

# KOSMOS, NOMOS, PHYSIS AND ‘THE CONCEPT OF LIBERAL DEMOCRATIC LAW’

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## **ABSTRACT**

The paper is a review of Johan van der Walt’s *The Concept of Liberal Democratic Law*. It proceeds through a genealogy of the articulations and alignments of the three terms – *kosmos*, *physis*, *nomos* – that form the backdrop of the book’s main thesis. In a discussion of tragedy and of the natural philosophers (Anaximander) it argues that Greek thought sustained a deep unity of the practical, the ethical, and the aesthetic, and looks at van der Walt’s interpretation and defence of public reason in that light.

## **KEYWORDS**

Tragedy, Antigone, kosmos, nomos, Anaximander, Protagoras

## **ANTIGONE(S)**

It is apposite that this short response to Johan van der Walt’s fascinating account of the Greek ‘kosmos’ begins with a note on the *Antigone*.<sup>1</sup> It is a pivotal argument in the early part of the book, the important chapter 3 on *Nomos and Physis*, that my review primarily addresses. Van der Walt is right to lament that ‘generations of law students’ have been subjected to a reading of the *Antigone* that sees it as a ‘quasi-platonic reprimand of sovereign action that violates the inviolable laws of God and nature’. It is not, he insists, ‘that Antigone is right and Creon is wrong’, and he is right to insist that, because such reading makes a mockery of the play as a *tragedy*. He quotes Albert Camus: ‘Antigone is right but Creon is not wrong’. (60)<sup>2</sup> And the ambivalence is not overcome in the way it is in Hegel’s famous reading of the play, in which a synthesis of ‘public’ and ‘private’ delivers where the truncated

<sup>1</sup> Johan and I taught a class together on Law and Justice while we were colleagues at Glasgow Law School over a decade ago now. Much of the course was structured around Greek Philosophy, and of course tragedy.

<sup>2</sup> All page references in the text are to van der Walt, Johan, *The Concept of Liberal Democratic Law*. Routledge, 2019

polarisation of the protagonists' stand-off fails.<sup>3</sup> The aporia is held, and held to, and it is this that secures that the tragedy does not descend into the universe of 'héros positifs et négatifs, c'est à dire la stupidité moderne,' van der Walt quotes Cornelius Castoriadis. (61)

The following extract is not from Sophocles, but from Anne Carson's fascinating retelling of the *Antigone*.<sup>4</sup> 'How is a Greek chorus like a lawyer?' Carson has the chorus ask.

'They are both in the business of searching for a precedent/ ... / so as to be able to say/ this terrible thing we are witnessing now is/ not unique you know it happened before/ or something much like it./ ... / Now I could dig up those case histories, tell you about Danaos and Lykourgos and the songs of Phineas,/ they wouldn't help you/ it didn't help me/ it's Friday afternoon/ there goes Antigone to be buried alive.'

And if that is the answer to the chorus' question *how is a Greek chorus like a lawyer?* we can only surmise that the last few verses shatter any lesson-invoking 'case histories', with a devastating attention to the fate, not of transgressors of law, but of Antigone, the girl, the sister, on *that* Friday afternoon. The particularity is arresting. No generalization, no rationalization, no lesson jars the concentration on the fate of this girl, whose resistance is and can only remain unique because the suffering is all hers. She stands, alone, before a responsibility she can neither shift nor renounce. What does it mean to extract lessons for the law from the agony of the girl walking to her burial site?

If there are 'lessons' to be had, they are certainly not of the precedent-setting type. Instead, there are two kinds of lessons that van der Walt takes from the *Antigone* (63-64) but they are inscribed at a meta-level. The first is that conflict can be *excessive* when it taps the 'abyssal' recesses of the human psyche. The second is that the resources of public reason allow *differences of conviction*, that if left unchecked can lead to carnage, to be played out as *differences of opinion*, and liberal democratic law offers us the procedures to accommodate that competition. Differences of conviction amount to an 'excessive conflict' that marks the fatal - fatal certainly for Antigone - move to 'erase the distinction between the ideal and the real, or between potentiality and actuality.' (64) Liberal democracy sustains the distinction and thus saves 'public reason'. I do not read in these 'lessons' any resolution to the aporia that haunts the tragedy, as I think neither does van der Walt, and he is right that we, citizens and authors of the democratic law, are the appropriate audience to receive Antigone's lesson: tragedy is born when myth is first relayed to an audience of citizens (more on this below). The relay confronts us with a melancholic experience of loss, if not the full blown 'aporia', because

<sup>3</sup> In van der Walt's account, Hegel's reading of the tragedy is a precursor to Camus and Castoriades. See p61 fn 17, and chapter 7 passim

