

DERRIDA, THE CONDITIONAL, AND THE UNCONDITIONAL

Review article of *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* by Johan van der Walt. Wits University Press Johannesburg 2005. xiii and 305 pp. Price R190.00 (paperback) / Birkbeck Law Press London Price £60.00/\$98.00 (hardback), £23.50/\$78.00 (paperback)*

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1 Introduction

For a considerable period of time Johan van der Walt attempted to open the eyes of legal scholars to the problem of subjectivism in judicial decision-making and has sought to theorise an interruption of this subjectivity. In addressing this problem the thinking of Jacques Derrida (1930-2004) has played a significant role. In *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (hereafter “*LS*”) Van der Walt takes further innovative steps in this regard. *LS* is a reworking of a number of essays which have been published in law journals over the past number of years on issues such as the horizontal application of fundamental rights, the need for justification in judicial decision-making, property rights, socio-economic rights, the death penalty, Duncan Kennedy’s fundamental contradiction, plurality, and reconciliation. Derrida’s thinking is of great importance for legal theoretical thinking. From the central role that Derrida has played in his texts, it is clear that Van der Walt shares this view.¹ Van der Walt’s publications have deservedly received considerable attention from a number of scholars. Some have reacted positively to

* I had the privilege, kindly extended to me by Van der Walt, to read this book with students in a course on legal interpretation at the University of the Western Cape before its publication in 2005. This opportunity and the discussion with students were of immense value to me. The National Research Foundation through their funding of the Research Unit for Legal and Constitutional Interpretation made possible the reading of some of Derrida’s texts on two occasions in April 2004 and January 2005 in Cape Town and Stellenbosch under Van der Walt’s expert guidance. These occasions, as well as numerous other discussions which I was fortunate enough to have with Van der Walt, were extremely enriching academic experiences. Like many others, I am indebted to Van der Walt for the example shown by his outstanding scholarship. This review, although critical of his thinking in some respects, will hopefully be read as an appreciative engagement, motivated, like Van der Walt’s writing, by a desire for justice. I would in this respect like to express my gratitude to three anonymous reviewers for their critical comments which assisted with the formulation of the arguments presented here. All errors of course remain my own. Part of the time spent in finalising this article was as research fellow of the Alexander von Humboldt Foundation at the Humboldt University, Berlin. In this respect I would like to extend my gratitude to Folke Schuppert for the generous hospitality extended to me.

¹ Apart from Van der Walt, a number of scholars have made important contributions to show the significant impact that Derrida’s thinking could have on law. They can unfortunately not all be referred to here.

his publications and have even partly adopted his views regarding Derrida.² Other scholars have, without really critically enquiring into Van der Walt's understanding of deconstruction and because of the presumed impossibility of attaining absolute justice implied by deconstruction, argued that Derrida's thinking does not aid us in making actual judgments in real life;³ that it is similar to an "outsider's game" – a game that one plays only while still uninvolved;⁴ that it leads the politics of adjudication into a theoretical cul-de-sac;⁵ that it undermines any attempt at moving closer to unconditional justice;⁶ that it involves an obsession with the violence which accompanies law and judgment;⁷ and that it appears not to differ significantly from political liberalism.⁸ At least in South African legal circles, but clearly not only here, these views on Derrida's thinking seem to be prevalent. Van der Walt has responded to some of these claims. My contention in this article is that a different reading of Derrida can provide a more compelling response. This reading will show that Derrida's "idea" of justice far exceeds Van der Walt's exposition thereof, that it has radical implications for actual judgment, that it is not at all obsessed with violence in the sense expressed above, and that it comes nowhere close to political liberalism. The publication of *LS* presents an excellent opportunity for this as it invokes and interprets many of Derrida's texts where these issues are addressed. It also allows us to reflect anew on the relation of Derrida's thinking to language as well as the notions of plurality, sacrifice, reconciliation, politics, time, friendship, justification, justice and hospitality – themes which are of great importance for legal-theoretical thinking as they all relate to justice.

This article therefore wishes to reflect specifically on the way in which Van der Walt interprets Derrida or at least the "very specific line of thought in Derrida's work" which he relies on.⁹ It may be argued that a more balanced assessment of *LS* is called for in this case as Derrida's texts are not the only ones Van

² See, eg, AJ van der Walt "Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State" 2001 *SALJ* 258 302-303; Van der Walt & Botha "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification" 2000 *Constellations* 341; Christodoulidis "Constitutional Irresolution: Law and the Framing of Civil Society" 2003 *European LJ* 401 402-403; De Ville "Deference as Respect and Deference as Sacrifice: A Reading of *Bato Star Fishing v Minister of Environmental Affairs*" 2004 *SAJHR* 577.

³ See Du Toit *The Contribution of Hermeneutics and Deconstruction to Jurisprudence: A Response to Professors Du Plessis and Goosen* in Bradfield & Van der Merwe (eds) "Meaning" in *Legal Interpretation* (1998) 41 50 (Du Toit does not directly respond here to Van der Walt, but gives a general assessment of deconstruction); Le Roux *Deconstruction and the Colour of the Dead: A Response to Professor Van der Walt* in Bradfield & Van der Merwe (eds) "Meaning" in *Legal Interpretation* (1998) 111 112.

⁴ Du Toit *The Contribution of Hermeneutics and Deconstruction* 50.

⁵ Davis "Duncan Kennedy's A Critique of Adjudication: A Challenge to the 'Business as Usual' Approach of South African Lawyers" 2000 *SALJ* 697 710. For a response, see Van der Walt "The Quest for the Impossible, the Beginning of Politics: A Reply to Dennis Davis" 2001 *SALJ* 463.

⁶ Davis 2001 *SALJ* 711.

⁷ Davis 2001 *SALJ* 711. See also *LS* 71 n 36.

⁸ Michelman "Postmodernism, Proceduralism and Constitutional Justice: A Comment on Van der Walt and Botha" 2002 9 *Constellations* 246. For a response, see Van der Walt *Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought* in Botha et al (eds) *Rights and Democracy in a Transformative Constitution* (2004) 213-230.

⁹ See *LS* 27.

der Walt relies on in constructing a post-apartheid theory of law.¹⁰ His very wide ranging and thorough analysis includes references to the thinking of Thomas of Aquinas, Kant, Husserl, Schmitt, Heidegger, Arendt, Levinas, Nancy, and Agamben, to mention only the most prominent. It may be said that even though there may be differences of opinion regarding the reading of Derrida, Van der Walt's approach and theoretical model could easily be justified philosophically with reference to one or more of these thinkers. *LS* may more specifically be said to appear particularly close to the thinking of Heidegger. This article will not seek to contest or enquire in detail into this possibility. This is not because the work of Heidegger and the other thinkers, or the way in which Van der Walt relies on them is not important, original or interesting. It is first to be noted that with regard to all of the themes that will be enquired into here, Van der Walt either aligns the thinking of these philosophers with that of Derrida or departs from them and "follows" Derrida, more particularly in those instances where Derrida's thinking on Van der Walt's reading differs from that of the other philosophers. With regard to Heidegger, for example, Van der Walt takes great care to show the similarities rather than the differences with Derrida.¹¹ A focus primarily on Derrida is therefore justified through the reliance placed on Derrida in *LS*. Secondly, this article would exceed its permissible length were such an analysis to be properly undertaken.¹²

Some may furthermore argue that Van der Walt's reading of Derrida is not something that can be analysed. How could one have a discussion of different interpretations of Derrida's texts, when he himself emphasised the instability of written texts, undecidability, indeterminacy, and dissemination? Such arguments or questions are usually made or raised with a general reference to "all of Derrida's work". If one reads his texts, it is not, however, difficult to find an answer to such arguments or questions. One of the clearest answers can be found in *Limited Inc* where Derrida responds to a question from Gerald Graff on the implications of his (Derrida's) thinking for interpretation. Derrida comments on Searle who in his reading was not "attentive" to the way in which Derrida uses the word *restance* (remains). Had he been attentive, Derrida says "he would have been on the right track and well on the way...to reading me ... [f]or of course there is a 'right track' ... a better way".¹³ Many other texts of Derrida can also be found where he addresses both those who are sympathetic

¹⁰ For a balanced and overall positive review of *LS*, see Singer "Book Review" 2006 *Social and Legal Studies: An International Journal* 605. Cf, however, Bohler-Muller "On Desire, Transcendence and Sacrifice" 2007 *Law and Critique* 253 who views Van der Walt's account as too pessimistic insofar as life-with-others is concerned.

¹¹ See especially *LS* ch 7.

¹² This review can at least be said to engage in an indirect, albeit brief manner with some of these thinkers (at least insofar as they are discussed by Van der Walt) and the relation of their thinking with that of Derrida.

¹³ Derrida *Limited Inc* (1988) 146. The whole paragraph from which the passage to be quoted has been extracted is of relevance here.

and unsympathetic to his work, and where he seeks to correct mistaken readings of his texts.¹⁴ A perusal of the many interviews with Derrida will show that he does the same in response to questions posed to him concerning his work.¹⁵ Of course there is some sense in which one can say that a discussion about the interpretation of Derrida's texts is not possible. That is, as the argument below shows, insofar as Derrida's texts invoke "the impossible", which strictly speaking "no longer belong[s] to the horizon of sense".¹⁶ This does not in itself prevent discussion of the interpretation of Derrida's texts.¹⁷

As for the relevance of Derrida's thinking for the readers of this journal, this article departs from a position of faith in the commitment to justice of these readers, believing that they will regard as important a discussion concerning Derrida's profound thinking which had always been primarily about justice.¹⁸ His thinking about language exposes to us the metaphysical assumptions upon which Western (legal) thinking is based and indicates to us a new way of thinking about law and its relation to justice. *LS* takes important steps in showing us this way. As indicated above, this review will nevertheless raise a number of questions regarding the steps taken by Van der Walt. As will become clear, the main point of theoretical dispute with Van der Walt, which this article seeks to address, relates to Derrida's thinking on language. It will be contended that language cannot be rigorously distinguished from consciousness of reality in Derrida's thinking. This will place a question mark behind Van der Walt's attempt to link plurality with the unconditional in Derrida's thinking and his reliance on phenomenology in order to posit plurality. It will furthermore be contended that the unconditional in Derrida's thinking, which is tied closely to his views on language, exceeds what Van der Walt understands under plurality and that the unconditional exceeds phenomenology. In addition, questions will be raised concerning the political consequences of the legal theory of Van der Walt. It will be shown that, because his approach is phenomenological in nature and therefore allied with the metaphysics of presence, it almost inevitably has certain conservative political consequences. A different reading of Derrida, it will be argued, allows us to view plurality, sacrifice, reconciliation, politics, time, friendship, justification and hospitality in a different way so as to construct an alternative post-apartheid theory of law. As will briefly be shown, this holds important implications for constitutional interpretation.

This review of *LS* will roughly follow its chapters.¹⁹ A short overview of the book will first be given. This overview is necessarily somewhat simplistic, but

¹⁴ See, eg, Derrida "A Letter to Peter Eisenman" 1990 *Assemblage* 6, *Rogues: Two Essays on Reason* (2005) 173-175 n 14, "Critical Response II: But, beyond... (Open Letter to Anne McClintock and Rob Nixon)" 1986 *Critical Inquiry* 155, and *Limited Inc* 156-158 n 9 on Habermas's reading of Derrida.

¹⁵ See, eg, Derrida in "Die Tragiese, die Onmoontlike en die Demokrasie: 'n Onderhoud met Jacques Derrida" 1999 *Fragmente* 35 where Derrida engages *inter alia* with Johan van der Walt on the interpretation of his (Derrida's) texts.

¹⁶ Derrida *On the Name* (1995) 92-93.

¹⁷ See specifically Derrida *Limited Inc* 146-147.

¹⁸ See Derrida *Force of Law: The "Mystical Foundation of Authority"* in Cornell, Rosenfeld & Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 3 7.

¹⁹ For reasons of space, horizontal application and the death penalty – the focus of chapters 1, 2 and 4 – will not be analysed in detail. This does not mean that these chapters or the appendix will be ignored in the analysis that follows. The introductory chapter of *LS* will be referred to throughout.

it is meant to provide a context for the analysis that will follow. Thereafter a more detailed enquiry will be made into Van der Walt's analysis of language, existence and time, which will roughly correspond with chapters 6 and 7 of *LS*. The next enquiry will be into the unconditional in Van der Walt's thinking, more specifically with regard to hospitality and justice. This discussion is central to chapters 3 and 8 of *LS*. Chapter 5 of *LS*, on law and sacrifice, will be the focus of the analysis under paragraph 5 of this review. In concluding, a reading of *LS* will be attempted that seeks to align it more closely with that of Derrida. As will be shown, *LS* stands readily open to such a reading.

