

RATIONAL NECESSITIES: ON THE SILENCE OF LIBERAL DEMOCRATIC THEORY IN FRONT OF THE UNREASONABLE OTHER

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ABSTRACT

To take or think history seriously, *The Concept of Liberal Democratic Law* tells us, is to comprehend it as a constant process of denaturalization. Having presented us with a conception of history as an on-going earthquake that ruins and denaturalizes everything, does Van der Walt not in the end step back from this seismic vision of history? This engagement seeks to circumscribe this question in the textual body of *The Concept of Liberal Democratic Law*. It does so under the auspices of the following bet: to submit one's literary enterprise as a reading is tantamount to submit one's work to a process of denaturalization. After all, in other interpretations, the text does not live on. Interpretation marks off the text's posteriority, its after-life. Therefore, by interrogating the way the text posits its possible readership, declaring silence to the foreseeable unreasonable reader, arguably one makes room to evaluate whether the text's representation of what liberal democracy is about does not end up being a dissemblance between its maxim and practice when it declares that before an unreasonable reader, the discussion must come to an end.

KEYWORDS

Distillation; liberal democratic maxim; death of forms of life.

INTRODUCTION

Johan van der Walt's *The Concept of Liberal Democratic Law* original title would have been *The Concept of Liberal Democratic Law Distilled*. Distillation expresses a very important metaphorical vein running through the book. Indeed, it gives its "central argument" its model: by bringing "to the boil" "the two competing concepts of nature,"

* I thank Carolina Stange Moulin and Professor Johan van der Walt for their comments and suggestions on earlier drafts of this article.

nature as *kosmos* and *phusis*, order and anarchic force, forming “an ambiguous metaphysics of nature” to which the concept of law would have been mixed, the work aims to “extract from them, through a process of conceptual distillation, the ethereal substance of liberal democratic law.”¹

Let me consider the very first occurrence of distillment as a trope in the book. After choosing Aristotle to play the role of “the father of Western jurisprudence,” – to borrow a phrase from a past piece of the author,² – whose “essential move” established the pattern of “obfuscation and equivocation” underpinning “Western metaphysics,”³ Van der Walt proposes that the book will follow this “pivotal line of thinking.” His goal, “to distill the concept of law from this long line of Western thinking in order to extract it from the heavy metaphysical bedrock”⁴ it has been rooted. Indeed, his book mainly deals with “metaphysical bedrocks” – and the corresponding debris of “well-known historical examples of institutional failure.”⁵ One image that helpfully elaborates the interconnection between metaphysical bedrocks and historical examples of institutional failure is to think of the bedrocks as touchstones, grounding the Western metaphysical alchemical transfiguration between *phusis* and *nomos*. In face of history’s earthquakes, the ground reveals itself as an abyss, in the aftermath of which, all transfigurations appear as historical ruins, nature as essentially transience, life as divided life.

At the bottom, how does one maintain one’s stance in the face of the wreckage of nature? To take or think history seriously, Van der Walt tells us, is to comprehend it as a constant process of denaturalization. One can consider this process of denaturalization as a relentless process of ruining, as the author also suggests in an earlier work.⁶ However, is it possible not to let one’s gaze drift back to some substance or ideal content that does not get ruined and denaturalized in the end? Does Van der Walt manage to do this? Having presented us with a conception of history as an on-going earthquake that ruins and denaturalizes everything, does Van der Walt not in the end step back from this seismic vision of history?

This engagement seeks to circumscribe these questions in the textual body of *The Concept of Liberal Democratic Law*. It does so under the auspices of the following bet: to submit one’s interpretive exercise to the other’s reading is tantamount to submitting

¹ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 13.

² Johan van der Walt, The language of jurisprudence from Hobbes to Derrida (the latter’s quest for an impossible poem), *Acta Juridica* 1998, p. 61-96, 1998, p. 62.

³ Id., *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 230.

⁴ Ibid., p. 4.

⁵ Ibid., p. 12.

