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REVIEW ARTICLE

Liberalism and the Reason of Law

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Johan van der Walt, **The Concept of Liberal Democratic Law**, London: Routledge, 2020, xiv + 267 pp, pb £27.99

A SURPRISING CLAIM

There are a number of straightforward ways to establish connections between modern law and liberalism; indeed, it is so facile that one is inclined to regard the requisite links as intrinsic.[1] For example, one could simply follow the trajectory of substitutions that the tradition underwent with regard to what it took to be its major substantive concern. The original liberalism of private property,[2] which is in different ways epitomised in the work of John Locke[3] and Benjamin Constant[4], gave way to a liberalism that puts self-realisation and freedom of expression at the center. We associate the names of Wilhelm von Humboldt[5] and John Stuart Mill[6] with this shift. The new liberalism of L.T. Hobhouse[7] invested the persuasion with a social face that was again eclipsed when liberalism

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1 See R. Mangabeira Unger, *Knowledge and Politics* (New York, NY: Free Press, 2nd ed, 1984) 72-76. J.W. Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1, 41-69; more recently, G. de Almeida Ribeiro, *The Decline of Private Law: A Philosophical History of Liberal Legalism* (Oxford: Hart Publishing, 2019).
2 See C.B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).
3 See J. Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, P. Laslett (ed), 1960).
4 See B. Constant, *Political Writings* (Cambridge: Cambridge University Press, B. Fontana (trans), 1988) 213-220.
5 See W. von Humboldt, *The Limits of State Action* (Cambridge: Cambridge University Press, J.W. Burrow (ed), 1969).
6 J. Stuart Mill, *On Liberty* (London: Routledge, J. Gray and G.W. Smith (eds), 1991).
7 L.T. Hobhouse, *Liberalism* (Oxford: OUP, A.P. Grimes (ed), 1964).

made its turn toward free movement of resources and returned triumphantly at the end of the twentieth century.[8] Property, freedom of expression, economic mobility: No matter how one looks at it, the liberal vision is always articulated in legal terms.

In spite of all shifts of emphasis, however, there has been a core of liberalism's association with law, namely freedom from interference or, *pace* 'neo-Republicans',[9] freedom from domination.[10] Whatever end a liberal society is supposed to serve primarily, it uses parliaments and courts of law in order to erect bulwarks against state interference and to make sure that the rule of law is observed so that people can stand a fair chance to conduct their life in anticipation of how the state may react to their conduct.

Curiously, none of these themes play a role in a book that claims to present not merely the concept of law, but, indeed, the *liberal* concept of law (the title is supposed to allude to the title of Hart's jurisprudential classic; 7). What readers encounter, rather, towards the end of this work is a concept of liberal democratic law that reads as follows (243): 'Liberal democratic law consists of an anomic, unnatural, inorganic, nominalist and nonspiritual system of non-actualisable legislative rules that govern, reflect and sustain the divided life of the societies that they serve.'

None of this is, of course, reminiscent of Locke or Mill, let alone Milton Friedman.[11] In the final pages, the author goes on to amend this concept by including what he regards to be empirical conditions of the possibility of a liberal society, namely, social guarantees and fictional outlets for the ineradicable human appetite for cruelty or the desire to excel in honorable combat (246-247).

The first parts of the following essay take a closer look at how the author develops this concept. It will be seen that it is entwined with a deflation of reason into a means to evoke attitudes. The concept of liberal democratic law defended by the author therefore comes perilously close to embracing some form of irrationalism. But this does not mean that the work lacks any merit. The second part engages with some of the author's amazing and powerful ideas. It attempts, however, to place them in a different context. It emphasises the relational nature of law and seeks to explain that constitutional authority has now taken the place of natural law. The concluding observations concern the historicity of the reasonableness that the law claims to embody.

VAGARIES OF EXPOSITION

It takes the author awfully long to arrive at his concept of liberal democratic law. After having gone through the whole text one wants to caution readers

8 For a historical account, see Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018).

9 See, notably, P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP, 1997).

10 See, most intriguingly, F.A. Hayek, *The Constitution of Liberty* (Chicago, IL: Chicago University Press, 1960) 17-20.

11 See M. Friedman, *Capitalism and Freedom* (Chicago, IL: Chicago University Press, 1962).

not to spend too much time on anything beyond the introduction and the final chapter (for a similar, less forthright advice by the author himself, see xii). These parts raise important questions. The other chapters, by contrast, offer relatively protracted, amazingly unconnected, occasionally superficial and at certain points somewhat embarrassing interpretations of the works of others. Worse still, for the most part, the text does not go anywhere or arrive at conclusions. It, hence, not infrequently terminates in the tiring exercise of comparing authors from different ages (at the end of which readers can learn, for example, that Dworkin's way of thinking is part of the Aristotelian mode of rooting law in life; see 210).

The text is protracted, for example, already at the outset where the author shares with readers his experience of reading Villey's and Schmitt's accounts of the history of ancient law and public international law, respectively (15-53). In the course of doing so it offers quite a bit of second-hand history of philosophy. For example, the few pages on medieval nominalism and voluntarism appear to have been taken right out of Villey (22-27).