<sup>4</sup> Carson, Anne, *Antigonick*. New Directions Publishing, 2015

Antigone's 'surplus of motive', *that* excess, does not carry into law, the notoriously reductive discourse that forces selection and simplification and entertains ambivalence only instrumentally in order to deliver its 'lessons', but it leaves its trace nonetheless. Van der Walt's (always) tentative defense of liberal democratic law is always indexed to a certain humility, and it is *for that reason* capable of something of a resonance of the *aporia*, while aware that the story that Sophocles tells is a story addressed to an audience of *citizens*, where significant was the *reception* of the *aporia* as a political event. There is a brief period in time - that rare period of condensation that was 5<sup>th</sup> C Athens - when such *disclosure* was possible. By the time of Aristotle and the *Poetics*, tragedy was a story told about the ἀφρονες, those who lacked 'reason'. As to the modern reception, it is displaced onto an aesthetic register where its legibility as a political dilemma over proper action (ορθῶς πράττειν) has long been eclipsed ('displaced' is the term used in the book).

There is a sacrifice in all this, and van der Walt knows it; in fact both in this book and other work, some of his profound insights always lean his thought in that direction. The 'excess of conviction' is of course an 'excess' that Antigone cannot step back from. Rawls' 'advice' 'not to ruin public reason' (64) is not advice that has any meaning for her who cannot divorce conviction from action, a divorce that marks perhaps that other aspect of 'la stupidité moderne'. Her very own articulation of love and law - filial love and higher law - comes up against unyielding registers on both sides and she is denied them both, because on those registers she misunderstands love, expressing it merely as the cold ('necrophiliac') adoration of the dead, and she misunderstands law too. Because what legal argument would qualify her to break into that watertight set of reasons, reasons of State, that she is confronted with? In Creon's confident statement of the law the speech act carries perlocutionary effect *simpliciter*, his edict *is juris-diction*. To this Antigone can only counter a law of a different order - *if* it can be called 'law' at all. How fragile this countering, more so when we see that her resistance presents itself as negation of Creon's totalizing appropriation, that includes and exhausts all alternatives: no conditionality enters the law-giver's verdict, no doubt clouds his intransigence, no remainder haunts his law.

As a result Antigone's resistance can only be understood from the location that Creon inhabits as a rejection of legal order *simpliciter*. Such a totalizing, exclusionary coverage of reasons is what Alain Badiou captures with the concept of the 'situation'.<sup>5</sup> A situation contains all its reasons, it provides the full range of perspectives in terms of what can be observed, described and counted-in. *Given* a situation, where that givenness over-determines, structures and enumerates, what are the opportunities of putting the situation itself to question, and where might they be sought? What does it mean to step back from the givens of a situation to allow

<sup>5</sup> See Badiou, Alain. *Being and event*. A&C Black, 2007.

that questioning? It means nothing, as Antigone finds out, condemned to be reciting the edicts of a 'higher' law without jurisdiction, and the demands of a 'higher' love without reciprocity. On both registers she is denied recognition, on both counts she appears a fool. What denies her the meaning of her demands is that the situation sets the conditions of what can be asked meaningfully. These are the *conditions* of questionability not its *object*. They determine what can be meaningfully counted-in and accounted for by the situation, and in this they establish and guarantee a *finite* responsiveness. This finitude is what underwrites the security of Creon's world. 'Love', too, from within Creon's world, will be thematised using the language and the symbols of prudence and functionality; from within Haemon's and Ismene's world it will be thematised as a plea - and only ever meaningful as such - to be *loved back*.

One could stop there and understand the tragedy as the impossible negotiation of the two situations neither of which has the requisite openness to any aspect of the other, because the criteria of what counts - and 'counts-in' - cannot be generalised across the two. Yet, significantly for this other reading of the *Antigone*, we might borrow from Badiou a more profound notion of *fidelity*. For Badiou emancipatory praxis can claim truth for itself if it can somehow capture *the event* of its disclosure. The event marks the improbable surfacing of a truth, improbable because the situation does not allow it. It is truth that can only be sustained if endorsed with a commitment to its promise, a promise that cannot be cashed out in the here and now. The term for the future-anterior on the experiential register is *fidelity*. For the event to irrupt at all in a space that has no place for it, fidelity has a constitutive role to play: both in projecting a place for 'it' - the event - and for holding on to 'it' even if 'it' is something that only retroaction might bring about. Nothing underwrites the risk that there may be no redemption. But if the wager succeeds, then for her who had assumed it with fidelity, Antigone - the fanatic, the misguided, the fool - will have emerged as the subject of truth. Without that (in every sense) unwarranted holding-on against the logic of the situation, the threats of authority, the appeals of Ismene and Haemon to give up the fatal stubbornness, to 'yield' to love, there would be no event because there would have come about no register to read it upon. In retrospect, rather than in its momentary eruption, does the event register as origin of something, as setting a certain sequence into action, as allowing causal links to be read *back* into the run of time, as forging patterns that offer it legibility *a posteriori*. Only in this way does retroaction fully take effect. Only in this way does Antigone emerge as the subject of her own truth, and of her love.