⁶ Cf. Johan van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*, Abingdon: Birkbeck Law Press, 2014.

one's work to a process of denaturalization. After all, the text will not live on in other interpretations. Interpretation marks off the text's posteriority, its after-life. Therefore, by interrogating the way Van der Walt's text posits its possible readership, declaring – as it expressly does – silence to the foreseeable unreasonable reader, arguably one makes room to evaluate whether the text's representation [*Vorstellung*] of what liberal democracy is about does not end up being a dissemblance [*Verstellung*] between its maxim and practice when it declares that before an unreasonable reader, the discussion must come to an end. By reenacting the Hegelian critique of Kant in *The Phenomenology of Spirit*, I attempt to interrogate the way the liberal democratic maxim and practice interrelate. Finally, I seek to outline the consequences of the trembling between these two poles for liberal democracy's political imaginary, connecting this apparent textual contradiction to how liberal democracy envisions the possibility of the death of other forms of life in its wake.

PHILOSOPHER'S STONES AND HISTORICAL RUINS

One searches in vain throughout the book for a definition of what Van der Walt repeatedly indicates as the main obstacle to the understanding of liberal democratic law – to wit, metaphysics. Thus, let's consider the valuable definition Van der Walt gives us in another text: “Western *meta*-physics turns on the political theological insistence that there is physics beyond physics. *Meta*-physics pivots on a doubling of existences, a doubling of existence that links the empirical to a transcendent reality beyond itself.”⁷ Ultimately, it is a matter of closure. Within Van der Walt's strategy, metaphysics designates the signature sustaining “the sign of a society doubling up and folding back onto itself, the sign of a society that posits and absorbs its own limits[,]” a movement that replicates the closure of the political as the opening to politics with another closure.⁸ It can be said that by “a myriad of ritual practices” – among which, as indicated above, one must consider a certain way of reading – this insistence, mirroring or doubling existence's “original division” as the split between the earthly and heavenly, secures to society its imminence as permanence, another word to indicate the closure

⁷ Id., Timeo Danais Dona Ferre and the Constitution that Europeans May One Day Have Given Themselves, in *Constitutional Sovereignty and Social Solidarity in Europe*, ed. by Johan van der Walt and Jeffrey Ellsworth, Bloomsbury: Nomos, 2015, p. 278.

⁸ Id., *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 108.

of closure brought by metaphysics. A couple of lines below, but also elsewhere,⁹ he identifies what would be “the essential knot that effects this tie,” namely, sacrifice.¹⁰

In what follows, I will endeavor to connect three terms that appear to be key to understand the force of Van der Walt’s text: sacrifice, alchemy and chemistry. To show how they intertwine, sustaining Van der Walt’s theoretical position, I would like to venture into the following interpolation. Metaphysical bedrocks are tantamount to philosopher’s stones. The immediate gain of this substitution is to reveal a possible connection between the two categories, metaphysical bedrocks and historical failures, and the effectual complex they manage to present, that is, “Old Europe.” It uncovers a crucial trace entwining the text’s force. Van der Walt’s opposition between alchemical and chemical readings repeats Immanuel Kant’s attack on a particular tone widespread in his time. This tone, characteristic of a certain enthusiasm or fanaticism [*Schwärmerei*], was adopted by whom Kant identified as the adepts of the philosopher’s stone [*das Stein der Weisen*], who without any “methodical investigation and knowledge of nature” promised the most dreamed of all treasures, the “otherwise concealed interaction between radically different spheres[,]”¹¹ namely, law and life. Conversely, Kant suggests that one should proceed as chemistry, separating [*Scheidung*] - or distilling - the empirical from the rational.¹²

The interaction between law and life expresses itself as history. The two manners of employing the philosopher’s stones, which Kant names as the terroristic and eudaemonist manners of representing history,¹³ correspond, respectively, to the anarchic and the cosmological understandings of *phusis* that Van der Walt designates as underscoring Old Europe’s way of reading the relationship between law and life. As the two conceptions of *phusis* overlap,¹⁴ what Van der Walt names in the book as “Old Europe” consists basically in an attitude that strives for presence and permanence, for

⁹ See esp. Id., *The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics*, in *Law’s Sacrifice: Approaching the Problem of Sacrifice in Law, Literature, and Philosophy*, ed. by Brian W. Nail and Jeffrey A. Ellsworth, New York: Routledge, 2019.