The chapters are also unconnected. Why the discussion of Antigone's predicament is followed by Protagoras' *homo mensura* (64-66), which in turn gives rise to a discussion of actuality and potentiality (70-81), remains a mystery. The reader is also puzzled that Christian messianism supposedly offers some greater insight than – and not only an alternative to – the Aristotelian way of relating potentiality and actuality (the question would also have to go to Agamben, whom the author ostensibly follows here; 17, 80–81). Subsequently, the distinction between potentiality and actuality is paralleled with the distinction between *auctoritas* and *potestas*, which is of venerable ancient pedigree and perhaps for that reason one of Agamben's hobbyhorses.[12] Readers, however, cannot but scratch their heads when they realise that, while the collapse of the distinction between actuality and potentiality is apparently to be welcomed, the uniting of *auctoritas* and *potestas* in one hand necessarily leads to murderous regimes (84-85, 236). The *demos* never stands a chance of being regarded as more than an ominous fiction (104-115). Perhaps the author should have looked into Paine's *Rights of Man*, where he would have found a narrative account of how popular sovereignty worked in a revolutionary situation.[13] Without anything further, a discussion of the universal and the particular is pasted onto the debunking of the people and followed by a discussion of utilitarianism, law and economics, and, finally Hegel and Savigny (112-167). The reader is left in bewilderment, asking how this hangs together. The accidental nature of this intellectual history continues when the relevance of 'life' for both Hegel and Savigny triggers an introduction to the Free Law Movement and American Legal Realism (159-167).

It is at this point, at the latest, that the discussion also turns out to be disturbingly superficial.[14] Relying on one-sided German secondary sources (166,

12 See G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, D. Heller-Roazen (trans), 1998) 44-48.

13 See T. Paine, *Rights of Man* (Harmondsworth: Penguin Books, E. Foner (ed), 1984) 185-194.

14 It could have occurred to the author, I add in passing, that one encounters at least three different versions of the general will in Rousseau's social contract: compromise, moral substance and

footnote 123),[15] the Free Law Movement is presented as though it had paved the way for the jurisprudence of national socialism (165). But this misrepresents the thrust of the movement. The Free Law Movement did not advocate the disregard of legislation and should not be viewed isolated against its critique of German conceptual jurisprudence. Placing it and what appears to be its companion across the Atlantic – American Legal Realism – in the vicinity of 'legal renewal' in Nazi Germany must create the impression that Realism was about giving the 'healthy moral sentiments of the people' (*gesundes Volksempfinden)* free rein in legal discourse. Nothing could be further from the truth. Realism was not an intellectually shallow revolt of blockheads using the rallying-cry of 'life' against logic, rather it was about paying attention to facts and greater candor of moral consequentialism in comparison with legal doctrine.[16]

The more the checkered history unfolds, however, the more the superficiality becomes apparent. The German public law scholar Rudolf Smend is squarely put into the 'Aristotelian' camp (210-211). This is as nuanced and fine-grained as it can get if it does not occur to you that the relevance of 'life' in Smend's *geisteswissenschaftlicher Methode* may reflect the influence of Wilhelm Dilthey,[17] Theodor Litt[18] and other varieties of the philosophy of life (*Lebensphilosophie)*.[19] It pains the reader when the position of Carl Schmitt, who professed '*Ordnungsdenken*' throughout the time that he catered to interests of the Nazi government, is presented as though he called it '*Ortungsdenken*' (38). One should not, at least not without further explanation, attribute to Schmitt a concept that he did not use himself to characterise his view (again, 148, 226). In fact, the author's doing so seems to originate from a mishap in the translation, for on page 38 he actually speaks of '"concrete order" thinking or *Ortungsdenken*'. The German term used by Schmitt was, of course '*konkretes Ordnungsdenken*', or, more precisely, '*konkretes Ordnungs- und Gestaltungsdenken*'.[20]

Matters become worse when the author mistakes Hart's internal aspect of rules for an attitude of acceptance or endorsement (178-179). As is well known, Hart referred to the internal aspect of – or viewpoint on – rules in order to

universalisable law, of which the author identifies only the third (118). See W. Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994) 176.

15 See for example O. Behrends, 'Von der Freirechtsschule zum konkreten Ordnungsdenken' in *Recht und Justiz im ‚Dritten Reich'* (Frankfurt aM: Suhrkamp, R. Dreier and W. Sellert (eds), 1989) 34.

16 See for example F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

17 See W. Dilthey, *The Formation of the Historical World in the Human Sciences* (Princeton, NJ: Princeton University Press, R. Makkreel et al (trans), 2002).

18 For a summary statement of Litt's ideas concerning 'the science of life' (*Lebenswissenschaft*), see T. Litt, *Denken und Sein* (Zurich: S. Hirzel Verlag, 1948).

19 See H. Schnädelbach, *Philosophy in Germany 1831-1933* (Cambridge: Cambridge University Press, 1983) ch V. For a contemporary critique that includes Husserl, whose work may have left an imprint on Smend, see W. Rickert, *Die Philosophie des Lebens: Darstellung und Kritik der philosophischen Modeströmung unserer Zeit* (Tübingen: Mohr, 2nd ed, 1922). See generally K. Rennert, *Die ‚geisteswissenschaftliche Richtung' in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günther Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987).

