is to have their pre-political rights protected. Liberalism is therefore characterized by a theory of ‘right’ instead of the political ‘good’, towards which it is neutral. The ‘good’ can only be determined through the free and autonomous preference of its citizens. By counting everyone’s preference equally, this autonomy is effectuated democratically, but this can never exceed the rights of men, which are the fundamental preconditions of the state.

Although rights are perceived as ‘neutral’ in this sense, they have a clear substantive value which does not depend on democratic or political choice. Rather, they function as an individual ‘trump’ against majority decision and state power.¹³ This function is closely affiliated with a more substantive and independent conception of the rule of law.¹⁴ This conception resembles the continental *Rechtsstaat*-conception, which requires the law to recognize and protect a substantive set of rights.¹⁵ Instead of relying on the religious foundation

¹⁰ In this section, I draw on Loughlin’s analysis of constitutional rights as deriving from two different historical traditions, in which he traces the rights conception of the American Revolution to the natural-law ideas of Thomas Paine and the rights conception of the French Revolution to the republicanism of Rousseau, Loughlin 2010, 342-372. I also draw on Whittington 2008, in his classification of approaches to the relationship between constitutionalism and democracy.

¹¹ Freedman & Stears 2013, 229-230.

¹² See Haakonssen 2017 for a historical outline of this tradition.

¹³ Dworkin 2009, 335 et seq.

¹⁴ Craig 1997, 467.

¹⁵ See Loughlin 2010, 312-341 for the complicated relation between the continental *Rechtsstaat* and the Anglo-Saxon Rule of Law.

of early modern theorists as Locke, many contemporary theorists turn to concepts such as ‘human dignity’ or ‘human autonomy’ as the justificatory foundation of these rights, which both focus on the necessary constitutive aspects of the fulfillment of our human lives.¹⁶ Whereas these conceptions still represent some natural law conception, a set of substantive rights can also be framed as a principle of morality or justice inherent to a legal order. Concepts such as Rawls’ justice as fairness or Allan’s constitutional justice, implying a set of rights as part of a substantive rule of law, are therefore firmly rooted within the liberal tradition.¹⁷

For the sake of this thesis, I take those conceptions which view constitutionalism, the rule of law and constitutional rights as having an independent and often counterbalancing function towards democracy as belonging to this ‘constitutionalist’ tradition, which could be roughly identified with that of liberal democracy. Although the distinctions between these traditions and their relation to liberalism is much debated, I think this is justified not only for reasons of clarity, but also because agonistic theory itself often refers quite generally to the ‘liberal’ or ‘constitutional’ tradition.¹⁸ Common to these theories (although not necessarily always present), is a ‘distrust in democracy’.¹⁹ Rights are meant as minority protection against the majority. By laying rights down in the formal constitution, an important role is opened for the judiciary, as a constitutional power independent from the legislator and executive possibly infringing on those rights, to protect and interpret them.²⁰ This is why both much constitutional theory and many actual constitutions or other bill of rights acknowledge the right of access to court and to a fair trial as an important right in itself.

2.2.2. Rights as part of democracy

On the other side of the spectrum, we can find those authors and theories who value constitutionalism as integral to instead of contrary to democracy. This approach, which we could designate (a bit bluntly) as the ‘democratic narrative’, is often skeptical of the ‘countermajoritarian’ quality of the constitutionalist conception of rights and the individualist human nature it advocates.

¹⁶ See Weinrib 2018 for a dignity based conception and Möller 2012, 73-95, for an autonomy based conception.

¹⁷ Allan 2001, Rawls 1985, especially 227-228.

¹⁸ See Tamanaha 2004, 32-46 on the relationship of liberalism and the rule of law; Ten 2007, 493-503 on that of constitutionalism and the rule of law.

¹⁹ Alexy 2012, 289.

²⁰ Elster 1988, 4; Freedman & Stears 2013, 337.

From the perspective of political theory, one of the most fundamental alternatives to the liberal narrative is given by the republican tradition. Republicanism values democratic sovereignty and self-governance through active public citizenship of the political community as a whole. Instead of the negative freedom from interference of liberalism, republicanism traditionally values the positive freedom of the collective to determine the common good. More recently, Pettit has tried to reformulate this dichotomy in a republican conception of freedom as the collective freedom from domination.²¹ In any case, it is therefore highly critical of the individualistic and atomistic liberalism's conception rights, which values the private life as protected from the state. Republicanism, highlighting the value of collective and public decision-making, is also skeptical of liberalism's counter-majoritarian tendencies. This does not imply a mere rule of the majority, because republicanism encourages citizens to transcend their own preference and deliberate about the *common* good, which ideally includes involving minorities both procedurally (allowing them to co-legislate) and substantively (considering their interests). This is why republicanism traditionally encourages the development of civic virtue, but will often also involve an account of the rule of law or rights.²²

There is a natural affinity between republicanism and constitutional-legal theory which emphasizes democracy as the foundational value of constitutional democracy (although not necessarily so). This narrative also reserves an important place for rights (I therefore exclude radical democratic theory which rejects rights from this chapter), but its approach can differ from the 'constitutionalist' narrative in two important ways. Firstly, the *foundation* and *content* of these rights is often justified not by referring to independent values, but by referring to the political choice to establish a political order.²³ An important implication is that the constitution can only be binding on the constituted authority (limiting the power of the state), but not on the sovereign itself (limiting the power of the people).²⁴ The constitution and its rights give its citizens protection within their own legal order, but they are free to change and interpret it,

²¹ Pettit 1997, 51 et seq.

²² Dagger 2011, 702-704.

²³ Whittington 2008, 284-286.

²⁴ According to Rousseau, our natural rights are extinguished when entering a political order and are converted into those rights constituted by the order itself, meaning there are no inalienable rights placing limits on the sovereign, see Loughlin 2010, 345

although often through procedures restricted by the constitution itself.²⁵ This makes this tradition critical of the monopoly of the judge to interpret and thereby develop the content of constitutional rights, which instead belongs to the people as sovereign.²⁶ Secondly, the *purpose* of constitutional rights is often approached differently: instead of protecting citizens against democratic decision-making, they are valued for enabling the democratic process.²⁷ Therefore, most theories of democracy require at least a set of procedural rights and sometimes even a set of substantive rights that would not be out of place in the average constitutionalist theory of rights.²⁸

Although these two characteristics (democratic justification/interpretation and democratic purpose) are often taken together, they do not necessarily need to do so. In fact, they are quite often in tension. The more substantive the rights required by democratic theory, the more their foundation seems to depend on something beyond factual democratic preference. This is why republicanism often runs into the difficulty of proposing a set of rights to fulfill the republican ideal of self-governance before it is achieved (which I will cover much more extensively in section 3.2) and will need to refer to some foundation that is independent from strict democratic preference. Here, these theories come very close to those ‘constitutionalist’ theories which value and justify rights as being internal to a democratic legal order. In a similar vein, many ‘constitutionalist’ theories value rights not only for their protecting value, but also for their enabling value to live in a community. At this point, the distinction becomes one of degree.²⁹ Yet I think the broad distinction between ‘constitutionalist’ theories (often affiliated with liberalism) and ‘democratic’ theories (often affiliated with republicanism), although oversimplified, is useful, if only to get a grip on the overwhelming literature and the agonistic criticism.³⁰

²⁵ A good example is Ackerman’s ‘dualist democracy’, which distinguishes between normal politics and ‘higher lawmaking’, both of which are conducted democratically, but the latter in a constitutionalist form, Ackerman 1991.

²⁶ See for example Kramer’s popular constitutionalism, Kramer 2004.

²⁷ Whittington 2008, 286-288.

²⁸ See Ely’s proposal of procedural constitutionalism (which I will cover in section 4.2), and Brettschneider’s proposal of democratic rights, which includes the right to privacy and property, Brettschneider 2007.

²⁹ Some authors explicitly occupy the middle ground, such as Dagger’s republican liberalism.

³⁰ See, however, Haakonssen 2007, 731-733, who criticizes the stylized conceptual distinction between republicanism and liberalism, which he holds does not accord with actual historical development.

2.2.3. Relationship to human rights

The position of any political theory on this theoretical ‘constitutional rights spectrum’, will often also inform its perspectives on human rights. Those theories advocating a substantive or moral content (more or less) independent from democratic choice will often perceive of the human rights regime as pursuing the same objective: the protection of the ‘inalienable’ rights of men. Within this tradition, it is more common to talk about constitutional and human rights interchangeably and welcome the convergence of both legal regimes. Those theories advocating a democratic foundation for rights, however, are often skeptical of human rights, which are less easily seen as an expression of the sovereign democratic will. Therefore, they will at least need democratic consent to be applicable in the local rights regime, but will always be regarded with some suspicion for their external and top-down character and the near absence of any possibilities for local communities to affect the content of these rights.

2.3. Constitutional rights in legal practice

Although many of these theoretical questions go unanswered, rights play an increasingly important role in practice. Most legal literature on rights approaches this practice heads on, while often only implicitly referring to its theoretical foundations. This is understandable, as the role of rights in practice is developed by actors which are themselves driven by practical rather than theoretical considerations. Nevertheless, any normative evaluation of practice will often implicitly rely on a position on the theoretical spectrum explicated above. In this section, I will therefore shortly examine the way constitutional rights currently operate in practice, with a special focus on the role played by the judge in adjudicating constitutional rights. In doing so, I will try to relate (debate on) contemporary practice to the theoretical framework above.

2.3.1. The development of constitutional rights

Over the last decades, the rights landscape has evolved quite drastically, both nationally and internationally. This development is often chronologically described in terms of ‘generations’.³¹ The ‘first generation rights’ consists of the civil and political liberties such as the freedom of speech or bodily integrity. The ‘second generation’ rights refers to social and economic rights, such as the right to housing, education or water. These rights have come to be recognized during the worldwide rise of the welfare state after World War II. Next to justifying these rights as

³¹ Waldron 2007, 748-751.

valuable in their own right, they are often defended by stating that people can only make effective and meaningful use of their first-generation freedom if their basic living conditions are guaranteed, because only then human autonomy can be fully developed.³² This is the thesis that first-generation and second-generation rights are *indivisible*. The term ‘third generation’ rights is used in a more loose way, but generally refers to rights to collective goods, such as a healthy environment, group rights, or rights of animals or even inanimate objects.³³

These, and other, developments change the legal characteristics of rights. Here Möller usefully describes a transition from the traditional rights conception to what he calls the ‘global model of constitutional rights’.³⁴ Firstly, the scope of constitutional rights has increased from protecting the most fundamental political interests to including a broad spectrum of rights. Secondly, whereas traditional rights imply negative obligations for the state (freedom from interference), many contemporary rights impose positive obligations, requiring the state to prevent violations which would otherwise occur. This is clearly visible in the development of socio-economic rights, which require the government to take active steps to provide its citizens with their basic necessities. A third development is that of horizontal effect: instead of merely regulating the relationship between state and citizen, rights now also regulate the relationship between citizens and other private actors. Taken together, these developments lead to a ‘proliferation’ of rights.

However, this proliferation of rights is accompanied by a fourth development: the increasing possibility to limit rights. Whereas constitutional rights traditionally prohibited any interference, interferences now only imply a violation if they are unjustified. Most rights regimes require interferences to meet the ‘reasonableness test’ to be justified. This requirement usually exists of the following elements: the infringed right must recognize the goal of the interference as legitimate, the measure must be suitable to achieve this goal, the measure must be necessary (there may not be a less restrictive alternative) and the measure must be proportional in the strict sense (the burden placed on the rights-holder cannot be disproportionate to the achieved goal).³⁵

³² Shue 1980, 24-25.

