Review of:

Bert van Roermund, *Legal Thought and Philosophy: What Legal Scholarship is About*, Cheltenham: Edward Elgar, 2013

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Published in *Political Theory* 42(3): 363-366, 2014

Under the guise of a textbook aimed at “students for whom law is an area of academic research” (1), and in spite of a rather bloodless title, Bert van Roermund offers us a profound and original political-theoretical treatise in its own right. The author guides his readers on a path of systematic reflection in pursuit of an account of political self-awareness that can explain “what law is about in the end” (9). Along the way he gives us insightful and often penetrating treatments of basic political concepts such as freedom, power, sovereignty, and authority, as well as philosophical questions about agency, selfhood, and the relation of thought to reality. The style is lucid (if you pay attention), at times almost conversational, and sprinkled with occasional wit. Moreover, Van Roermund is wonderfully ecumenical in his sources, learning equally from phenomenology and analytic philosophy of action, for example. But most of the time he keeps his impressive knowledge of different traditions of thought in the background. The book’s first aim is to critically make sense of law, not of a body of thought about it.

The point of departure is the ambiguous question “what is so compelling about law? What is it about in the end, such that we cannot afford to cut loose from it and say that we can do without it?” (4) Further on, it becomes “why law stands to reason” (24) and “why we may call law reasonable” (36). And later, still: “What is law about if we take into account the understanding human agents have of *themselves* as part of the world they live in; the social world in particular?” (89) The aim of our inquiry, as these formulations more or less suggest, isn’t so much to provide a justification of law from an external standpoint, as it were, but rather to think *with* the law, or to “think one’s way through law, [while] acknowledging other ways” (7).

In the first chapter we are off to something of a false start. This is partly deliberate, in the sense that the doctrine Van Roermund reconstructs and demolishes here, called “contractual naturalism,” represents for him a blind alley in thinking about law, one that is nonetheless a “persuasive and dominant pattern of discourse” (13), less a theory than the legal profession’s knee-jerk reaction to the question of why law makes sense (and the author confesses that he himself “could not escape from it, that night some bastards flung a brick into his bedroom” (13)). Only at the end of chapter one (section 5) do we find the beginning of the sustained train of thought that constitutes the heart of the book. I cannot do justice to this brilliant and subtle line of reasoning here, and will merely sketch its contours. In pursuit of an answer to the question why law makes sense, Van Roermund critically discusses various ways of conceiving law from the first person perspective of a social agent. In the process he gradually constructs a more and more complex notion of selfhood, which eventually yields a notion of justice that explains what law is about in the end.

Self-preservation is the first proposal. This cannot be what law is all about, because in order to give sense to the *self* that strives for self-preservation we must posit a more basic notion of self-determination. An appeal to natural needs would not suffice, since subjects must acknowledge a degree of freedom to determine which needs matter to begin with (self-sacrifice is a live option). Then, in chapter two, we discover that unqualified self-determination cannot be the basis of law either. This is not because interaction among such agents leads to chaos. Van Roermund argues intriguingly that the dynamics of power among them could lead to an equilibrium in which they keep one another within measure. Still, this equilibrium cannot account for law, because it misses the symbolicrole of distinctly politicalpower. Here we encounter a central theme of Van Roermund’s earlier work: law speaks in the first person plural, and as such involves the symbolic constitution of a “we.” In other words, at stake here are not *I-thou* relations among independent individuals, but *I-we* relations of subjects to a collective agent. Now, one might think that this move begs the question. Isn’t such a collective identity precisely what is in need of explanation, when we ask how law makes sense? But this objection fails to appreciate Van Roermund’s argumentative strategy. The point is not to justify or explain law in terms of a prior account of (non-legal) social relations, to someone not familiar with it, as it were. Rather it is to explain what is reasonable about law from within the perspective of subjects who find themselves confronted with it. The importance of the symbolic dimension of political power is, then, to show that the *political* self-awareness that characterizes such a first person perspective cannot be understood in terms of pre-political, unbridled self-determination.

So explaining the reasonableness of law requires a more complex account of selfhood. More fundamental than self-determination for Van Roermund is a sense of self-awareness in which autonomy is bound up with heteronomy: “the self has to be accounted for in terms which it cannot determine itself” (57). Self-awareness involves dependence on a stubborn reality that is independent of it. At this point, “the other” comes to figure as normative, in the sense of a “value” for the sake of one’s own self-awareness: “In order to be reliable, self-awareness entails, in any case: taking ‘the other’ into account; i.e. acknowledging a perspective that cannot be reduced to the perspective of the first person agent” (80). Van Roermund argues, drawing on Levinas, that in attributing value to the other’s distinct perspective, self-awareness affirms its own priority over the other but, at the same time, the appearance of the other also calls the authority of this attribution of value (and the ordering it presupposes) into question. So there is a second sense in which self-awareness must conceive “the other” as normative: as a norm that is transgressed from the start in thinking from a *first*-person perspective. This leads Van Roermund to conclude that self-awareness involves commitment to two contrasting principles of recognition: “(1) acknowledging the other as a value, i.e. a reality that we can judge and find ‘good’; (2) acknowledging the other as a norm, i.e. a reality that judges us and finds us ‘good’” (or wanting, I suppose) (105). There is no reconciling the two, only an incessant “to-and-fro” between them (107).

This predicament shows up politically in the double bind of a legal order that unavoidably proclaims an identity and thereby calls forth challenges against the terms in which it does so. Justice, for Van Roermund, is precisely the practice of acknowledging and negotiating this double bind; it is “the ability of a polity to acknowledge unconditionally what counts against its self-proclaimed identity without being coerced to do so” (125). For example, he sees the ambiguous incorporation of human rights in the democratic legal framework of a particular community as an acknowledgment of the contestability of the specific boundaries it sets with regard to citizenship and immigration.

This idea of justice—which we may perhaps call ‘agonistic’ insofar as it essentially affirms openness and contestability—is fascinating and carefully elaborated. In contrast, Van Roermund’s step to viewing law as simply the “institutionalization” of this idea of justice seems hasty (112). Law can be more or less just, more or less open and responsive to alterity. Moreover it seems that law must in the end be about more than maintaining the openness of the legal order itself. Indeed, in chapter three, about the positivity of law, we find a somewhat different or at least more complex account of what law is about as a product of authority. Political authority is conceived there as “[practical] knowledge about how to order society [...] so as to end or curb potentially disruptive conflict [...]” (161). Justice shows up in two features of authority. The first is a certain “independence” (171) or “self-restraint in the articulation of collective selfhood” (172), manifested for example in the separation of powers and majority rule. The second has to do with law being an object of knowledge and discussion, which Van Roermund sees as a manifestation of an acknowledgment by the legal order that something can be held against it, since knowledge of the law can be held against officials as well being used by them. This interesting idea is developed in chapter four through an in-depth discussion of the nature of norms, their validity, and how they relate to facts.

The fifth and last chapter contains a rewarding analysis of interpretation and rule following, with particular attention to the importance of perspective and reflexivity for understanding how rules provide orientation regarding what to do. This chapter is more self-contained than the others; it does not explicitly depend on or develop the proposed idea of justice. After this the book comes to a rather abrupt end. Having covered a lot of ground, it would have made for a more satisfying closing if our guide had taken stock of where we wound up in the end. Perhaps such reservations about the book’s structure stem from reading it more as a systematic treatise than it was intended. But doing so is certainly worthwhile for the distinctive perspective on law that it articulates.[[1]](#footnote-1)

1. Thanks to Albert Joosse and Hans Lindahl for commenting on a draft. [↑](#footnote-ref-1)