2 Themes and terminology

In the introductory chapter of *LS*, Van der Walt sets out the main themes of the book. Van der Walt indicates that he agrees with those in the Critical Legal Studies (CLS) movement who equate law and politics.²⁰ He says, however, that he will seek to resist this inevitable involvement of law with politics by drawing a distinction between politics and the political.²¹ Whereas politics (*la politique*) entails the exercise of power, which leads to the destruction of plurality, he associates the political (*le politique*) with democracy (an empty space),²² plurality, the public interest, the public, alterity, and otherness.²³ According to Van der Walt, judicial, legislative and executive decisions are inevitably in favour of one or some at the cost of another or others. In every judicial, executive or legislative decision, where two viewpoints are presented (what is referred to as plurality) one of these viewpoints will in other words be sacrificed in the decision that is taken. We can also say that in every case to be decided (the focus in the book is specifically on judicial decisions) there will be a retreat from the public, from the political, from plurality (a retreat from multiple possibilities, opinions and convictions occasioned by political differences and otherness).²⁴ A judicial decision thus "retreats" from plurality and plurality "retreats" from the judicial decision.²⁵

Van der Walt argues for the retrieval of plurality and of the political from its inevitable withdrawal in present representations thereof.²⁶ This withdrawal can be said to take place through a "privatisation" of the public, apartheid being the example par excellence of such privatisation.²⁷ Van der Walt consequently argues that the sacrificial dynamics of representation and privatisation that are at stake in every judicial decision must be examined and acknowledged. By doing this, a judicial decision would become a "political" decision, and a retrieval of plurality would in a certain sense be achieved. This approach

²⁰ *LS* 6 146.

²¹ Van der Walt *LS* 6-7 relies in this respect on the texts of Claude Lefort, Philippe Lacoue-Labarthe and Jean-Luc Nancy.

²² *LS* 56, relying on Claude Lefort.

²³ *LS* 6-7.

²⁴ *LS* 9-10.

²⁵ *LS* 9.

²⁶ *LS* 10. Van der Walt invokes Hannah Arendt to make his argument in favour of plurality (*LS* 8-9), although he is critical of Arendt's thinking insofar as it shows too uncritical a belief in the possibility of the political and of plurality.

²⁷ *LS* 8 10.

would allow one in each new decision that has to be taken, to again reconsider the sacrifices that were made earlier. It should be clear from the above that Van der Walt does not agree with depictions of the public or the public interest as a collective, as norms held in common, as a unity or a body of consensus.²⁸ The inevitable result of a judicial decision is nevertheless a representation that “reduces to oneness the multiple conflicting desires and concerns that inform the law in a contradictory fashion”.²⁹ Social ambiguity and multiplicity are in other words reduced through the judicial decision – they are turned into simplicity and oneness.³⁰ Van der Walt, however, argues, as we saw, that by acknowledging the sacrificial destruction of plurality performed by the judicial decision, plurality would be retrieved, albeit as lost plurality.³¹

The policy of apartheid in South Africa obviously involved excessive sacrifices.³² Post-apartheid law, Van der Walt argues, should consist in a constant regard for and an acknowledgement of the sacrificial destruction of otherness.³³ The idea behind the acknowledgement of sacrifice or the attempted retrieval of plurality is a restriction of social sacrifices to those that are absolutely inevitable.³⁴ As all judicial decisions (sometimes all “serious” ones)³⁵ inevitably involve sacrifice, the question arises which ones should be regarded as permissible. Determining whether sacrifice is excessive, calls for measurement. Van der Walt finds the appropriate measurement in the notion of justification.³⁶ All conduct by subjects or agents of social power should be subject to this requirement.³⁷ Unlike other (liberal) theorists, Van der Walt notes that justification should not be equated with justice or the provision of just grounds for a decision.³⁸ In fact, there should be an acknowledgement in a judicial decision of the inevitably “unjust grounds” on which every such decision is based.³⁹ This clearly ties in with the earlier insistence on the recognition of sacrifice and the need for the “retrieval” of plurality in a judicial decision. It also ties in with Van der Walt’s insistence on horizontality. In accordance with his proposal, the claim of a losing party will not be dismissed, but “set aside”, thereby keeping it “alongside”.⁴⁰ This is an attempt at ensuring a “non-normative human dignity”, a radical equality, co-existence, or the horizontality of mortals, although these will always remain in retreat.⁴¹

²⁸ LS 8 10.

²⁹ LS 11.

³⁰ LS 11.

³¹ LS 11-12.

³² LS 13.

³³ LS 139.

³⁴ LS 13 149.

³⁵ See LS 9 and 201-204; “The crisis of application inheres in the inevitability of having to reduce to oneness or one sentence and thus destroy the plurality of convictions that inform every serious legal question or conflict.” Cf LS 11 (all judicial decisions); LS 70-71 (all decisions); LS 147 (each and every legal decision); LS 208 (every judicial decision); LS 226 (every judicial decision).

³⁶ LS 72.

³⁷ LS 74.

³⁸ Van der Walt LS 15 here invokes Derrida’s distinction between law and justice.

³⁹ LS 15.

⁴⁰ LS 16 24-25.

⁴¹ LS 17.

3 Language, existence and time

At the heart of the argument presented in *LS* is the relationship between language, time and what Van der Walt refers to as “existence”. In the introductory chapter Van der Walt notes that in chapter 7 he will articulate

“an understanding of phenomenology as the retrieval of the irreducible plurality of existence that withdraws from the destruction of plurality that takes place in every particular representation of existence at any given point in time. The retrieval of the political from (its retreat from) politics and legal politics that the understanding of law as sacrifice pursues turns on this phenomenological retrieval of plurality.”⁴²

In the rest of *LS* and specifically chapter 7, Van der Walt takes the interesting and challenging step of seeking to reconcile this thinking (which he relates to that of Nancy, Lacoue-Labarthe, Lefort and Heidegger) with that of Derrida. Hospitality in Derrida’s thinking, Van der Walt tells us, “too also comes to the fore in the event of a tragic juridical destruction of hospitality”.⁴³ Hospitality is a necessary part of plurality. Van der Walt puts it as follows:

“Hospitality is the *condition without which* the other cannot appear alongside the self so as to bring about plurality. However, hospitality is also the condition of the retreating advent *through* which plurality becomes possible.”⁴⁴

From the introductory chapter it becomes clear that Van Walt draws a correlation between that which comes to presence (or present actualisations of existence) and representation. That which is present is also that which is represented. Plurality (or the political or the public), however, withdraws from the “process of representation”, he tells us.⁴⁵ Representation destroys the plural.⁴⁶ In chapter 7 Van der Walt elaborates on this through his reading of Derrida’s *Rogues* and *Speech and Phenomena*⁴⁷ and the analysis there of sovereignty and the notions of time and signs in Husserl. Van der Walt’s reading, which at first appears unproblematic, shows how the two texts tie in with each other in respect of sovereignty and consciousness.⁴⁸ Consciousness, he argues with reference to Derrida, can never be purely present to itself. It is always in need of “external” signs, language or communication. The same applies to sovereignty. Whereas Husserl believed that linguistic signification simply repeats in a secondary fashion an original meaning, Derrida maintains that “present meaning is the product of repetition”.⁴⁹ “It is the repetition of the sign under varying circumstances”, Van der Walt reminds us, which “allows for its specific meaning under present circumstances”.⁵⁰ Leaving out a few lines that relate more directly to time, to which we will return shortly, Van der Walt tells

⁴² *LS* 7.

⁴³ *LS* 12.

⁴⁴ *LS* 12.

⁴⁵ *LS* 12 206. See further *LS* 200-204 where this reduction from plurality to oneness is elaborated on with reference to Agamben’s discussion of the passage from *langue* to *parole* and of the senate (*auctoritas*) and magistrates (*potestas*) in Roman law.

⁴⁶ *LS* 10.

⁴⁷ (1976).

⁴⁸ *LS* 217-218.

⁴⁹ *LS* 218.

⁵⁰ *LS* 218.

us that “Derrida would assert *contra* Husserl that the sign, which always signifies absence (since signification would not be necessary if the signified were present), is older than the presence that Husserl ascribes to meaning”.⁵¹ This reading of Derrida has enormous potential. It hints at Derrida’s “diagnosis” of philosophical thinking from Plato to Hegel (and even Heidegger) as being based on a view of language which privileges presence, as well as the intention and consciousness of the subject, and the proximity of the voice.⁵²

Taking our leave from *LS* for a moment, Derrida questions the classical assumptions regarding the meaning-function of language, that it is structured or made possible by the intentional and conscious acts of a speaker fully present to him- or herself.⁵³ This idea is based on the assumption that language is simply a transparent medium or vehicle for the transportation of meaning, which is already present prior to the act of uttering or writing down of words to the consciousness of the speaker or writer.⁵⁴ Derrida contends that language is not a self-transparent medium for thought – neither in the case of speech nor of writing.⁵⁵ In enquiring into that which makes meaning possible, Derrida points out that the marks⁵⁶ that are used by the speaker or the writer can function in their absence as well as in the absence of the intended addressee, also in the event of their death.⁵⁷ Iterability, the ability of language to function and produce effects in the absence of the speaker or sender and addressee, the (secret) law of language in other words, entails more than the classical concept of repetition (repeating an original thing which comes first).⁵⁸ An “essential” feature of language is its “non-presence”: it can function and produce effects without the self-present thought of a subject, also in the event of his or her death. The relation with death is therefore also an essential feature of language. Taking account of Freud’s insight into the death drive and the logic of the repetition compulsion, which play a deciding role in our reliance on language, we can say that language is structured by the relation to death, which can be referred to as a type of structural unconscious.⁵⁹ Language or the marks of language are thus not made possible by a subject or a signified; these are effects of that which structures language.⁶⁰ This has the consequence that language cannot be possessed, that it cannot be appropriated.⁶¹ The appropriations that do take place are effects of the structure of language, and do not arise from a pure self-present identity or from reality. Language, Derrida points out, is the

⁵¹ *LS* 219.

⁵² See, eg, Derrida *Dissemination* (2004) 67-186, *Of Grammatology* (1974) 3-26, *Speech and Phenomena* 3-26.

⁵³ See in this respect all the essays of Derrida in *Limited Inc* (1988). Space does again not allow for a full analysis.

⁵⁴ This is also the dominant way in which Constitutions are viewed in legal theory.

⁵⁵ *Of Grammatology* 166-167.

⁵⁶ Derrida sometimes uses the term “mark” rather than sign because of the sign’s metaphysical presuppositions. The notion of the sign is based on the distinction and link between a signifier and a signified: see Derrida *Speech and Phenomena* 138, *Positions* (2004) 17-22.

⁵⁷ Derrida *Margins of Philosophy* (1982) 316-317.

⁵⁸ Derrida *The Post Card: From Socrates to Freud and Beyond* (1987) 351, *Limited Inc* 70-71.

⁵⁹ Derrida *The Post Card* 341 343-344 351-352 362, *Speech and Phenomena* 40, *Margins of Philosophy* 18-19, *Limited Inc* 73.

⁶⁰ Derrida *Limited Inc* 76, *Glas* (1986) 4, *Positions* 25-26, *Margins of Philosophy* 16-17.

⁶¹ Derrida *Monolingualism of the Other; or, The Prosthesis of Origin* (1998) 23-25 40 68.

language of the other; it returns to the other, exists asymmetrically, always for the other, kept by the other, coming from the other, *the* coming of the other.⁶² The “other” here should not be understood as another person or being. The “other” concerns, first of all, representation and the relation with death.⁶³ The functional structure of language thus entails non-life, non-presence, non-possession, expropriation, unconditional justice, absolute hospitality, and the perfect gift.

This structure of language is not, however, what Van der Walt explores. Let us return now to the passages in *LS* which set out the argument on time that were left out previously, which may explain Van der Walt’s approach.⁶⁴ Van der Walt refers here to Husserl’s insight that the present moment retains within itself the moment preceding it and an anticipation of the moment that will succeed it. In the introductory chapter of *LS*, Van der Walt also tells us that Derrida’s notion of counter-time is derived from Husserl’s phenomenology of inner time consciousness.⁶⁵ In terms of this analysis, a present moment always retains traces of the past and the future. The present is thus never simply and fully itself. Derrida, Van der Walt asserts, nevertheless criticises Husserl for his attempt to found phenomenology on the presence of a present moment. According to Van der Walt, Derrida radicalises phenomenology and “emphasises the exteriority, the pasts and futures that produces what appears to be a present moment”.⁶⁶ Van der Walt refers in this regard to the “spectral mode of the future anterior” in Derrida’s thinking, “the moment that will have been without ever having been present”.⁶⁷ In the same vein, Van der Walt, in chapter 7, contends the following regarding Husserl’s insight regarding time:

“This insight, argued Derrida, confirms the presence of a non-presence and an alterity in the very moment (*Augenblick*) of full presence that Husserl ascribes to original meaning. Husserl’s ‘originary’ moment of meaning’s ‘immediate’ and ‘indivisible’ self-presence (or *ipseity*, as Derrida would put it in *Voyous*) is always already divided in itself between presence and non-presence, identity and alterity.”⁶⁸

With reference to Derrida, Van der Walt extends this idea to the notion of a “counter-time of a counter-day” which “disjoins the present of the present”.⁶⁹ This is the time of friendship, Van der Walt tells us, “albeit the mourning survival of ruined friendships, the time of friendship that manifests itself only by withdrawing from presence”.⁷⁰ Van der Walt relates this understanding of time

⁶² Derrida *Monolingualism of the Other* 40–68.

