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BETWEEN MODESTY AND AMBITION: REMARKS ON *THE CONCEPT OF LIBERAL DEMOCRATIC LAW*

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ABSTRACT
Johan van der Walt offers a modest conception of liberal democratic law as a groundless modus vivendi, while at the same time backing up this conception with an ambitious inquiry into the long history of Western metaphysics and the ways in which it shaped legal imagination. There are two main dimensions to my criticism of Van der Walt's work, and they exactly divide between its modesty and ambition. I contend that the understanding of liberal democratic law as a modus vivendi is *too modest* insofar as it avoids normative justification, whereas the philosophical storyline is *too ambitious* insofar as it amplifies the extent to which questions of legal and political theory are embedded in questions of ontology.

KEYWORDS
Liberal democracy, law, justification, legal positivism, philosophical foundationalism

The Concept of Liberal Democratic Law is at once both a modest and an ambitious book. It has an extremely modest take-home message: "liberal democratic legislation is nothing but an intelligent response to irresolvable differences of opinion", that is, "a human and humane measure taken in response to insurmountable political differences that render invocations of the 'absolute foundation of life' meaningless" (p. 243).[1] Johan Van der Walt argues for an understanding of liberal democratic law as a contingent and reversible outcome of political contestation, a constellation of "compromises reached in the face of differences of opinion" (p. 8). Emphatically devoid of any metaphysical foundations whatsoever, it is a nominalist and positively legislated construct based on political compromises in a pluralistic society supposedly aware of its own irreducible plurality.

[1] All in-text paranthetical page numbers refer to Johan van der Walt, *The Concept of Liberal Democratic Law* (New York: Routledge, 2020).

To make a case for this modest position, however, Van der Walt undertakes an ambitious theoretical endeavor and engages with the long history of "Western metaphysics," which, in his view, not only cradled the concept of liberal democratic law, "but also smothered and distorted it for much too long" (p. 223). The sheer scope of the investigation is daunting, to say the least. It extends from conceptions of nature in pre-Socratic philosophy to Aristotelian ontology and all the way to Hegel's philosophical historicism, followed by a series of critical encounters with some of the most prominent legal theorists of the 20th century, ultimately with a view to "distilling" from this "heavy metaphysical soup" the "pure" concept of liberal democratic law (p. 13).

There are two main dimensions to my criticism of Van der Walt's work, and they exactly divide between its modesty and ambition. Put in a nutshell, I find the central thesis of the book *too modest* but the historico-philosophical storyline *too ambitious*.

Van der Walt's pure concept of liberal democratic law is so modest that he hardly offers any normative argument in its defense. Nor does he offer any specific account of what makes it *liberal* and *democratic* in the first place. With regards to liberalism, he rejects (rightly, in my view) all appeals to the philosophical discourse of natural law as untenable: "Liberal democracy cannot claim allegiance to some kind of natural law conception of law without seriously misreading its own historical narrative," because it is "the form of government that emerged from the historical recognition that divisive social pluralities disqualify everyone from claiming the capacity to glean from nature, or from 'reason,' rules and principles that are universally valid and bind all people in the same way" (p. 7). Given the irreducible plurality of worldviews and interpretive frameworks, we are indeed no longer in a position to invoke, say, Jefferson's "self-evident truths" or Kant's "facts of reason," which are putatively beyond dispute. Likewise, with regards to democracy, Van der Walt warns about the perils of conceiving "the people" as a macro-subject capable of speaking in one voice and acting on one will. Drawing on Claude Lefort's much celebrated notion that the site of "the people" is an empty space and that it must remain empty for the sake of democratic openness, he argues that the "invocation of the People as the foundation of democratic government has from the beginning been steeped in theologico-political myth-making" (p. 231).