Of course a great deal more needed to be said about Badiou's theory, and I leave only tentative the connection to Antigone's plight. How, one might ask, are we to understand an emergent truth as somehow taking place *within* the situation but *not* being *of* it? Let us simply repeat that for Badiou a counter-factual fidelity to the event of this emergent truth constitutes the subject of truth. If this calls for a 'wager'

it is because no guarantee is offered that this will not forever remain a tragic commitment and the acting out of it will remain *hubris*. And we could generalise that across the spectrum of Antigones.<sup>6</sup> If Ulrike Meinhoff's (Heinrich Böll's 'Antigone') is indeed the story of a certain self-authorisation, played out in the insistent claiming of a speaking position in a situation that afforded none,<sup>7</sup> then with Badiou we could perhaps claim that both heroines were the subjects of a bitter truth, their fidelity to the event of truth exacted, for Antigone in the lonely burial site of her 'wedding chamber', for Meinhoff in the white cells of the Stammheim prison.

But surely, one would object, what is the meaning of a 'wager' in situations where fate has been sealed? What is there to risk when holding on to the event, holding on by returning for a second burial of the body of the brother, simply seals her fate? Death, the consequence of a *certain* death, places an absolute limit that makes nonsense of the 'wager' - tragedy allows no space for it. For this, final step, let us return to the play's much celebrated 'ode to man'. Here, half-way through the play, the chorus celebrates man as a '*deinon*' creature. The fraught meaning of this predicate, *deinon*, oscillating between 'wonderment' and 'horror', famously is what most befits 'man' in his ingenuity, his craftiness, his taming of beasts and of nature. And yet, for all that is brought into existence by him, death is the absolute limit.

Here is the 'ode to man' in Elizabeth Wyckoff's translation:

Many the wonders but nothing walks stranger than man/ ... /And she, the greatest of gods, the earth/ ageless as she is, and unwearied - he wears her away/ as the ploughs go up and down from year to year / ... Language, and thought like the wind/ ... / he has taught himself to shelter against the cold,/ refuge from rain. He can always help himself./ ... There's only death/ that he cannot find an escape from.

And in Carson's freer rendition:

'many terribly quiet customers exist but none more/ terribly quiet than man / his footsteps pass so terrible soft across the sea / down he grinds the unastonishable earth / with horse and shatter ... Every outlet works but one: / Death stays dark.

Maybe that darkness is why Antigone falls silent. It is what makes her determined walk to the burial chamber unbearable. But in her obsessive commitment to honour her brother beyond any recognition that might redeem it, in fact anything that might even *count as recognition* - at no point does Antigone allow herself the illusion that those around her are capable of the requisite comprehension - does she not remain

<sup>6</sup> The plural here is suggested by George Steiner in Steiner, *Antigones*. Yale University Press, 1996.

<sup>7</sup> I have developed this argument with respect to the Baader-Meinhoff group in a paper with the title: 'The Objection that cannot be heard'. See Christodoulidis, Emilios. "The Objection that cannot be Heard: Communication and Legitimacy in the Courtroom." In Duff A et al (eds) *The Trial on Trial*, Hart publishing, 2004: 179-202.

faithful to the event of a love that no worldly contingency can distract from or efface? Even where that incomprehensibility attaches to the relationship of the protagonist to her own actions upon which we see her deliberate on the stage,

for which [s]he takes the initiative and responsibility but whose real meaning is beyond h[er]... so that it is not so much the agent that explains the action but rather the action that, revealing its true significance after the event, recoils upon the agent and discloses what she is.<sup>8</sup>

It is a 'love for the dead' she kept reminding us that commits her, faithfully, to her own. And maybe in that symmetry, that unlikely reciprocity, *darkness lifts*, if with Camus we ask the question that he has Sisyphus asking: 'what destiny cannot be defeated through contempt?' With it her death-driving fidelity to Polynices, excessive, irrational, incomprehensible on all available registers, allows the event of love to break through, and herself to emerge finally as the subject of that love.

There is something of the *deinon*, and of the ambivalence that transverses it, that lies at the foundation of van der Walt's response, as far as institutions are concerned, to the baffling, contradiction-laden nature of existence. Rent and divided against itself is the reality of the 'abyssal void' of existential conviction as it rests on the plane of secular institutions where the decisions that govern public life are managed. The 'tight rope' of liberal democratic law is the metaphor that van der Walt uses, and its use turns contradiction into tension, as the 'tightrope' is stretched between 'the political and the poetic' (69); and if it is pulled taut it is because while 'poetry is a crucial companion for the political' it should not be confused with it. The defense of the concept of liberal democratic law lies here. Its 'every rule and decision ... traverses the tight rope and the abyss beneath it.'