⁶³ See Derrida *Glas* 78. See further 78–79 where Derrida brings the phrase “I am already dead, even before living” in relation to his discussion of Husserl in *Speech and Phenomena*.

⁶⁴ *LS* 218–219. On my reading, Derrida in the first pages of *Speech and Phenomena* (see also chs 1–7) does not refer to a distinction that Husserl draws between expression (*Ausdruck*) and meaning (*Bedeutung*) (see *LS* 217), but instead to a distinction between signs of expression (*Ausdruck*) and of indication (*Anzeichen*). This distinction relates to the privilege that Husserl grants to consciousness and self-present meaning. Derrida complicates this distinction by showing that all signs (also when used in silent monologue) are caught up within an indicative process, another name for the relation with death (40–54). Van der Walt’s reading necessarily affects, at least in an indirect way, the way in which he views the “notion” of counter-time in Derrida’s thinking.

⁶⁵ *LS* 23.

⁶⁶ *LS* 23.

⁶⁷ *LS* 23.

⁶⁸ *LS* 218–219.

⁶⁹ *LS* 219. See also *LS* 22.

⁷⁰ *LS* 219.

also with sovereign judicial decisions which, as we saw above, dismiss for the moment one of two competing claims to justice. Such a present statement of the law in a present moment is “always already divided within itself by the non-presence of past and future possibilities of the law”.⁷¹

The question that arises is how we managed to move from Derrida’s thinking of language as something which cannot be possessed and thus unconditional justice or absolute hospitality, to a view of justice which is related to the competing claims of justice of the parties to a legal dispute. Can *Speech and Phenomena* be read so as to say that Derrida adopts the insight of Husserl on time? Is the “counter-time” or the “future anterior” which Van der Walt speaks of, the same as what Derrida “means” when he refers to time in this way? This question is already problematic, because it assumes that for Derrida, time is something that is related to meaning. This is not the case, and here, on my reading, lies the main difference between Derrida’s “notions” of “counter-time” and the “future anterior”, and the views of Van der Walt.

Before we return to *Speech and Phenomena*, we need to look at a number of Derrida’s other texts that relate to time. In *Gift of Death*, Derrida reads Kierkegaard’s analysis of the sacrifice of Isaac by Abraham. Derrida refers to the paradoxical situation within which Abraham finds himself: on the one hand he has to sacrifice his son (and therefore himself) in terms of God’s command; on the other hand, doing so would constitute murder in the eyes of law and ethics. Derrida also points to Kierkegaard’s famous expression that “the instant of decision is madness” and continues as follows:

“The paradox cannot be grasped in time and through mediation, that is to say in language and through reason. Like the gift and ‘the gift of death’, it remains irreducible to presence or to presentation, it demands a temporality of the instant without ever constituting a present. If it can be said, it belongs to an atemporal temporality, to a duration that cannot be grasped: something one can neither stabilize, establish, grasp [*prendre*], apprehend, or comprehend.”⁷²

Similar passages can be found in many of Derrida’s other texts where he relates this a-temporality or the “future anterior” with the incalculable, the unconditional, the “to come”, and the impossible, as that which makes time and meaning possible.⁷³ The a-temporal “is” in other words a time that will never be present; it exceeds the time of the present, and bears no relation to a past or a future as a modified presence.⁷⁴ This allows us to analyse more closely the passage which Van der Walt quotes from *Speech and Phenomena*, and which informs his view of counter-time:

“As soon as we admit this continuity of the now and the not-now, perception and nonperception, in the zone of primordially common to primordial impression and primordial retention, we admit the other into the self-identity of the *Augenblick*; nonpresence and nonevidence are admitted into the *blink of an instant*. There is a duration to the blink, and it closes the eye. This alterity is in fact the condition for presence...”⁷⁵

⁷¹ LS 220.

⁷² Derrida *The Gift of Death* (1995) 65.

⁷³ See, eg, Derrida *Given Time: I. Counterfeit Money* (1992), *Acts of Literature* (1992) 416-433, *Politics of Friendship* (1997) 16-17 26-48 249-250, *Rogues* 35-39, *Hostipitality* in Thomassen (ed) *The Derrida-Habermas Reader* (2006) 225-226, *Force of Law* 26-28, *Glas* 79.

⁷⁴ Derrida *Speech and Phenomena* 142-143.

⁷⁵ Derrida *Speech and Phenomena* 65, LS 219.

There are no major differences between Van der Walt's translation and the one cited above. At stake is how we understand this passage, specifically the phrases the "continuity of the now and the not-now"; "we admit the other"; or as Van der Walt has it, "one welcomes the other"; and "[t]his alterity is in fact the condition for presence". We already have some idea of how Van der Walt understands these phrases and how it will significantly affect the way in which he understands justice and its relation to law. What was said above regarding a-temporality in Derrida's thinking must already raise questions about Van der Walt's interpretation. From the context of the above passage it is clear that Derrida does not adopt Husserl's notion of inner-time consciousness. According to Derrida, Husserl still privileges the present or the now through retention.⁷⁶ Husserl also privileges the present through the notion of solitary discourse, which, according to Husserl, requires no expression, representation, or language: it is a moment of pure presence.⁷⁷ Derrida, however, shows that another logic is at work in Husserl's text and that Husserl himself agrees that solitary discourse cannot take place without signs or representation.⁷⁸ Like Husserl (and Rousseau as we will see below), Van der Walt finds representation problematic. He contends that Derrida has similar problems with representation.⁷⁹ My reading of Derrida's texts does not confirm this contention. For Derrida the sign or representation "is" the moment of non-presence, alterity or the relation with death that always disrupts presence.⁸⁰ This also complicates Husserl's insight into the dividedness of a present moment in time. It is not simply that the present moment refers to past and future moments,⁸¹ but that time is always disrupted by the non-presence produced by signs.⁸² As we saw above, this does not refer simply to a past or future moment, but to a time that has never been present. The not-now and nonperception that Derrida refers to in the quotation above is consequently not a reference to a past or future present, but to expression, representation, language, or the relation with death, which "is" a non-presence.⁸³ The admission or welcome of the other and the "notion" of alterity must similarly be understood in terms of the impossibility of pure presence of the self to itself.⁸⁴ Even in the case of silent thinking or internal monologue,

⁷⁶ Derrida *Speech and Phenomena* 61-69. See also Derrida *Margins of Philosophy* 34.

⁷⁷ Derrida *Speech and Phenomena* 70-87.

⁷⁸ Derrida *Speech and Phenomena* 82.

⁷⁹ See eg *LS* 28 where Van der Walt refers to Derrida's alleged "acute regard for the reductive dynamics of sacrifice that lies at the heart of representation and the representational mode of thinking that commence the moment one needs to state the status of something".

⁸⁰ See also Derrida *Of Grammatology* 295-316 where Rousseau's criticism of representation is analysed.

⁸¹ Van der Walt *LS* 23 puts this as follows: "Instead of the present, Derrida's deconstruction or radicalisation of phenomenology emphasizes the spectral mode of the future anterior, the moment that will have been without ever having been present. This moment is or will always have been spaced between and thus displaced by pasts and futures, expropriated by pasts and futures" (footnote omitted).

⁸² See Derrida *Speech and Phenomena* 15: "[S]ince the possibility of constituting ideal objects belongs to the essence of consciousness, and since these ideal objects are historical products, only appearing thanks to acts of creation or intending, the element of consciousness and the element of language will be more and more difficult to discern. Will not their indiscernibility introduce nonpresence and difference (mediation, signs, referral back, etc) in the heart of self-presence?"

⁸³ See Derrida *Speech and Phenomena* 6-7 15. Van der Walt's view of death is tied to horizontality: see *LS* 82.

⁸⁴ Cf specifically Derrida *Speech and Phenomena* 58-59 60 where Derrida speaks of non-alterity within the context of Husserl's discussion of internal monologue or pure presence to the self which according to Husserl does not entail the use of signs.

language or representation is involved; the other or alterity, which must here be read as a reference to (the law of) language or representation, “is” in other words admitted or welcomed: we are never quite alone with ourselves in self presence so as to found a pure source from which knowledge can be derived.⁸⁵ The fact that time belongs to no one,⁸⁶ does not therefore mean, at least not for Derrida, that it belongs to everyone.⁸⁷ Regarding time still as belonging, albeit to everyone, is very likely to lead to a conservative politics. The same is likely to happen if one views democracy as a temporal democracy, as a “government by everyone and no one”.⁸⁸ Such a democracy still remains attached to self-government or the notion of the power of the people.

The above analysis also enables us to understand differently the reference of Van der Walt to Derrida asserting “*contra* Husserl that the sign... is older than the originary presence that Husserl ascribes to meaning”.⁸⁹ Even in the event of internal discourse, as we saw above, language is admitted or welcomed “into the self-identity of the *Augenblick*”. As his other texts also show, Derrida has no complaint that language cannot succeed in adequately representing reality or existence. Everything begins with representation, Derrida says.⁹⁰ In *Of Grammatology*,⁹¹ Derrida shows the problematic relation of Rousseau with signs and representation. There are marked similarities between Derrida’s analysis of Rousseau and *LS* in relation to the notion of representation. According to Rousseau, signs and representation disrupt pure presence. Van der Walt similarly finds representation problematic because it cannot adequately present the irreducible plurality of existence. Rousseau and Van der Walt both seek a return to an origin, which is believed to precede representation – Rousseau to nature and the people as pure presence, and Van der Walt to (consciousness of) the irreducible plurality of existence.⁹² Representation, necessary as it may be, must according to Rousseau and Van der Walt remain as close as possible to reality, nature or existence. Rousseau therefore insists that the representatives need to be changed often and that speech or the living voice need to characterise political discourse.⁹³ Van der Walt in similar fashion insists that plurality

⁸⁵ See also *LS* 214 n 61 where Van der Walt links his phenomenological approach with the attainment of a secure basis for knowledge.

⁸⁶ See *LS* 17 24; Derrida *Given Time* 3.

⁸⁷ See *LS* 24 83 on time belonging to everyone.

⁸⁸ *LS* 17 24 56.

⁸⁹ *LS* 219.

⁹⁰ Derrida *Speech and Phenomena* 45 n 4 – taking account of the fact that both “begin” and “representation” must not be understood in their traditional sense. Representation should not be understood here as the making present in signs of something which is already present in reality. This would be a metaphysical understanding of representation.

⁹¹ 295-316.

⁹² The predominant approach in legal thinking is to regard the people as presence or legitimating source of a Constitution; see, eg, Böckenförde *Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts* (1986); Mohnhaupt & Grimm *Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* 2 ed (2002) 100-141; Rubenfeld *Legitimacy and Interpretation* in Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 194-234. See, eg, Derrida *Of Grammatology* 197 on Rousseau: “On several levels, nature is the ground, the inferior step: it must be crossed, exceeded, but also rejoined. We must return to it, but without annulling the difference. This difference, separating the imitation from what it imitates, must be *almost nil*.”

⁹³ See Derrida *Of Grammatology* 302.

needs to be retrieved from representation. Derrida,⁹⁴ however, shows how what is assumed to be without representation (for example, nature in Rousseau) is always already affected by representation. Derrida, as we saw, similarly finds it problematic that Husserl posits a pure self-presence and that he views signs as secondary.⁹⁵ Husserl also seeks a moment of pure self-presence without representation.⁹⁶ No irreducible plurality of existence, pure self-consciousness or nature can, however, be said to precede language from which point of view language can be viewed or thought of.⁹⁷ It is impossible to distinguish rigorously between representation and (consciousness of) reality.⁹⁸ It is not therefore, according to Derrida, the case that something goes wrong or gets lost in representation, but rather that representation cannot be viewed from a position of pure self-presence. It can only be viewed from the “law” which structures it, or what Derrida refers to as *différance*, general writing, or iterability.⁹⁹

As we have seen above, Van der Walt equates that which is represented with (what comes to) presence. When he refers to Derrida saying that the sign “always signifies absence”, we now see that he understands this as an absence in the sense of something (a signified) that does not get represented in the sign. This is of course an important aspect of Derrida’s thinking regarding language, but the consequences Van der Walt draws from this are, I would contend, different from those drawn by Derrida.¹⁰⁰ Van der Walt retains the notion of the sign – the distinction between a signifier and a signified – and in this way leaves open the possibility of a signified existing in itself, outside of language and purely present to thought.¹⁰¹ For Derrida, as we saw above, this absence of a signified, as well as the absence and potential death of the speaker/sender and the addressee, is what structures language and holds important implications, *inter alia* the impossibility of its being possessed. This is because, as the phrase “there is nothing outside the text” indicates, there is no transcendental signified outside of language, which can root language in something fixed and certain.¹⁰² “[E]very signified is also in the position of a signifier”, Derrida¹⁰³ says. For Van der Walt, as we saw, this absence (the irreducible plurality of existence which functions as transcendental signified) needs to be retrieved from representation. As Derrida¹⁰⁴ explains, keeping the notion of the sign inevita-

⁹⁴ *Of Grammatology* 309–312.

⁹⁵ See also *LS* 217–218.

⁹⁶ See also *LS* 217–218.