20 See C. Schmitt, *On the Three Types of Juristic Thought* (Westport, CT: Praeger, J. Bendersky (trans), 2004). In footnote 24 on page 38 the author refers to the German original edition of this work. There is no mention of *Ortungsdenken* in this pamphlet that advocates *Ordnungsdenken*.

explain that people obtain guidance by using them as critical standards.[21] Being guided by rules does not in and of itself amount to their substantive acceptance. One can obtain guidance by adopting the internal perspective even if one is substantially detached from the relevant normative standard. One can, for example, point out to adherents of a religion that their understanding of their professed faith is misguided by speaking from what they regard to be their relevant point of view.[22] One can accept what their religion teaches as the relevant standard for their conduct without thereby accepting this standard for oneself. The author's conflation of guidance and substantive acceptance plays a central role for his outlandish claim that Kelsen[23] and Hart, possibly along with Kant, are major trailblazers of the liberal concept of law simply because they accommodate the coexistence of the internal and the external perspectives on law (178, 210, 223). The author seems to identify the latter with what Kant called 'legality',[24] that is, an outward and possibly internally unengaged ('detached') mode of observing the law (153).[25] But possibly more nuance is required here. Legality and the internal viewpoint on law are perfectly compatible with one another, as not least legal positivists such as Kelsen have contended.[26] Relentlessly, however, the author insists that Hart is 'profounder than many legal theorists who engage with his work realize' (169) once his work is set against the background of history of metaphysics of which he may have not been aware (171). The great insight that the author attributes to Hart is that the law is sustained not

21 Hart's terminology is shifting. See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 84-90.

22 This decisive contrast between the internal and the external point of view concerns the question whether someone is either ready to use a rule as a critical standard or merely interested in predicting behavior. See Hart, *ibid*, 87. It is conceded, however, that Hart often uses the standard case in which those accepting a rule as the relevant standard are also ready to follow it in their own conduct.

23 Since Kelsen's theory of democracy puts compromise at the centre, he is also taken to be one of the purveyors of the idea of pluralism (203, 210). But in their legal theory, both Kelsen and Hart were merely interested in the question under which condition the normative quality of the legal system is possible and not in recognising that a liberal society is pluralistic. For both, the legal system is taken seriously *as normative* only from the internal point of view. See, aside from Hart, H. Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, B. Litschewski Paulson and S.P. Paulson (trans), 1992) 34-35 (on the 'existence of legal science over a millennium, which … serves … the intellectual requirements of those who concern themselves with law.'). Any consistency with pluralism that comes from the simultaneous social relevance of the internal and the external perspective is entirely accidental. There is no necessary connection – as the author recognises (203) – between Kelsen's Pure Theory and liberal democracy. What is, socially, written into the pure theory of law is entirely different from it. The legal system as reconstructed by Kelsen appears to be like the machinery serving a detached authority somewhere at the outskirts of an empire. It exists for civil servants only, and these are eager to keep each other in check. The law does not speak to the 'subjects'. The common people are only relevant insofar as their behavior keeps the production of more law going. During the period of the Habsburg Monarchy, the relationship between the imperial offices in Western Galicia and a population ignorant of the official language probably matched this picture. Kelsen's legal system is the universalisation of the colonial situation of Western Galicia into the idea of law. The law is deeply foreign, deeply arrogant and deeply susceptible to arbitrariness.

24 See I. Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 2nd ed, M. Gregor (trans), 2017). Legality is conformity with law, regardless for the reasons leading thereto.

25 'Obedience' in Hart's parlance. See Hart, n 21 above, 110.

26 See Kelsen, n 23 above, 34.

only by those adopting an internal perspective, but also by those approaching it externally (179). If law was rooted in life[27] – by which the author means wholehearted endorsement by those following it – it would not be liberal (179, 210.) For what Hart thereby acknowledges is the reality of social division (203-204): 'Liberal democratic law ultimately depends on the possibility of sustaining adequately satisfactory relations between those subjects of law that have an internal perspective to law, and those that have an external perspective.' Under this condition, the author contends, no group's moral 'essence' is 'actualized' in the law. The people remain outside of it (204).

The most awkward misreading, however, concerns another one of the author's intellectual heroes, namely Giorgio Agamben. The author lets Agamben say (in quotation marks that remarkably also contain parentheses) that Saint Paul '[wrote in Greek, but thought in Yiddish]' (80). This is, in spite of the use of quotation marks, not a quote from Agamben who on the pages cited by the author refers to Jakob Taubes who replied to Emil Staiger's comparison of Paul's Greek to the German of medieval Ashkenazi Jews, called 'Yiddish'. Staiger reportedly said that Paul's Greek was like Yiddish. Van der Walt does not seem to get this and refers again to the 'Yiddish Saint Paul' (81). In fact, he attributes to Taubes the observation that 'Saint Paul was the one who wrote in Greek but spoke Yiddish' (238). But that's all wrong. What Agamben recounts on the pages of *The Time That Remains* is the joke made by Staiger that the Letters of Paul were not written in Greek, but in Yiddish[28] and Taubes humorous reply to it that this was the explanation why he, Taubes, as a Jew, understood them.