We will return to the prescription for liberal democratic law, as we will return to the *Antigone* and its 'lessons', with the benefit of having in the meantime looked at how the terms *nomos*, *physis* and *kosmos*, having run a significant semiological trajectory in the preceding centuries, come to frame what it will mean for the citizens of Athens to comprehend 'learning through suffering' (*παθόντα γινωσκειν*). It has been persuasively argued that tragedy is *born* in the 5<sup>th</sup> century because it is only then that *myth* comes to be understood from the point of view of the *citizen*. The 5<sup>th</sup> C is when, to extend van der Walt's metaphor, the 'tightrope' is fastened. Because a tightrope affords passage, however fraught. It shows the way to the citizen *but* (or maybe even *because*) to the tragic heroine it denies passage. Suspended taut over the 'abyss' it offers her no register of recognition: devastatingly the lesson that Antigone can offer to a concept of liberal democratic law is not the truth of her conviction, but the mistake of holding on to it. On the axis of the particular and the general, of what remains human in its complexity against what is shorn of humanity

<sup>8</sup> Vernant J-P & P Vidal-Naquet, *Myth and Tragedy in Ancient Greece*, Zone Books, 1988, 32

in its institutional reduction, of what yields against what resists insistently and fatefully, is played out an impossible dialectic that comes undone on the axis of liberal democratic law. To the tragic hero is offered only *aporia*, the denial of passage, not any tightrope of a dialectic. But for the citizen, something is learnt in the collision of worlds, his own and the hero's. For the hero there will be neither reconciliation nor recognition offered on the plane of 'differences of opinion' but only *mis*recognition through a different set of questions over what is staked, what wagered and what achieved. For the citizen there will be a lesson about taking the path of prudence, and if there is an 'abyss', the path will circumvent it. But this is to move too quickly. The *concept of liberal democratic law* does not take the easy path of exclusionary reasoning but holds on to the tension, though uneasily; we will see this as we move, with van der Walt, from Sophocles to Protagoras. We follow the book in navigating between *kosmos*, *nomos* and *physis*, but depart from an older historical trajectory that staggers the relation it describes, and in the process perhaps troubles its more confident locution, and settled meaning, in the institutions of the polis. And if this other history contests the alignments on which van der Walt's argument depends, it is a troubling that is consonant with van der Walt's book's profound, unsettled and unsettling animus, and perhaps truer to it for that.

## FROM MILETOS TO MELOS

The archaeology of *the Concept of Liberal democratic law* fixes on the shifting signifiers of the Greek terms *nomos*, *physis* and *kosmos*. The book begins with the trajectory of these terms in the works of Willey and Schmitt, to return to the Greek origin in chapter 3, and specifically to Aristotle in chapter 4, thereafter pursuing its development by Agamben. My reflections here concern only the Greeks, in fact only the pre-Socratics. They also extend to Protagoras' famous dictum - that man is measure of all things - in the way that it occupies central stage in van der Walt's account, or, perhaps more than 'stage', the position of the *pivot* on which the concept of *liberal* law turns *democratic*.

Now these are contested histories, and my own contribution here aims only at a staggering of those trajectories in a way that adds to the complexity, that strengthens the thread of continuity that is occasionally too speedily sacrificed to rupture in the book's narrative, and finally that allows a return to the tragic genre in a way that relativises the meaning of its 'lesson'. None of these attempted qualifications contest the main argument, which van der Walt concisely and eloquently gives us. After all any theoretical account must reduce complexity by managing selection; ruptures are meaningful *given* continuities in place; and tragedy is constitutively about 'lessons' typically of what constitutes *hubris*. If anything, the trajectory here follows his, with some emphases shifted and the attention fastened on the shifting signifiers that organize the history.

The 5<sup>th</sup> century Athenian sophist Protagoras, ‘almost a century before Aristotle wrote the *Ethics*,’ notes van der Walt, ‘had little hope that the crucial elevation of *nomos* to *kosmos* that underpinned earlier Greek societies was still an option for fifth century Athens.’ (66) *Kosmos* was the term for the natural order of things; *nomos* for what ‘today would signify the contingent conventionality’ of law-making (65). Their coincidence was a result of a series of displacements, the argument goes, whereby the aesthetics of military excellence was replaced, in the 6<sup>th</sup> century, by an ethic of peaceful human life, of orderly civil relations and transactions. But this common measure, suggested Protagoras, was not ‘given’ in humans, as intrinsic to their nature, but had to be realized through equal democratic participation. The meaning of *homo mensura* is that ‘humans decide the reality in which they live, and they do so without access to any objective measure [cosmological] that would save them from arbitrariness.’ (66-7) Protagoras thus ‘resisted the great naturalisations of the politics of his time, the physicalist and the cosmological’ (68): the former, typically associated with sophists like Thrasymachus, would have treated physis – and the law of the strongest – as the motor of any politics and the exercise of sovereignty; the latter would have read politics (*nomos*) into the natural order of things (*kosmos*). Protagoras’ insight shows how fragile the foundation of the political proved to be, explains van der Walt. In 431 the Peloponnesian war unleashed the darker forces of unchecked power. In two successive years two extraordinary atrocities were committed by the Athenians: the slaughter of the entirety of the male population of the island of Melos in 416, and a year later the disaster that was the Sicilian expedition, an early instance of imperial brutality. Following the war, neither Plato in the early 4<sup>th</sup> C nor Aristotle some decades later, were able to restore anything but a pale approximation of the *nomos* and the *kosmos*, in the practices of the polis aspiring to *arete*.