³³ Such as the currently emerging tradition of rights of rivers.

³⁴ Möller 2012, 2-15.

³⁵ See Leijten 2018, 106 et seq. for different versions of these tests.

Through this development, the character of the right changes from a legal ‘rule’ with a trumping character to a ‘principle’ or an ‘optimization requirement’.³⁶ This is a necessary implication of the proliferation of rights, through which the interest protected by the right will increasingly come into tension with other protected interests, often other rights. These interests will have to be assessed integrally and often “weighed” against each other.

2.3.2. *Constitutional rights adjudication*

Together with the development of rights, the task of the judge in protecting them has also increased. Following the evolution of rights towards principles, the contemporary practice of constitutional rights adjudication is characterized by a two-stage approach.³⁷ Firstly, the judge has to assess the *scope* of the right. Judges are often quite generous in doing so, interpreting more traditional or general rights to include a new and more specific right. A striking example is the German Constitutional Court recognizing a right to feed pigeons in public parks under the general freedom of action of article 2 of the German Constitution.³⁸ This contributes to the rights proliferation described above, which in turn makes it more attractive for people disadvantaged by political procedure to reframe their interest into a rights question, feeding this development again.

Secondly, the judge will have to assess whether the *limitation* of the right is justified based on the reasonableness test. For example, when the government expropriates people, wanting to reinforce the flood defense system, they will have to prove that the planned reinforcements are able to achieve improved safety (suitability) and that this cannot be done anywhere else (necessity). Importantly, when it comes to proportionality, the right does not require one specific course of action, but only excludes those that are disproportionate. Here, the test leaves explicit room for those actors who are democratically legitimized to balance the different interests at stake.³⁹ In case of a positive obligation, governments can usually defend taking insufficient action by pointing at their limited financial resources, which they might have already spent on national security measures.

³⁶ Alexy 2012, 291.

³⁷ Leijten 2018, 88 et seq.

³⁸ *BVerfGE* 54/143.

³⁹ Möller 2012, 117-123.

2.3.3. *Judicialization of politics*

These developments change the relationship between rights and political decision-making quite radically, and therefore between the judge and the legislator and executive. Under the traditional rights model, rights functioned as ‘trumps’ and hence as the *borders* of political decision-making. If a political decision infringes on these rights, the judge will strike it down. If it does not, it is not a question of (rights) adjudication, but of politics. Through the development of rights towards principles and the ensuing two-stage adjudication, however, an increasing number of political decisions falls under a right, the impact on which becomes an *integral* part of the decision.⁴⁰ Although the political decision-room is reserved in the proportionality requirement, the decision becomes subject to legal requirement and therefore to judicial review.

This development fits within the broader development of *judicialization* or *juridification*, where an increasing number of policy issues comes to fall under legal norms.⁴¹ Instead of defining the borders of public decision-making (public bodies can exercise their authority at their discretion within the bounds of the law), these norms now cover the entire field of action.⁴² In doing so, the law acknowledges that completely determining the correct decision beforehand is both impossible and undesirable (completely eradicating both private or public democratic autonomy) in two ways. Firstly, it increasingly resorts to setting procedural requirements, for example doing diligent research or giving reasons.⁴³ The necessity and suitability tests fit well within this development. These procedural rules do not determine the outcome, but regulate the way it is achieved. Secondly, the outcome itself is also increasingly covered by open or ‘vague’ norms, such as ‘behaving according to appropriate social practice’ or ‘reasonableness’. Instead of simply applying these norms, the judge will have to interpret them to the given situation while also appreciating the autonomy of those acting. Rights are an easy vehicle for ‘judicialization’, because they represent an intuitively important value that is easily cast in legal terms and require interpretation to be effectuated. The Urgenda-case (see

⁴⁰ See in the most radical way Kumm’s notion that all politics aims towards specifying the rights of citizens, Kumm 2010, 152.

⁴¹ Hirschl 2008, 121.

⁴² This development is equally true for private law, but I will focus here on public law, as the tension with democracy is most pressing here.

⁴³ A major aspect of this is the rise of evidence-base law making, where judicial review increasingly focuses on the quality of the evidence used in legislation, see Van Gestel & De Poorter 2016.

introduction) is a good example of this: the court interpreted the applicable rights to life and family life way broader than was usually the case.

Judicialization both limits the possible outcomes beforehand and subjects the actual outcome to increasing judicial scrutiny. For constitutional rights, proliferation of scope and limitation changes the content of the right from something narrow, but substantive and determinative to a very broad ‘right to justification’.⁴⁴ Kumm defines the accompanying task of the court as one of enabling ‘Socratic Contestation’: although the final decision on public policy is up to the legislature, the different aspects of the proportionality test require this decision to hold up in court by being explainable as reasonable.⁴⁵

2.3.4. Evaluation of contemporary practice

The current rights practice is both embraced and heavily criticized. To get a grip on this literature, I will try to relate it to the theoretical perspectives explicated above.

Most theories embracing rights proliferation are explicitly or implicitly indebted to the ‘liberal’ or ‘constitutionalist’ narrative, because these developments affirm the independent importance of the rule of law and rights. On a theoretical level, many of these authors defend a broad conception of rights by pointing to the indivisibility of all rights (as explicated above) and to the importance of newly recognized rights to basic concepts such as autonomy or dignity.⁴⁶ From a more practical perspective, some authors argue that acknowledging both the existence of a right and other (public interests) is the best way to give legal meaning to the increasingly complex and conflicting different interests and different actors who claim legitimacy to decide on them.⁴⁷

However, some constitutionalist and liberal authors are more critical of proliferation. From a practical perspective, the high expectations raised by it are seldom met because of the broad limitation possibilities, especially the possibility to outweigh individual interests with large public interests.⁴⁸ Some authors therefore advocate minimum ‘core’ for any right which cannot be outweighed or limited by majority decision-making, functioning as a trump again.⁴⁹

⁴⁴ Möller 2012, 74.

⁴⁵ Kumm 2010, 167-170.

⁴⁶ See Kumm 2010, who bases his defense of his global model on the autonomy concept.

⁴⁷ Barak 2012, 457-458.

⁴⁸ Leijten 2018, 101.

⁴⁹ Leijten 2018, 123-141.

From a theoretical perspective, however, there is an inherent tension in relating judicialization to liberalism. Although liberalism values the rule of law for protecting rights, it also values neutrality towards the private and public good and therefore regards more law as less freedom. More libertarian or laissez-faire liberals will hardly recognize themselves in the picture I have painted here, which implies increasing socio-economic and cultural government interference.⁵⁰ Therefore, many liberal authors criticize the tendency of progressive thinkers to hijack the liberal rights language to their own (progressive) political vision and advocate a more traditional conception of rights.⁵¹

Another strong line of criticism points to the decline in democratic voice over political questions through judicialization.⁵² This criticism often aims at the judge, who is not democratically legitimized but whose power increases. Although judicialization theoretically leaves political decision to elected actors, many norms, both procedural and substantive, increasingly allow the judge to examine whether specific decisions are legitimate on the basis of his own considerations, without the applicable law giving him explicit mandate to do so. There was, for example, a good portion of surprise and criticism on the Dutch Supreme Court deciding in favor of Urgenda, because this would exceed the power granted to the judiciary within the *trias politica*.⁵³

A closely related point is that an increase in solving political issues through rights, leads to a derogation of those rights being something supra-political. Especially unpopular judicial rights-based decisions are often fuel to the fire of populists, who frame these decisions as elitist and hence as lost power to ‘the people’. For many authors there is an important warning to be found in this tendency: the more rights are developed extra-democratically through court, the more these rights become debated within society.⁵⁴ This is for example clearly visible in the United States, where the discourse on transgender or immigrant rights has become highly polarized. Here we clearly recognize the ‘democratic’ narrative of constitutional rights. Rights can perform an important part in a vital democracy, but they can only ever legitimately do so if they are derived from and sustained within the political order itself.

⁵⁰ This is a result of the inherent tension of liberalism between law and freedom and of the many different faces of liberalism, see Tamanaha 2004, 43-46.

⁵¹ See Bradley 2017, 407-414.

⁵² See for example Anderson 2018, who is extremely critical of courts imposing ‘gender ideology’.

⁵³ Boogaard 2016, on the similar decision of the regional court.

⁵⁴ Mounk 2018, 103-104, 107-109.

In a different line of criticism, many authors point out that, although purporting to bring progress, human rights depend on an individualistic ideology that obscures larger political questions. Moyn argues that ‘the age of human rights’ is mostly a ‘victory of the rich’.⁵⁵ Rights allow the powerful to discharge of their moral obligations by pointing to the fulfillment of some basic rights, instead of being radically challenged to think about the meaning of (redistributive) justice and equality. Although such criticism probably belongs more to the communitarian tradition (which I will let rest here), this also resonates with the republican narrative, which encourages the active deliberation of the common good instead of the passive protection of rights.

2.4. Conclusion

The role of rights within legal and political practice has rapidly increased over the last decades. Through the quick development of the scope and content of rights, almost any political decision will impact the rights of someone. Although the possibility to limit rights has equally broadened, this results in an increasing number of political decision being subjected to legal standards and judicial review.

In this chapter, I have tried to formulate a meaningful normative framework for the rest of the thesis by relating the literature of contemporary constitutional law on this practice to the more foundational perspectives on rights within political theory. Those who value rights as part of constitutionalism as an independent from democracy, will more easily favor judicialization through rights, whereas those who emphasize the democratic foundational and/or functional value of rights will be skeptical of the decrease of democratic control over both the content of rights and the political decisions they affect.

⁵⁵ Moyn 2018, 2.

3. The agonistic paradox: law and rights in agonistic democracy

After having given a general introduction into rights and rights adjudication in the previous chapter, the rest of this thesis will focus on these topics from an agonistic perspective. In this chapter, I will examine the different roles that law and rights can play in general within an agonistic framework, which will enable me to look into the role of the judge in the next chapter.

To do so, I will first give a short summary of general agonistic theory (section 3.1) and introduce one of its main characteristics: the agonistic paradox (section 3.2). I will then use this perspective of the paradox to examine the general place of law (section 3.3.) and the more specific place of rights (section 3.4) within agonistic theory.

3.1. Agonistic democracy: an introduction

Over the last decades, agonistic democracy has become a mature democratic theory, in particular through the work of Mouffe, Honig, Connolly and Tully. Although it comes in many different forms and has been categorized in different ways, I will focus on the common characteristics of agonistic theory and only distinguish where necessary.⁵⁶

The starting point of agonistic theory is its post-foundationalism: it denies the existence of any transcendent or rational foundations to base the meaning of the good life or structure the political order on.⁵⁷ On the contrary: the world is characterized by a deep value *pluralism* that originates from humans trying to ‘make meaning of a world that does not provide it’.⁵⁸ This results in the inevitability of *conflict* between different perspectives and values, which lacks any standard to solve it.⁵⁹ Whereas traditional democratic theory tries to definitively answer the question how to structure political life, agonistic theory asserts that such a definitive answer simply cannot be given.

Nevertheless, through the same practice of conflictual pluralism that precludes meaning as being pre-*given*, meaning is constantly *constructed* by producing discourse. Discourse is best understood as the set of linguistic practices which discipline the way the actors apply the terms truth, meaning and knowledge to the world around them.⁶⁰ This discourse is always *hegemonic*

⁵⁶ For useful typologies, see Wingenbach 2011, Chapter 3; Fossen 2008.

⁵⁷ Wenman 2013, 6.

⁵⁸ Wingenbach, 22.

⁵⁹ Gray 1995, 116.