A SOMEWHAT MODEST VIEW OF REASON

In the preface, the author puts the cards on the table (xii). The book, he says, has 'two aims'. It is supposed to present an argument about liberal democratic law. At the same time, the argument is to emerge from the 'language and format of a textbook that can be used in the teaching of legal and political theory'. What holds both aims together is a project of 'distillation'. The whole protracted enterprise is supposed to 'distill' the concept of liberal democratic law from the mash of a metaphysical tradition that is located between commitments to *physis* and *nomos* by stripping the tradition of its slag and to arrive at a 'purified' idea (13): 'The argument proceeds by bringing both these conceptions of nature to a boil, so as to extract from them, through a process of conceptual distillation, the ethereal substance of liberal democratic law.'

The result of composing and heating up the brew is that the presentation of the materials prevails over the argument. Actually, it drowns the argument in long-winding excerpts from the literature. Arguments are never really made. Matters are often only posited, apparently with the understanding that they are already known by the initiate. The guarantee of the right to life depends

27 The author advocates a 'lifeless' theory of law, 199.

28 See G. Agamben, *The Time That Remains: A Commentary to the Letter to the Romans* (Stanford, CA: Stanford University Press, P. Dailey (trans), 2005) 4.

on the exclusion of some life from protection (83). Apparently, this is so because Agamben has said so. The fusion of *auctoritas* and *potestas* in one person transforms the state into a killing machine (84, 96). The explanation is that this reflects Agamben's 'profound understanding of the totalitarian regime that the National Socialist movement became' (96). The book does not argue, it is merely taking sides (such as taking the side of Protagoras against Aristotle, 74). Even at its very core, it uses rumination rather than argumentation. This is not least manifest in the fact that one particular paragraph representing the gist of the book is repeated time and again on several pages (5, 62, 196, 222, 243). It represents van der Walt's *nomos* to which we shall return below.

The book does not explain whether the distillation process is a historical process that is driven by the forces that are part of the brew or by the author's predilections. It never explores intellectual victories or defeats; it just expresses likings and disdain. For example, the preference for recognising the reality of social division and cultural plurality is matched with the distain for rooting law in 'life' (166-167, 227). Rooting law in life is supposed to mean the law becomes 'reduced to an internal perspective sustained by one social group (usually by a majority) at the complete cost of an external perspective held by another social group' (179).[29] And this is – ostensibly – bad. But it is far from self-evident that the predominance of one homogeneous group over others exhausts all conceivable relations between 'law' and 'life'. Approaching law from the perspective of 'life' can mean to take interest into account and to explore the human needs and real conflicts underlying their representation in legal vocabulary. 'Life' does not in and of itself designate homogeneity, as the author posits. Nevertheless, unperturbed by doubt, the message of the book takes its shape through a concatenation of 'likings' or 'dislikings' of certain ideas. Expressions of disgust are frequent: demos: boo! (111-113, 231–232); potentiality: bad! (17, 74, 67, 234); kosmos, order, natural law: dreadful! (7, 18, 227). But there are also traces of exhilaration: sovereignty: cool! (229); nominalism: yeah! (23, 229).

Put in metaethical terminology, this exercise amounts to what emotivism believes to be the true significance of moral judgment, namely, to elicit agreement or revulsion.[30] This is remarkably consistent with what reasoning is implicitly taken to be able to accomplish in this book. The question remains, however, whether intellectual cheerleading is of any avail when it comes to attaining one of the project's objectives. According to the author the book is 'informed by the concern that the age of liberal democracy is currently running the risk of coming to an end without anyone ever having understood clearly what it really was about' (xi). Apparently, both the impending demise and the lack of understanding are to be regretted, for liberal democracy 'remains the only plausible political position for anyone who considers the fundamental freedom of all individuals to develop autonomous lives the core value of human existence' (10).

29 The author continues: 'In other words, to be or to become rooted in life, law has to give up all liberal democratic pretensions that purport to respect the equal worth of the external and internal perspectives to law that inform divisive social pluralities' (179).

30 See C.L. Stevenson, The Emotive Meaning of Ethical Terms (1937) 46 *Mind* 14.

But how are the ayes and nays of intellectual posturing supposed to provide us with a clear understanding of liberal democracy and its value?

THE *NOMOS* OF LIBERAL DEMOCRATIC LAW

The author explains that 'the whole point of this book is to extract the concept of liberal democratic law from Western philosophy's metaphysical invocations of "Nature" and "Spirit"' (174). It is as though the idea needs to be rescued from its encumbrance with irrationality. Apparently, the deadweight of metaphysics comes to a head in a view of the relation of life and law that conceives of life as 'orderly enough to embody law' (210). In spite of rejecting all non-made *nomoi*, the author seeks to stem the tide of attempts to root positive law in natural law or order with a *nomos* of his own that emerges from the 'distilled' concept of liberal democratic law. This *nomos*, which is stated in a few sentences that are repeated like a mantra throughout the book (5, 62, 196, 222, 243) can be restated as follows:

(1) In order to avoid being dismissed for duplicity or hypocrisy you have to stick to believing in the correctness of the principles that appeal to you.
(2) Do not believe, and abstain from acting on the belief, that others also have to be persuaded of the reasons that persuade you.
(3) If you did, you would behave illiberally.