I would like to pick up the thread earlier than van der Walt does, with Hesiod and Homer in the 8<sup>th</sup> C. Hesiod’s *Theogony* is immersed in the myth of sovereignty. All cosmological order was tied to the sovereign gestures and victories of deities and was the product of such victories. Significantly *dike* (justice) had operated at two levels – in heaven it was sovereign divinity unknown and inaccessible, on earth it was expressed as the whim of the kings (take the example of Agamemnon, epitome of the Mycenaean *wanax*, the absolutist ruler of the 14<sup>th</sup> and 13<sup>th</sup> centuries.<sup>9</sup>) And although with the victory of the Olympian Gods over the older deities in the *Theogony*, chaos *is* countered, and Zeus does put things in order, this order is undecipherable by the humans. So much for these older histories of the barely legible alignments of *kosmos* and *nomos*. Homer’s *Iliad* is the epic poem of the

<sup>9</sup> ‘The term *wanax* disappears from the strictly political vocabulary’ with the Dorian invasion and the overthrow of Mycenae, to be replaced by the word *basileus* which connotes a different logic of rule, and a ‘crisis of sovereignty’. See Vernant Jean-Pierre, *The Origins of Greek Thought*, London: Methuen, 1982, 37, 38 and passim.

heroic age and celebrates warrior excellence. In this too there is a randomness to the wills of the gods, and if there is an order it is illegible to the human intelligence, which is why the protagonists of the Heroic Age are condemned to act in a world where the meaning of the action that defines them largely transcends their own comprehension. This is still a world where hubris (the very concept on which 5<sup>th</sup> C tragedy pivots) goes unrecognized, and one where Protagoras' human 'measure' would measure nothing.

But by the end of the 7<sup>th</sup> Century, in fact at the very turn of that century, we have two extraordinary parallel developments that first lend visibility to *physis* and its alignment to *nomos* and *kosmos* respectively. Solon inaugurates his grand law-giving enterprise to the Athenians giving them equal standing before the law. 'I wrote,' says Solon, 'the same laws for the kakos [low] and the agathos [high], laying down impartial justice for each.' 'At the centre of the State he stood,' writes Jean-Pierre Vernant, 'like an immovable pillar ... [of] a political order that sets up an equilibrium between opposing forces ... [and exercising] a *dike* that was necessarily the same for everyone.' (1982, 85) This was a law-giving on the clean slate that the release from debt (*sysaxtheia*) had cleared for the demos of Athens. It is quite extraordinary that at exactly the same time that Solon performs his grand balancing act in Athens in the domain of *nomos*, the same thinking of *proportion* arises in the Eastern expanses of the Greek world, in the work of the natural philosophers of the School of Miletos, but this time in relation to *kosmos*. It has been repeated often now, this 'miracle' of 'de-sacralisation', where all of a sudden, on the shores of Ionia, logos broke free of myth. For our more limited purposes, we note that it is the same logic of proportion that drives the political argument (in Athens) and the cosmological argument (in Miletos) and founds them both on equilibrium. Solon's was an equilibrium of social forces and political dynamics; in Anaximander it is an argument about equidistance. Anaximander's own departure from his fellow 'natural philosophers' is intriguing: against the founding of the first principle of natural order – the *arche* – on a single primordial element, on water in Thales, or on air in Anaximenes, for Anaximander the first principle does not draw on any one substance but on the equal distance between them all. And in the principle of equidistance from all the elements, the *arche* itself comes to be thought as proportion, and it maintains itself in time as the perpetual *return to* proportion. Whatever gains in supremacy, temporarily, must yield to equilibrium, and Anaximander's famous 'fragment' that has given rise to a million interpretations and equivocations, – that 'all elements mutually and in sequence offer to one another reparation (*tisis*) and justice (*dike*) for the *adikia* (injustice) they have committed' – names the *compensatory rhythm* that holds together a cosmology founded on balance. When, in her essay on the *Iliad*, Simone Weil famously says: *Nous ne sommes géomètres que devant la matière; les Grecs d'abord géomètres dans*

*l'apprentissage de la vertu*' (138),<sup>10</sup> it is arguably the striving to proportion that she is alluding to.<sup>11</sup> Less intriguingly, it is also proportion that undergirds Hannah Arendt's 'architectonic' argument about the construction of public space in Athens (the agora), and the same notion of proportion had a profound influence on Greek thought from medicine<sup>12</sup> to urban planning.

