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Book Review: Law and Sacrifice: Towards a Post-Apartheid Theory of Law

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Book Reviews

JOHAN VAN DER WALT, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*. London: Birkbeck Law Press, 2006, 320 pp., £60 (hbk).
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> *'The task of legal thought and legal theory is to retrieve friendship from the ruins of litigation' (p. 224)*

The Preamble to the Post-apartheid Constitution of the Republic of South Africa (1966) plainly states that its goal is to 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. The Bill of Rights requires it to be interpreted to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' (South African Constitution, 1996: s.39(1)(a)). The Constitution also specifies that the Bill of Rights may well apply to private, as well as public actors – a practice now commonly known as the horizontal application of constitutional rights (s.8(2)). In both text and spirit, the Constitution requires the reconstruction of South African law to eradicate apartheid both in law and society. What would it mean to do this?

This is the question that occupies Johan van der Walt in his brilliant new book, *Law and Sacrifice: Toward a Post-Apartheid Theory of Law.* The book is wide-ranging and ambitious. In searching for a post-apartheid theory of law, van der Walt complicates his own task enormously in two ways. First, he uses the particular situation of South Africa's rejection of apartheid to consider the larger question of what justice requires in law more generally. The apartheid issue serves as both a historical setting and a narrative backdrop to the most fundamental questions about the meaning of justice and its realization in law. The lessons gleaned from apartheid and the fight to eradicate it therefore bubble over into legal theory in general, making the author's insights applicable to any legal system attempting to create a free and democratic society that treats each person with equal concern and respect. By generalizing in this way, van der Walt asks us to 'come to terms with the . . . potential for apartheid in every political and judicial decision' (p. 234). Second, van der Walt admires and uses the analytical techniques of deconstruction, especially those promoted by Jacques Derrida. Deconstruction, however, is generally used to take texts apart, not to make normative arguments in favor of justice. How can one argue in favor of a concept and deconstruct it at the same time?

Van der Walt links these two forms of ambition by highlighting one of the major innovations of the 1996 Constitution, that is, the choice to protect constitutional rights not only against state actors but against private actors, at least in some cases. For example, the constitutional right to equality (South African Constitution, 1996: s.9) combined with the constitutional rights to property (s.25) and housing (s.26) might prohibit a landlord from refusing to rent to a family because of their race. It

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might prohibit the eviction of landless people from private land when they have no other place to go, as the Constitutional Court ruled in the *Grootboom* case (s. 84). Van der Walt outlines the history of disputes over the horizontal application of constitutional law in the drafting of the Constitution and in its interpretation by judges. He then argues that the concept of horizontal application should go even further and take over the field entirely. Rather than a conception of horizontal application of rights that is marginalized with a core concept of constitutional rights held vertically against state actors, he proposes thinking about all legal relations and all constitutional rights in a horizontal sense. He calls this 'turning the law on its side'. This horizontalization of the law would in turn have three main features.

First, turning the law on its side would place the state in a non-privileged position; like all actors, it would be required to justify itself when it interprets and applies law in a way that impinges on interests of persons – which is to say, always. The state is toppled from its privileged vertical position over citizens and made to stand alongside them. Since it derives its power from the consent of the governed, it has no sovereign immunity; rather it must answer for the ways in which law and sovereign power affect those they touch.

Second, the prime goal here is to create a 'culture of justification' (p. 61) that acknowledges the sacrifices entailed by any law or any legal right and requires reasons to be given to justify those sacrifices. 'Post-apartheid legal theory', van der Walt argues, 'should insist that judicial discourse becomes a detailed register and record, not only of the social benefits pursued by deciding a case in favour of one party, but also of the harms resulting from deciding the case against the other party' (p. 187). This insight encapsulates van der Walt's core argument about what was wrong with apartheid: it viewed some people as less than human beings, treating their interests as unworthy of consideration, and failing to count them or recognize them in the course of choosing applicable law.