⁹⁷ See in this regard Derrida *Limited Inc* 93 on this characteristic of all metaphysical thinking which he describes as follows: “The enterprise of returning ‘strategically,’ ideally, to an origin or to a ‘priority’ held to be simple, intact, normal, pure, standard, self-identical, in order *then* to think in terms of derivation, complication, deterioration, accident, etc.”

⁹⁸ Derrida *Speech and Phenomena* 15–49.

⁹⁹ The non-concept of *différance* of course ties in with what was said above regarding the structure of language. It engages *inter alia* with the contention of Ferdinand de Saussure that in language there are only differences without positive terms and that language is not a function of the speaking subject (the subject is inscribed in language or a function of language). It also engages with the Freudian notion of the death instinct and the putting off, postponement or placing in reserve of the relation to death: see Derrida *Margins of Philosophy* 3–27, *Positions* 22–27.

¹⁰⁰ See specifically in this regard Derrida *Margins of Philosophy* 319–321.

¹⁰¹ See Derrida *Positions* 19 commenting on De Saussure.

¹⁰² Derrida *Limited Inc* 148.

¹⁰³ *Positions* 19.

¹⁰⁴ *Positions* 20.

bly leads to privileging the voice as being closest to the thought of the signified concept. Speech, it is believed, erases the signifier as soon as it is uttered, making it transparent and reducing the exteriority of the signifier.¹⁰⁵ We detect something of this not only in the fact that Van der Walt denigrates representation, but also when he says that “[m]an is irreducibly the animal *with* language. He can at most become the animal that fails or refuses to speak, fails or refuses to speak or acknowledge sacrifice.”¹⁰⁶ Speaking, it appears from this passage, is for Van der Walt the way in which the (absent) signified can best be made “present”.¹⁰⁷

Because of his adoption of the metaphysical notion of the sign, Van der Walt effectively adopts three levels of analysis: (1) the irreducible plurality of existence before language comes into play, which consciousness can become aware of through phenomenological reduction; (2) sovereignty, law, politics and language which fail to acknowledge the sacrifice involved in representation; and (3) law and language, which acknowledge sacrifice and therefore retrieve plurality.¹⁰⁸ Although Van der Walt appears to be following Derrida in not regarding plurality (on level 1 and in a sense, level 3) as a “presence”,¹⁰⁹ representation is for Van der Walt, as in all metaphysical thinking, a mere transition stage in the turn of the circle of *logos* from the self (consciousness) back to itself. Language, we can also say, for Van der Walt, provides the mediating point between *archē* and *telos*. The consequences of these seemingly small differences in thinking about language are immense, as will appear shortly. At the risk of repetition, for Derrida there can be no pure self-presence or an irreducible plurality of existence of which consciousness can become aware because language, and thus representation, is always already involved.¹¹⁰ Derrida puts this as follows:

“But there is every reason to believe that representation and reality are not merely added together here and there in language, for the simple reason that it is impossible in principle rigorously to distinguish them. And it doesn’t help to say that this happens *in* language; language in general – and language alone – *is* this.”¹¹¹

For Derrida there is thus no level 1, as there is for Van der Walt, because language is always already involved. There “is” only language, but language “is” structured by death and dispossession.¹¹² The three levels of analysis in Van der

¹⁰⁵ Derrida *Positions* 20-21.

¹⁰⁶ *LS* 134.

¹⁰⁷ Cf in this respect Derrida’s comments on Husserl’s similar strategy in *Speech and Phenomena* 16.

¹⁰⁸ See specifically *LS* 10.

¹⁰⁹ *LS* 7 8 12 16 23. Plurality is sometimes referred to in the same breath as the ideal of revolutionary constitutionalism: see *LS* 39-40. On the ideal in phenomenology, see Derrida *Speech and Phenomena* 53-54.

¹¹⁰ Derrida *Speech and Phenomena* 48-49.

¹¹¹ Derrida *Speech and Phenomena* 49-50. See also Derrida *Limited Inc* 83 102 on the transgression of “the alternative of existence and non-existence”. We can now see that Van der Walt’s notion of representation as that which comes to presence, referred to at the beginning of this paragraph, conforms with the classical idea of representation – a reduplication (an inadequate one in this case) that befalls simple presence: see Derrida *Speech and Phenomena* 45 n 4 and 57 n 6.

¹¹² Language thus always involves violence, but in a different sense than is usually understood in legal scholarship with reference to Derrida. The violence that is at stake in language deprives us of our possession thereof, deprives us of self-presence, and thus opens the possibility for unconditional justice: see Derrida *Of Grammatology* 112.

Walt's thinking also explain his reliance on Derrida in favour of a phenomenological approach to justice.

The phenomenological approach adopted by Van der Walt in relation to adjudication is partly a result of his reading of Derrida as "belonging to a line of phenomenological thought that runs from Husserl and through Heidegger".¹¹³ Derrida is relied on in this context because of his "radical extension" of the phenomenology of Husserl and Heidegger.¹¹⁴ Whereas Husserl's phenomenology merely "traverses plurality" and "ultimately celebrates a return to oneness", Heidegger and Derrida mourn ruined pluralities, according to Van der Walt.¹¹⁵ Van der Walt traces this "mourning" to Heidegger's reflections on the ontological difference and the retrieval of the *lêthe* of *alêtheia* as well as to Derrida's reflections on the ruins of friendship (understood as plurality).¹¹⁶ Van der Walt, through a phenomenological reduction or bracketing of naïve consciousness, seeks to expose to consciousness the irreducible plurality of existence. This reduction in other words seeks to "bracket" language or representation.¹¹⁷ From this (stable) position of phenomenological awareness, language and law would then be judged inadequate, as not being able to adequately represent existence. The destruction of plurality, according to Van der Walt, comes about because of the sacrificial structure of language and law, being unable to represent plurality.¹¹⁸ A critical phenomenology, Van der Walt concludes, "would ultimately have to retrieve plurality from its ruins".¹¹⁹ This should happen, as we saw above, through the acknowledgment of the sacrifice that takes place through every judicial decision which ruins the multiple possibilities or plurality of the law.¹²⁰ Van der Walt, we also noted above, relates justice to the unfulfilled claim to justice of each of the parties to a dispute, or plurality.¹²¹

It should already be clear from the above exposition, that Derrida's relationship with phenomenology (as well as with Husserl and Heidegger) is complex, somewhat more complex, I would suggest, than indicated by Van der Walt.¹²² We already noted that Derrida shows the impossibility of distinguishing rigorously between language and consciousness of reality, a distinction which

¹¹³ LS 27 28.

¹¹⁴ LS 223. Van der Walt LS 191 223 specifically invokes Derrida *Force of Law* 22-24 in support of his phenomenological approach where Derrida speaks of the *epokhê* of the rule.

¹¹⁵ LS 206: "For Heidegger and Derrida...the closest that *logos* can ever come to *ousias* is through mourning the destruction of the multiplicity of *ousias* by the unitary representation of *logos*." See also LS 208-209.

¹¹⁶ See LS 16 209-214 219-224. Truth (*alêtheia*) unveils itself (in representation), but always remains hidden, withdrawn or veiled (its state of *lêthe*): LS 211. See further par 4 2 *infra* on friendship.

¹¹⁷ See also Derrida *Speech and Phenomena* 43-44 58.

¹¹⁸ LS 196.

¹¹⁹ LS 208 (also LS 223-224).

¹²⁰ LS 134.

¹²¹ LS 219 (also LS 16).

¹²² This is not the place to go into the detail of Derrida's agreements and differences with Heidegger. Derrida undoubtedly admires this very profound thinker of the 20th century, but see, eg, Derrida *Positions* 8-9 and 48-49 where he indicates his movement away from Heidegger because the latter's texts still show signs of belonging to metaphysics. Heidegger also continues to privilege the voice and shows a disdain for literature. See also Kearney *Dialogues with Contemporary Thinkers* (1984) 109-110 where Derrida indicates that the major difference between him and Heidegger lies in their relation to language. This does of course not mean that Heidegger's texts (as well as those of Plato, Aristotle, Hegel, Husserl and others) are homogeneous. As will be shown in par 6 *infra*, this is also the case with LS.

phenomenology insists on and which Van der Walt attempts to complicate, but in the end retains.¹²³ Phenomenology furthermore follows metaphysics in relying on the “*presence* of sense to a full and primordial intuition” as source for knowledge.¹²⁴ Van der Walt follows in the steps of phenomenology and metaphysics in this respect insofar as he relies on the consciousness of the irreducible existence of plurality as source of knowledge concerning language and law.¹²⁵ Non-presence (language) is in other words thought of from the position of presence (the irreducible plurality of existence of which consciousness must become aware).¹²⁶ Phenomenology is also problematic in other respects. The “phenomenological *epokh *”, as Derrida has pointed out (and as is arguably the case with Van der Walt’s phenomenology) is “carried out *in the name and in the sight of meaning*”.¹²⁷ In the phenomenological plurality of Van der Walt there is no transgression of meaning. Meaning remains tied to the interests of the parties to a dispute and therefore remains caught within a restricted economy.¹²⁸ Derrida, through the “*epokh * of the rule”, does not on my reading confront us with the crisis of having to reduce to one the multiple claims to justice of the parties to the dispute as Van der Walt contends.¹²⁹ As we will see in more detail below, Derrida, by “bracketing” law, inscribes it within that which it cannot control: non-meaning, dissemination, dispossession, death, unconditional justice.¹³⁰ The latter non-concepts do not belong to, but instead exceed or suspend phenomenology.¹³¹ Van der Walt’s phenomenological approach is in

¹²³ Derrida *Speech and Phenomena* 43-44 58.

¹²⁴ Derrida *Speech and Phenomena* 5.

¹²⁵ On the essential link between phenomenology and metaphysics, see Derrida *Writing and Difference* (2001) 208-209 and *Speech and Phenomena* 4-5 9. See also *LS* 218. One has to be very careful in reading Derrida’s statement in *Positions* 9-10, referred to in *LS* 221, that, as Van der Walt puts it, “[t]here is no transgression, no beyond of metaphysics”. The whole passage cannot be quoted here, but note that Derrida says “[t]here is *not* a transgression, if one understands by that a pure and simple landing into a beyond of metaphysics, at a point which also would be, let us not forget, first of all a point of language or writing... But by means of the work done on one side and the other of the limit the field inside is modified, and a transgression is produced that consequently is nowhere present as a *fait accompli*.”

¹²⁶ See *LS* 213-217. Cf in this respect Derrida *Margins of Philosophy* 34. As we saw, Van der Walt *LS* 218-219 refers to alterity in the same breath as the “presence of a non-presence”. Absence for Van der Walt *LS* 219 is “a spectral, if not eerie counter-mode of presence”. As Derrida *Margins of Philosophy* 65, however, notes, absence is simply a negative form of presence.

¹²⁷ Derrida *Writing and Difference* 339. See, eg, *LS* 174: “The *political element* of ‘political liberalism...only arises when two or more possible meanings or possible applications of a centrally undisputed constitutional or other normative value’ are disputed. The *political* arises only with the occurrence of a plurality of conflicting opinions regarding the norms we supposedly hold in common.” Van der Walt also speaks of plurality in terms of the “ambiguity” in the law (*LS* 140 141). Ambiguity, like polysemia, but unlike dissemination, is still within the realm of meaning: see Derrida *Margins of Philosophy* 310, *Monolingualism of the Other* 26.

¹²⁸ See also Derrida *Writing and Difference* 343. Van der Walt *LS* 226 distinguishes between pure conflict and representations of conflict. Even “pure conflict” (“as yet unresolved and untainted by any steps toward hermeneutic or symbolic resolution”) appears still to be tied to meaning (although not to hermeneutic resolution).

¹²⁹ *LS* 203. Cf Derrida *Force of Law* 22-24.

¹³⁰ Derrida *Writing and Difference* 339. As appears from the rest of this article, Van der Walt’s interpretation of the mystical foundation of law as referring to plurality (*LS* 71 204) is highly contestable. The mystical foundation should, for the reasons stated, instead be read as related to unconditional justice (see Derrida *Force of Law* 19-20). See also Derrida *Faith and Knowledge: The Two Sources of “Religion” at the Limits of Reason Alone* in Derrida & Vatimo (eds) *Religion* (1998) 1 18-19 on the mystical foundation of authority as that which allies the secret on the one hand to foundation and knowledge on the other. See further Derrida *Writing and Difference* (2001) 334 on sovereignty and silence in Bataille.

¹³¹ Derrida *Rogues* 148-150, *Adieu to Emmanuel Levinas* (1999) 51-54, *Writing and Difference* 339; Derrida & Ferraris *A Taste for the Secret* (2001) 34.

other words built on the problematic notion of a consciousness purely present to itself. As Derrida has shown in relation to Husserl, and as Van der Walt himself acknowledges¹³² there can be no pure self-consciousness, which is not from the beginning infiltrated by language.