Let us take from this two qualifications to van der Walt's argument, the significance of which, while certainly not staggering, is still worthy of note. The first is that *kosmos* and *nomos* arise as 'co-original' in this story, a parallel perhaps best mirrored in Solon's *nomos* and Anaximander's *kosmos*; *kosmos* and *nomos* are mutually implicated and analogously cast, both drawing on an *arche* that understands itself as proportion. It is thus not the achievement of 5<sup>th</sup> century Athens to *elevate* *nomos* to *kosmos*. But if it was its achievement to celebrate *nomos* in the flourishing of Athenian democracy it needed certainly to guard it against that other logic, the *physis* that van der Walt describes so well alternatively as 'realist', as 'abyssal' and as what subverts political space itself: 'Melos becomes the non-place or the destruction of place' he writes. (43) But if this is the 'physis' of Thrasymachus and the Sophists, this is still a 'law' of the strongest, and is not the narrative of the Heroic epic that *strains at meaning*; it is not the telling of the *Theogony* or of the *Iliad*, incapable of drawing any clear border between what can be rationalized and what cannot. As Heraclitus puts it brilliantly '*Ὁ Ἀναξ ου το μαντεῖον ἐστί το ἐν Δελφοίς, οὔτε λέγει οὔτε κρύπτει ἀλλὰ σημαίνει*' ('the Delphic God neither speaks nor hides, but offers signs')— and how one deciphers those signs is not offered up to reason. This is not the *physis* of the 'natural law' of the Sophists, this is a *physis* that remains untransparent.

So with both these caveats in mind let us trace a different genealogy. At stake is the 'transformation of Greek societies ... in the course of which the ethics and aesthetics of the warrior became increasingly displaced by an ethics and aesthetics of peaceful urban life.' (56) 'For this new ethic that gained ground in the sixth century... moderation was the key operative term, not excellence.' (57) Much is staked on this 'displacement' in van der Walt's account: ultimately it will allow a *staging* on an aesthetic register of what on a political register can only be destructive of political space itself, what made the Peloponnesian War 'a war against the very principle of the city' (60). The yearning for excess and for excellence is channeled away from public life and into the 'theatre of cruelty' (the anachronism is mine, Johan is too careful a reader of Artaud to commit it) that was the *tragic genre*. I want to argue that there is a deeper continuity that the term 'displacement' elides. That it is the same drive to excellence that migrates from heroic exuberance to civic virtue.

<sup>10</sup> 'We are only geometricians before matter; the Greeks were, first of all geometricians in their apprenticeship to virtue.' (Weil, *L'Iliade, poeme de force*)

<sup>11</sup> Plato had inscribed on the entrance to the Academy: 'noone enter here who is not a geometer.'

<sup>12</sup> Cf Alkmaeon's definition of health as the '*isonomia ton dynameon*' (Vernant, 1982, 124)

That we have continuity and transferal (within the same register), not substitution (of registers, aesthetic for political). That the term 'displacement' reads differentiation where, in Athens, there is unity. And that all this matters in terms of van der Walt's debt to the Greeks.

Another short detour is necessary at this point. Remaining with the earlier Greek societies before the flourishing of Athenian democracy, let us pick up the thread of the 'military factor' (as Antony Andrewes puts it)<sup>13</sup> and look with Jean-Pierre Vernant at the hugely significant shift – significant for *political* organisation – of a key change in military technology. The decisive factor of the spectacular rise in power of the city-State of Sparta in the 7<sup>th</sup> and 6<sup>th</sup> centuries were new techniques of warfare that replaced the reliance on the mounted military nobility of the *hippeis* (the cavalry) with the heavily armed line soldier, the *hoplites*. The shift marks a departure from the individual excellence, the splendid performance, and personal superiority of the *aristoi* on horseback, with the shoulder-to-shoulder combat of the infantry. The cohesion, maneuver-coordination and mass action of the 'elbow-to-elbow' warfare of the *hoplites* proved an invincible new principle of warfare, and ushered in not just a new dimension of *philia* on the battlefield but also the equality of the citizen-soldiers.<sup>14</sup> It is emphatically not that the older principle of the 'correspondence between martial qualifications and the right to participate in public affairs' was abandoned. It is that its content changed, and the qualification that was reserved to excellence now became generalized to the hoplites whose very qualification as effective soldiers was their *unexceptionality*. The status of soldier and the status of citizen coincide, but the decisive turning point in the history of the polis is that it now extends citizen participation to those who submit to common discipline, and as the very source of the city's military prowess relies on that discipline, it is excess that becomes seen as hubris and unexceptionality as virtue, as principle of inclusion in the polis and principle of equal treatment by its laws. A more gradualist, and perhaps pedantic, explanation to the irruption of the 'scandal'<sup>15</sup> of Athenian democracy.