¹⁰ Id., Johan van der Walt, Timeo Danais Dona Ferre and the Constitution that Europeans May One Day Have Given Themselves, in *Constitutional Sovereignty and Social Solidarity in Europe*, ed. by Johan van der Walt and Jeffrey Ellsworth, Bloomsbury: Nomos, 2015, p. 278.

¹¹ Peter Fenves, *A Peculiar Fate: Metaphysics and World-History in Kant*, Ithaca: Cornell University Press, 1991, p. 103

¹² Immanuel Kant, Kritik der praktischen Vernunft, in *Werke in zwölf Bänden*, B. 7, Frankfurt: Suhrkamp, 1977, p. 301.

¹³ See Id., *The Conflict of the Faculties / Der Streit der Fakultäten*, bilingual edition, transl. by Mary J. Gregor, New York: Abaris Books, 1979, p. 144-146

¹⁴ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 99-101.

“a glorious history and history of glory.”¹⁵ The most exemplary representatives of Old Europe chosen by him, Michel Villey and Carl Schmitt,¹⁶ are shown as living in the present both “as if the worst has already happened,” and by warding off loss “as always already in the future.” Together, these opposite directions “produce the illusion of an intact present – solitary, sufficient, immune from past or future threat.”¹⁷ In a word, immune from history.

As indicated in the introduction above, Van der Walt’s reading appears to go in the opposite direction. It aims to reckon with the fact that “[h]istorical processes and developments, however, are invariably processes of denaturalization. They expose the arbitrary and non-natural status of all attempts at – or pretensions to – naturalization. History invariably unmasks all naturalizations as false or pseudo-naturalization.”¹⁸ And that, therefore, “humanity always exists outside its own history and therefore outside or ‘before’ the law, notwithstanding the tendency of relatively stable linguistic and juridical practices to effectively produce persuasive ‘internal perspectives’ to law that create the impression of close links between law, life, and history, or language, life and history.”¹⁹ As anticipated in the introduction, we may ask whether Van der Walt envisions his own text as subjected to this process of denaturalization. I would argue that this is a crucial question. The difference between his self-declared Kantian approach and those of the adepts of the philosopher’s stone hinders on this question. As a way to circumscribe it in the direction of a possible answer, I suggest we should read his text in search for its position before a reader who assumes an “external perspective.” In other words, the question is about the unreasonable reader who does not share with liberal democrats their internal perspective to liberal democracy, and, thus, who brings with her the threat of revealing the book’s stance as another attempt at naturalization, and, therefore, as arbitrary and non-natural.

THE SILENCE OF RATIONAL NECESSITIES

The difficulty of distinguishing between alchemy and distillation reveals how distillment constitutes an index to a recurring thread throughout Van der Walt’s oeuvre. Consider *The Horizontal Effect Revolution and the Question of Sovereignty*,

¹⁵ Id., *The Romantic Allure of Old Europe: Pertinent Questions and Non-Responses*, *The Modern Law Review*, v. 83, n. 5, p. 1086-1100, 2020, p. 1098.

¹⁶ Cf. Id., *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 15ff.

¹⁷ Rebecca Comay, *The Sickness of Tradition: Between Melancholia and Fetishism*, in *Walter Benjamin and History*, ed. by Andrew Benjamin, London: Bloomsbury Publishing, 2006, p. 95-96.

¹⁸ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 78.

¹⁹ Ibid., p. 183.

where we find the most elaborate definition of this process. There, the author characterizes distillation as the “disembodiment,” and even “de-contextualization” of the “substantive baselines,” the “painful and shameful circumstances,” embedding each and every conflict. Nevertheless, and crucially, “[t]he law is always abstract[,]” its essence being “to perform abstraction and to present conflicts in the light or clarity of abstraction.” Assuming as its inheritance this impetus towards conceptualization *qua* purification, liberal democratic law should effect by dint of raising of “glassy surfaces,” crystal clear as they may be, an “obscuration” of “the murky depths” of political and historical concretization.²⁰ However, before this paradoxical obscuration through clarity, as an “act of purification,” “the sacrificial heart of law,”²¹ one may wonder whether the interpretations pursued in the search for liberal democratic law do not pass their judgment too assuredly. In the sense that, to employ another trope from Van der Walt’s affluent stock, it actually lets the coin fall, although it should supposedly remain “airborne as long and as often as possible.”²² By doing so, it ends up overlooking the only demand the transcendental imperative of interpretation advances: “it ought to be an interpretation.”²³