This enables a different understanding of what Derrida says in *Rogues* about sovereignty. As Van der Walt correctly points out, sovereignty has to be expressed in language.¹³³ Van der Walt, as we, however, saw above, retains consciousness as the ultimate source of knowledge concerning law. Sovereignty in the guise of consciousness thus remains the structuring principle of law as sacrifice. If sovereignty's condition of possibility is, however, to be found in the law of language, in counter-time, as Derrida contends, sovereignty is in radical fashion deprived of its identity. Its exercise would then not simply be conditioned by opposing claims to justice, but by auto-immunity, unconditional justice, or incalculable reason.¹³⁴ As we will see in what follows, Van der Walt's views on language and time as well as his phenomenological approach significantly affect the way in which he views the unconditional in Derrida's thinking and the notion of sacrifice.

4 The conditional and the unconditional

4.1 Hospitality and justice

As we saw above, Van der Walt regards hospitality as the *conditio sine qua non* of plurality, the condition without which the other cannot appear alongside the self so as to bring about plurality.¹³⁵ In this respect, Van der Walt relies on Derrida's analysis of hospitality in the context of a commentary (by Derrida) on Camus's *L'Hôte*.¹³⁶ In the story, as Van der Walt tells it, a French geography teacher has to take an Arab prisoner to a police station. The teacher simply indicates to the prisoner where the prison is and leaves it to the prisoner to get there. The teacher is unsure whether the prisoner will indeed go to the prison, but he does. Van der Walt refers to Derrida's comment that Camus maintains the ambiguity of the French word *l'hôte*. Van der Walt in turn comments as follows on this analysis:

"L'hôte means both 'host' and 'guest' and thus leaves open the question as to who is being the host and who the guest. The story thus portrays a non-subjective hospitality that exists between the French teacher and the Arab prisoner and cannot be said to originate in either one of them. At issue for Derrida is a certain event of hospitality, a certain differential event that graciously lets both the teacher and the prisoner be. For a moment at least, the hierarchical or vertical relation between the coloniser and the colonised is replaced or displaced by a horizontal relationship of mutual responsibility. The event of hospitality opens up the space that allows for the coming together of more than one. The

¹³² LS 217-218.

¹³³ LS 217. From LS 213 it appears that Van der Walt equates sovereignty and representation or language, whereas Derrida, as will be argued here, sees it differently.

¹³⁴ Derrida *Rogues* 109 141 149. Although the terminology is somewhat different ("sovereignty" taking the place of the unconditional in *Rogues*, and "lordship" that of sovereignty), the same ideas are expressed by Derrida in his reading of Bataille in *Writing and Difference* 334-335.

¹³⁵ LS 12 220.

¹³⁶ See Derrida *Responsabilité et Hospitalité* in *Derrida et al Manifeste pour l'Hospitalité* (1999) 111 117-119.

event of hospitality can thus be said to constitute the heart of the plurality that Arendt avers to be the *conditio sine qua non* and *conditio per quam* of political life.¹³⁷

Van der Walt thus reads reciprocity into the notion of hospitality. The teacher (coloniser) and the prisoner (colonised) are in a sense “reconciled” in a temporary moment on Van der Walt’s reading. In my view, the text of Derrida which Van der Walt refers to, calls for a different interpretation.¹³⁸ This again ties in closely with the discussion above of language in Derrida’s thinking. The text indeed speaks of the reversibility of the traditional host/guest relationship. Derrida points out that the “host” (the French teacher, Daru) who, on the instructions of a French constable, has to hold an Arab man hostage for a day and is supposed to hand him over to the police station the next day, is in fact himself a guest of the Arab man. Daru, although he was born in Algeria, is a coloniser who is at home – at the other’s home, the Arab man’s home. Daru now has to take a decision as to whether he is going to hand over the man to the police – a responsibility that has to be taken on his own. He feeds the prisoner for some time (his host) and ends up not taking the decision himself, leaving it to the prisoner to take the decision. These passages do not in my view support a reading of hospitality as reciprocity or horizontality between a host and a guest. Instead, they speak of a disruption of Daru’s subjectivity,¹³⁹ unconditional hospitality, asymmetry, and disproportionality.¹⁴⁰ The link with what was said above regarding language should be clear.

What Derrida says in this text also appears to be perfectly in line with what he says in his other texts about hospitality as well as with the rest of his “philosophy beyond philosophy”.¹⁴¹ In *Adieu*, Derrida similarly refers to the dual meaning of *hôte*.¹⁴² From these pages it is, however, clear that there is no mention of reciprocity or horizontality when Derrida speaks about hospitality. The one (the host) who receives (the guest), Derrida says, is himself a guest in his own home.¹⁴³

“He receives the hospitality that he offers *in* his own home; he receives it *from* his own home – which, in the end, does not belong to him. The *hôte* as host is a guest.... The one who welcomes is first welcomed in his own home. The one who invites is invited by the one whom he invites. The one who receives is received, receiving hospitality in what he takes to be his own home, or indeed his own land, according to a law that Rozenzweig also recalled. For Rozenzweig emphasized this originary disposition, this withdrawal by which the ‘owner’ is expropriated from what is most his own, the ipse from its ipseity, thus making of one’s home a place or location one is simply passing through.”¹⁴⁴

Van der Walt links the notion of horizontality and its relation to hospitality also with Karin Blixen’s relationship with the “squatters” on her land; the

¹³⁷ LS 81.

¹³⁸ I would like to express my gratitude to Jean-Baptiste Baribonekeza for his assistance with the translation of this text.

¹³⁹ See also Derrida *Politics of Friendship* 68-69 on the disruption of subjectivity.

¹⁴⁰ A similar reading of Camus’s text is offered by Davis “The Cost of Being Ethical: Fiction, Violence and Altericide” 2003 *Common Knowledge* 241.

¹⁴¹ Derrida & Dufourmantelle *Of Hospitality* (2000); Derrida *Hostipitality* in Derrida *Acts of Religion* (2002) 358, *The Principle of Hospitality* in Derrida *Paper Machine* (2005) 66, *Hostipitality* in Thomassen (ed) *The Derrida-Habermas Reader* (2006) 208.

¹⁴² 41-43.

¹⁴³ Derrida *Adieu* 41.

¹⁴⁴ Derrida *Adieu* 41-42. See also Derrida *Aporias* (1993) 10.

Thomist notion of a natural right to share the surface and fruits of the earth; Claude Lefort's assertion that democracy is "government by everyone and by no one"; and Heidegger's reference to time as "public".¹⁴⁵ That which Van der Walt detects in the legal order with reference *inter alia* to Aquinas¹⁴⁶ – using a strategy, which is comparable with that of Derrida – is nevertheless a very conditional form of hospitality (ownership remaining subject to the rights of the poor to satisfy the *basic needs* of life, liberty and dignity).¹⁴⁷ Possession, albeit common possession, remains intact.¹⁴⁸ In principle there is of course nothing wrong with a method like this, which seeks to find in the legal order more equitable, but nonetheless conditional, legal principles. It is, however, very different from Derrida's reading of texts of the tradition through which dispossession, the incalculable or the unconditional comes to the fore.¹⁴⁹ Van der Walt is clearly aware of the "radical" nature of Derrida's thought.¹⁵⁰ On my reading, however, he shows some discomfort in relation to this "radicalism".¹⁵¹

This raises the question as to what Derrida means when he says, as Van der Walt points out, that absolute hospitality cannot be given effect to. This can be explored through a number of texts,¹⁵² but let us restrict ourselves to Derrida's reflections on justice and hospitality. In all of Derrida's texts that relate to these non-concepts he tells us of a paradox between the conditional and the unconditional. Derrida's thinking on the unconditional is very close to that of Levinas, closer than Van der Walt indicates.¹⁵³ When Derrida speaks of unconditional justice in *Force of Law*, he refers to it as being

"irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality".¹⁵⁴

This is repeated in *Specters of Marx* where Derrida speaks of justice as the "incalculability of the gift and singularity of the an-economic ex-position to others".¹⁵⁵ In *Before the Law*, Derrida refers to the "law of laws" or the "law itself"¹⁵⁶ which, as the text makes clear, has to be brought into relation with *inter alia* iterability, *différance* and unconditional justice in Derrida's other texts.¹⁵⁷ In his tribute to Mandela, Derrida refers to a superior law, also referred to as justice, the law of laws – a law which has not as yet presented itself – in

¹⁴⁵ LS 81-83. This of course ties in with the notion of time analysed in par 3 *supra*.

¹⁴⁶ See similarly, the reliance on Grotius (LS 86-89), Locke (LS 90-94) and Kant (LS 94-96).

¹⁴⁷ LS 85-86 92.

¹⁴⁸ LS 85-87.

¹⁴⁹ See, eg, Derrida *Politics of Friendship* 233-234; Derrida & Roudinesco *For What Tomorrow...A Dialogue* (2004) 3-7.

¹⁵⁰ See, eg, LS 220 where Van der Walt speaks of the boundlessness of hospitality which cannot but lead to self-destruction.

¹⁵¹ See, eg, Van der Walt's statement that it is Levinas (and by implication not Derrida) who calls us to unconditional hospitality (LS 96). See also LS 220-221 and 258.

¹⁵² Also *inter alia* with reference to friendship which will be discussed *infra*.

¹⁵³ This is clear from a reading of Derrida *Adieu*.

¹⁵⁴ Derrida *Force of Law* 25. See further Derrida *Glas* 242-244 and *Given Time* on the gift.

¹⁵⁵ Derrida *Specters of Marx: The State of the Debt, the Work of Mourning, & the New International* (1994) 22-23.

¹⁵⁶ See Derrida *Acts of Literature* 183 191-192.

¹⁵⁷ See in this respect also Derrida *Force of Law* 7.

the name of which Mandela challenges the legal system.¹⁵⁸ This “law of laws” or unconditional justice “is” the condition of possibility of laws. Absolute hospitality (with its “connotations” of being hostage to the other, of loss of possession) plays the same role in relation to conditional versions thereof.¹⁵⁹

In all of these instances, Derrida also acknowledges that the unconditional cannot come to presence. It thus always finds expression in a conditional way. Nevertheless, it continues to haunt the conditional, entailing that the conditional is never fully present to itself. This appears somewhat similar to what we find in Van der Walt, but it is to be noted that the unconditional in Derrida’s thinking does not entail any reciprocity. It is the *conditional* that entails reciprocity as is the case with plurality in Van der Walt’s version thereof.¹⁶⁰ There is in other words a continual tension between the conditional and the unconditional in Derrida’s thinking. Instead of saying that Derrida’s thinking is reconciled with the fall or internal tragedy of hospitality,¹⁶¹ it would be more accurate to say that Derrida insists that there has to be a negotiation between the conditional and the unconditional. It is furthermore from the “position” of absolute hospitality, unconditional justice and unconditional friendship that limitations need to be worked out.¹⁶²

The promise of revolutionary constitutionalism that Van der Walt addresses in chapter 1 of *LS* can be viewed in a different light if we take account of Derrida’s “notions” of absolute hospitality and unconditional justice. This promise would then not be that of a re-horizontalisation of all instances of constitutional review,¹⁶³ but the promise of unconditional justice that every Constitution speaks of.¹⁶⁴ Without opposing Van der Walt’s argument in principle concerning the need for the horizontal application of fundamental rights, it could be said that unconditional justice requires of us to, in a certain way, retain the notion of verticality, which *LS* attempts to abolish from legal thinking. If we think of a court case in terms of an event, and if we think of an event as having a similar structure as unconditional justice,¹⁶⁵ we can hear the need for verticality in the following words of Derrida:¹⁶⁶

“When Lévinas or Blanchot speak of the ‘Très Haut’, the Most High, it is not simply religious terminology. It means that the event as event, as absolute surprise, must fall on me. Why? Because if it doesn’t fall on me, it means that I see it coming, that there’s an horizon of expectation. Horizontally, I see it coming, I fore-see it, I fore-say it, and the event is that which can be said [*dit*] but never predicted [*prédit*]. A predicted event is not an event. The event falls on me because I don’t see it coming. Like the *arrivanti*, the event is something that vertically befalls me when I didn’t see it coming.”

¹⁵⁸ Derrida *The Laws of Reflection: Nelson Mandela, in Admiration* in Derrida & Tlili (eds) *For Nelson Mandela* (1987) 13 22-29 34 37-38.

¹⁵⁹ See the references in n 141 *supra*.

¹⁶⁰ We will also see this in the discussion in par 4 2 *infra* of reconciliation and friendship in *LS*.

¹⁶¹ *LS* 220.

¹⁶² See Derrida & Roudinesco *For What Tomorrow* 59-61.

¹⁶³ *LS* 51.

¹⁶⁴ I will explore this in a forthcoming publication with reference to Derrida *Declarations of Independence* in Derrida *Negotiations: Interventions and Interviews 1971-2001* (2002) 46-54.

¹⁶⁵ See Borradori *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (2003) 85-94; Derrida “A Certain Impossible Possibility of Saying the Event” 2007 *Critical Inquiry* 441.

¹⁶⁶ 2007 *Critical Inquiry* 451-452.

Unconditional justice must be affirmed as that which always disrupts the law from on high. Unconditional justice in this way imposes an infinite responsibility, which allows no rest for any good conscience.¹⁶⁷ The horizontality of mortals¹⁶⁸ still allows for a certain measure of complacency, as will be shown below.