It is these developments in military technology that usher in that 'brief and briefly beautiful century' (44) with the significant victories on the battlefields of Marathon in 490 BC and a decade later at Salamis and Plateae, against the Persian armies of Darius and Xerxes respectively. Aeschylus fought at Marathon as a young man. He went on to write the century's most profound verse, followed by Sophocles' most exquisite and Euripides' most elaborate, all within the glorious century of Athens. The flourishing of tragedy during this century for the first time brings the Athenian citizen face to face with myth, and its 'just terrors'. The confrontation remains most

<sup>13</sup> Andrewes, A, *The Greek Tyrants*. London: Hutchinson, 1956

<sup>14</sup> Vernant, 1982, pp60-66

<sup>15</sup> See Rancière J, *Disagreement*. University of Minnesota Press, 1999

intriguing when it remains most unresolved. Aeschylus may ‘vindicate’ Orestes in the final book of *the Oresteia* after the famous ‘trial’ staged for him by the Olympian gods, but the real question over whether the darker older deities – the ‘furies’ – would conform to the court’s verdict of the absolution of Orestes, remains crucially unresolved, and with it the *nomos*, and the meaning of the sovereign decision, recedes back to the incomprehensibility of the ‘chthonic deities’. Even in Sophocles’ *Antigone* the only deities referred to by the chorus are the ‘nocturnal’ gods Dionysus and Eros, and for all of Antigone’s invocation of him, Zeus remains silent. As for Euripides, the youngest of the three, his later work is deeply imbricated in the disasters that befall Athens. By 431 BC, Athens would engage in the Peloponnesian War against Sparta, suffer the plague (that also killed Pericles) in that same year, and in the course of the war inflict carnage on the island of Melos. Euripides writes *The Trojan Women* a year after the massacre and the reference could not be clearer: ‘*Mad is the man who sacks a city; whoever makes a desert of temples and tombs, the sanctuaries of the dead, has laid destruction for himself in time to come.*’<sup>16</sup> In these years Aristophanes is impeached; Thucydides whose account of the war – as well as the epidemic that ravaged Athens<sup>17</sup> – remains one of the most penetrating treatises of political analysis, is exiled; as is Pheidias, architect of the Parthenon. And Euripides, he too facing charges of impeachment, by 412 has left Athens to take refuge in the Court of the Macedonian King where he writes his two final tragedies: *Helen*<sup>18</sup> and the *Bacchae*, which closes the cycle of tragedy in the most profound and irrevocable way. In the *Bacchae*, the Apollonian moment of ‘logos’ is overflowed by the ‘last force of the old nature’ and disappears into the recesses of the Dionysian return to the ecstatic, to paroxysm (*paralerema*), the irrational [the *α-λογον*]; or to the ‘abyssal void’ that van der Walt takes the great poets of Greece to have expressed (68).

I mention the Apollonian and the Dionysian moments for a reason here in discussing van der Walt’s argument about the Greeks. Nietzsche’s *The Birth of Tragedy* is built around the holding together *in sublime tension* of the Apollonian and Dionysian moments – the “*Kunsttriebe*” (“artistic impulses”) – that he famously argued constituted the great achievement of tragedy. The Dionysian moment enters tragedy from the music and the dances of the *τραγωδοι* (those who ‘sang in goatskins’) where echoed the single utterance, more cry than signifier, with which for centuries Dionysus was to be evoked: *εβοι* (evoi). The Apollonian moment is the achievement of logos. Tragedy is the vehicle for the *expression* of this

<sup>16</sup> Poseidon in the opening scene [lines 95-97] of the play.

<sup>17</sup>In the midst of all that is currently being published on the pandemic, it would be instructive to return to Thucydides’ lucid description of the plague in Athens and its impact on the social bond.

<sup>18</sup> There is an analysis of this penultimate tragedy in my forthcoming book *The Redress of Law* (2021)

incongruence, where the Dionysian excess grafts itself, improbably, on the unfamiliar register of the word, vests itself as logos in order to emerge onto the plane of the rational with the opportunity for the first time to bring to expression the deep recesses of the human psyche. The Homeric 'naivety' (the term is Schiller's) is the predominance of the Apollonian 'illusion' that gave form to those ideals of beauty, courage, etc., that allowed the Greeks, however briefly, to transcend the compulsion of necessity and affliction with the 'aesthetic offer' of the Olympians. Maybe it is this tension, and the underlying precarity, that van der Walt discerns in Protagoras, where the contingency is given play in the democratic moment but where the framing conditions that undergird and organize the democratic moment are keyed to a human measure, however precariously.