As to Van der Walt’s breathtaking interpretation of voting procedures, near the end of the book, which, accordingly, are described as delinking law from life, one wonders what is the vote of thought. “We vote on something when it has become clear that our intuitions and convictions about matters that concern everyone are not shared by everyone[,]” when the absence of “the correct or true way to deal with the issues of life that we need to settle” cannot and must not be covered up. Voting, therefore, “effectively confirms the gap that opens up between the reality of life and the intuitions or convictions regarding this reality that become manifest in the face of division.”²⁴ Voting is a clear *sign*, in the Kantian sense,²⁵ of the possibility of what could be called the liberal democratic maxim – which, I would suggest, is but a variation of the transcendental imperative of interpretation – evoked three times over the book’s length, and, therefore, deserving to be quoted in full:

²⁰ Ibid., p. 76-77.

²¹ Id., *Law, Utopia, Event: A Constellation of Two Trajectories*, in *Law and the Utopian Imagination*, ed. by Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, Stanford: Stanford University Press, 2014, p. 85

²² Johan van der Walt, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*, Abingdon: Birkbeck Law Press, 2014, p. 244.

²³ Werner Hamacher, *The Promise of Interpretation: Remarks on the Hermeneutic Imperative in Kant and Nietzsche*, in *Premises: Essays on Philosophy and Literature from Kant to Celan*, transl. by Peter Fenves, Cambridge: Harvard University Press, 1996, p. 89-90.

²⁴ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 242.

²⁵ On the Kantian notion of sign and its importance to Kant’s thoughts on history, see Peter Fenves, *A Peculiar Fate: Metaphysics and World-History in Kant*, Ithaca: Cornell University Press, 1991, p. 138ff.

By all means believe that the principles and convictions by which you act are the correct ones. You have to do so. But, do not succumb to the temptation to insist that those who evidently and adamantly disagree with you have good reasons to agree with you. The moment you do this, you being the descent into a dogmatic liberalism that ultimately risks becoming as illiberal as any adversary of liberal democracy imaginable.²⁶

Five pages after its first positing, the course of the text appears to dissemble this first moment, “and instead makes the opposite into the essence.”²⁷ Because, unexpectedly, it announces what readership it has in mind and which “you” are invited to the liberal democratic “you and me” envisaged. The page states, bluntly, to those who “were to suggest the fundamental principle of liberal democracy endorsed here itself merits dismissal[,]” that “the discussion would simply have to stop. We would have nothing more to say to one another.”²⁸ How one should read this “vertigo-inducing movement”²⁹ at the opening pages of the book? The moment after it posits the maxim which captures “the fundamental principle of liberal democracy,” it dismisses the maxim when it utters silence towards its possible readership. It is “the utter silence of someone who keeps himself locked up within himself, who refuses to be cast aside vis-à-vis an other[,]” the “hard heart” which “does not recognize the contradiction it commits when it does not let the discarding that took place in *speech* be the true discarding, whereas it itself has the certainty of its spirit not in an actual action but in its

²⁶ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 223; for its other apparitions, see p. 5 and 196-197.

²⁷ G. W. F. Hegel, *The Phenomenology of Spirit*, Transl. by Terry Pinkard, Cambridge: Cambridge University Press, 2018, p. 357; G. W. F. Hegel, *Phänomenologie des Geistes*, Leipzig: Dürsch'schen Buchhandlung, 1907, p. 399: “... und macht vielmehr das Gegenteil zum Wesen.”

²⁸ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 11.