4 2 Friendship and reconciliation

Van der Walt, as we saw above, links reconciliation with plurality and with the political and argues that these are (also) impossible.¹⁶⁹ He speaks in this regard of the need for reconciliation of that which is “patently irreconcilable”, of the “perhaps” of reconciliation, and of reconciliation as “always to come”.¹⁷⁰ This is again related to the notion of counter-time and what Van der Walt refers to as “the time for friendship”.¹⁷¹ In Van der Walt’s thinking there can only be talk of friendship when there are two friends.¹⁷² At the same time friendship is impossible, because friendship is always conditioned by one, and sometimes by both “friends”.¹⁷³ This is in turn extended to litigation where those who litigate (as “enemies”) were often friends or lovers before.¹⁷⁴ The post-apartheid theory of law, Van der Walt espouses, as we know, seeks to retrieve friendship (or plurality) from the ruins of litigation, where only one party will always come out as the winner.¹⁷⁵ The above can also be expressed in terms of the impossibility of the reconciliation of liberties or claims to justice.¹⁷⁶ Van der Walt speaks in this regard of the time of reconciliation, which cannot be thought of in terms of a presence, but as always to come.¹⁷⁷

Van der Walt remains faithful to Derrida in saying that friendship between two friends is always conditional. However, as in other contexts, he emphasises the reciprocity or the dual nature of friendship (as well as of hospitality, justice and democracy). On my reading, the way in which Derrida speaks of friendship is somewhat different from Van der Walt’s depiction thereof. In *Politics of Friendship* Derrida speaks of friendship in the same vein in which

¹⁶⁷ See the epigraph in *LS* from Derrida *Specters of Marx* xv.

¹⁶⁸ *LS* 150.

¹⁶⁹ *LS* 179-180 237. Another important “impossibility” appears in Van der Walt’s other texts: that of resolving the counter-majoritarian problem. See Van der Walt & Botha 2000 *Constellations* 350; Van der Walt “Hospitality and the Ghost: A Response to Emiliios Christodoulidis’s Article ‘The Paradoxes of Sovereignty’ (2002 *TSAR* 108)” 2002 *TSAR* 362. Derrida *Rogues* 6-18 on my reading suggests that the antinomy does not lie between rights and democracy, but between limited democracy (with limited rights) and the democracy to come.

¹⁷⁰ *LS* 235 237.

¹⁷¹ *LS* 219. See also *LS* 226 where Van der Walt states that the counter-time “also goes by the names of friendship, hospitality and justice in Derrida’s dreams about the possibility of the impossible” and par 3 *supra*.

¹⁷² *LS* 219 221 223.

¹⁷³ *LS* 221.

¹⁷⁴ *LS* 224.

¹⁷⁵ *LS* 224.

¹⁷⁶ *LS* 241-242.

¹⁷⁷ *LS* 242.

he speaks of unconditional justice: a friendship that will not be based on sameness and reciprocity, but on dissymmetry.¹⁷⁸ Derrida furthermore draws a clear distinction in a number of texts between reconciliation on the one hand and unconditional forgiveness and justice on the other.¹⁷⁹ Derrida does not say that reconciliation is impossible and he indicates that he (politically) supports attempts at the best possible reconciliation.¹⁸⁰ At the same time he points out that reconciliation always involves strategic calculations or an economy and that it always takes place on the basis of conditions favouring one of the parties.¹⁸¹ Derrida acknowledges that reconciliation can be thought of on the same terms as unconditional forgiveness and justice (“a more radical kind of reconciliation, beyond the political”), but points out that it is not usually thought of as such.¹⁸² Van der Walt’s attempt to think reconciliation in those terms, I would submit, still falls short of what Derrida states in relation to unconditional forgiveness.¹⁸³ Asymmetry, which Derrida regards as essential to forgiveness and justice, effectively falls away in Van der Walt’s conception of reconciliation (as well as in plurality and the political) and is replaced by horizontality.¹⁸⁴ Thinking of reconciliation as being impossible does not succeed in taking us to a certain beyond of law or politics. Instead, by making reconciliation the (impossible) aim of law (as Van der Walt does), we remain within a relatively restrictive and conservative (liberal) conception of law. This could change if reconciliation is inscribed within unconditional justice or freedom without power.¹⁸⁵ Negotiating between the conditional and the unconditional from these non-sites might sometimes lead to “better” or “more equitable” forms of reconciliation than one which simply seeks to momentarily reconcile “external liberties” by minimising harm.¹⁸⁶

5 Sacrifice

5.1 Sacrifice and the unconditional

As should be clear by now, and as the title clearly states, the notion of sacrifice is central to *LS*. Van der Walt, as we saw, calls for the acknowledgement

¹⁷⁸ See Derrida *Politics of Friendship* 63 with reference to Nietzsche: “Good friendship supposes disproportion. It demands a certain rupture in reciprocity or equality, as well as the interruption of all fusion or confusion between you and me. By the same token it signifies a divorce with love, albeit self-love.” Derrida (16-24 63 185 194-195 220 232-233) speaks in this regard also of an arche-friendship, an immemorial friendship, of non-reciprocity, dissymmetry, disproportion and the incalculable which makes friendship possible.

¹⁷⁹ Derrida *et al On Forgiveness: A Roundtable Discussion with Jacques Derrida* in Caputo, Dooley & Scanlon (eds) *Questioning God* (2001) 52 57: “[F]orgiveness, if there is such a thing, should be devoid of any attempt to heal or reconcile.” See also Derrida & Kearney “A Dialogue with Jacques Derrida” 2004 *Philosophy Today* 4.

¹⁸⁰ Derrida *Philosophy Today* 4-5. See also the convincing argument of Van der Walt *LS* 146 on the need for a legal politics of inclusion.

¹⁸¹ Derrida *Philosophy Today* 4, *On Forgiveness* 57. Van der Walt *LS* 145-146 also shows an awareness of this.

¹⁸² Derrida *Philosophy Today* 5, *On Forgiveness* 57, *Archive Fever in South Africa* in Hamilton *et al* (eds) *Refiguring the Archive* (2002) 38 74 76.

¹⁸³ See also Derrida 1999 *Fragments* 47-49. The closest Van der Walt comes to this is in *LS* 141-146 which will be discussed in par 5.1 *infra*.

¹⁸⁴ Derrida *On Forgiveness* 57, *Force of Law* 20 22.

¹⁸⁵ See Derrida *Rogues* 42-55.

¹⁸⁶ See *LS* 234-248.

of sacrifice in every judicial decision as such decisions inevitably amount to a destruction of plurality. In order to further stress the impossibility of plurality, Van der Walt refers first to Irigaray and then to Nancy. Van der Walt is, however, somewhat critical of both authors because, according to him, there is not a sufficient regard in their texts for the impossibility of plurality. Van der Walt also takes issue with Nancy because of the latter's contention that we are on the eve of a non-sacrificial existence.¹⁸⁷ Van der Walt believes that it is impossible to escape from sacrifice. In discussing Nancy's notion of the *partage*, Van der Walt refers us to Derrida's reading of Nancy in *Rogues*.¹⁸⁸ Van der Walt sites three passages from *Rogues* and concludes as follows:

"Derrida's insistence on the impossibility of the *partage* relates directly to his acute regard for the inevitability of traumatic sacrifices in human and social relationships. 'Everything takes place between the sacrifice that cuts and the sacrifice that binds', he writes in *Resistances*. 'We sacrifice in order not to be sacrificed', he states in *Donner la Mort*. He clearly holds history without sacrifice to be impossible [reference is made in a footnote to *Cinders*]."¹⁸⁹

In principle, nothing that is objectionable can be found in this passage. It is regarding the implications of what is stated here that a few questions need to be raised. Can one conclude from what Derrida says as referred to in the above passage that the interests of a losing party in a court case are always "sacrificed"? Can we furthermore conclude from the above that this sacrifice and the "unjustness" thereof need to be acknowledged in court cases? The answer to the first question will be in the negative. The answer to the second question will be a qualified yes.

The very sophisticated and informative argument of Van der Walt, which takes us through a reading of Hubert and Mauss,¹⁹⁰ Horkheimer and Adorno, Bataille, Agamben and Nancy, as we saw, also accords a role to the thinking of Derrida. Van der Walt links the notion of sacrifice with Derrida's thinking on sovereignty which was referred to above.¹⁹¹ The history of sovereignty, Van der Walt says following Nancy, is also a history of sacrifice.¹⁹² Van der Walt specifically attempts to link silence to sovereignty and to what Derrida says about sovereignty without language in *Rogues* – silence amounts to sovereignty and (unacknowledged) sacrifice.¹⁹³ Van der Walt then proceeds to refer to man as "irreducibly the animal with language".¹⁹⁴ He can at most become the animal that fails or refuses to speak or to acknowledge sacrifice. Sovereignty concerns at most a refusal, but a thoroughly linguistic refusal to speak about sacrifice, a thoroughly linguistic refusal to acknowledge sacrifice.¹⁹⁵ Sovereignty, accord-

¹⁸⁷ LS 138-139.

¹⁸⁸ See also LS 117.

¹⁸⁹ LS 20 (footnotes omitted). The corresponding pages in the English edition of *Cinders* (Van der Walt refers to *Feu la Cendre* (1998) 28-32; I consulted the 1987 ed) are pages 44-48.

¹⁹⁰ It is noteworthy in this analysis that Van der Walt chooses to follow Hubert & Mauss (LS 147) and thereby, as he does in the case of language, implicitly adopts a notion of sacrifice which views death from the position of presence, life and meaning ("death itself signifies the very impurity that life seeks to avoid": LS 130). Cf in this respect Derrida *Speech and Phenomena* 8 10.

¹⁹¹ See also LS 20-21.

¹⁹² LS 126.

¹⁹³ LS 134. See also par 3 *supra*.

¹⁹⁴ LS 134.

¹⁹⁵ LS 138.

ing to Van der Walt, silences the law; sovereignty is the language of silenced and silent sacrifice.¹⁹⁶

The expression “the animal with language”, referring thereby to man or humanity, is clearly objectionable in terms of Derrida’s thinking.¹⁹⁷ Van der Walt is nevertheless correct to point to a relation in Derrida’s thinking between sovereignty and sacrifice. Even though Derrida may not in any of his texts expressly call for an acknowledgement of sacrifice, one could say that he does so implicitly. The more important questions that Van der Walt’s discussion raise relate to the structure of sacrifice and the kind of sacrifice that is involved in judicial decision-making. Because of Van der Walt’s views on language, as discussed above, because of the value he attaches to plurality, and because of the position that he gives to justice, the notion of sacrifice is extended to all parties that lose a case.¹⁹⁸ On my reading, the texts which Van der Walt refers to in the above quotation call on us to think differently about what is regarded as sacrifice in the legal context and consequently also what kinds of sacrifice need to be acknowledged (if at all) in judicial decisions. For reasons of space we will be restricted to a short analysis of the passages from *Cinders* that Van der Walt refers to in the quotation.¹⁹⁹ These passages contain quotations from *Glas*.²⁰⁰ In the relevant pages of *Glas*, Derrida discusses the first moment of natural religion in Hegel. Derrida shows how this figure of natural religion that Hegel speaks of – “the pure, all-embracing and all-filling luminous essence”, a figureless figure that burns itself in the all-burning – needs to guard itself, keep hold of itself, so as not to destroy itself completely. Only by keeping itself in reserve, can something remain to open the dialectical process and history. Derrida refers here to sacrifice both in the sense of pure destruction (“it sacrifices itself”) and in the sense of keeping hold of itself (“the sacrifice sacrifices itself”).²⁰¹ Derrida extends this “notion” of the burning-retaining sacrifice to the pure gift without exchange which in a similar way has to economise itself in order to take on a stable subsistence.²⁰²

Sacrifice in Derrida’s texts is, as the above paragraph shows, clearly linked with calculation and the incalculable or the conditional and the unconditional²⁰³ Calculation and therefore law²⁰⁴ (even a very progressive legal system) inevitably amounts to sacrifice.²⁰⁵ On my reading, this does not, however, translate into

¹⁹⁶ LS 137.

¹⁹⁷ This is not because of an objection to man being referred to as an animal, but because animals are impliedly referred to by Van der Walt as being without language. Cf in this respect Derrida *Of Grammatology* 241 244-245; Derrida & Roudinesco *For What Tomorrow* 62-76; Derrida “The Animal that therefore I am (More to Follow)” 2002 *Critical Inquiry* 369, *Points...Interviews 1974-1994* (1995) 255-287. Van der Walt’s closeness to Heidegger’s thinking perhaps comes to the fore here most clearly, if one takes account of Derrida’s remark in *Points* 268 that the “distinction between the animal (which has no or is not a *Dasein*) and man has nowhere been more radical nor more vigorous than in Heidegger”.

¹⁹⁸ LS 219.

¹⁹⁹ An analysis of the other texts of Derrida that are referred to – Derrida *Resistances of Psychoanalysis* (1998) and *The Gift of Death* would lead us to the same conclusions.

²⁰⁰ Derrida *Glas* (1986) 238-243.

²⁰¹ Derrida *Glas* 241 244.

²⁰² Derrida *Glas* 243.