⁶⁰ Henderson 2018, 34.

and determined by the power relations of those involved.⁶¹ Discourse is therefore best understood as the balance of the power of different perspectives, each asserting their own absolute claim to meaning, resulting into something like the social taste of what appears rational or reasonable.⁶²

Importantly, through this discourse, we also constitute our identity. Identity is not found in the ‘essence’ of its subject, but is rather constructed through the relations with other subjects, which means that identity is always social and political.⁶³ Therefore, through discourse, a hegemonic collective identity is constructed: an ‘us’. This relational quality of meaning and identity implies that such a construction always requires a ‘constitutive outside’: a ‘them’.⁶⁴ Hegemonic discourse is always exclusionary: it determines what is reasonable and rational and who are inside the dominant discourse by positing the other as unreasonable and irrational and outside the discourse. In this sense, agonistic democracy provides a powerful negative criticism against traditional liberal democracy and deliberative democracy, which promise to provide rational or neutral foundations for political theory, but is actually merely the current dominant and exclusionary narrative.⁶⁵

Nevertheless, precisely because discourse is exclusionary, complete hegemony is impossible. As Bonnie Honig points out, hegemony produces ‘remainders’ (those who fall outside the dominant narrative), whose counter-hegemonic discourse always remains a possibility.⁶⁶ Therefore, hegemony is always temporary, contingent and *contestable*. Agonistic democracy *values* this contestability, which is why its name derives from the Greek word ‘agōn’: contest. It does so for different, but related reasons.⁶⁷ An important strand of agonism takes contest to be *emancipatory*: by contesting the status quo as the result of a contingent power relationship, outsiders can expose the injustice and harm that is done to them by the hegemony and try to become a part of the discourse themselves.⁶⁸ Another value of contestability, highlighted by Chantal Mouffe, is the possibility to turn the violent antagonism

⁶¹ Mouffe 2013, 2-3.

⁶² See Siemens 2002, 91-106 for this relationship between power, balance and taste from a Nietzschean perspective.

⁶³ Wingenbach 2011, 24-26.

⁶⁴ Mouffe 2013, 4.

⁶⁵ See for a summary of these criticisms Wenman, 73-90.

⁶⁶ Honig 1993, 10.

⁶⁷ As Fossen 2008 points out.

⁶⁸ Fossen 2008.

between enemies into the agonism between adversaries. Agonistic contest creates an outlet for the currently excluded, by reserving the possibility for them to (re)gain the power to determine social meaning.⁶⁹ Finally, perfectionist agonists value how contest forces citizens to develop the best of themselves and cultivate nobility and virtue.

The positive value of contestability provides the agonistic democrat with a standard to engage in critical judgement. This lifts agonistic theory from beyond mere nihilism (stating there are no standards at all), to a post-foundational critical theory (stating there are no external or foundational standards).⁷⁰ Although agonistic democracy cannot provide a definitive political *theory* given the absence of foundations of political life, it aims to improve political *practice* by enhancing contestability and contingency within a world without foundations.

In general, agonism prefers moments of becoming and movement over moments of being and seemingly permanent closure. This has important political implications: it prioritizes the *constituent* power of democracy over *constituted* powers such as the rule of law.⁷¹ If the common good cannot be determined by referring to purely rational principles, this requires, as Gray puts it, a radical instead of rational choice and this points to a primacy of politics, where the contingency of this choice is explicitly recognized.⁷² This is why agonistic democracy is a theory of *democracy*: it values the freedom of the agonistic subject to change and shape the world around her, which is inherently relational and social. This deviates from the traditional conception of democratic legitimacy as complete self-legislation, as we are never completely power-free.⁷³ Furthermore, this implies a concept of democracy that pervades all of society and is not bound by formal political definitions.

3.2. The agonistic paradox

Although agonistic theory encourages contest against hegemonic discourse, it also acknowledges that human beings, as situated and social subjects, need discourse to construct meaning and understand the world.⁷⁴ Any act of contest will therefore need to refer to the common discourse to be understandable at all. Therefore, we will only ever be able to contest

⁶⁹ Mouffe 2013, 5-18.

⁷⁰ Wenman 2013, 45-46.

⁷¹ Wenman 2013, 6-9; Gray 1996, Wingenbach 2011, 28-30.

⁷² Gray 1996, 121-122.

⁷³ Wingenbach 2011, 28.

⁷⁴ Wingenbach 2011, 30 -39.

the discourse we are ourselves a part of, by claiming that it should recognize our interests and identities. In doing so, we can only ever contribute to new exclusionary discourse. This leads to a strange paradox: discourse is needed to produce meaning, but it is always without foundations and exclusionary, thereby making both possible and necessary the contest over its meaning which produces discourse in the first place.

As Rousseau already showed, this paradox is at the very basis of our political order as a democracy. To be legitimate, a political order has to be founded by the people that subject themselves to it, but this people only comes into existence *as a people* by the political order they have founded. So which comes first: the people or the political order?⁷⁵ Bonnie Honig argues that neither does: they are implicated in a perpetual reciprocal process.⁷⁶ A political order can only be legitimate by referring to a people that founded it. Nevertheless, this claim can only be validated *retrospectively* by the people who came into existence through this act of founding. However, this ‘people’ is always exclusionary (‘We’ are the people because ‘they’ are not) and incomplete, thereby creating the possibility of contesting its foundations. This contestation (‘No, actually, ‘we’ are the people’, or: ‘We also belong to the people’), forms another act of founding, but will also have to refer to a previously existing people. This claim can again only be validated retrospectively. This means that founding a political order *ab initio* is impossible: founding is always a moment of *refounding*.⁷⁷ The existence of political order and the people that legitimate are constantly in flux, without a clear beginning or end. This leads to a focus on the *process* of contestatory founding over the *moment* of founding and acknowledges that a new political order can only come into existence through reference to a previous one.

The same is true for the discourse and the contest against it: it is impossible to say which comes first, because they bring each other into existence, while always claiming to have come first. In contesting the order we live in, we do not only say it *should* include us, but claim retrospectively that it already *does*, thereby affirming this order but also opening new possibilities for contest. We work out the political order we live in, by constantly contesting and renegotiating it.⁷⁸ This paradox distinguishes the post-foundationalism of agonistic democracy from anti-foundationalism: it acknowledges the inescapability of foundations, but

⁷⁵ Rousseau, *Social Contract*, Book II, ch. 7.

⁷⁶ Honig 2007, 13-15.

⁷⁷ Lindahl 2008, 142.

⁷⁸ Wingenbach 2011, 29.

argues that they will have to be contingent.⁷⁹ It also distinguishes agonistic democracy from radical democracy, which denies the existence of any legitimate constituted power or institutions, because they repress democratic potential.⁸⁰ Agonistic democracy, on the other hand, acknowledges that we need a political order and its institutions to organize our contest against and that the end-result of our contestatory activities can only be the re-foundation of these institutions.⁸¹

This is why the agonistic and democratic freedom of the constituent power is not sovereign, but has to move within the order it is situated in. Here, Lefort's metaphor of the 'empty seat of democracy' comes in: although everyone is constantly claiming authority to legitimately determine the order around us, no one is ever able to completely do so, while at the same time affirming the legitimacy of the democratic order as such. There is always an element of heteronomy to our political order.⁸² Opposing constituent and constituted power is therefore not as easy as it is sometimes presented to be.⁸³ Nevertheless, constituted power and its discourse and institutions, can facilitate its own contestability in a varying degree. The task for the agonistic democrat is therefore to think about the political order we find ourselves situated in and the institutions that derive from it and make them more contestable.⁸⁴ This is why many agonistic writers, such as Mouffe and Connolly, criticize, yet do not seek to abolish liberal democracy, but think about contesting and re-evaluating our current political values and making them more contestable from within this system.

3.3. The place of law within agonistic democracy: (de)judicializing

3.3.1. Contest within or over rules?

This paradoxical attitude of agonistic theory towards discourse, order and institutions also informs its attitude towards law, which is clearly visible when answering the following

⁷⁹ Wingenbach 2011, 8. Marchart 2007, 14.

⁸⁰ Wingenbach 2011, 31-33.

⁸¹ Wingenbach 2011, 39.

⁸² Van Roermund 2009, 120-122.

⁸³ See Wenman 2013, 203-297; Kalyvas 2005 for very optimistic accounts of the absolute constituent power, which are therefore also not really agonistic.

⁸⁴ Wingenbach 2011, chapter 4

question: should the democratic agon be conceptualized as a contest *within* and/or *over* the rules of the political order?⁸⁵

As a starting point, agonistic democracy can never allow for rules external to the contest, because there is no foundation for such rules except the contest itself.⁸⁶ On the contrary: it needs to acknowledge that rules and law are in fact the very tool through which hegemony closes down political contest and subsumes it under one fixed outcome.⁸⁷ This means that from the agonistic standpoint, all law is actually (fossilized) politics, how ‘rational’ or ‘neutral’ it may appear.⁸⁸ As Wingenbach states: “Neutrality, like universality, is an ideological fiction.”⁸⁹ Even worse: a ruse to draw our attention away from its inherent hegemonic quality. This forms the heart of the criticism against liberalism and other universalist political theories: they close down political life by legalizing the political through a seemingly neutral jurisprudential or constitutional structure.⁹⁰ According to Honig, most political theory is actually complicit in ‘virtue politics’: they present their own theory as a solution for the conflictual nature of the world and offer juridical and administrative solutions that are actually an attempt to close down political power.⁹¹ Here, we see a very clear aversion against the judicialization described in section 2.3.3.

Therefore, agonism encourages contest *over* the rules of the game. Lindahl argues that agonistic contest is not only ineluctable, but also irreducible towards the rules of the existing order: it can neither be prevented nor be explained in the terms of the existing order.⁹² Whereas the political order, in need of foundation and unity, posits rules that divide acts into legal and illegal ones, it can never do so exhaustively. Acts of contesting this very division through *alegal* acts always remain possible. It is precisely this ‘opening’ between legal and illegal acts, of contesting the rules that define the political order, that is at stake in the agon. Kalyvas calls this the possibility of a new legal beginning, deriving from the ultimate origin of all rules in the constituent power.⁹³

⁸⁵ This the central question of the essays in Schaap (ed.) 2009, see Schaap 2009, 2.

⁸⁶ Kalyvas 2005, 228.

⁸⁷ See Wenman 41-44.

⁸⁸ Henderson 2018, 36.

⁸⁹ Wingenbach, 73.

⁹⁰ Gray 1996, 122.

⁹¹ Honig 1993, 2-5.

⁹² Lindahl 2009, 60-61.

⁹³ Kalyvas 2005, 228.

However, many other agonistic authors emphasize the need of an institutional and legal context for contest to take place in. Andreas Kalyvas shows that the agon of Ancient Greece was always a contest between equals, which resulted in a complex institutional and legal system which was meant to ensure this equality.⁹⁴ This ‘ancient’ attitude is still visible emphasis of some agonistic thinkers, such as James Tully and Chantal Mouffe, on the need of a shared framework or consensus, which both enables contest by making its assertions understandable, but also limits it by excluding acts that fall outside of it as ‘unreasonable’.⁹⁵ This framework binds the participating actors together and turns antagonism into agonism.

