

In conversation

The Literary Exception and the Rule of Law: a conversation on liberal democracy, populism, interpretation, law and poetry

Johan van der Walt, Karin van Marle and Wessel le Roux¹

Abstract

Johan van der Walt discusses key themes from his most recent book *The Literary Exception and the Rule of Law* Oxfordshire Routledge (2023) with Karin van Marle and Wessel le Roux. Van der Walt calls for a genre of law and literature scholarship that does not seek to soften or erase the differences between law and literature, as is typical in most law-as-literature scholarship, but that seeks to highlight the tensions between law and literature (represented by the avant garde poetry of Paul Celan and Paul Valéry). Van der Walt argues that the same event can give rise to a legal and a poetic response. Liberal society exists in the space that is opened up by these opposing trajectories. Liberal law must respect the non-poetic nature of its regulatory function

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and resist attempts, especially among nationalists and populists, to cure the existential inadequacy of law.

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The limits of liberal democracy

Karin van Marle: Thank you, Johan. I think we should start where you start this book, titled *The Literary Exception and the Rule of Law*. And you start in your preface with reference, actually, to the end of your previous book, the book titled *The Concept of Liberal Democratic Law*,² referring to something that prompted the argument that you are making in this book. So, don't you want to go back to the previous book and unpack those arguments for us?

Johan van der Walt: Yes, the book indeed starts where *The Concept of Liberal Democratic Law* ends. And in that book, I ended with a definition of liberalism which suggested that liberal democracy cannot survive without poetic fictions. It's literally conditioned by powerful enough fictions, poetic fictions, that answer to the need of fulfilment, political fulfilment or existential fulfilment, that liberal democracy does not offer and cannot offer. Spoken in a very general sense, the concept of liberal democracy that I developed in the book, in the previous book, underlines the fact that we live in pluralist societies that require us to enter into compromises all the time. So, no one's 'comprehensive vision of life,' as Rawls would put it, can be fulfilled, and yearnings for comprehensive fulfilment cannot be satisfied in liberal democracy. And that puts the whole idea and the practices of liberal democracy under immense strain. This is so because of a very common and widespread idea of politics, that politics must be the expression of the fundamental desires, yearnings, longings of the human being. Both the *The Concept of Liberal Democratic Law* and *The Literary Exception* pivot on the insight that one must forget about this kind of fulfilment when one wants to live in a liberal democracy. When people's different longings and yearnings are so disparate as they are in the pluralist societies that emerged from Western Modernity, the yearning for political fulfilment can only end in carnage.

That's the basic idea of the book. And so, what do we do with all these yearnings and longings, existential demands that one can say, especially since the 19th century, since the rise of romantic nationalisms, were projected onto politics? In the romantic era we had a clear connection between art and

2 Van der Walt JD *The Concept of Liberal Democratic Law* Oxfordshire Routledge (2019).

politics. Romantic nationalism was the political expression of these longings for existential fulfilment – a longing that was in fact a longing for personal and collective self-expression. This is written all over the essential problematic that one sees in the philosophy of Hegel, and the whole era and context in which, for instance, the young Hegel, Hölderlin and Schelling were students in the Theological Seminar in Tübingen. The philosophy of the young Hegel and Schelling and the poetry of Hölderlin were all responses to a Kantian recognition that modern life is divided, the recognition that all of us who live in the age of modernity have divided lives. The question of the time pivoted on the experience of constant division, on the one hand, and the romantic yearning for wholeness, on the other. There was, however, no way back to the pre-modern modes of existence – the Greeks, the Middle Ages – about which the Romantics dreamed. Those who came to understand the modern condition well, as Hegel later did, realised that the fulfilment of the yearning for wholeness was no longer possible.

And that is where the idea of poetic fiction comes in as a possible compensation for that lack of fulfilment, which may then rid politics of this burden of having to answer to that urge. That's where I start off in *The Literary Exception. The Concept of Liberal Democratic Law* already refers to Heller. Hermann Heller's observations about the Weimar era, in his critique of Hans Kelsen, are for me a very typical and telling statement of the key issue at stake here. Heller has been discovered in a recent European Law Journal as a major figure and theorist of the Weimar era. To say that Heller was a liberal democrat would be stretching it somewhat, but he was a social democrat and therefore surely belonged to the democratic camp in Weimar politics that remained faithful to the fundamental principles of the Enlightenment. But even he, in his critique of Kelsen, talks about the yearning for law to express, and that means also for *politics* to express, the absolute ground of life. For me, this sounds just like Carl Schmitt. At the core of Heller's democratic and Enlightenment political thinking survived the same idea of the political as an existential expression of a people that we associate with Schmitt.