²⁰³ Van der Walt “Law as Sacrifice” 2001 *TSAR* 723 accurately notes and comments on this.

²⁰⁴ See Derrida *Force of Law* 16 and 22 on the calculable nature of law.

²⁰⁵ See also Van der Walt 2001 *TSAR* 723.

the sacrifice of every losing party to a judicial dispute. The sacrifice that is problematic for Derrida could more accurately be described as sacrificial logic, which can be linked with knowledge, calculation and the conditional.²⁰⁶ Only that which never comes to presence and which cannot be known – for example incalculable justice or absolute hospitality (amounting to a sacrifice of meaning) – is freed from the logic of sacrifice.²⁰⁷ *The Gift of Death* tells us that absolute responsibility requires of us to sacrifice; to sacrifice law, ethics and politics – all of which serve to protect us from the death instinct.²⁰⁸ Van der Walt's discussion of Derrida in relation to sacrifice is again closely related to the way in which he understands Derrida's views on language, and in this specific context, the relation between sovereignty and language.²⁰⁹ As noted above, Derrida contends in *Rogues* that sovereignty, because of its belonging to language and the need for it (that is, sovereignty) to be clothed with meaning, is inevitably shared from the "start".²¹⁰ Sovereignty is a consequence of language. Language is its condition of possibility. It can only have meaning through language. Because of Derrida's views on language, he can conclude from this that sharing or language compromises in an auto-immune fashion the immunity of sovereignty. Again, we have here a relation between the calculable and the incalculable which is very different from a relationship between silence and unacknowledged sacrifice (sovereignty, law, already clothed with one meaning) on the one hand and speaking or the acknowledgement of sacrifice on the other (the retrieval of the plurality of meaning).²¹¹

The text of *LS*, perhaps in spite of the intentions of the author, nevertheless opens itself to the understanding of the notion of sacrifice as proposed above. Van der Walt at certain points, as we saw, insists that the result of every court case amounts to the sacrificial destruction of plurality (that is, the reduction to oneness of the multiple conflicting desires and concerns that inform the law in a contradictory fashion).²¹² *LS*, however, also speaks of "sacrificial reasoning", which could be read as an acknowledgement that sacrifice occurs as a result of a failure to give effect to the demand of incalculable justice or absolute hospitality, not simply by virtue of not holding in favour of one or the other party in a court case.²¹³ This reading is made possible by the fact that Van der Walt also refers to law with reference to Derrida as "the sacrificial self-destruction of hospitality".²¹⁴ In chapter 5 of *LS* Van der Walt also continuously empha-

²⁰⁶ Derrida *The Gift of Death* 43 94-95.

²⁰⁷ See also Derrida *Writing and Difference* 324 (also 323 325 327 335) on Bataille reading Hegel: "Absolute comicalness [general economy] is the anguish experienced when confronted by expenditure on lost funds, by the absolute sacrifice of meaning: a sacrifice without return and without reserves."

²⁰⁸ Derrida *The Gift of Death* 64 67 95. See also the epigraph of *LS*, a quotation from *Specters of Marx* xv where Derrida refers to infinite responsibility.

²⁰⁹ See par 3 *supra*. Derrida's discussion of the sacrifice of the *pharmakos* in *Dissemination* 133-135 similarly shows that writing, representation and death are to be found on the inside of life (the walls of the city) and therefore the impossibility of pure self-presence without representation (130-135). See also Derrida *Limited Inc* 90 103 on the parasite.

²¹⁰ Derrida *Rogues* 101-102.

²¹¹ *LS* 134.

²¹² *LS* 11.

²¹³ See *LS* 143.

²¹⁴ *LS* 145.

sises what could be regarded as “unconditional provisions” of the Constitution, specifically regarding the socio-economic rights to health care and housing, and shows the problematic nature of all limitations of these “unconditional” rights.²¹⁵ As Van der Walt furthermore shows with reference to the *Grootboom* case,²¹⁶ even if a “deserving” party “wins” a case, resulting in a relatively progressive decision, the result may remain very far removed from unconditional justice. This translates into a thinking about justice that is no longer concerned with the reasonable calculation of benefits for a self-governing people. Thinking of justice in this way could clearly have important political consequences as will become clear in what follows.

5 2 Sacrifice and justification

As we saw above, Van der Walt resorts to justification in order to resolve the issue of which sacrifices should be accepted in society. He seeks to maintain the link with sacrifice by insisting that in justifying a decision, sacrifice should be acknowledged as well as the fact that the decision is ultimately based on unjust grounds. Van der Walt acknowledges the limits of justification (it cannot be just, in Van der Walt’s sense of this notion), but nevertheless hopes that this would lead to the acceptance of only those sacrifices or limitations of rights which are “inevitable”.²¹⁷ Derrida’s texts do not on my reading contradict the argument of Van der Walt that there is a need for the justification of judicial (as well as executive and legislative) decisions (and even of the conduct of private parties). Like Van der Walt, but for different reasons, Derrida finds justification problematic. This is primarily because of the different views they hold on justice. For Derrida, justification is in tension with the notion of infinite responsibility. Justification, even when sacrifice and injustice are acknowledged, ultimately amounts to self-justification.²¹⁸ Van der Walt on the other hand links the notion of justification with the limitation clauses in Bills of Rights, and argues for the need to justify limitation with reference to the rights protected in a Bill of Rights.²¹⁹

If we accept the need for justification, should this justification not go beyond the rights in a Bill of Rights, which are already restricted forms of the unconditional promise of justice contained in a Constitution?²²⁰ Is justification not instead to take place first with reference to unconditional justice? A court case involving the Constitution necessarily involves a judge in the unconditional. Unconditional justice calls on her to do the impossible. The unconditional can nevertheless only be given effect to through calculation. For unconditional justice to have “force”, a judge therefore also has to calculate and most importantly, to justify *this* limitation.²²¹ Although a reference to the limitation clause (if any) of a Bill of Rights) will necessarily also have to take place, what is first

²¹⁵ LS 141-146.

²¹⁶ LS 143-145.

²¹⁷ LS 141 149.

²¹⁸ Derrida *The Gift of Death* 62.

²¹⁹ LS 14-17.

²²⁰ See Derrida *Negotiations* 105.

²²¹ Derrida *Force of Law* 24.

of all required is a negotiation between the unconditional and the conditional. To put it in yet simpler terms, in every instance where the Constitution is interpreted or applied, the unconditional needs to come to the fore.²²² This unconditional is that which makes a Constitution possible and can therefore not simply be ignored.²²³ Only after an exposure to the unconditional, and from this non-site, can calculation, that is interpretive methods, values, and principles start to play a role. The latter inevitably brings us into the realm of self-justification, a movement away thus from unconditional justice.

5.3 The politics of sacrifice

Van der Walt refers to his own political position with reference to Derrida as “a progressivism without illusion”.²²⁴ This position is inspired by the distinction between politics and the political that Van der Walt subscribes to. He also invokes Kennedy’s fundamental contradiction in support of this approach:

“[A]n acute regard for the fundamental contradiction is crucial to the post-apartheid theory of law that [is] developed in this book, for a post-apartheid law would indeed require that the liberal and conservative ‘counterparts’ to which Kennedy refers in the passage above would indeed be *counterparts*. It would require that they not be so far apart that they cannot, when circumstances demand, take stances that deviate from their typical ideological positions, stances that are for this reason non-ideological.”²²⁵

In light of this, it appears somewhat strange that Van der Walt nonetheless argues in favour of what some would refer to as clear ideological or political positions. He takes, for example, a firm position in favour of the direct horizontal application of fundamental rights in the name of the promise of a revolutionary constitutionalism²²⁶ and takes a stand against the death penalty.²²⁷ He also argues strongly against neo-colonialism and neo-feudalism in the form of global capitalism.²²⁸ It could plausibly be argued that in all the above instances the South African Constitution provides room for debate, in other words for “a contradictory plurality of voices” (using Van der Walt’s terminology).²²⁹ One could furthermore ask whether there is in regard to the above positions not also room for “reasonable dissent” and “a fundamental plurality of voices regarding the question that is to be decided”.²³⁰ These positions are furthermore taken seemingly without the author subjecting himself to his self-imposed requirement of acknowledging the sacrifice to the opposing interests involved (that is, in favour of indirect horizontal application, the death penalty and global capi-

²²² Legal scholars often understand Derrida’s reference to justice as singularity in *Force of Law* 25 as implying that Derrida finds problematic the generality of law, which denies the singularity of every case. There can be little doubt that singularity is important in Derrida’s thinking. The singularity of every decision nevertheless calls first of all for an exposure to the unconditional: see, eg, Derrida *Points* 359.

²²³ See n 164 *supra*.

²²⁴ *LS* 77.

²²⁵ *LS* 166.

²²⁶ *LS* 51.

²²⁷ See ch 4.

²²⁸ *LS* 72.

²²⁹ See *LS* 165.

²³⁰ See *LS* 140-141. Van der Walt acknowledges the ideological nature of the disagreement on horizontal application: see *LS* 3 34 36 n 6.

talism) or of the need to “set aside” or “keeping alongside” the other political view. How is this to be explained?

Van der Walt is likely to argue that (at least some or perhaps all of) the positions he takes in the above regard (also insofar as the interpretation of the Constitution is concerned) are not “politics”, but that they fall within the sphere of “the political”, that which makes politics possible or which “allows for the emergence of ideological preferences”.²³¹ The political thus appears to be situated above or beyond politics, thereby succeeding to escape from the charge of simply constituting an ideological position.²³² The arguments on direct horizontal application and the death penalty are most clearly linked to plurality by Van der Walt.²³³ Can the political or plurality in Van der Walt’s model, however, lay claim to fall within a space which “is” beyond politics? As was contended above, only the unconditional can in a certain sense transgress metaphysics, ideology and politics.²³⁴ The “political” that Van der Walt espouses, as can be seen from his view of the legal decision as comparable to the flipping of a coin or to juggling, instead comes very close to political relativism.²³⁵ This also happens through his extension of the notion of sacrifice to the interest(s) that lose out in every judicial decision or every “serious” judicial decision.²³⁶ Had Van der Walt “followed” Derrida more closely, this could have been avoided.²³⁷

A further question must be asked regarding the political consequences of Van der Walt’s approach, specifically as set out in the passage quoted above. If left and right are not to be “too far apart”²³⁸ and if the position of the “swing” judge is exalted,²³⁹ is there really still a chance for revolutionary constitutionalism? Van der Walt’s approach requires that a Court must acknowledge the sacrifice of the interests of a particular “losing” litigant (and therefore the “injustice” of such sacrifice), not only in politically conservative decisions (where acknowledging sacrifice does appear appropriate), but also in progressive ones.²⁴⁰ My concern relating to the potential political consequences of such an approach should be apparent from a somewhat lengthy list of examples from real and imagined “serious” cases. Such a list will show that the concern is not an isolated one and that it relates not only to disputes between the State and individuals, but also between natural/juristic persons. Herewith the list: a judgment

²³¹ *LS* 165. Van der Walt *LS* 8, eg, invokes the horizontal application of fundamental rights as “the ultimate way in which the law can be revised in terms of public interest”.

²³² As we saw in par 3 *supra*, the political could be situated on level 1 and, in a way, level 3 of Van der Walt’s analysis, and politics on level 2.

²³³ Concerning the “free market”, Van der Walt *LS* 216 refers to this as a “unitary system of representation” which ruins plurality.

²³⁴ See par 3 *supra*. Van der Walt’s approach is also aimed at legitimacy, which Derrida *Force of Law* 6 15 views in calculable terms similar to law. See *LS* 223 where Van der Walt states that “a post-apartheid theory of law would hope to make possible an ongoing respect for law in the face of inevitable interim legal coercion”. See also *LS* 178-179 220 233.

²³⁵ *LS* 229 243-248.

²³⁶ See, eg, Van der Walt’s acknowledgement in *LS* 71 regarding the *Carmichele* case.

²³⁷ For Derrida’s response to an accusation of relativism, see Derrida & Roudinesco *For What Tomorrow* 22 and Derrida *et al Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida* in Kearney & Dooley (eds) *Questioning Ethics: Contemporary Debates in Philosophy* (1999) 65 78-79.

²³⁸ *LS* 166.

²³⁹ *LS* 164-166 190.