I do agree with these lines of criticism debunking foundationalist conceptions structured around natural law and "the people." However, granted that a liberalism of natural law variety is no longer viable and that democracy is premised not so much on the presence as the absence of "the people," the compelling theoretical question would be how to account for the *normative content* of liberal democracy. After such a sustained and erudite critique of foundationalism as Van der Walt's, one at least expects the question to be raised. And yet, it is precisely this question that *The Concept of Liberal Democratic Law* fails to raise, let alone address. In the

end, without any attempt to normative theorizing, we are invited to embrace liberal democracy as a modus vivendi of sorts. This strikes me as an unnecessarily modest position, especially in our historical juncture where so many factors seem to sound the death knell for liberal democracy, as Van der Walt himself acutely observes in the opening remarks of the book. If he is right in this diagnosis, then, legal and political theorists committed to liberal democracy would be well-advised to argue for something normatively more substantial than a mere modus vivendi.

Van der Walt's reasons for avoiding normative theorizing are not systematically expounded, but they seem to stem, at least in part, what he takes to be the liberal democrat's dilemma. On the one hand, liberal democrats are committed to a set of principles—"such as equality before the law, respect for the inviolable dignity and integrity of persons, freedom of conscience and belief of all individuals, and so forth" (p. 2)—which they deem to be the "right" or "correct" principles.[2] Without a sincere commitment of this sort, they would not be liberal democrats in the first place. On the other hand, however, it is precisely because they are liberal democrats that they would not (and of course, should not) impose their principles on others. The assumption that "those who evidently and adamantly disagree with your principles and convictions ultimately have good reasons to agree with you, good reasons that somehow just remain unbeknown to them and to which they should become enlightened" (p. 5) is not only presumptuous but also dangerous. It paves the way for a "dogmatic liberalism that ultimately risks becoming as illiberal as any adversary of liberal democracy imaginable" (p. 5).

Finding themselves between a rock and a hard place, so the argument goes, liberal democrats must maintain a dual relation to "rightness" or "correctness." They are supposed to remain committed to what they take to be the right principles of liberal democracy, while at the same time acknowledging the fact that liberal democratic politics is not a "pursuit of correctness" because in contexts of serious disagreement "reliance on correctness gets one nowhere" (p. 4). The crucial point is to understand that "contexts of serious disagreement regarding the correct course of action to be followed demand a very different approach to the challenge of sustaining enough 'common ground' to render adequately peaceful co-existence possible" (p. 4). Or as Van der Walt puts it more succinctly a few pages later: "Dogmatic insistence on the appropriateness or correctness of liberal democratic principles obstructs the unique mode of political praxis that these principles demand" (p. 6).

To my view, this is a lesson that much of contemporary liberal democratic theory has *already* taken to heart. Suffice it to recall John Rawls's "political liberalism" and Jürgen Habermas's "discourse theory of law and democracy." Taking plurality and

[2] Van der Walt does not make a distinction between "rightness" and "correctness." So, for the purposes of this essay, I also use these terms interchangeably, as bearing on the propositional content of normative validity claims.

disagreement seriously, Rawls and Habermas built their own stories about liberal democracy around the question of what it means to seek common ground despite our disagreements. The differences in their philosophical strategies notwithstanding, both endorse a modest program of justification and decidedly reject any appeal to metaphysical foundations in their defense of liberal democracy. Their theories are "postmetaphysical" through and through, and yet not *too modest* (in the sense that I argue Van der Walt's is) for they face up to the challenge of how to make sense of the normative content of liberal democracy without succumbing to philosophical foundationalism. That is, they offer impressive attempts at postmetaphysical modes of normative justification, which are specifically geared toward the contemporary reality of late modern societies marked by plurality and disagreement. The kind of political theorizing we find in Rawls and Habermas is thus postmetaphysical but *not* postnormative.

Of course, not all readers of Rawls and Habermas would agree with the latter claim. According to some, despite their self-professed aspiration to move beyond metaphysics, foundationalist assumptions are covertly smuggled into the conceptual edifice of their theories. On this reading, the typical charge is that these theories are not really postmetaphysical. According to others, however, in bidding farewell to metaphysics, Rawls and Habermas have also given up the distinctive aspiration of political philosophy, which is to offer compelling visions of the good life. The charge here is rather that their theories are not normative enough.