I, for one, understand (1) to formulate a precept alerting us to the dangers of cynicism and nihilism. As human beings, we cannot live together without seriously believing in right and wrong. When talking about right or wrong we should mean to say what ought or ought not to be done. We feel the burden of responsibility for our views only as long as we are serious.[31]

It is more difficult to pin down what (2) is supposed to mean. It can mean the following:

(2a) Concede to others the right to disagree with you even if they are mistaken.

This is, indeed, a liberal idea that was defended at great length in Mill's *On Liberty*.[32] Mill argued that even a belief that we hold with utmost certainty must be susceptible to challenge, if only to reassert us of its correctness.

(2) could, however, also mean:

(2b) If you insist on the correctness of your views without permitting others to reject what persuades you, you betray your belief in reason.

This is a performative contradiction argument that appeals to the autonomy of reason. One would not respect the autonomy of reasonable agreement if one forced people to believe certain things or to act as though they did.

Conceivably, (2) could simply also mean:

31 Admittedly, even the first principle is beset with the problem that believing the truth is independent of a will to believe. See B. Williams, *Truth and Truthfulness* (Princeton, NJ: Princeton University Press, 2002) 135.
32 See n 6 above.

(2c) All reasons are person-relative.

Before examining which reading is actually the author's, it should be noted that (3) does not necessarily follow from (2). Engaging in the attempt to persuade others of what fails to persuade them is not illiberal. It is just futile and possibly even annoying. It may seem as though the matter is different when it comes to coercion. But coercion and, hence, eliciting legal behavior – outward conformity – from people is not per se illiberal. Threatening people with penalties for murder is not illiberal vis-à-vis those who get a kick out of killing other people. It is, even if perhaps undesirable, morally permissible. The use of threats and force would be impermissible only in instances where we legitimately disagree. Hence, inferring (3) from (2) is correct only in cases where we have to accept disagreement. I am afraid, though, that the author is of the view that we potentially disagree on everything (76): 'The question that the human race is facing today will have to be decided without anyone being able to stage cogent philosophical or scientific claims regarding the 'good life'. But this, again, implies that societies are illiberal unless, as the author contends, they are built on a patchwork or '… constellation of compromises reached in the face of differences of opinion …' (8).

It is safe to conclude, a fortiori, that (2a) is clearly not the interpretation favored by the author. His rejection of all *nomoi* (except his own) does not make him predisposed to even conceive of some view as erroneous. All views are equal, no view is better than any other.

(2b), however, according to which reason can only emerge from free endorsement, is not a plausible candidate either. There are moments at which the author comes close to endorsing this view, for example when he says the following (6): 'Dogmatic insistence on the appropriateness or correctness of liberal democratic principles obstructs the unique mode of political praxis that these principles demand.'

As is well known, such insistence is the Achilles heel of 'militant democracy',[33] that is, the use of the coercive force of the state against anti-democratic political groups, which is both unavoidable and at odds with liberal democracy. It is unavoidable because it would be deleterious for a democratic polity if it tolerated its intolerant enemies;[34] it is, however, also inconsistent with it since a liberal democracy is supposed to rest on free support by its citizenry not least for the reason that it leaves room for disagreement. Such support, however, can be reasonable only if it is uncoerced.[35] Any use of threat of violence in order to sustain liberal democracy asphyxiates its free endorsement by reason and hence puts into question whether it is indeed worthy of support.

The author, however, does not address this predicament. He exhibits, therefore, no interest in interpretation (2b). Rather, he seems to support militant

33 For an introduction, see J.-W. Müller, 'Militant Democracy' in *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, M. Rosenfeld and A. Sájo (eds), 2012) 1253.

34 See K.R. Popper, *The Open Society and Its Enemies: New One-Volume Edition* (Princeton, NJ: Princeton University Press, 1994) 581, fn 4.

35 And this would have to include, arguably, support of penal laws that protect democracy against self-subversion.

democracy, for he says that liberal democracy '… must and will respond forcefully in the face of any threat or pressure'. He merely cautions that it should do so with the awareness that its current institutional forms neither exhaust nor fulfil the idea (7). (2b) is also not a plausible candidate in the face of this tacit endorsement of relativism (233). It needs to be doubted, hence, whether according to the author there is anything like reason as something that we share and that undergirds the principles of liberal democracy. Reason would give us a unified perspective and make us seek the unconditional foundations of the conditions. The author does not seem to be terribly charmed by such an ambition. In fact, it is to be expected that he would dismiss it as metaphysics ('boo').

It is reasonable to conclude, then, that it is rather (2c) what (2) is supposed to say. Unsurprisingly, it confirms and generalises the emotivist deflation of reason[36] that we noted already above and that is reflected throughout the book.

If all reasons are person-relative, reasons actually cannot persuade. They can only fit into an already existing set of beliefs held by some person or group.[37] Reason is then confronted with the problem that it no longer functions as such, for it fails to move the intellect. This is relevant for the first-personal perspective, too. How could you ever persuade yourself of the correctness of your principles? You cannot. You either are already primed with beliefs that allow you to accommodate new convictions or, alternatively, you are simply accidentally thrown into believing what you believe. Nobody has *reason* to believe something that afflicts one like some fancy.