²⁴⁰ One could, however, ask whether a progressive decision in all cases would not be infinitely more preferable than acknowledging the sacrifice of conservative decisions.

which invalidates legislation which authorises the death penalty;²⁴¹ a judgment bringing about the decriminalisation of prostitution;²⁴² a judgment which invalidates discriminatory legislation (based for example on race, gender or sexual orientation);²⁴³ a judgment holding that the right to freedom of religion entitles a Rastafarian to use cannabis without the threat of criminal sanction;²⁴⁴ a judgment holding that a T-shirt company may poke fun at a multinational company without a sense of humour;²⁴⁵ a judgment holding that the State is vicariously liable for the rape of a woman by on-duty policemen offering to give her a lift home in the early hours of the morning;²⁴⁶ a judgment holding that refugee applicants are entitled to reasons for decisions denying them such status;²⁴⁷ a judgment holding that a developer is not allowed to proceed with the building of houses for the rich and famous on the slopes of Table Mountain and in the process destroy the environment and trample on the rights of a minority religious community;²⁴⁸ a judgment holding that the State needs to provide pregnant mothers with nevirapine to prevent the infection of babies with HIV;²⁴⁹ and a judgment holding that the State cannot simply cancel social benefits (on suspicion of corruption) without affording those affected a hearing.²⁵⁰

One is entitled to ask why it would be necessary in these “serious” cases, which all in some way or another extend (rather than restrict) equal freedom or freedom without power, to acknowledge “sacrifice”.²⁵¹ Is there indeed any sacrifice which is worthy of being acknowledged here in spite of the “seriousness” of the cases? If one is to speak here of sacrifice, would it not rather be with reference to those who still remain excluded from the benefits of these rights?²⁵² Is it not to them – those who will often *not be* in the courtroom – that any apology of unjust sacrifice should be directed? Is the acknowledgement of the “sacrifices” that the homophobes, xenophobes, chauvinists, bigots,

²⁴¹ *S v Makwanyane* 1995 3 SA 391 (CC).

²⁴² *S v Jordan* 2002 6 SA 642 (CC) (majority dismissing challenge to legislation criminalising prostitution).

²⁴³ See, eg, *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *Moseneke v The Master* 2001 2 SA 18 (CC); *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)* 2006 1 SA 524 (CC); *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

²⁴⁴ *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) (majority dismissing challenge to constitutional validity of legislation which criminalises the use of cannabis, also in relation to Rastafarians).

²⁴⁵ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SabMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC).

²⁴⁶ *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

²⁴⁷ *Xu v Minister van Binnelandse Sake* 1995 1 SA 185 (T) (Court holding that “aliens” not entitled to reasons in the event of the refusal of residence permits).

²⁴⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA).

²⁴⁹ *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC). See *LS 73* where Van der Walt states that the decision of the government in this regard patently lacked justification, which may imply that a Court would in such a case not have to acknowledge any sacrifice.

²⁵⁰ *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 4 SA 385 (T); *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 2 SA 849 (E).

²⁵¹ See Derrida *Rogues* 48–49 on the unconditionality of (equal) freedom.

²⁵² The case of *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) (held that permanent residents entitled to right of access to social security) illustrates the point well that it is not always the interests of the party that loses that get sacrificed. In this case it is those that are still excluded, that get “sacrificed”. See also Van Marle “Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming in Post-Apartheid South Africa” 2004 *SAPL* 605 626–628.

racists, capitalists and heartless politicians and bureaucrats would have to make in some of the examples above, not instead likely to lead to further restrictions on the unconditional equality (also of non-citizens) which Derrida says the democracy to come concerns itself with?²⁵³ Does the acknowledgement of this kind of sacrifice not risk becoming an easy way out for a Court that does not want to face up to its responsibility of complying with the demand of unconditional justice, while taking account of law?²⁵⁴ Does this approach not risk making Derrida's thinking more acceptable to and "utilizable" for those on the right than those on the left?

It is my contention that, compared to Derrida, Van der Walt has a very different understanding of progressivism without illusion. For Derrida this clearly entails a left politics without the naïve belief that this amounts to unconditional justice. The reason for this is not the fact that the triumph of a left position in a court case has led to the sacrifice of the politically conservative point of view, but because it will never have gone far enough, as is clear from Derrida's exposition of absolute hospitality.²⁵⁵ Deconstruction leaves us with the imperative to negotiate the best possible response between the unconditional and the conditional.²⁵⁶ It is when we attempt to negotiate between two conditional positions that a left politics is likely to lean towards conservatism. This becomes clear when we focus on certain of the political positions Van der Walt adopts in *LS*.²⁵⁷ Van der Walt for example appears rather comfortable with the need for (harsh) punishment for crime in his discussion and rejection of the death penalty.²⁵⁸ He also appears somewhat complacent in his acceptance of the need for immigration control in respect of those he refers to as "aliens".²⁵⁹ One could furthermore, without endorsing the arms deal, raise questions regarding Van der Walt's "putting South Africa first" policy in relation thereto.²⁶⁰ Van der Walt's reference to man as "the animal with language", referred to above, also has potentially conservative political consequences. This is especially the case insofar as the alleged absence of language in animals has throughout history been relied on, whether explicitly or implicitly, for the imposition of incredible cruelty towards as well as to the slaughter and pleasurable consumption of animals.²⁶¹ This is continuing every day. It is also in this respect significant that Van der Walt attaches great value only to *human* dignity and to the rights of *citizens*.²⁶² This is related to the close association that Van der Walt draws between

²⁵³ See Derrida *Rogues* 42-54 133.

²⁵⁴ See Derrida *Force of Law* 22-29.

²⁵⁵ See, eg, Derrida & Roudinesco *For What Tomorrow* 59-61. See also Derrida in Kearney *Dialogues with Contemporary Continental Thinkers* (1984) 119 on the "radicality" of deconstruction.

²⁵⁶ See Derrida *On Forgiveness* 58-59, *Paper Machine* 127 128 131, *Manifeste pour l'Hospitalité* 133.

²⁵⁷ Except for the examples that follow or as elsewhere indicated, I find myself in substantial agreement with Van der Walt's left politics as expressed in *LS*.

²⁵⁸ *LS* 112-113 117. Cf in this regard Derrida & Roudinesco *For What Tomorrow* 143 read with 227 n 15. *LS* 117 n 64 nevertheless notes the difficulties involved with punishment.

²⁵⁹ *LS* 220. This is closely related to Van der Walt's retention of the notion of (shared) possession by the citizens of a nation-state as characteristic of plurality: see *LS* 70 123. Cf in this respect Derrida *Negotiations* (2002) 99-104.

²⁶⁰ *LS* 60-61.

²⁶¹ See n 197 *supra*.

²⁶² *LS* 17 65 70. See also Van der Walt's comfortable association of his approach of horizontalisation with humanism: *LS* 189-190. He also states that it is "humanity" that holds all goods in common: *LS* 85.

justice and self-government.²⁶³ Self-government, as we know, is directly related to (democratic) sovereignty, not to the democracy to come.²⁶⁴ It also relates to Van der Walt's view of liberty or freedom, which, although it seeks to allow for the simultaneous existence of two, still remains very close to the notion of freedom as power.²⁶⁵ If the unconditional, the hyper-ethical, or hyper-political in Derrida's thinking is brought to the fore, a more progressive politics (regarding for example "criminal" sanctions, immigration, humanitarian aid, and relations with animals) is likely to follow from this, whilst realising that whichever policy is adopted, we would never have gone far enough.²⁶⁶

6 An alternative post-apartheid theory of law

Van der Walt's *LS* is clearly one of the most sophisticated attempts to date to reflect on the implications of the thinking of Derrida in relation to law. My contention in this article has nevertheless been that justice, in Derrida's terms, requires much more of us than Van der Walt contends. Justice, it was argued above, should not be related to the claims to justice of parties to a dispute. Instead, Derrida speaks of justice in the same breath as incalculable equality, absolute hospitality and the perfect gift. This "idea" of justice breaks with equivalence, reciprocation and calculation. Derrida's texts tell us that judges need to negotiate between the unconditional and the conditional. Unconditional justice requires sacrifice – the sacrifice of the self; that is also of the law which ultimately serves the interests of those in society whose reason as well as freedom (viewed as power) and property interests tend to be the strongest. Only by negotiating a response between the conditional and the unconditional would justice stand a chance in any judicial decision. The notions of plurality, the political, the fundamental contradiction and sacrifice, as understood and utilised by Van der Walt, are unlikely to lead to radical constitutionalism. This allows us to think differently about the "problem" with apartheid. I would contend that the problem with apartheid was not its attempt to represent plurality, which ultimately destroyed plurality, without any regard for plurality's inevitable withdrawal.²⁶⁷ The "problem" was rather that it strayed extremely and unacceptably far, even as far as possible one could say, from the unconditional. It was ultimately, as Van der Walt also indicates, centred on identity, purity, exclusivity, community and sovereignty on the basis of pure self presence (a belief in "legalising" that which is "natural" and God-ordained).²⁶⁸ A post-apartheid theory of law should rather, as was sketched in outline above, show the fallacy of constructions based on the idea of pure self-presence and affirm the inevitable haunting of representation by the unconditional.

²⁶³ See *LS* 178 180 181 182.

²⁶⁴ See Derrida *Rogues* 6-18. As Manderson "The Care of Strangers" August 24 2002 *Australian Financial Review* 1-2 correctly points out, "the self and the tribe are simply two ways of putting me first".

²⁶⁵ See *LS* 150-151 234-242. Cf in this respect Derrida *Rogues* 42-55.

²⁶⁶ See Derrida *Rogues* 152.

²⁶⁷ *LS* 8 12 123.

²⁶⁸ *LS* 13 125.

It is likely that a certain Johan van der Walt would not disagree with this “alternative” post-apartheid theory of law.²⁶⁹ *LS* begins and ends by contemplating a passage from Heidegger’s *Sein und Zeit* which Van der Walt translates as follows:

“The niveau of a science is determined by the extent of her capacity for a crisis as regards her foundational principles.”²⁷⁰

Van der Walt emphasises the word “crisis” in this passage and says that it should be understood as “incapacity”.²⁷¹ The word “crisis” in this passage, Van der Walt says, “points to an incapacity that overcomes us under certain circumstances, an incapacity in which we happen to land”.²⁷² *LS*, he adds, involves an explication of “the crisis with which the demand for post-apartheid law and the self-foundation of legal science confronts us”.²⁷³ *LS* must therefore address origin and becoming, but in relation to an incapacity. Incapacity of course speaks of inability and powerlessness, of a subject that is no longer in control, of the host becoming the guest, of the other taking the decision in me, of absolute hospitality, of the perfect gift. Language, as we saw, is for Derrida similarly marked by the incapacity of a subject, announcing the death of the subject.²⁷⁴ *LS*, a book which is dominated by the theme of a still somewhat restricted economy of plurality, as the above-quoted passages show, is made possible by the thought of the unconditional, a thought which is inextricably intertwined with the structure of language.

This also allows us to think differently about the “structure” of *LS*. As we saw above, Van der Walt refers to man as “irreducibly the animal with language”.²⁷⁵ We see here that van der Walt views language and representation as always already disrupting presence, even in silence (the silence of language which cannot represent plurality). Van der Walt furthermore refers to hospitality as “the condition *sine qua non* and the *conditio per quam* of plurality”.²⁷⁶ Instead of understanding hospitality as another name for plurality (as in the reading above), hospitality can be understood as the introduction of a fourth level of analysis (in addition to the three mentioned above).²⁷⁷ This necessarily complicates the levels of analysis in Van der Walt’s thinking. In brief, it would have the result of abolishing level 1 in *LS*. Levels 2 and 3 would furthermore be understood as different possible versions of the conditional, derived not from level 1, but from level 4. Law perceived thus is likely to be more open to absolute hospitality, in a way that is somewhat similar, but nevertheless more pro-

²⁶⁹ The allusion here is of course to the heterogeneity that Derrida continuously explores in his reading of texts from the tradition; see eg Derrida *Specters of Marx* 16.

²⁷⁰ See *LS* 1: “Das Niveau einer Wissenschaft bestimmt sich daraus, wie weit sie einer Krisis ihrer Grundbegriffe fähig ist.”

²⁷¹ *LS* 2 264.

²⁷² *LS* 2.

²⁷³ *LS* 2.

²⁷⁴ It is also significant to note that the moment of crisis in Husserl, whom Van der Walt as we saw follows to a certain extent, is always a crisis of language: see Derrida *Speech and Phenomena* 81, Edmund Husserl’s *Origin of Geometry: An Introduction* (1989) 92 n 96.

²⁷⁵ *LS* 134.

²⁷⁶ *LS* 12.

²⁷⁷ See par 3 *supra*.

gressive than what Van der Walt prescribes for level 3. Read as such, *LS* will have inaugurated in an exemplary fashion a post-apartheid theory of law.²⁷⁸

OPSOMMING

In sy onlangse boek, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*, gee Johan van der Walt 'n duidelike uiteensetting van die moontlike impak van onder andere Jacques Derrida se denke op die reg. In hierdie artikel word die boek krities geanaliseer en word daar aangetoon dat Derrida se tekste vir 'n ander interpretasie oopstaan. Met verwysing na 'n aantal temas word aangetoon dat Derrida se denke meer verregaand is as in Van der Walt se model. Die onvoorwaardelike speel byvoorbeeld in Derrida se denke 'n kardinale rol terwyl dit bykans afwesig is in Van der Walt se model. Van der Walt beklemtoon die noodsaaklikheid van pluraliteit en die onmoontlikheid van versoening tussen verskillende sienings van die reg in 'n bepaalde saak. So 'n benadering kan konserwatiewe politieke gevolge inhou. 'n Ander interpretasie van Derrida, waar die onvoorwaardelike voorop staan, hou meer belofte in vir 'n na-apartheid regsteorie.

²⁷⁸ To end on a more personal note: it is this strain of the unconditional in Van der Walt's thinking that has always held an immense attraction for me.