Regardless of how one reads Rawls and Habermas, there would be no doubt that their thinking is deeply relevant to the central theme of Van der Walt's inquiry. Throughout the book, however, except a few passing allusions, Van der Walt does not at all engage with these two prominent figures of contemporary liberal democratic theory—an omission which he rightly expects that readers will find "strange" (p. xiii). It is indeed strange, and given the overarching argument of the book and the wide range of topics addressed in it (including, say, pre-Socratic philosophers), the explanation he makes in the Preface—that an extra chapter on Rawls and Habermas would make the book too long—is far from satisfactory.

I make this point not because I think that either Rawls or Habermas simply got it right. But I do think that they asked the right kind of questions, i.e., questions regarding how liberal democratic theory ought to think through justification. The paradigm shift inaugurated by their works paved the way, initially independent of one another, for conceptions of justification centered around "public reason" (in the case of Rawls) and "public deliberation" (in the case of Habermas). To make a long story very short, while the former is primarily about the content of reasons given in a justification process, the latter is about the process of reason-giving itself.[3] Their differences notwithstanding, both approaches endorse that the justification of

[3] Simone Chambers, "Theories of Political Justification," *Philosophy Compass* 5/11 (2010): 894.

coercive laws and public institutions in a liberal democratic polity can no longer appeal to an independent order of verification, but must be intersubjectively validated and remain open to contestation. Hence their profound relevance to the "unique mode of political praxis" that Van der Walt associates with liberal democracy.

The lack of engagement with this brand of liberal democratic theory leads to a crucial shortcoming in Van der Walt's work, one which concerns the basic structure of the argument. Once the postmetaphysical modes of normative justification are left out of the picture, it becomes all too easy to frame the debate along an either/or question: either we endorse pure positivism and a modus vivendi account of liberal democratic politics, or we fall back upon an old school foundationalism. But is this a true dichotomy in the first place? If Van der Walt thinks that it is, he needs to make a case for it by engaging with postmetaphysical yet normatively oriented theories of liberal democracy, which claim to have moved beyond precisely such dichotomy. Without a critical engagement of this sort, the dichotomy that structures the basic argument of the book remains by and large unpersuasive.

A further problem has more specifically to do with the relation of law and politics. "From the perspective of liberal democratic law," writes Van der Walt, "legislation is the principal format of law, and all law is in principle legislation" (p. 241). Since law is positively enacted against the background of disagreement, it relies on contingent majority-minority configurations and lays no claim to truth. "Liberal democratic legislation does not tell anyone that he or she is wrong for having opinions and preferences that conflict with its coercive terms. It simply asks everyone to respect those coercive terms as the outcome of a legitimate legislative procedure and a 'legitimately' won right to govern" (p. 243). I have no objection to this statement in and of itself. The problem is rather that it remains unclear how we are supposed to make sense of a "legitimate legislative procedure" capable of bestowing some kind of justification to coercive law.

The legitimate legislative procedure is itself legally constituted. What this means is that law and democratic process stand in a circular relation to one another. This does not have to be a vicious circle, provided that—in Van der Walt's own words—"legislation remains an outcome of *rational* majority-minority relations" (p. 241, emphasis mine). Van der Walt does not explain what he means by "rational." In my view, to ensure some degree of practical rationality, the procedural constraints on political will-formation, namely, the legally constituted democratic process, must be able to meet some set of normative criteria that endows it with a capacity to legitimize the outcome in terms of good reasons. Or to put it differently, there must be some kind of link between the rational merits of the procedure and the legitimacy of the outcome. As Habermas noted in an exchange with Frank Michelman and Jeremy Waldron: "If it is not by virtue of the cognitive content and the reasonable expectation of a rationally acceptable outcome of deliberation, what

else makes a deliberative process of legislation and adjudication a generator of legitimacy so that citizens are induced to accept controversial results as 'worthy of respect?'"[4] To be sure, procedures (even when they are normatively demanding and strictly observed) cannot dictate or guarantee the cognitive quality of the outcome, but they can at least ensure the rationality of the process, thereby enhancing the democratic legitimacy of legislation. Yet, it is hard to see how any legislative procedure would serve to this purpose if the "application of norms bears no intrinsic relation to norms" (p. 8), as Van der Walt insists from the outset.