If (2c) is the author's preferred interpretation of (2) ('yeah'), then the question is what we can make of (1). If beliefs are entirely accidental, why should we stick to them? The only point in doing so is that we are left with no alternative. Hence, the view turns out to be cognate to that form of decisionism that counsels us to hold on to what we have resolved to do for there is nothing but our resolve that anchors us in life.[38] This implies, of course, that our commitment to liberal democracy is no longer rational aside from the effect that it has to provide our life with direction.

The irrationalism underlying this view is actually celebrated toward the end of the book. Any form of *nomos* is rejected.[39] Faith in the people is debunked as fool's paradise. There is no general will, but merely compromise (233): 'The concept of liberal democratic law takes leave of this unification and personification of society as decisively and incisively as possible, by making the fundamental divisions and differences between people its unwavering point of departure.'

The book affirms the divided life (178, 234, 178, 204, 222, 234) of contending groups. The rejection of thinking in terms of potentiality and actuality (235) leads to the surprising consequence that not even a rule is actualised in its application (237, 238): 'Legal rules do not enter their application. They are

36 See, notably, A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, IN: University of Notre Dame Press, 2nd ed, 1984) 23-25, 34.

37 Put in modern metaethical terms, reason and reasons are always and already related to existing attitudes and beliefs. See S. Street, 'Constructivism about Reasons' (2008) 3 *Oxford Studies in Metaethics* 207, 208, 212 fn 12, 220, 224, 231.

38 For a discussion of Kierkegaard from this perspective, see MacIntyre, n 36 above, 40-42.

39 Evidently, assuming that this rejection encompasses the author's own *nomos*, the claim made in the book is indeed self-effacing.

terminated by their application … There is no communicative transition from the rule to its application. The law does not come alive in its application, as Pound suggests, it dies there, and lives on elsewhere.'

It does not come out of the blue, therefore, when the author confronts us with the puzzling claim that all law is legislation (241). This can be taken to mean that the law is made afresh in each and every legal act. If there is 'no communicative transition' from the rule to its application, there can also be no legal system, for there is no continuity of the process of law creation. Law turns out to be just a series of unrelated and unsystematic impositions. Using Hart's memorable words that have occasioned so much mockery from Stanley Fish,[40] it is just the 'temporal ascendancy of one person over another'.[41] There is no difference between liberal democracy law and the Augustinian band of robbers. Interestingly, this is a rather bleak perspective on liberal democratic law. One wonders why anyone should have reason to defend it.

FROM LIBERAL DEMOCRATIC LAW TO THE LEGAL RELATION

But does it have to be so bleak?

There is a truly important idea explored in this book. It says that the law is nobody's law in the sense that it is not designed to lend expression to the moral sentiments of one particular group or persuasion. But this matter is possibly misapprehended by contrasting the articulation of the 'life' of a group with the grudging acceptance of democratic compromise with which no participant can wholeheartedly identify. Perhaps the important point that is made by the author needs to be articulated differently; and why not in the old-fashioned manner of distinguishing between law and morality?

It is a recurring theme of the book that law merely requires legality qua 'outward' or unengaged conformity with legal enactments. As I have tried to explain before,[42] legality, thus understood, is essential to a correct understanding of law because the necessity of relating to one another legally emerges from an antinomy within morality. In many instances, the substantive and the social dimension of moral judgment can point into different directions. While one can be substantively convinced of the correctness of one's own view, socially, by taking into account that one is merely one equal judging person among others, one may have to concede that other people have reasons to view matters differently. The reasons are not one's own, but they could be had one grown into a different person as a result of one's social station, education or various formative experiences.[43] The antinomy is manifest in the fact that while,

40 See S. Fish, 'Force' in *Doing What Comes Naturally* (Oxford: OUP, 1988) 503.

41 See Hart, n 21 above, 24.

42 See A. Somek, *The Legal Relation: Legal Theory After Legal Positivism* (Cambridge: Cambridge University Press, 2017).

43 Those privy to the discourse of political liberalism will realise that the text alludes to what Rawls calls the 'burdens of judgment'. See J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1991) 56-57.

substantively, one thinks that one is right one must not claim, socially, that others are wrong.

This experience is of eminent concern for the author. He even states that liberal democrats have 'a dual relation to correctness' (4). They are convinced of their own views *and* believe that an authoritative decision made in the face of serious disagreement is unassailable. This is just another way of stating the antinomy between the substantive and social dimension by anticipating that, among equals, choices and powers to decide are the way to address it.

The upshot of the antinomy is the recognition of reasonable disagreement.[44] Its resolution is the legal relation. It emerges by yielding to the determination made by others subject to conditions of autonomy, equality and reciprocity. Within a legal relation one grants others the power to determine what one ought to do. One remains self-determining, nonetheless, by granting others this authority. One's own self-determination is mediated by making oneself yield to others. The ultimately self-determined choices made by others, however, no longer necessarily reflect what we believe, morally speaking. The law that is issued by authority is not 'ours'. The reasons that one encounters are not one's own. Actually, within the systemic context of a complex legal order the law reflects the influence of so many different moral perspectives that no one is able to identify with it. The law is nobody's law.

With the emergence of the legal relation, practical reason carves out a space in which moral judgment can reach out beyond itself. Along its social dimension – in the relation between and among persons – its substantive dimension – the reasons for right and wrong – becomes reduced to the fact of a choice or a decision. Practical reason thus partakes of the substantive 'groundlessness' that the author attributes to decisions (4).