²⁹ G. W. F. Hegel, *The Phenomenology of Spirit*, Transl. by Terry Pinkard, Cambridge: Cambridge University Press, 2018, p. 357; G. W. F. Hegel, *Phänomenologie des Geistes*, Leipzig: Dürsch'schen Buchhandlung, 1907, p. 399: “... dieser schwindelnden Bewegung ...”

innerness[.]”³⁰ and, thus, perhaps, the avow “that it is in fact serious about neither of them.”³¹

This movement that turns the representation [*Vorstellung*] of the liberal democratic maxim in its dissemblance [*Verstellung*] reflects what can be read as one particular slip of pen, of clear legal-political implications, and which reinstates the violence of silence towards the other. When presenting the liberal democratic maxim for the third time, on page 222, the text indicates a forth reference to this statement on page 243. Now, page 243 advances a conception of legislation that clearly resonates with the paradox surrounding the liberal democratic maxim:

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. This also explains why liberal democratic legislation is in principle accompanied by judicial review procedures that unflinchingly respect the right to govern and to pass coercive legislation, but nevertheless prevent the coercive terms of legislation from intruding more than is *rationally necessary* into the right to think, prefer and exist differently.”³²

I would like to highlight the employment of “rationally necessary,” rather than, for instance, “reasonably uncircumventable.” Should there be any interpretive valence into inquiring about the significance of what could be a merely “slip of the pen”? As a matter of respect for the text, I think it does. Immediately, it could be argued that “rationally necessary” refers to the “third proportionality test,” about which Van der Walt wrote in the last chapter of *The Horizontal Effect Revolution and the Question of Sovereignty*, a section that, tellingly, begins discussing the Roman law dicta that also open *The Concept of Liberal Democratic Law*, and with an appeal to the distinction

³⁰ G. W. F. Hegel, *The Phenomenology of Spirit*, transl. by Terry Pinkard, Cambridge: Cambridge University Press, 2018, p. 386. The entire quote, broke up above, reads as follows: “... the utter silence of someone who keeps himself locked up within himself, who refuses to be cast aside vis-à-vis an other [...] At the same time, the hard heart does not recognize the contradiction it commits when it does not let the discarding that took place in speech be the true discarding, whereas it itself has the certainty of its spirit not in an actual action but in its innerness[.]” G. W. F. Hegel, *Phänomenologie des Geistes*, Leipzig: Dürr’schen Buchhandlung, 1907, p. 431: “... die Stummheit, sich in sich zu behalten und sich nicht gegen einen andern wegzuwerfen, entgegensetzt. [...] Zugleich erkennt es nicht den Widerspruch, den es begehrt, die Abwerfung, die in der Rede geschehen ist, nicht für das wahre Abwerfen gelten zu lassen, während es selbst die Gewißheit seines Geistes nicht in einer wirklichen Handlung, sondern in seinem Innern[.]”

³¹ Ibid., p. 357; Ibid., p. 399: “Es bekennt damit, daß es ihm in der Tat mit keinem derselben Ernst ist.”

³² Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 243.

between *auctoritas* and *potestas*, a distinction addressed with a whole chapter in the latter.³³

“Rationally necessary” would stand, thus, for the following test, then presented as a conclusion to a “historical deconstruction of the nodal or atomic conception of sovereignty reflected in the maxim *princeps legibus solutus est*[:]” “the demand that no majority legislation or administrative act, or the absence of any of these, may come to interfere more with the equal and horizontal liberties of citizens than can be justified to them in *plausible* and *convincing* terms that they can *plausibly be persuaded* to respect.”³⁴ The emphasized words obviously intertwine with what I would call the liberal democratic maxim, discussed above. They also connect, as the end of the section indicates, with an explicit reference to Rawls,³⁵ to the idea of “reasonableness.”

However, to refrain from this interpretive solution offers some food for thought as well. In the two books, Van der Walt states that, respectively, even liberal democracies must “insist on a minimum of normative closure,”³⁶ and, “as any kind of *political formation* worthy of the name, it must and will respond forcefully in the face of *any* threat or pressure.”³⁷ Political formations, as “social constructions,” “must consider the fundamental (social) constructions on which they pivot non-contingent if they wish to remain the social constructions that they are.”³⁸ And, therefore - concluding with an exemplifying statement that appears to me as a variation of the express delimitation of readership in *The Concept of Liberal Democratic Law* pointed out above:

There may be people who would want to claim that stripping someone of the liberty to create a racially segregated private sphere also strips that person of an element of his or her fundamental liberty. That is their problem and a theory of liberal constitutional democracy cannot solve it for them. They entertain a concept of liberty that is irreconcilable with liberal democracy and irrelevant to liberal democrats. A theory of liberal democracy can only speak *meaningfully* to people like Seidman and Tribe who evidently are liberal democrats but struggle to make sense of some of liberal democracy’s troubling complexities.³⁹

³³ See Id., *The Horizontal Effect Revolution and the Question of Sovereignty*, Berlin: Walter de Gruyter, 2014, p. 381.