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Protagoras knew that the 'time of self-evident equations of nomos and kosmos was evidently over'. (65) And although he is likely to have died before the more devastating evidence (of Melos and Sicily) was known to him, his famous statement, in van der Walt's interpretation of it, prefigures the 'immense crisis' that the polis was heading toward. The human mensura argument replaces any cosmological argument that confidently aligns the human nomos to any cosmic logic or order. 'A common measure was not given' but people had to be asked and decisions needed to be taken on civic matters. The decision brings with it an ineliminable element of contingency, but not necessarily arbitrariness as long as the democratic decision involves all citizens. More importantly, if 'politics proceeds from the opening up of a historical precipice from which it must leap' (67) which carries the 'experience of the immeasurable', democracy introduces the element of measure - though it is a measure that nothing beyond it warrants, a humility coupled with its precarity. The concept of liberal democratic law draws on these features and treats them as constitutive.

In the final chapter of the book, van der Walt offers a 'distilled' concept of liberal democratic law, first by defining it 'provisionally', and then by returning to it with the addition of two important qualifications. The first of these is that any concept of liberal democratic law must include a reference to adequate provision for socio-economic needs as *a matter of definition*. The second qualification has to do with facing up to the difficult truth that inevitably it will be confronted with the 'illiberal politics of truth and conviction' (244) that command the deeper allegiances of participants in any democracy. If Heller had associated the fascination with fascism amongst the Weimar youth with their 'search for ethical rootedness', our own Age similarly shows that with the hollowing out of other forms of solidarity and association in civil society, fascist populisms become the main point of access and of entry of the youth into what passes as the public sphere. The message that van der Walt extracts from Heller is one about the displacement he has already proposed, where the liberal democracy of the future can divest itself of the

passionately held convictions and channel the dangerous energies – even the ‘messianic yearnings’ – away from the ‘political’ and toward the ‘poetic’ as, he says had happened before, in the case of Sophocles and Protagoras. (246-7)

What struck me perhaps more than anything else in reading Johan’s book was its proximity to another argument that runs alongside it obliquely. I have in mind Alasdair MacIntyre’s superb book *After Virtue*. It too draws its central argument from the Greeks, albeit Aristotle rather than Protagoras or Sophocles. It too develops a moral theory in relation to thinking the social bond. But its greatest proximity is elsewhere, I would suggest. *After Virtue* offers a moral theory from the perspective of a sensibility that is no longer available to the moderns. The context of the polis that made possible the thinking of virtue dissipates in modern pluralistic societies where the moral makeup of character and life descends into the shrill competition of claim and counter-claim of what MacIntyre calls ‘emotivism’, grounded on nothing more than ‘preference’, and whose appeal can be nothing more persuasive than this exaltation: ‘I think this good; you should too’.<sup>19</sup> Van der Walt’s prescription for the exercise of public reason is one that flows from but cannot restore the unity from which it emanates. Instead it is condemned to the interstice between the political and the poetic, but having lost the unity of experience and action that underlay them both in Ancient Greece, must now recast them in a compensatory modality. Which means that the poetic and the political correlate to conviction and opinion respectively, in a division of labour of sorts. The problem of this fragmentation and separate deployment is not that opinion loses its basis in conviction or that it is thinned out in the way that ‘preferences’ are for MacIntyre. It is rather that the circulation and competition of claim and counterclaim cannot (as it is meant *not* to) engage the comprehensive theories of justice that justify them, which means that the opinion ‘we owe duties of justice to others’ counters as equal the opinion ‘I care little for justice to others’. When the political is floated as opinion in the shallow circuits of competition, it becomes increasingly difficult to sustain a substantive theory of justice. If the all-too-brief rerun of the genealogy of the articulations and alignments of the three terms – kosmos, physis, nomos – teaches us something it is that Greek thought sustained a deeper unity that does not transfer readily across to modern dilemmas. Ancient thought holds the practical, the ethical, and the aesthetic together in a mutually constitutive way, and it is the ‘achievement’ of modern thought to tear them radically apart. A forthcoming book by van der Walt – *Law, Literature and Liberal Democracy* – promises to ‘study the relation between liberal democracy and aesthetic fiction more incisively.’ (247) It will be a treat when it arrives. In the interim we are left with a melancholic gesture much like MacIntyre’s, of paring back the ambition of public reason, with the political and the poetic set on separate tracks in the name of defending public life.

<sup>19</sup> See MacIntyre, A: *After Virtue*, London: Duckworth, 1981, p12 and chapter 2 passim.