SECOND-ORDER DISAGREEMENTS

Nevertheless, there is an inherent limit drawn to legitimate legal authority. It can grow only within the zone of reasonable disagreements. But where does this zone begin, and where does it come to an end?

Can reasonable people disagree over whether physician-assisted suicide should be permitted? Many are inclined to think they can. Can people reasonably disagree over whether the police may torture someone who threatens to blow up a building but refuses to divulge which one it is going to be? I am inclined to believe that reasonable people can disagree on this question. Others may not be willing to make this concession and insist that under any circumstances the use of torture is impermissible. They believe that everyone has to see it that way.

Such second-order disagreements over the scope of reasonable disagreements are not uncommon. Our deepest disagreements concern the scope of reasonable disagreements, that is, the question over which issues it is reasonable to disagree owing to their irredeemable complexity or in the face of the ineradicable

44 *ibid*, 55; J. Waldron, *Law and Reasonable Disagreement* (Oxford: OUP, 1999) 151.

plurality of human perspectives. We agree that there is no reasonable disagreement over racism or sexism. But do we also agree that there can be no reasonable difference of perspectives as to what *counts* as racist or sexist behaviour?

Obviously, there can be reasonable disagreement on the point at which disagreements cease to be reasonable. The history of political philosophy demonstrates that second-order reasonable disagreements are frequent. Rawls, for example, alleged that Robert Nozick's views on justice[45] would be rejected by participants in the 'original position' for failing to neutralise contingencies of birth, circumstance, and 'natural endowments'.[46] At the same time, it can scarcely be denied that Nozick did not suffer from insanity, nor was he an evil-minded man. On the contrary, he was a serious philosopher who formulated important challenges to Rawls' theory.[47] The disagreement between Rawls and Nozick was entirely reasonable. It concerned matters over which reasonable people very plausibly disagree.[48]

Again, the author is right. We do not avail of a *nomos* investing us with an outline of where we may legitimately disagree. But this views the matter too negatively. There is a risk that if we leave it at that our views become too crude. We may then be ready to either succumb to the law of the jungle (what the author calls *physis*, 30) or throw up our hands and say that all that remains for us is the pragmatist's hope that we can get along even when we are aware of lacking metaphysical guarantees.[49]

CONSTITUTIONAL AUTHORITY

But we already have more. Not by accident, our modern societies are not predicated on natural law. All public authority is based on constitutions. Constitutions are of human design. They are law that is posited against the backdrop of presuppositions (241) as to where the reasonable disagreements of ordinary politics have to come to an end. In a constitution we agree, when it comes to organising our political process, not to disagree on the relevance of parliaments or on extending the franchise to all citizens. We also agree that certain practices are unreasonable, such as slavery or locking people up without providing them with the writ of habeas corpus or some equivalent remedy. Of course, there is room for disagreement on all of these issues, simply because a lively political debate must not exclude controversy, but those who beg to differ with the constitution are not given the authority to translate their view into valid law – not, at any rate, pursuant to ordinary legislative procedures.

45 See R. Nozick, *Anarchy, State, and Utopia* (New York, NY: Basic Books, 1973).

46 See J. Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, E. Kelly (ed), 2001) 16, 97-98.

47 It may not have been by accident that a Marxist philosopher took Nozick particularly seriously. See G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995).

48 Second-order reasonable disagreements are perilously transitive. They augment the scope of reasonable disagreements, see below.

49 See R. Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1988).

Thus understood, constitutions plot a line. In Germany, for example, policy makers may disagree on many things, but they are supposed to understand that human dignity is inviolable. This principle is taken to authorise the prohibition of games that exploit commercially the simulation of homicide.[50] It is not permissible to operate a 'Laserdrom', not, at any rate, by pointing out, among other things, that people should be free to do what they want to do since we legitimately disagree on whether playing at killing people is either appalling or morally insignificant. This is how a limit to what is reasonable is drawn historically by deciding cases.

Constitutional line-drawing is carried out with an eye to the exercise of authority. It is not by accident, therefore, that constitutional law embodies the values that constitute the antinomy of morality, namely, autonomy, equality and reciprocity. These moral ideas become recast in the relational form of law.[51] Hence, the legal discourses that they give rise to are different from ordinary moral debates. For example, instead of asking whether it is permissible to assist persons in committing suicide, the question becomes whether petitioners have a right to determine when and how to end their lives, whether the state has an obligation to protect people against their death wish or whether the state has less restrictive means available than a criminal penalty for assisted suicide in order to save people from imprudent choices. It is in the decision of such cases that the scope of what we reasonably disagree on becomes redrawn.

Clearly, there is something odd, to say the least, about identifying constitutions with historical manifestations of our sense of reasonableness. Constitutions are historical artifacts. They do not have the power to determine reason. As soon as the limits of reasonable disagreements are expressed in a decision and give rise to an interpretive discourse, reason becomes tainted with contingency and attains a determinate shape that mocks its fluid existence in processes of ratiocination. It becomes 'public reason'.[52] As soon as reason is written into stone it turns into something that is different from itself. While reason becomes, admittedly, in the course of an externalisation, denaturalised and set into a historical perspective, its artificial mode of being 'positive' or 'posited' makes us necessarily view from the perspective of reasonable disagreements over where reasonableness begins and comes to an end. The halo of public reason surrounding constitutional law is quite artificial and, indeed, theatrical.