³⁴ Ibid., p. 383. (emphasis in the original).

³⁵ Ibid., p. 386.

³⁶ Ibid., p. 195.

³⁷ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 7 (first emphasis in the original, the second is mine)

³⁸ Id. *The Horizontal Effect Revolution and the Question of Sovereignty*, Berlin: Walter de Gruyter, 2014, p. 189.

³⁹ Idem. (emphasis mine)

One might ask what happened between Van der Walt's initial undersigning of deconstruction's resistance to meaning,⁴⁰ and his later resignation to silence before the interruption of meaning brought forth by the unreasonable other. This question is, ultimately, about violence and history. This becomes clear when one reads Van der Walt's abdication in comparison to Rawls contemplation of the death of forms of life in the wake of liberal democracy.

The question Rawls comes to face is this: "if some conceptions will die out and others survive only barely in a just constitutional regime, does this by itself imply that its political conception is not fair to them?" His answer pivots on the fact that "[n]o society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the inevitable effects of our culture and social structure." Nevertheless, "that there is no social world without loss is rooted in the nature of values and the world, and much human tragedy reflects that." At any rate, this fact of nature commends that "these social necessities are not to be taken for arbitrary bias or injustice."⁴¹

As much as I'm aware, despite the fact that Van der Walt dedicated an article to the question of historicity in Rawls, he never confronted these passages. In *Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice*, Van der Walt correctly pointed out how "[t]he most decent of constitutional democracies and other decent peoples[,] before their constant needs "to constitute or re-constitute themselves in and through moments of coercive closure[,] must not forget, and indeed acknowledge "the extent to which their regular need for closure involves them in moments of sovereign imposture from which a certain indecency can never be eradicated fully." He contends, moreover, in words that starkly contrast with the silence he considers inescapable in his later work, that there would be "no point in invoking the unreasonableness of the other under these circumstances, unless one wants to terminate questions of responsibility and justice and switch to a discourse of sovereign self-justification and self-assertion."⁴²

That notwithstanding, it appears that at the level of liberal democratic theory, one cannot but bypass "the period of urging and difficult persuasion[,] "⁴³ in "an appeal to good will, and to the absolute commitment to the desire for consensus in

⁴⁰ Cf. Johan van der Walt, The language of jurisprudence from Hobbes to Derrida (the latter's quest for an impossible poem), *Acta Juridica*, 1998, p. 61-96, 1998, p. 76.

⁴¹ John Rawls, *Political Liberalism*, New York: Columbia University Press, 1995, p. 197.

⁴² Johan van der Walt, Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice, *Constellations*, v. 16, n. 1, p. 23-43, 2009, p. 30, 40, note 16.

⁴³ *Ibid.*, p. 42 note 35.

understanding.”⁴⁴ This good will, is “extremely evident,” and, therefore, “rationally necessary.” However, as the obverse of the holy pathos of the Greeks, it is also abounding in death. Thus, from this other take on Van der Walt’s slip of pen, reasonableness appears to be always already substituted by “rational necessity,” Rawls’ “social necessities” which are neither arbitrary nor unjust, alike the laws the Athenian envoys evoked to the island of Melos – the “necessity of nature” according to which “wherever anyone has the upper hand they rule,”⁴⁵ –, in reason of their meaningfulness attained during the intercourse between “you and me,” the privileged point of view of liberal democratic theory.⁴⁶

CONCLUDING REMARKS: WESTERN SOBRIETY

As the preceding discussion allows one to glimpse, *The Concept of Liberal Democratic Law*, in its attempt to distill the ambivalence of *phusis* from the body of law, dedicates itself considerably to a discussion of Greek excellence. The structure underlying its approach to the relationship between the Greeks and us mirrors the way the book posits its relation to the unreasonable reader. In other words, the conception of our relation to the Greeks put forward in the book, mirrors the way in which it instantiates its own version of the liberal democratic “you and me.” As something to keep at arm’s length, to keep at a distance. Yet, the proximity just implied, between liberal democracy’s bloodless sacrifice of forms of life and the tragedy of Melos entails that their relation may demand another form to be congruously thought. Not in terms of a vanishing point, but as a chiasma. By way of conclusion, let me just explore this other form of thinking the relationship between the Greeks and us, which, accordingly, may reveal another form of thinking the relation between the “you and me” of liberal democracy.