3.3.2. *The language of rules: Wittgenstein and Derrida*

To understand how these positions are actually two sides of the same paradox, it is necessary to examine the nature of law and rules within agonistic theory. Here, the work of Wittgenstein and Derrida comes in useful. In his *Philosophical Investigations*, Wittgenstein asserted that to understand the language we use to describe the world, we need to understand the rules of the language game, which can only be understood within the context or the ‘form of life’ in which language is used.⁹⁶ James Tully draws an analogy to this insight when talking about the language of constitutionalism, which gives the rules in terms of which we understand our relations to each other.⁹⁷ Although every subject finds itself in a rule-bound situation, he states, the complexity of the multiplicity of language usage nevertheless means that the rules can never completely determine the situation. Therefore, rules always give a certain freedom for their own application.⁹⁸ This resembles the legal approach of the common law: through applying the system of rules derived from previous cases to a new case, with its own complexity and ‘newness’, rules can gradually develop.⁹⁹

Like Wittgenstein, Derrida assumes that language’s meaning is constructed through its usage, but also asserts that this meaning is always *referential*: its meaning depends on what it does not intend to mean. This ‘non-meaning’ will always leave a trace of alterity to the meaning of the word, making it unstable and ambiguous: the moment of finding its ‘real’ meaning is

⁹⁴ Kalyvas 2009.

⁹⁵ Mouffe 2005, 103; Tully 2000, 473-474.

⁹⁶ Wittgenstein 1967, 242.

⁹⁷ See Tully 1995, 103-112, on Wittgenstein.

⁹⁸ Wittgenstein 1967, no. 83. Wittgenstein 1995, 107; Wenman 155, Tully, 1995.

⁹⁹ Tully 1995, 113.

always deferred. Although meaning depends on the way it is used in the past and is in this sense bound by rules, the multiplicity and alterity of language precludes its meaning to be completely the same in a next utterance. This is what Derrida calls iterability: we need to *repeat* for a word to have meaning, even though we can never prevent altering it in repeating it.¹⁰⁰ Through every act, meaning is simultaneously affirmed and denied.¹⁰¹ For the application of rules, this means that there will always be an aspect of alterity, or *undecidability* to them, because the language of rules prevents new situations to be completely contained within the rules.¹⁰² This means that, although every act of application will always have to refer to the rule and its previous applications, it can never be a true repetition, but will always contain something new.

3.3.3. *The paradox of rules*

This is the legal paradox: the legal order lays down a system of rules, which distinguishes agonism from antagonism: it defines actions as part of contest *within* an order. At the same time, this legal structure never be exhaustive or definitive: its exclusionary character, or its ‘alterity’, creates the possibility of ever new meaning. This is the ‘opening’ of a legal structure for agonistic acts of contesting the rules of the game, through which we exercise our agonistic freedom. Nevertheless, this opening only exists within a given rule-structure, which only allows for legal-illegal rules. Therefore, a-legal acts can only become legitimate if they are acknowledged retrospectively as legal in the first place.¹⁰³ Every act of contesting always needs to *repeat* while proposing new meaning. Therefore, to ‘iterate’ (in the Derridan sense) is always (re)conforming or (re)founding the legal structure. This distinguishes agonism from mere decisionism: there is room for new meaning, but not for new rules that fall completely outside the existing legal framework or aim to abolish it altogether.¹⁰⁴ A true ‘new legal beginning’, as Kalyvas proposes, is therefore impossible within agonistic theory.

Instead of distinguishing between contest within rules and over rules, it is more useful to talk about working out the rules of the game while playing.¹⁰⁵ As Honig explains: the agon consists of a perpetual conflict between the impulses of virtue (stating the rules) and *virtù* (the

¹⁰⁰ Derrida 1988, 9.

¹⁰¹ Wenman 2013, 237, Honig 1993, 93.

¹⁰² Henderson 2018, 37.

¹⁰³ Lindahl 2009, 62.

¹⁰⁴ As Honig is eager to show, Honig 2007, 118.

¹⁰⁵ Wenman 2013, 155; Wittgenstein 1967, no. 83.

courage to resist the rules).¹⁰⁶ Agonistic democracy is then most aptly described as a practice of constantly renegotiating and working out the rules of the political order we find ourselves situated in. Our current constitutional democracy can be seen as the medium through which we work out the terms of our constitutional democracy.¹⁰⁷ This means that the rules and values of constitutional democracy shape the way in which democratic contest can take place, but far from being neutral or external, their content is itself on the table for renegotiation.¹⁰⁸ The task for the agonistic democrat is then to think from within our current legal framework about ways to make it more contestable.

3.4. Agonistic approaches towards rights

We can now turn to the place of *rights* within agonistic theory.

3.4.1. Rights as hegemony

At first sight, rights seem a poor fit for agonistic theory. Traditionally perceived as the showpiece of liberalism and constitutionalism, they are right at the heart of agonism's criticism of liberal legalism. This criticism consists of two closely related points.

Firstly, rights purport to limit the political contest over the common good from an external point, which is never possible within agonistic theory. Because of the deep value pluralism of our political world, there is no such thing as a neutral theory of 'right' separate from the political 'good', as liberalism advocates. On the contrary, all seemingly neutral and rational grounds are always hegemonic. Bonnie Honig is therefore critical of the liberal rights-narrative, which she calls the 'chrono-logic' of rights. This narrative purports to develop the universal membership of mankind through a necessary and linear progression of rights. This perspective, she warns, by framing the content of rights as necessary and rational instead of contingent, closes our eyes for the remainders of such rights and obstructs legitimate resistance against its content.¹⁰⁹ This criticism clearly implicates the judicialization through rights, and resembles the criticism of authors like Moyn on the exclusionary character of rights (section 2.3.4).

¹⁰⁶ Honig 1993, 14, 205.

¹⁰⁷ Owen 2009.

¹⁰⁸ Mouffe 2005, 104.

¹⁰⁹ Honig 2009, 47, 63.

Secondly, agonistic theory is critical of the political conception of democracy the liberal rights narrative advocates. Instead of passively pointing to our rights and preferences, agonistic subjects should work out the common good by actively and conflictually arguing about its content.¹¹⁰ Liberal rights therefore paint a false sense of political freedom. Instead of pursuing passive freedom from state interference, the agonistic conception of freedom acknowledges that such freedom can never be achieved within any political order. Following a Foucauldian understanding, agonistic freedom implies actively opposing the necessary attempts of the hegemonic framework to govern our life and conduct, by using the space of exclusion and alterity every framework necessarily leaves.¹¹¹ By trying to convince people of the value of passive rights, the liberal narrative would lead to the “corrosion of political life”.¹¹² In this way, exclusionary judicialization remains seemingly ‘neutral’ and uncontested.

Although agonistic theory is critical of rights, it is useful to note that it is especially so of the ‘constitutionalist’ or ‘liberal’ rights conception as identified in section 2.2.1.¹¹³ Although Pettit’s ‘freedom from arbitrary power’ will never be achieved, there is in fact a clear affinity between agonistic theory and the republican notion of freedom and accompanying notion of rights as an active struggle against domination and determination of the common good.¹¹⁴

3.4.2. *Agonistic rights*

Furthermore, as rights are in fact a part of the contingent discourse we find ourselves in and which we can only critically assess from within, we cannot simply reject them. Some authors, though acknowledging that the liberal narrative of rights as external and neutral is inadequate, have therefore tried to work on a conception of rights that fits within the agonistic project.

3.4.2.1. *Rights as (anti-)hegemonic claims*

¹¹⁰ See Mouffe 1993, 65; Honig 2009, ch2.

¹¹¹ Wenman 2013, 39.

¹¹² Gray 1995, 124.

¹¹³ In section 2.3.4, I noted that many strains of liberalism are critical of judicialization themselves. Although I think some agonistic theorists are therefore too quick in identifying liberalism with a tendency to judicialized anything, even a narrow liberal rights conception will have to build on something seemingly neutral, rational or external and is therefore still implicated within agonistic criticism.

¹¹⁴ Wenman 2013, 5.

From an agonistic perspective, the existence of rights within our given discourse cannot be justified as an external limit to the political contest, but can only be seen as an expression of this contest itself. Here, we run into the agonistic paradox again. On the one hand, rights are currently part of the necessary legal framework of our order. They show each actor which claims are at her disposal and make them understandable for each other. This allows them to navigate through social life in a meaningful way. Nevertheless, these rights are always hegemonic and exclusionary, favoring those with discursive power over others, but are therefore also always contestable. However, any act of contest is only recognizable as such if it refers to the existing framework, in this case by claiming a right of its own. This claim, if successful, leads to a (re)negotiation of the hegemonic rights framework and thereby to its own affirmation. This means rights are always contingent and ambiguous, constantly in flux.¹¹⁵ Instead of an external and counter-democratic limit of the political contest, they are an internal product of it.¹¹⁶

We can now start to envisage an agonistic rights claiming practice. Imagine a company, called SwissAqua, using several daughter companies to secretly gain a monopoly on all the water wells in a country that suffers from drought, and then quadrupling the price of bottled water. It can currently invoke its property rights and state that its business is perfectly legal. In doing so, it makes a legitimacy claim from within the given hegemonic legal framework. It is now an agonistically strategic move for the citizens to resist this monopoly by making a rights claim of their own, for example that being a citizen of the country entitles them to access to its natural resources. Although this example seems to be about the simple *redistribution* of physical goods, Owen and Tully argue that every type of political demand is ultimately only understandable in the terms of a struggle for the *recognition* of value and identity claims.¹¹⁷ At stake here, and in all rights claims, is the set of substantive political values of the dominant discourse.

As Karen Zivi shows, in making (rights) claims, such as the right to water, citizens participate in a *performative* activity: they try to bring the claim into being by making it.¹¹⁸ This draws on Austin's speech theory, who distinguished speech acts into simple constitutive ones (stating facts) and performative ones, which bring a phenomenon into being by stating it (such

¹¹⁵ Hoover 2016, 165.

¹¹⁶ Honig 1993, 15. Zivi 2012, 116-117.

¹¹⁷ Owen and Tully, 2007, 268.

¹¹⁸ Zivi 2012, 116-117.

as saying ‘I do’ in a wedding).¹¹⁹ Whereas in Austin’s theory, the felicity of performative speech acts depend on being uttered in the correct circumstances, the Derridan complexity and alterity of language’s meaning means that felicity in known circumstances can never be guaranteed, nor can felicity in unknown circumstances be prevented by the current rules.¹²⁰ This is the opening moment of the paradox. At the same time, the language-bound character of all speech acts implies that performative actions can only take place within a given constitutive structure.¹²¹ In fact, any rights claim will have to state that it is already recognized within this framework. This is the limiting moment of the paradox: any rights claim will have to make some reference to the existing rights framework to be felicitous.

Rights claiming, in this perspective, is not so much valued for its definitive content, but as an emancipatory device for the constituent power to challenge and transform the claims of the constituted power.¹²² Far from being atomistic and passive, conceived in this way, rights are an active device for democratic citizenship: they equip citizens to exercise their freedom to contest the framework that governs our life from within. The agonistic democrat rejects the chrono-logic of rights and instead embraces the contingency of rights claims and their capricious and unpredictable developments.¹²³ These developments often begin at unexpected places, throughout all of society. Legal validity, if ever achieved, is only the end stage, where agonistic movement is settled into hegemony again and should therefore not be our primary focus, as it is for much contemporary rights theory.

3.4.2.2. *Rights as enabling (anti-)hegemonic claims*

From this perspective, rights claims can be seen as anti-hegemonic claims, exposing the contingency and undecidability of the current hegemonic claims. In making such claims, agonistic subjects make use of their agonistic freedom. Although every subject possesses this freedom ontologically, she does not always have the effective capacity to exercise it.¹²⁴

¹¹⁹ Austin 1976, 5-6.

¹²⁰ Austin 1976, 14 et seq.; Honig 1993, 91-93.

¹²¹ Derrida 1988, 9.

¹²² Hoover 2016, 149; Zivi 2012, 121.