Our second-order disagreements on the scope of reasonableness are themselves reasonable as long as we exchange arguments in philosophical controversies, interminable as they may well be. As long as we give reasons and abstain from fighting with fists, we disagree reasonably. But since the reasonable is always determined from within such second-order reasonable disagreements – reasonable disagreements as to what we reasonably disagree on – the scope of reasonable disagreements is always up for grabs. If it is reasonable to disagree on

50 See Case 35/02, *Omega Spielhallen und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

51 For the classical statement, see W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, CT: Yale University Press, W. W. Cook (ed), 1946).

52 What Rawls made of this idea would merit a separate article. See J. Rawls, 'The Idea of Public Reason Revisited' in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) 129.

what makes a disagreement unreasonable, its unreasonableness can be cast into doubt. There may be no such thing as 'dignity', after all.[53]

Constitutions are positive law. But when matters transcend the routine operation of politics[54] they cannot avail of settled understandings. They provide the context in which practical reason historically determines itself.

PRACTICAL REASON REQUIRES PRACTICE

We have observed above that the author conceives of the working of reason in a manner in which emotivists among meta-ethical theorists perceive the function and point of moral judgment.[55] It is supposed to elicit approval or disapproval, but it is incapable of persuading by rational means. This view of reason is confirmed by the evocative style with which the author, in his quest to 'distill' good ideas, sorts out what he believes to be obnoxious metaphysical slag.[56]

Again, the question may be asked whether a less bleak and more nuanced view might not better capture our experience that what we appeal to as 'reason' is more implicit in what we agree upon than explicit in the principles that we hail and nonetheless often indeterminate from an *ex ante* perspective.

The existence of the legal relation demonstrates that our practical reason is not finished in the format of our moral beliefs. Hegel insisted correctly against Kant that the critique of practical reason cannot succeed unless it emerges from the actual practice of moral judgement. Believing that one could engage in such a critique beforehand is tantamount to believing that one could learn how to swim before descending into the water.[57] From the perspective of Hegel's objection it can be seen, hence, that the emergence of legal relations is integral to the critique of practical reason and moral judgment. This means, in particular, that the practical reason of morality is incomplete. It must externalise itself and bracket its substance within the legal relation in order to find the proper institutional locations in which it can become a reality in the languages of law and constitutional doctrine in particular.

The historical existence of practical reason, however, also reveals its social nature.[58] This social nature is not only manifest in the necessity of a plurality of subjects but in the puzzling fact that the existence of reason is a matter of

53 See A. Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Cambridge, MA: Harvard University Press, 2017).

54 On the uninterpreted constitution, see R.F. Nagel, *Constitutional Cultures. The Mentality and Consequences of Judicial Review* (Berkeley and Los Angeles, CA: University of California Press, 1989).

55 See n 27 above.

56 The author could claim Walter Kaufmann in his support, who once said that much great philosophy is marked by paucity of arguments and peremptory dicta. See W. Kaufmann, *Tragedy and Philosophy* (Princeton, NJ: Princeton University Press, 1968) 31.

57 See G.W.F. Hegel, *Enzyklopädie der philosophischen Wissenschaften, Werke in zwanzig Bänden* (Frankfurt aM: Suhrkamp, E. Moldenhauer and K.M. Michel (eds), 1969-71) vol 8, § 10 (annotation), 54.

58 See for example R. Brandom, *Tales of the Mighty Dead: Historical Essays in the Metaphysics of Intentionality* (Cambridge: Cambridge University Press, 2002) 220.

mutually recognising conceptual and inferential norms.[59] That what we call reason is a matter of mutual recognition does not entail that we are free to make it up as we please. Reason has to be built from reason. Yet the process of construction is marked, *prospectively*, by indeterminacy.[60] Is it sound to conclude based on how we interpret the principle of equality that the institution of marriage must be available to same-sex couples as well? At the historical juncture at which the decision has to be made, we can plausibly argue either way. Yet, once a step has been taken into one direction the interpretation of the equality principle solidifies *retrospectively*. Once we are putting the precedents together, we can discern principles and a structure of examining the relevant issues. If this observation is correct, then it implies that something factual has to intervene in order to invest reason with a more durable and determinate shape. In other words, we need to have historical practice in order to have practical reason. Hence, the self-alienation that ostensibly results in an externalisation of reason is integral to its own operation (apologies for making a clearly Hegelian point). Something factual has to intervene in order to make reason possible, and that factual is something that does not persuade, but that happens to throw us into states of belief.

The author has pointed us into this direction. We must give him credit for that. Had he laid a stronger emphasis on the historicity of reason, the book would have ended up less tilted towards decisionism. If one were to put this conclusion into the form of a motto, it would read: More Hegel, less Hart.

59 See R. Brandom, *A Spirit of Trust: A Reading of Hegel's Phenomenology* (Cambridge, MA: Harvard University Press, 2019) 286, 298.

60 See R. Brandom, *Reason in Philosophy: Animating Ideas* (Cambridge, MA: Harvard University Press, 2009) 84-88.