Thus far I have tried to clarify what makes Van der Walt's pure concept of liberal democratic law too modest. Let me now turn to what I find too ambitious in the philosophical storyline of the book—and to this end, I want to use the foregoing remark about norms and their application as a springboard. Rejecting the notion that there exists "some essential normative and epistemic continuity between the ideal content and the practical realisation of a norm," Van der Walt defends an alternative understanding of rule application "as a compromise that simultaneously sustains, disrupts and severs the relation between the real and the ideal" (p. 8). To be sure, this is a significant topic in legal theory, and obviously there are philosophical stakes in the discussion. But what exactly are these stakes? According to Van der Walt, they go all the way back to Aristotle's metaphysics: "For purposes of thinking through this understanding of norm-application—thinking through what takes place in the process of application—one also needs to rethink Aristotle's potentiality-actuality distinction, as Agamben prompts one to do. The distinction between potentiality and actuality, and the rethinking of this distinction is for this reason one of the key focus points in this book." (p. 8) It is this mode of theorizing and its typical gestures which amplify the terms of the debate to the scale of "Western metaphysics" that I find over ambitious.

Instead of engaging here in a technical discussion as to why it would be a category mistake to frame the problem of rule application in terms of Aristotle's potentiality-actuality distinction, I would like to conclude with some brief remarks on the pretension of deep continuity implicit in such amplifying gestures. Van der Walt tells a grand story, according to which the very notion of *nomos* is from the beginning embedded in two conceptions of nature, that is, "nature conceived as cosmic order" or *kosmos*, on the one hand, and "nature conceived as the anarchic reign of physical forces" or *physis*, on the other (p. 225). Aristotle is the key figure in the longstanding metaphysical tradition that worked hard to sustain a clear distinction between *kosmos* and *physis*, aligning *nomos* with the former, so that law would remain firmly rooted in the intrinsic order of things. Since then many followed in his footsteps—including Roman jurists, Aquinas, Hegel, Savigny, Rudolf Smend, and Ronald Dworkin—all seeking a secure foundation for law in

[4] Jürgen Habermas, "On Law and Disagreement: Some Comments on 'Interpretative Pluralism,'" *Ratio Juris* 16/2 (2003): 190.

the "metaphysics of life" in one way or another. "Conceptions of cosmic order, nature, life and Spirit just come back again and again. Hence also, the persistent invocation of life as the foundation of law in Western legal thought right into the twenty first century." (p. 225)

Van der Walt's narrative features a parade in which the same metaphysical drive displays itself in ever new guises. It is against the background of this overarching story that we are also invited to see the alleged affinity between, say, Hitler's appeal to natural necessity in *Mein Kampf* and the discourse of Athenian envoys who claimed (as related by Thucydides) the right of the strongest over the inhabitants of Melos. Following the fateful year of 1933, we are told, "German politics effectively became one with the ageless force of *physis* that the Athenians invoked in their transaction with the Melesians in 416 BCE" (p. 97). Thus, vastly different historical episodes and political constellations separated by more than two millennia turn out to be instances of the same failure to secure a neat distinction between *kosmos* and *physis*. Despite erudite commentaries on a wide range of specific topics and authors throughout the book, what keeps the storyline together is in the end a set of sweeping—or, if you like, ambitious—generalizations.

This brings me back to the question that has been lingering with me since I completed reading *The Concept of Liberal Democratic Law*: what is it that the modest (in my view, too modest) conception of law defended by Van der Walt theoretically gains from the ambitious (in my view, too ambitious) philosophical story narrated in the book? My short answer is, not much. Or better yet, not much that it could not already gain from the kind of pragmatism that informed, for instance, Richard Rorty's liberalism. In fact, given Van der Walt's turn to "poetic fictions" at the very end of the book, I cannot help but speculate that Rorty, in confining "poetic fictions" to the sphere of private irony, points towards a much more lucid direction than Agamben's allegedly "profound" lead. Cicero once suggested that he would rather err with Plato than getting it right with Pythagoreans.[5] Sometimes the choice of with whom to err is as important as—or perhaps even more important than—getting it right. Van der Walt chooses to err with Agamben, and I doubt that it is a choice that would benefit the concept of liberal democratic law.

[5] Cicero, *Tusculan Disputations*, trans. Andrew P. Peabody (Boston: Little, Brown, and Company, 1886), I. 17.