¹²³ Honig 2009, 56.

¹²⁴ Owen 2009, 81.

Hegemony is therefore often successful not only in formulating the common discourse, but also in limiting the capacity to contest it.¹²⁵

Agonistic theory, valuing contestability of values above any particular value, therefore often emphasizes the values of civic freedom and the equality of every citizen in its capacity to exercise it, as *conditions* for successful agonistic contest. According to David Owen, civil liberties, such as the freedom of speech, can play an important role here. Although neither necessary nor sufficient, they can enable the freedom of citizens to contest the current discourse and are an important acknowledgement of the equality of each citizen to do so.¹²⁶ These rights enable people to make their objections *public*, thereby joining the public contest over discourse. This is why Judith Butler emphasizes the importance of the ‘right to appear’, as effectuated in the right of assembly, to make use of public space and claim to be visible.¹²⁷

From this perspective, rights can be the effectuation of the values of freedom and equality, which are part of the constitutional framework of the order. At this point, agonistic theory comes very close to constitutional theories which also imply rights as inherent to the constitution a legal order. Yet, within agonistic theory, these ‘constitutional principles’, will always remain highly paradoxical. They cannot be an external rule of the game (as standard constitutionalism would have it), as these cannot exist within the agonistic world. They can only have a foundation in their own constant renegotiation through the contest that takes place *both* within and over them. Their meaning can never be fixed, but is itself subject of the agonistic contest. This also implies, as Mouffe points out, that these principles can only exist within a people that binds itself together through the contest they are engaged in.¹²⁸ Here, Hannah Arendt’s insight (or warning) that rights only offer resort for people who already belong to a community, resonates.

At the same time, however, the value of freedom and equality lies in the very fact that they allow people to contest the exclusionary hegemony and state that they are *not* free or *not* equal.¹²⁹ This is obvious for the completely excluded such as legal aliens, but is implicit in every agonistic objection that the hegemonic discourse favors some and excludes others. Civil liberties are therefore pre-eminently performative: by making use of one’s right to speech or

¹²⁵ Tully 2002, 221-225.

¹²⁶ Owen 2009, 81-82.

¹²⁷ Butler 2015, 26.

¹²⁸ Mouffe 2005, 40-41.

¹²⁹ Deranty & Renault 2009, 52.

protest, the agonistic subject claims that she is a part of the community that grants these rights. This resembles Arendt's 'right to have rights': because only people belonging to a community can have effective rights, the most basic right should be to belong to one. As Butler notices, this is a performative claim: it has no pre-existing ground, but it is enacted by the people claiming it.¹³⁰ Nevertheless, because of the inherent conflictual and exclusionary nature of the world, true equality and freedom can never be reached. Civil liberties are therefore truly paradoxical: they have their foundation in the constant renegotiation of their own meaning, but because they can never offer what they promise they always open up space for new interpretations, renegotiations and re-foundations. This idea is quite beautifully summarized by Derrida's concept 'democracy to come'.

3.4.2.3. *Two different types of rights?*

Rights are therefore approached from two different angles within agonistic literature: rights as (anti)-hegemonic claims and rights as enabling making such claims. Sometimes this literature seems to imply that this concerns two different rights and that agonistic theory, only positively valuing contestability, regards the latter as more fundamental.¹³¹ As a starting point, this seems to make sense: agonistic theory cannot independently value the contest between the right to water over the right to property, but as it values this contest itself, it does value for example the right to speech. This seems to distinguish this right as a procedural rule of the game from the (anti)-hegemonic rights discourse as the substantive game itself. Yet, I think this distinction can never be qualitative, as both types of rights find their foundation in the same contest in which the meaning of the political order is worked out.

On the one hand, the rights that might be perceived as procedure, or as enabling 'rules of the game', such as the traditional civil liberties, can never be applied independently from the contest they are meant to enable but in which they also find their foundation. On the other hand, recalling the indivisibility-thesis of section 2.3.1 (civil liberties are inseparable from and dependent on social rights), we could easily imagine the SwissAqua-citizens rephrasing the claim over water itself as a precondition for taking part in the contest over political values as a member of the community. This seems to lead to an untenable position, as agonistic democracy only values the rights and rules based on freedom and equality for enabling the otherwise

¹³⁰ Butler 2015, 48-49.

¹³¹ See Deranty & Renault 2009, 54-55, for an explicit distinction between these two function of rights within agonistic theory. Honig, 63, also seems to hint at this.

radically pluralistic contest. Yet any political claim can be framed as an enabling 'rule of the game', which would leave little or no 'game' to be played. In fact, however, the rules of the game and the game itself cannot so easily be separated. The entire agonistic contest consists of working out what it means to be part of a political community of free and equal citizens, which will nevertheless never be reached because any interpretation of its preconditions will be exclusionary again and opens up a new possibility of contest.

This does not imply that there is no difference between the game and its rules, but rather that it always remains a gradual rather than a strict one. The meaning of membership of the community is ever contingent, but the disagreement over its meaning can take different levels. The deeper this disagreement goes, the more the negotiation of meaning will take the form of (anti)-hegemonic practice itself. They might (temporarily) take the form of law, becoming a 'rule of the game', but they are vulnerable for contest and new interpretations. On the other side of this spectrum, there are those rules and rights that have been recognized by the discourse as the necessary fundamental rules of the game. Within our current society, these are the rules of constitutional democracy. Although agonistic democracy recognizes these to be exclusionary and contingent as well and encourages challenges them through public performance, this will take more effort. In any case, its end-station (for example: should they involve a right to water?) can never be pre-given.

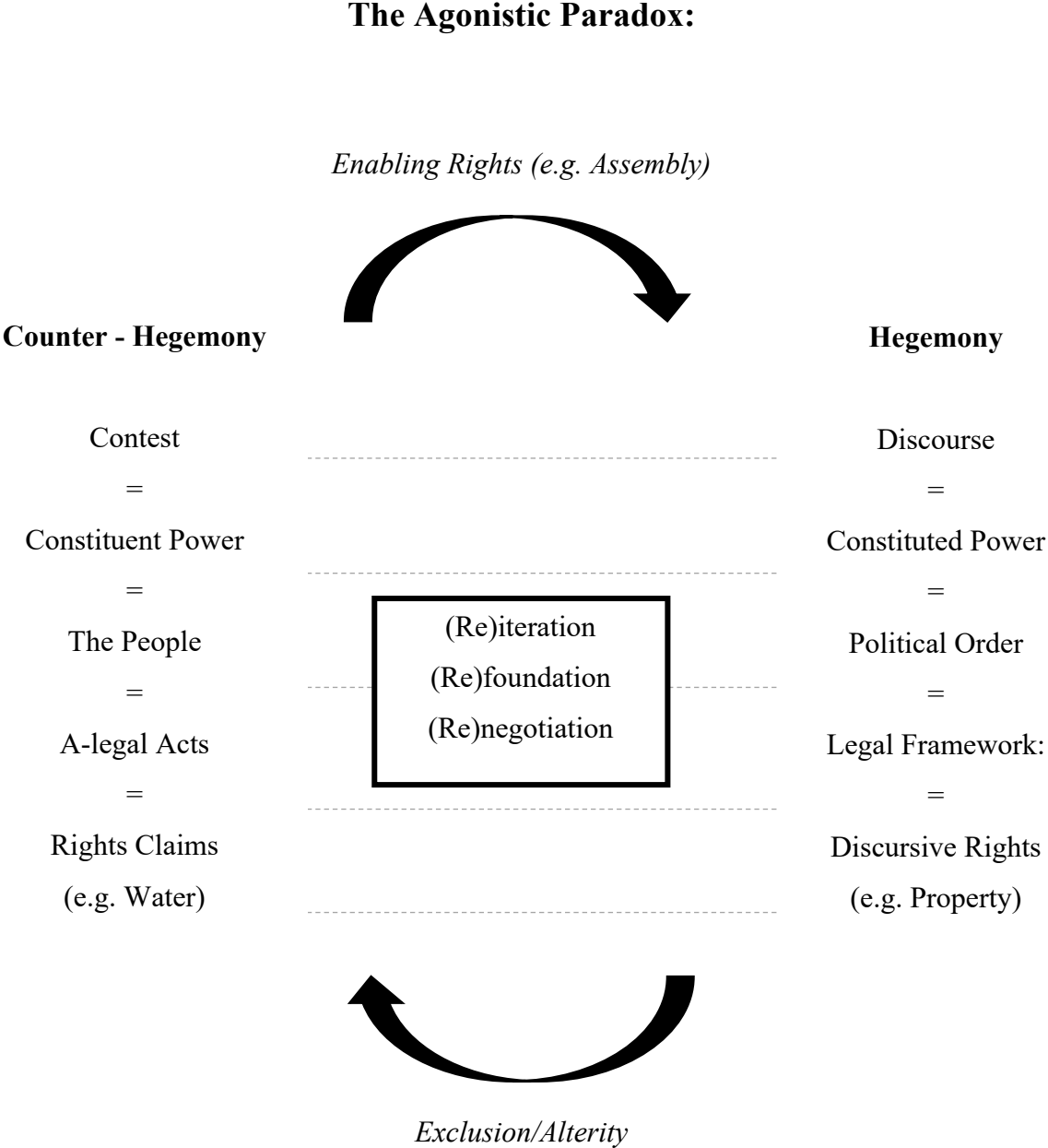
3.5. Conclusion

Agonistic democracy encourages contest against the exclusionary and hegemonic discourse of the constituted power. Because the constituted power often operates by closing down the political contest through the use of law, agonistic theory rejects any legal theory which purports to regulate the political externally, neutrally and/or rationally. Nevertheless, it also acknowledges that every act of contest can only be understood within a common discursive framework. This is the agonistic paradox: contest always has to refer to the discourse it aims to deconstruct and can therefore only lead to its reconstruction, giving it a foundation in its own constant renegotiation. Law is essential to this: without a framework of rules, the agonistic contest *over* political meaning turns into antagonistic violence *against* each other. This framework is never external or neutral, but is constantly renegotiated: agonistic contest takes place both within and over its own rules.

The place of rights within agonistic theory can only be understood from this paradoxical perspective. On the one hand, rights close down political contest by allocating definitive claims,

which are always hegemonic. On the other hand, this opens up the possibility for counter-claims. Through this interplay of discursive and anti-discursive rights claims, the content of these rights is constantly renegotiated. Next to these, another type of agonistic right is often identified: those enabling (anti)-discursive claims, such as the right of free speech or protest, although they cannot be strictly separated: in the end, all rights are to their own extent part of the ‘rules of the game’ that is played by the political order working out the meaning of freedom and equality.

This chapter can be summarized as in the following illustration:



4. The agonistic judge and constitutional rights adjudication

Rights are part of the constitutional framework that is both necessary and necessarily contested in the agonistic world, producing its own foundation through a constant process of renegotiation. In this chapter, I will turn to one of the most prominent actors engaged in this process: the judge. I will examine if and how the judge could perform the task of adjudicating constitutional rights in an agonistic way. To do so, I will first formulate a critical agonistic perspective on the contemporary judge, including his current approach to rights adjudication (section 4.1). I will then use this perspective to lay down a positive blueprint for the agonistic judge (section 4.2), which I will then specify for the adjudication of rights (section 4.3).

4.1. The judge: critical agonistic perspectives

Tasked with applying the law, which agonistic theory often sees as a hegemonic institution suppressing genuine democracy, agonistic literature is generally suspicious of the judge. In this section, I will turn this general suspicion into a critical framework concerning two different hegemonic practices of the judge: his application of the law and his deviation from the law.