According to Friedrich Hölderlin, who dedicated his entire life to think the same Greek excellence [*Griechischer Vortrefflichkeit*] which Van der Walt interrogates throughout his book, the Greeks were less the masters of what was innate to them, the “holy pathos,” than of what they contrived to capture to their “Apollonian empire,” to wit, “Junonian,” Western sobriety. These “extraordinary humans,” who were

⁴⁴ Jacques Derrida, Three Questions to Hans-Georg Gadamer, transl. by Diane Michelfelder and Richard Palmer, in *Dialogue & Deconstruction: The Gadamer Derrida Encounter*, ed. by Diane Michelfelder and Richard Palmer, New York: State University of New York Press, 1989, p. 52.

⁴⁵ Thucydides, *The War of the Peloponnesians and the Athenians*, ed. and transl. by Jeremy Mynott, Cambridge: Cambridge University Press, 2013, p. 382

⁴⁶ Cf. John Rawls, Kantian Constructivism in Moral Theory, *The Journal of Philosophy*, v. 77, n. 9, p. 515-572, 1980, p. 534

“sufficiently soulful” [*seeleuvoll*] to excel in the “gift for presentation,” accomplished to appropriate what was strange for them. “And what for them is (occidental) culture, clarity of presentation and Junonian sobriety, is for us nature. In all peoples, the formative tendency leads to the foreign element, in such a way that all which is proper and natural tends to be forgotten and left unmastered.”⁴⁷ Thus, the poet concludes: “apart from what must be the highest for the Greeks and us, namely, the living relations and fate, [*dem lebendigen Verhältnisse und Geschick*] we may not dare to have something identical with them. But the proper must be well learnt just as the foreigner. Hence the Greeks are indispensable for us.”⁴⁸

Hölderlin’s suggestion, when read against the grain of Van der Walt’s argument, may be interpreted as the contention that we, standing at the obverse of Greece, and not at a distance, at the end of its history, should attempt to do the inverse, in order to resist, through our “formative passion,” a similar, and yet antithetical “death-impassioned ‘enthusiasm’.”⁴⁹ Since death always underpins one’s innate, “natal endowment,” instead of colorful sacrifices and eagerness for blood, our lawful enthusiasm, in attunement to our innate sobriety, would entail the ἀπάθεια of “the coldest, emptiest death of all, having no more meaning than chopping off a head of cabbage or swallowing a mouthful of water[.]”⁵⁰

Hegel wrote this line in order to grasp the terror of the guillotine. To update this image, one could easily think of a drone strike. To put it bluntly: should liberal democratic theory’s response be to propose rules of engagement to drone strikes that comply with – but do not actualize, as it were – some sort of proportionality test? Some well-intentioned liberal democrats would answer in the affirmative.⁵¹ Would this conform with the concept of liberal democratic law advanced by Johan van der Walt?

⁴⁷ Françoise Dastur, Hölderlin and the Orientalisation of Greece, *Pli*, n. 10, p. 156-173, 2000, p. 167.

⁴⁸ Friedrich Hölderlin, *Sämtliche Werke und Briefe in fünf Bänden*, ed. by Frank Zinkernagel, v. IV, Insel, Leipzig, 1921, Brief 209, p. 531.

⁴⁹ Cf. Veronique Foti, *Epochal Discordance: Hölderlin’s Philosophy of Tragedy*, SUNY Press, New York, 2006, p. 15.