Third, van der Walt uses the insights of deconstruction to argue that justice requires that we refuse to rationalize law and justice so as to make the inevitable harms imposed by law invisible to us. Justice, paradoxically, requires recognizing and making visible the inevitable injustices resulting from attempting to create a just legal system. We must 'acknowledge . . . the injustice of the justified curtailment of a right' (p. 15). Only if the law-maker faces the costs, as well as the benefits of every law, can justice be done and be seen to be done. Van der Walt explains:

> *Turning the law on its side* . . . would no longer keep *apart* the winners and losers of court cases. It would keep them *alongside* one another. They would come to understand that the decision could easily have gone the other way and that next time round it could indeed go the other way. The expectations and aspirations of everyone involved in disputes would thus in principle remain in play, despite the need to *set aside* some aspirations from time to time. But this setting aside would no longer constitute a dismissal. It would in fact open up *the horizontal depth of space* in which more than one can live together . . . (p. 189)

This argument is reminiscent of that of Martha Nussbaum in *The Fragility of Goodness* (2001) in which she defended the rationality of ancient Greek myths that found tragedy even when an actor did the right thing when the actor failed to recognize the inevitable injustices associated with just actions. The ultimate goal of post-apartheid law is to remain vigilant and attentive to the effects of law on human beings, especially those on the losing side. This standard does not determine what justice requires in a mechanical way, but attention to the sacrifices law imposes on human beings and the responsibility to justify those sacrifices in a way the victims could understand, if not accept, is the closest we can come to abolishing apartheid in law.

REFERENCE

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LESLIE J. MORAN, EMMA SANDON, ELENA LOIZIDOU AND IAN CHRISTIE (EDS), *Law's Moving Image*. London: GlassHouse Press, 2004, 255 pp., £28.00 (pbk).
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I began to read *Law's Moving Image* with one primary question: 'what do law and cinema have to say to each other?' I finished reading it with the same question still in mind. I like to imagine that, for the editors, this question was posed and reposed, and that they swung between pleasure and discomfort as they witnessed the simple conflation of law and film becoming tangled up, and eventually unravelling.

Edited by an interdisciplinary team from Birkbeck College, *Law's Moving Image* has its origins as a conference at Tate Britain, and I would not be the only reviewer to note the lack of thematic or theoretical cohesion of this volume (Mussawir, 2005; Panko, 2005). The volume does not make clear the location it seeks in the burgeoning field of literature on law and film, nor does it conclude anything about the viability of thinking about law and film together. Divided into three parts, each part filled with an eclectic sub-collection of essays, it addresses cinema as jurisprudence (viewing law through film), representation (law in film), and regulation (laws about film).

Certain themes recur (citizenship, aesthetics, markets) but what seemed to me to be a key question – 'what is film?' – was not asked. Film is not an artistic-cultural practice like any other. It is an extremely expensive, heavily regulated, and highly collaborative commodity. Film functions as political propaganda, mass education, and broad-spectrum social distraction. Films are trouble *and* fun, risky *and* responsible, imaginative *and* banal. The collection of films under discussion here samples certain components of the medium (documentaries, children's films, bio-pics, art-house cinema), but the reader is left wondering if it is possible to even talk about 'film' as a unified subject.

Of course, 'law' is itself an intangible term: some chapters take a positivist view of law, others refer to law as a perspective, a methodology, an ideology, or a cultural text. More than anything, this volume helps me to conclude that perhaps film and law, despite their indeterminacy, seek a unified response from their subjects: constantly asserting themselves as speaking with a single voice, constantly clamouring to be heard, persistently addressing us as though we were an audience, sitting in the dark, looking up at them.

The opening chapter, by Ian Christie, points out that the term 'diegesis' originally referred to the recitation of facts in a Greek law court, before he issues a call to discard legal positivism in favour of ethics, conscience and indeterminacy, looking at several Second World War films in which characters face various forms of supernatural judgment. Eugene McNamee's chapter on *Henry V* explains how the English common law (and Kenneth Branagh's adaptation of Shakespeare's play) trace the journey from darkness towards light, and how English constitutionalism and Shakespeare both deploy poetry upon popular consciousness, seeking to achieve consensus about national identity and sovereignty.