4.1.1. *The judge in traditional constitutional theory*

To understand how deeply agonistic theory affects the position of the judge, it is useful to compare it with his position within more traditional constitutional theory. Here, his position depends on one's perceived relationship between law and democracy, which could be classified along the same lines as different conceptions of rights of section 2.2.¹³²

From a constitutionalist perspective, democratic decision is subject to legal conditions meant as an external constraint. Here, law is based on a conception of *right* and is in tension with democracy.¹³³ This narrative reserves an independent place for judicial review and judicial supremacy for protection the law against politics. However, from the perspective of democratic legitimation, law is itself a political and democratic product: it is a product of the will or *might* of the people.¹³⁴ The task of the judge is to examine whether the exercise of power is lawful by

¹³² In reality, such a sharp distinction cannot be drawn. See Loughin 2000, 217-227.

¹³³ Loughlin 2000, 3, 13.

¹³⁴ Loughlin 2000, 9, 12-13.

applying the law as laid down through democratic procedure. In the words of Rousseau, the judge is ‘la bouche de la loi’.¹³⁵ Here, law and democracy are not opposed as such, but judge-made law is opposed to democratically made decisions and law. Where the law is silent, any exercise of power submitted to them is political and not for them to judge.

Those viewing law as a product of democratic power are highly critical of judicialization which marks the ‘end’ or ‘displacement’ of politics.¹³⁶ Whereas this development gives the judge more capacity to steer democratically legitimated power through the interpretation of broad and open norms (see section 2.3.3), these authors call for an application of the law that is in line with democratic intention.¹³⁷

4.1.2. *The judge in agonistic theory*

For agonistic theory, however, the criticism runs deeper. As is clear from the previous chapter, agonistic theory is also highly critical of ‘judicialization’, as agonism rejects any theory of *right*. The ‘common good’ could only ever be established through a process of political and conflictual interpretation.¹³⁸ Judicialization falsely implies to allocate this decision to a ‘neutral’ or ‘just’ judge and norms, but any such neutral application will always be a hegemonic closure of political movement.¹³⁹ However, agonism cannot adopt the traditional constitutional solution of endorsing a stricter interpretation of the ‘democratically given’ law, because it does not identify democratic validity in the laws and decisions produced through democratic procedure, but rather opposes these two.¹⁴⁰ Agonism can neither identify law with the sovereign *might* of the people, which it can never fully include and which is rather always exclusionary and heteronomous.¹⁴¹

This is the agonistic paradox again: it values the democratic process of conflictual and ever-changing becoming, but as soon as this produces an outcome, this moment is destined to be hegemonic, exclusionary and oppressive of the true democratic power again. Like meaning,

¹³⁵ Montesquieu, *De l'Esprit des Lois*, XI, 6 (49).

¹³⁶ See Loughlin 2000, 229 et seq.

¹³⁷ E.g. Kramer 2004, 252-253.

¹³⁸ See Gray 1995, 122 and Wenman 2013, 77-79 for sharp criticism on the extra-legislative law-making powers of the judiciary.

¹³⁹ Mouffe 2013, 3

¹⁴⁰ See section 3.3.1.

¹⁴¹ Van Roermund 2009, 119 et seq.

democratic legitimacy is ever ‘deferred’ within the agonistic framework and remains ever elusive. This puts the judge in an awkward position: in deviating from the law’s strict meaning, he gives himself an illegitimate hegemonic external ground to judge from, but in strictly following the law, he only confirms and enforces the rules of the hegemonic power.

4.1.3. Agonistic criticism on current rights adjudication

This double-perspective also informs the critical agonistic approach towards rights adjudication.

On the one hand, agonistic theory is highly critical of the current practice, in which both the scope and possible limitations of rights increase, leading to a two-stage adjudication (see section 2.3.2). Both stages are implicated in the general agonistic criticism of judicialization and on the judge hegemonically enforcing political power. The broadening of the scope of rights is often the result of the generous interpretation of the judge, instead of the result of a political process. Here, we recognize the ‘chrono-logic of rights’, where the content of rights appears to have been present from the beginning. At the limitation stage, the judge will assess whether political decisions are legitimate on both procedural and open substantive norms. This is what Kumm called ‘Socratic contestation’, forcing public bodies to defend and possibly adjust their decisions infringing on rights and their reasons for taking them. This is highly problematic for agonistic theory, which rejects any rational grounds to assess political decisions. This is especially true for the proportionality requirement, which implies that the different interests at stake can be “weighed” in reasonable or unreasonable ways. However, the radical value pluralism of agonistic theory implies that the different interests and rights at stake in a specific conflict are always incommensurable and that we lack the scales to weigh and compare them.¹⁴²

Through the combination of broadening scope and limitation, political decisions, such as those on climate measures, are increasingly made on the basis of ‘rational’ requirements and in courts. Therefore, rights adjudication is also part of the increase of technocracy, in which political decisions are increasingly made on the basis of technical or economic considerations, and which leads to a decrease of democracy.¹⁴³ Agonistic theory is highly critical for the pre-empting of political processes this implies, leading to what Mouffe calls the ‘post-democratic’

¹⁴² See Gray 1996, 116-117, referring to Raz 1993, 137.

¹⁴³ Mounk 2018, 100-101.

world. Framing decisions and adjudication as based on ‘facts’ or ‘technical considerations’, closes our eyes for the fact that decisions are never value-free and will furthermore always represent an exclusionary and hegemonic narrative. Although the Urgenda-decision, for example, might seem to benefit all, this decision does imply a number of normative things: that climate measures should be taken, that it is the government who should take them from the general treasury, thereby perhaps lowering the budget for assessable health care, that it should do so to benefit those human citizens who fall under the European Charter etc. Furthermore, by presenting these decisions as necessary and reasonable, they exclude those who disagree as unreasonable or as ‘outsiders’ of a political elite.¹⁴⁴ Here, the criticism on rights proliferation as feeding populism (see chapter 2) resonates. From an agonistic perspective, the Urgenda-decision, and the scope of the possible rights involved, can only be presented as a contingent result of a political contest itself.

On the other hand, the agonistic solution cannot be to return to the classical conception of the judge applying rights as ‘trumps’: the legal borders of political decision-making. In doing so, the judge would move into the other undesirable position of simply confirming the rules of the hegemonic order and limiting genuine democratic power. This is clear for any conception of constitutional rights as representing some a-priori theoretical conception (such as natural rights), because this refers to an extra- political ground that cannot exist within agonistic theory. However, this is also holds when conceiving of constitutional rights as the result of democratic decision to lay down a constitution. Here, the problem is the *moment* of the democratic legitimation, which is always outdated. The moment they are laid down thereon they have become a hegemonic limit on the continuing and ever-changing process of democracy.

4.2. The judge: an agonistic role description

4.2.1. The judge as part of the paradox

Although agonistic theory is critical of the judge, its solution cannot be to outright reject an actor so prominently embedded in our current legal order (as radical democracy perhaps would), as it can only assess him from within this order. When doing so, it becomes clear that

¹⁴⁴ Mounk 2018, 107-108. Although this is not the place to examine Dutch populism, it is notable that Thierry Baudet is a strong opponent of the Urgenda-case, framing it as a judicial elitist victory of leftist parties.

the two critical perspectives formulated above coincide with the two sides of the paradox of this order.

On one side of the paradox, agonistic theory acknowledges the necessity of institutional order in understanding the world around us, even though it will always be hegemonic and exclusionary. The judge performs a vital role in this order by guaranteeing the enforcement of the rules laid down by it. Regardless of their substantive merits, this produces the legal certainty necessary for any sustainable order, because it indicates which actions are to be understood as valid and legal. Although we might perceive the judge as an ally of the hegemonic power, executing and enforcing the rules which benefit them, this legal certainty protects other agonistic actors as well. The hegemonic power will have to operate through the legal framework, which legitimizes its exclusionary actions, but also prevents it from acting on the basis of mere force.¹⁴⁵

On the other side, the order's exclusionary character will constantly enable its own contestation and thereby its own re-foundation. This contestatory action is enabled by the opening of *undecidability* of every rule submitted to the judge, in which traces of its alterity shine through (section 3.3.2). The judge cannot only be called upon by the hegemonic power to enforce its own rules, but also by contestatory actors who want to invoke new directions and interpretations. In this sense, the courtroom also provides an important forum for performative contestatory claims, advocating for new and different interpretations.¹⁴⁶ Even when this does not end in legal victory, the call for a new interpretation has been put out to be heard and discussed.

Locating the judge's position in the middle of the agonistic paradox goes a long way to accommodate the critical perspective formulated above. On the one hand, agonistic judge can never simply 'hide' behind the rules he is applying and whose undecidability he has to acknowledge. On the other hand, the judge always has to operate within and refer to the framework that is given to him, The judge is himself an integral part of the dynamics of order and contest, through which the content of rights is constantly renegotiated and legitimized. However, it also explains why the contradiction of the double-critical perspective can never be solved. The judge is both required to affirm the rules of the hegemony and to deviate from them.

¹⁴⁵ This is why legal certainty, regardless of the substantial value of the rules, is an important part of the rule of law, even when most narrowly formulated, because it guides people's conduct.

¹⁴⁶ See Henderson 2018, 165 for this function in the context of public litigation groups.

4.2.2. *The decision*

This is the predicament of the judge: he could never make a decision that is properly agonistically valid, yet he has to. The moment of democratic validity is found somewhere in the democratic contest, but is ever deferred, becoming hegemonic at the moment it comes into being. The decision of the judge is always too early (choosing a possible interpretation for himself), or too late (confirming hegemony). However, the legal order, in search for certainty and predictability, demands to be confirmed through application and therefore requires there to be one correct interpretation. It appoints the judge to fix the development at a point in time and hence to do the impossible: to decide. How could he ever combine this undecidability and the need to decide?

The radically nihilistic answer would probably be to acknowledge that every ‘undecidable’ decision is always random or even a product of the ‘madness’ inherent in a world without foundations and will always lack legitimacy.¹⁴⁷ At this point, we could argue that agonism does offer one positive value: the contestability of its own system (section 3.1) In her exposition of the agonistic judge, Henderson therefore turns to Ely’s idea of procedural review.¹⁴⁸ Ely argues that the judge’s only task, in judging the laws made by the people, is to protect democracy itself.¹⁴⁹ Instead of reviewing the substantive values at play, he should review and protect the procedure through which they are determined. This feels like a natural move: if the judge cannot determine the correct answer, because only the democratic contest can do so, then the one thing to do is to protect this contest. However, when translating this idea to agonistic theory we run into a number of problems. Firstly, the judge can never independently devise or employ the grounds of review proposed by Ely. Within agonistic theory, the content of ‘contest-enabling’ values can only be worked out in the contest which they enable and in which (re)produces their foundations. Therefore, this meaning is itself constantly in flux and undecidable and needs another point of reference. This leads to an infinite regress, which is why the ground of ‘contestability’ will always need an undecidable decision in itself. Secondly, where Ely’s model would not apply, the case before him still needs to be decided. Ely’s (highly simplified) model of ‘protect democracy or do nothing’ is agonistically untenable, because

¹⁴⁷ Following Derrida 1992, 26, referring to Kierkegaard’s expression ‘L’instant de la décision est folie’, or ‘The instant of decision is madness’.

¹⁴⁸ Henderson 2018, 115 et seq.

¹⁴⁹ Ely 1980, 73-74.

‘doing nothing’ implies confirming the law as it currently stands, which is already a hegemonic use of the space of undecidability of the case before him.