⁵⁰ G. W. F. Hegel, *The Phenomenology of Spirit*, Transl. by Terry Pinkard, Cambridge: Cambridge University Press, 2018, p. 343; G. W. F. Hegel, *Phänomenologie des Geistes*, Leipzig: Dürr’schen Buchhandlung, 1907, p. 383: “Das einzige Werk und Tat der allgemeinen Freiheit ist daher der Tod, und zwar ein Tod, der keinen Innern Umfang und Erfüllung hat; denn was negiert wird, ist der unerfüllte Punkt des absolut freien Selbst; er ist also der kälteste platteste Tod, oline mehr Bedeutung als das Durchhauen eines Kohlhaupts oder ein Schluck Wassers.”

⁵¹ For a suggestion precisely along these lines, based on John Rawls’ reasoning in *The Law of Peoples* concerning the use of force in “failed or unwilling host states,” see Thomas McDonnell, Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists, *The George Washington International Law Review*, v. 44, p. 243-316, 2012, esp. p. 298. See also Bernard Harcourt, *Critique & Praxis*, New York: Columbia University Press, 2020, p. 489, briefly discussing the case of Harold Koh, who “[a]fter a long and brilliant career as a human rights

To be fair, the author questions whether the liberal democracies of our time do not in fact rely “on hidden amity lines that indeed render the whole project of liberal democracy pointless.” His counterproposal, “should they not explore the possibility of such hidden amity lines relentlessly, for the sake of replacing them with modes of unburdening such as poetry and athletics that are more reconcilable with the ideals of liberal democracy,” however, formulated as it is, suggests that Van der Walt conceives these “amity lines” as painted in Greek blood red. Whereas, with its “purported precision and hygiene,”⁵² it may be said that drone strikes actually embrace liberal democracy’s “grey lack of heroism.”⁵³ Arguably, although in a rather grim way, it may be said that they also bring the discussion to stop in face of the unreasonable other.

Therefore, immediately, assuming the structure relating the Greeks and us underlying Van der Walt’s interpretation, nothing would be farther from them than drone strikes. However, nothing seems closer to Western sobriety. Thought otherwise, the chiasma relating the ancient Greeks and the West shows that the tragedy of Melos, an event that has a noteworthy position within Van der Walt’s last work,⁵⁴ in its relation to the tragedy of liberal democracy should be conceived not as two points at the opposite extremes of a line, but as the two sides of a coin.⁵⁵ As mentioned above, in his past work, Van der Walt suggested that one should envisage legal decisions as to the tossing of a coin, which should remain airborne as much as possible. To wind up, one may think, then, of the sound following the drop of this particular coin. Whether

advocate,” came to be nominated by President Barack Obama “to serve as the legal adviser to the U.S. Department of State under Secretary of State Hillary Clinton.” Koh ended being, it seems, in his role as legal adviser, the person who “effectively wrote the rules of engagement to justify the use of lethal force in drone strikes.” For a broader discussion of this topic, see also Id., *The Counterrevolution: How our government went to war against its own citizens*, New York, Basic Books, 2018, esp. chap. 4: “In its rapid and apparently surgical death, [drone strikes] can be portrayed, like the guillotine, as almost humane.” But also, the discussion of the use of drone strikes to kill US citizens. I’m thankful to Professor Pierre Legrand for bringing Harcourt’s *Critique & Praxis* to my attention.

⁵² Bernard Harcourt, *The Counterrevolution: How our government went to war against its own citizens*, New York, Basic Books, 2018, chap. 4.

⁵³ Johan van der Walt, *The Concept of Liberal Democratic Law*, New York: Routledge, 2020, p. 247. The entire concept runs as follows: “Liberal democratic law consists of an anomic, unnatural, inorganic, nominalist and non-spiritual system of non-actualisable but adequately socialist legislative rules that govern, reflect and sustain the divided life of societies that manage to sustain sufficiently forceful poetic fictions to compensate for the grey lack of heroism that they will have to endure during the time that remains.”

⁵⁴ Ibid., p. 42-44.

⁵⁵ Ibid., p. 240 For a reading of Hegel along these lines, connecting his notion of tragedy to the apprehension of civil society, see, Miguel Vatter, *The Republic of the Living: Biopolitics and the Critique of Civil Society*, New York: Fordham University Press, 2014, p. 17-59.

it falls heads or tails, in both cases, it is soundless, virtually the same as the worst violence, the violence of primitive and prelogical silence.