The task for the judge, then, is chase after the moment of validity of the applicable rules. Even though he knows he will never seize it, he can aim to deviate from it as little as possible, in both directions. In doing so, the value of contestability can function as a point of orientation to navigate the interpretation room the given rules provide him with. This point will always derive its strength from the value structure of the community, which is in itself never given. Sometimes it might prominently point into a direction, sometimes it might give the judge a premonition and sometimes it might be completely silent. In any case he has to *decide*. He does so in his capacity as a human being, himself part of the same discourse as the actors presenting their case to him. He hears their arguments, connects them to the rules and their developments, lets himself be persuaded by one or the other. This informs his decision, which he takes to be the best one. This is what Honig calls the ‘rule of men’: instead of clinging to the illusion that the law can tell us what to do, we should acknowledge that its execution will always depend on real-life human decisions.¹⁵⁰

This decision is not the mere application of the rule, which is undecidable, but also not mere madness: the judge will always have to refer to the given legal structure he operates in. Laclau therefore speaks of “regulated madness”.¹⁵¹ In fact, the decision will have to retrospectively claim to have been the correct one from the beginning, while also affirming this choice on its own force. This decision will ever lack a definitive legitimate foundation, but is also constantly re-affirmed by the order that has appointed him to do the impossible and executes its results. At the same time, this decision will never be final, because it will always favor one option over the other, and therefore opens up possibilities for contestation. This is the function of publishing decisions and their motivation, allowing for public criticism and giving excluded persons the possibility to do better next time.¹⁵² In this way, the judge is both an external party, deciding on the case as a final instance and closing the contest down, but as every ‘final’ decision will only be the hegemonic beginning of new interpretations, he is also an integral part of an ongoing contest.

¹⁵⁰ Honig 2009, 86.

¹⁵¹ Laclau 1996, 58. See also the distinction between agonism and decisionism Honig draws, Honig 2007, 118.

¹⁵² See Henderson 2018, 110-113.

4.3. Agonistic constitutional rights adjudication: SwissAqua

These are all still quite abstract considerations, which I will flesh out when thinking about the specific task of the judge in the adjudication of rights. As this is the core of the thesis, I will try to draw the different aspects of this and the previous chapter together in thinking about the SwissAqua-case.

Imagine the citizens of one of the country's cities, forced to spend half their income on the bottled water of SwissAqua, go the court to claim a right to water by demanding from Swiss Aqua to provide water to the city council at utility rate. Such a right is not laid down in the constitution or other legal rules. As claims are only understandable and legally permissible if referring to the existing framework, they will have to claim it is included in an existing right, such as the right to life, health or family life. In defending itself, SwissAqua will point to its property rights on the water wells. How should the judge determine which right prevails?

From an agonistic perspective, the content of these rights can only ever be the paradoxical product of the political contest over value claims. The position of the judge follows from this paradox. On the one hand, the judge protects and enforces the currently prevailing legal rights as the 'rules of the game', thereby protecting the predictability and certainty of the order needed for social life. The right of property performs such a function, by making a vast number of our actions understandable and meaningful. On the other hand, this right is highly exclusionary and precisely therefore contestable. This turns the court into a suitable forum for invoking new interpretations and directions. However, this paradox also brings out the difficulty of his task: the rights submitted to him are in the process of being renegotiated and are therefore undecidable, yet the case is brought before him to be decided. Although judge will always hegemonically close down this contest, he can aim to be as close to the moment of validity as possible and should avoid deviating too much towards the two hegemonic movements of the critical framework. He cannot simply conform the currently common interpretation of the right of property as pre-given or necessary. Neither can he simply devise a completely new right himself, as this would overstretch the opening of the current legal rules. The judge is not the first, but the last stage of agonistic development. Any claim to water will begin in society itself, by acts of raising awareness, protest or even civil obedience.

The optimal point between these two is undecidable and cannot be rationally weighed or determined. It is up to the judge, as appointed decision-maker, to decide on it. In doing so, he can use the value of contestability as a normative point of orientation. When applying Ely's work here, we could develop the following line of thought: the judge cannot independently

decide on the contest between the rights to water and the right to property, but he can make sure that the contest over its existence is open for everyone. Therefore, he cannot simply allow the right to water in court, but the citizens could appeal to him to have their rights to protest protected.

Yet, this paints too easy a picture, because all rights claims are part of the contest over meaning of membership of a political order of free and equal citizens (section 3.4.1.3). On the one hand, ‘procedural’ rights will have to be decided on themselves. In her exposition on decision-making (although by administrative discretion) in emergency times, Bonnie Honig refers to the decisions made by Louis Freeland Post to cancel thousands deportation orders for alleged foreign anarchists issued in the First Red Scare.¹⁵³ One of the ways he did this, was by claiming jurisdiction over these orders and applying the judiciary standards of due process to his administrative proceedings. In doing so, he used the undecidability of the given rules – which he claimed to strictly follow -, to give a new direction to the right to a fair trial, in which he tried to steer the rules of the game into the direction that he perceived as more ‘fair’. To estimate Post’s activities positively, as Honig clearly does, we need another judgement of the meaning of the value of contestability and are caught up in the contest over the terms of membership of the political community again. On the other hand, the claim over water is itself a claim about the meaning of the political order and could be framed as an ‘enabling’ right itself. To say whether this is the case, requires another judgement of the values of the community.

For every right he is applying – both the ‘procedural’ rights that enable contestation and the more ‘substantive’ rights -, the judge takes the value of contestability as a point of orientation for the rights he is applying. Its strength will differ according to the value structure of the community and yet he has to decide on its strength himself. Some of the rights submitted to him have a more secure status as an enabling ‘rule of the game’, and some of them have not. He has to move within the meaning of freedom and equality of the community and yet is not completely bound by it, which precisely gives him the room to move beyond the current, possibly exclusionary, interpretation. In a sense, the judge is bound up in an infinite number of decisions: He has to decide on the rule submitted to him, for which he uses the value of contestability, on which he has also has to decide. This sequence has no ultimate foundation, which is why they inseparably come together in laying down judgement in the case. Ultimately

¹⁵³ Honig 2009, chapter 3, 65-86.

there is no ground to do so but his own intuition, his feeling of agonistic fairness, such as that of Louis Freeland Post. In any case, the judge can never simply ‘not decide’ on ‘substantive’ questions, because the order has appointed him to (temporarily) affirm the status of the rules of the community. If he rejects a claim for not (yet) having achieved the status of a rule of the game, this is a decision in itself.

Going back to SwissAqua, imagine the citizens organizing and showing up to a demonstration in which they sit on the roads towards SwissAqua’s headquarters, vocally demanding a right to water. This is a double-performative activity: the citizens, claiming to be a part of the political community in which the agonistic contest takes place, claim a right to demonstration and a right to water. Imagine SwissAqua going to court to have the citizens prohibited from blocking the roads, or the citizens going to court to claim a right to water. Whether the citizens can appeal to a right to protest, or SwissAqua to a right to property, depends on the meaning of these rights within the given order, on which the judge will have to decide.

Although it is impossible to spell out here what the judge will decide (it is his decision after all), I will for a moment try to substitute his judgement with my own. Imagine he will judge that the right to demonstration does include the right to hinder visitors to corporations, thereby showing them the harm that is done to them. Yet, he decides that the legal order does not consist of a right of water. This might not please those who believe in the social rights narrative, but I do think it highlights an important point. Developing rights that we think are appropriate is not just the responsibility of the legal order, informed by scholarly work. On the contrary, it is a democratic practice. Any value, such as freedom and equality, can only ever be truly fostered within a community that values it as part of a common discourse or identity.¹⁵⁴ Agonistic narratives always begin throughout society itself, by creating awareness and building support. A purely legal victory often turns out to be a disappointment, because it does not lead to societal change. Even worse, it might turn current disagreeing parties from possible future allies into definitive antagonists, who feel excluded themselves.

This is equally true for those rights that do seem to appear quite settled as procedural ‘rules of the games’ within our current order. Within our constitutional democracy, these are worked out through the civil liberties we value as important. It is the judge’s responsibility to protect and possibly develop these values, but he can only do so *as expressions of the*

¹⁵⁴ Mouffe 2005, 40-41.

community, of which he is himself a part. Although it is impossible to separately discuss the specific civil liberties here (both for lack of space and because they cannot be pre-given), I do want to highlight one that is of significant importance for the judge: the right of access to justice or to a fair trial. This is the opening through which any actor of the contest can appeal to the judge as an ‘external’ arbiter and therefore also the opening through which the judge can enter the contest as an ongoing process himself. Although any judge will therefore be particularly keen to protect this right, he can only do so because he is appointed by the order himself.

4.4. Conclusion

Agonistic theory is critical of judicialization through rights, for hegemonically creating legal meaning. Yet, it can neither encourage a strict application of the law, which is hegemonic in itself. These are the two sides of the paradox of law, in which the moment of legitimacy remains ever referred and elusive. Although the judge will never fully grasp this moment, always being too late (confirming hegemony) or too early (hegemonically confirming law himself), the order asks of him to affirm the law through a decision. Yet, when turned around, this paradox also forms the funnel in which he moves: by avoiding both hegemonic movements of the paradox, it pushes him towards the moment of legitimacy, which will always remain on the horizon.

In doing so, the judge can take the value of contestability as a normative orientation point: if the moment of legitimacy can only be found in the contest over its meaning, he can encourage this contest itself. Yet, he cannot do so independently, because this value itself can only be founded within the contest over the meaning of membership of an order of free and equal citizens. This meaning is contested in every case submitted to the judge, although to a lesser or greater degree. Therefore, in any case the judge takes this value as an orientation point, but has to decide on its strength himself. The judge is bound up in an infinite number of decisions, which come down in the one decision he takes on the case. Ultimately, he has no foundation to do so but his own sense of agonistic fairness, deriving from his own membership in the order he is part of working out.

5. Conclusion

The phrase ‘But I have a right to .. !’ quickly comes to mind to anyone who feels infringed by politics, society, family or simply by life itself. The concept of rights is thoroughly interwoven into the fabric of our lives and is one of the major players of contemporary legal and political practice.

In this thesis, I have focused on the possible place of rights within agonistic democracy. As agonistic theory is engaged in our own experiences and actions as subjects in the ‘real world’, I have chosen to do so through the *practice* of the judge adjudicating them. This thesis therefore aimed to answer the following research question: *What, if any, is the appropriate role of the judge in adjudicating constitutional rights within the framework of agonistic democracy?*

5.1. Conclusion

In chapter 2, I have outlined the contemporary practice of rights adjudication, which is characterized by ‘rights proliferation’. Through the broadening of the content of rights, almost any political decision will impact the rights of someone. Because this implies an increasing tension with other rights, interests and the democratic power over this decision, the possibility to limit rights has broadened parallel to their scope. Although this doctrine tries to respect the political character of the decision itself, an increasing number of political decisions is now subject to legal standards and judicial review. The combination of procedural requirements and open substantive norms limits the possible decisions and subjects the final decision to a ‘right of justification’, which forces authorities to give a reasonable motivation for their decisions. In other words: rights proliferation enables the judicialization of the political.

To facilitate an evaluation of this practice from the perspective of political theory, I have advanced a (loose) division between political theories that value rights as belonging to the tradition of constitutionalism as an independent value from democracy and political theories that emphasize the foundational and functional value of rights within democratic control itself. Those theories embracing rights proliferation will usually be constitutionalist in nature, because it encourages the protection of rights against majority decision-making through the use of law and courts. Those trying to reconcile rights with democracy are more skeptical of the decrease of democratic control over the content of rights and the political decisions infringing on them. Many of these theorists emphasize the need for democratic support, not only for rights to be

legitimate, but also for them to retain a shared and constitutive narrative in our society instead of falling prey to populist discourse.

In chapter 3, I have examined the place of rights within agonistic theory. On the one hand, agonistic theory formulates a powerful criticism against judicialization through law and rights. Within the agonistic world, there is no extra-political or foundational truth. Meaning can only exist within the discourse constructed in the conflictual process of politics that pervades all of our social life. This meaning is always hegemonic and exclusive, which is why agonism encourages contesting it. In general, agonistic theory favors political meaning to be constructed within political processes of becoming rather than through seemingly ‘rational’ procedures or norms, which are always hegemonic. Because producing law is the pivotal mechanism of hegemony, agonistic theory encourages the *dejudicialization* of political decision-making. On the other hand, though, agonistic theory will never be able to reject discourse, as any political order needs it to construct meaning. This is the agonistic paradox: any contesting act will always have to refer to the discourse it aims to deconstruct, claiming to have always belonged to it, thereby constructing or legitimizing this discourse in the first place. Law takes a central role here: without a framework of rules, the contest *over* political meaning becomes contest *against* each other. Within our contemporary society, this function is performed by the framework of constitutional democracy. Yet, this framework is never neutral or permanent, but itself constantly renegotiated. Through the practice of law, the political is constantly (de)judicialized

The place of rights within agonistic theory follows from this. Rights judicialize the political, because they allocate seemingly definitive claims. At the same time, this opens up a practice of dejudicializing these claims through performing counter-claims. To be understandable, these are formulated as alternative yet performative right claims: in making them, they claim to have always been present. In doing so, the rights of the order find their foundation within their constant (de)judicialization. Within agonistic literature, there are often two approaches to rights: next to the rights discourse in which the recognition of substantive claims of the order is contested, there are those ‘fundamental’ rights which enable this contest. Yet, I have argued that this distinction cannot be maintained strictly, but only gradually. Through all rights claims, the meaning of the political order of free and equal citizens is worked out, to which their actors performatively claim to belong. Some of these rights have been recognized by the discourse as the fundamental and enabling rules of the game, and some (still) belong more to the game itself.

In chapter 3, I turned to role of the judge within agonistic theory. Here, I argued that his position follows from the paradox in which the law and rights are produced and contested. This position explains the criticism on the judge as hegemonically creating law, because law can only be produced within the political paradox itself. Yet neither can the judge strictly affirm this law, because it is hegemonic the moment it comes into existence. Within the agonistic paradox, the moment of validity is ever referred, making every case before the judge undecidable. At the same time, this paradox also gives the judge its function: he both judicializes (affirming the necessary framework of the order) and dejudicializes (opening up possibilities for new meaning). These two critical moments contradict each other, but precisely therefore push him towards the moment of validity. They come together in the moment of decision. Although this decision will never reach the moment of validity and is in this sense illegitimate, the activities of the judge are still constantly legitimized by the order which gives him the authority to judge and executes his judgements.

As pointed out by Henderson, an important function of the judge is to protect the political contest itself. Yet, the value of contestability finds its foundations in the contest over the meaning of a political order of free and equal citizens itself, which is at stake at every case submitted to him. Therefore, he can take this value as a normative orientation point, but can only do so according to its given strength in the community, which itself needs a decision. When deciding on rights, the strength of this normative orientation point will probably be stronger for those rights that are traditionally labeled as procedural or enabling, such as the right to protest than for those ‘substantive’ rights that are debated. Nevertheless, because the distinction between the two is always gradual, the judge is caught up in this infinite sequence of decisions in every case. In the end, he will simply have to decide. He does so as an external arbiter, but he also does so as a human being part of the contest over meaning himself. His decision is both the final closure of the contest over meaning the order has appointed him to make and the beginning of a new contest over this decision itself.

This thesis therefore concludes that the judge can perform a vital part in the paradoxical process in which agonistic rights find their (re)foundation, because he both affirms them and opens them up for new possible meanings. The agonistically ‘appropriate’ function for the judge is found in the balance between this two. Yet, this balance is a fragile one and is easily overstepped in both directions of the paradox. Here, agonistic theory offers a powerful critical analysis of

contemporary political theory and practice. In my opinion, agonistic theory is rightfully critical of the constitutionalist narrative of judicialization through rights proliferation. In a world characterized by increasingly diverse and often conflicting perspectives, it might seem attractive to turn to the law and the judge to solve these conflicts in a rational way. Nevertheless, agonistic theory warns us that these solutions, however rational they may appear, will always be exclusive, as our conflictual world simply does not allow for perfect solutions. Although exclusion is therefore inevitable, putting forward our own beloved solutions as the only rational or reasonable ones, runs a considerable risk of portraying those with different ideas as unreasonable political outsiders. Instead, agonistic theory encourages us to expose and embrace our conflicting and exclusive perspectives as part of an ongoing process of conflict *over* something: our shared political order.

There is an important warning here for those inspired by the Urgenda case, such as the group of doctors who has recently announced to go to court to enforce a general prohibition on the private use of fireworks.¹⁵⁵ The Urgenda-decision might please those who wish to protect the environment, Yet, any long-term change will only be possible by exposing the results of our current behavior and transforming our relationship with the earth from *within* the order we live in. By hegemonically imposing climate measures, the judge runs the risk of turning those disagreeing against these measures or even against himself. After all, the more the judge deviates from the discursive meaning of the rights he is adjudicating, the more he will become a hegemonic actor of the contest, opening up the disagreement over its interpretation and corroding its status of a ‘fundamental’ rule of the game, instead of an external actor affirming the rules of the order. In the end, all rights are part of the order through which we draw each other together as a community. A conflictual community, yes, one that is constantly disagreeing and renegotiating, but a community after all, sharing in a conflict over something mutual, in which our human capacity to self-rule expresses itself.¹⁵⁶

In this criticism, the agonistic rights conception often resembles those theories which emphasize the need for democratic legitimacy of rights and political decisions and which are therefore also critical of rights proliferation. In general, these theories often share a heritage in the republican tradition.¹⁵⁷ Nevertheless, I think agonistic theory also has something valuable to say to these theories, in pointing out that democratic legitimacy is in itself an ideal that will

¹⁵⁵ A similar point is made by Elzinga 2020.

¹⁵⁶ Honig 2009, 85.

¹⁵⁷ Wenman 2013, 5.

never be reached. There is something misleading in turning to the democratic will of the people, because this will is highly conflictual in itself, will always be susceptible to different interpretations and will always be exclusionary. Although agonistic theory emphasizes the primacy of politics, it will always encourage the continuous contestation of the contemporary ‘democratic consensus’.

5.2. Discussion

When engaging with agonistic theory, the reader is sometimes left with a profoundly unsettled feeling. If there are no external foundations, no transcendental truths, what is the basis for our own beliefs, convictions and judgements? This is agonism’s strength: it challenges us to examine these beliefs, expose them as contingent to foster what we hold important by actively defending it from within society. Agonistic theory is a characteristically strategic theory: it examines the possible actions of subjects in contesting the discourse around them.¹⁵⁸

Nevertheless, it is also agonism’s difficulty: it offers no basis to evaluate current social and political practices beyond the measures these practices themselves offer. Many agonistic theorists value contestability, yet, as repeatedly argued in this thesis, the value of contestability can itself only be founded within the contest over political meaning. This is an inherent result of the concept of power that underlies the concept of discourse and therefore the entire agonistic legal framework. If the power relations of this discourse are heavily outbalanced, this will affect the discourse. If our understanding of meaning follows from this discourse, it is hard to see how we could ever say that the framework *should* be different. This problem of normativity also affects the position of the players in the game, which is explained by their relative power. The powerful will try to keep in power, the excluded will try to contest them. Yet, it is hard to say what they *should* do beyond this position. Perhaps the strategic character of agonistic theory is therefore mostly evaluative. Most agonistic democrats are aware of these issues, for example when explicating that their ideas on constitutional democracy are always particular to their own current regime.¹⁵⁹ Here, agonistic theory has two options: it can either state that it cannot normatively prescribe its own agonistic insights or it can try to do so anyways. The problem with the former is that it leaves many unsatisfied, the problem with the latter is that it is hard to reconcile with agonism’s own post-foundationalism. Although I have not examined this in the

¹⁵⁸ Wenman 2013, 12-15.

¹⁵⁹ See Mouffe 2013, 29, calling liberal democracy a ‘contingent articulation’.

thesis, there is for example a problem with Connolly's concept of 'agonistic respect'. Evaluated from the position of the players in the contest, it is hard to see why they should develop something like this.¹⁶⁰

These normative issues are inherent to agonistic democracy and could not be solved within this thesis. Nevertheless, they do affect the conclusions of this thesis and should therefore at least be acknowledged. Although I have showed that rights can perform a valuable part within agonistic theory, it is hard to say that they should actually do so beyond the acknowledgement of the order itself that they should. This affects the conclusion on the judge. From an agonistic perspective, we can analyze the position of the judge as an integral part of the contest and explain his tendency for judicialization as a result of his wish to consolidate his position. Although I have formulated an 'agonistically appropriate' role in answer to my research question, it is hard to conclude on the basis of this thesis that the judge should actually take up this role. This is why I have tried to avoid prescribing a strong normative role for the judge, even though this feels unsatisfying.¹⁶¹

Perhaps my final conclusion is at best an evaluative ideal on the horizon. A problematic question, though, is *whose* ideal this is: that of the agonistic democrat evaluating contemporary practice of adjudication or that of the participants of the agonistic agon? And to which of these categories does the judge belong? Here we enter precarious agonistic terrain: can we meaningfully distinguish between the spectating evaluator and the participant? On the one hand, agonistic theory asks us to acknowledge our own situatedness when evaluating contemporary practice. On the other hand, this makes it hard to say anything beyond our own position. This tension comes together in the position of the judge: is he a political actor driven by a desire to reinforce his own position in relation to other political actors, is he a citizen maintaining his own social position, or is he a someone *beyond* this, evaluating social practice from an agonistic viewpoint, feeling for those exposed and bringing them the things promised by the symbols lady Justice carries? Although this discussion already risks becoming a second thesis altogether, I think it is useful to point out that a sharp distinction between spectator and actor can never be maintained.¹⁶² We are all part of the social discourse we live in. We are driven by the need to

¹⁶⁰ See Siemens' criticism on Connolly from a Nietzschean perspective, which I will sadly have to let rest in this thesis, Siemens 2013, 87-91.

¹⁶¹ Henderson does in fact conclude that the judge should or should not do certain things, such as avoiding judgement that permanently exclude people, Henderson 2018, 163-168.

¹⁶² See Feldman 1999, 10-14 on Gadamer.

protect our own position, but by exposing and evaluating the world around us, we might be also be able to distance ourselves a bit, see ourselves as connected to something broader, which is at the same time the very practice we are constantly engaged in.

5.3. Further research

These previous observations point to the necessity of further research into agonistic democracy and its relevance for contemporary political thought in general. More specifically, I think agonistic theory would benefit from more legal perspectives. For someone coming from a traditional legal education, it is sometimes hard to recognize the relevance of discussions in agonistic literature on law for legal practice. For a theory that intends to be engaged in social practice rather than theoretical philosophy, this is something of a deficit.

As stated in the methodology section, this thesis was intended as a conceptual project, requiring the short and general exposition of a number of different topics. This means that almost every section of this thesis could be complemented with more detailed research. This is especially the case for the general exposition of agonistic theory, where I could not do justice to the different conceptions of different authors. Furthermore, I think the research of this thesis could also be benefit by placing its approach towards rights more explicitly in relation to that of other political theories. The most interesting one would probably be that of Habermas, with which agonistic theory already stands in a long conversation.

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