It is this understanding of politics that we need to give up enduringly for the sake of the ideal of civilised politics, for which I take liberal democracy as the primary, but surely not only, example. Not all civilised forms of politics need to conform to the format of liberal democracy as we more or less know it, and one should add that the forms of liberal democracy as we more or less know it have not always been examples of civilised politics. John Rawls also expanded

his idea of liberalism in his later writings to include other forms of reasonable, of decent politics that pursue the ideal of civilised compromises with others with whom you have to live together. If one cannot do this, if one cannot rid politics of the Romantic quest for self-expression which now is written all over the return of these populist movements in Europe and elsewhere in the world, one will have to give up on the idea of democracy as a civilised expression of human existence, or rather, as a civilised *organisation* of human coexistence.

The links between law, populism and poetry

KvM: Thank you. I wanted, specifically, to ask you about populism. I think you've now hinted at it. Without reducing the argument, and you'll have to fill in for those who have not read the book, but what is the link that you make between poetry and populism?

JvdW: There's a close link. I think populism or the populist movements are, I'll put it provocatively, poetic movements. But with one qualification: they are poetic movements informed by extremely bad poetry. Populist movements are poetic movements, but they basically indulge in bad poetry that real poets can only scorn, given the way they express themselves in crude metaphors of belonging, of the existence of the people, things that we know language cannot express. Poets, real poets, simply do not think that way anymore.

So yes, the link between populism and poetry is very real in my book. It comes out especially in my discussion of Schmitt. I argue that his whole political vision is ultimately a poetic vision of politics. I suspend judgement on whether there was any real poetry, or good poetry, in Schmitt. I don't think so. But I needn't go into that. Suffice it to say that populist movements generally pivot on Schmittian or quasi-Schmittian ideas of romantic self-expression, and *poetic* self-expression at that. Schmitt criticised the Romantics of the late 19th century, but he himself continued to indulge in that kind of romantic understanding of politics, the kind of politics that can only make for bad poetry, or crude poetry.

KvM: I remember, and I'm not sure if it's in the book, but I remember a conversation where you spoke about the Spanish author, Cercas. And that his book, *Soldiers of Salamis*, is a good example of, in a way, this poetry developing into a revolution?

JvdW: Yes, indeed. I'm absolutely taken by the works of Javier Cercas. I was not ready yet to write about him in this book. There's one reference to him. But perhaps it will come later. Since then, I've also read another book of his, *Lord of All the Dead*, and I can only recommend it very strongly. The wonderful thing about Cercas is that he actually engages with his problematic when he describes the Spanish Civil War and the 'Falange' movement that was afoot at the time, a movement that was very close to Franco's fascism. But it started out as an extremely fine poetic movement that pursued the idea of poetic and spiritual renewal of society, and so forth. And then Cercas highlights it so well in the book how crudeness simply washed through their thinking when the Falange turned into a political movement. Their transformation into a political movement basically annihilated their poetic beginnings. I believe this is the key or at least one of the key themes in the book. Cercas develops it so well. He commences by portraying some of the Falange leaders as truly poetic minds. And then at some point, when they begin to turn to fascist politics, the fine poetry that inspired them at first simply gives way to crudeness. Yes, Cercas surely corroborates the idea in *The Literary Exception* that populism and fascism make for bad poetry.

KvM: Kelsen plays a very important role in this book. And specifically, this idea that Kelsen, his *Grundnorm* or foundational value is a fiction. But doesn't *that* sound quite literary or poetic?

JvdW: Well, no, not necessarily. To go fast, one should distinguish between juridical and poetic fiction. Fiction, as a general term, is an essential condition of language in general. But fiction as a generic, sort of overarching term, can be split into two kinds of fiction. Poetic fictions and legal fictions. Kelsen's theory of law pivots on the juridical fictions that render a legal system possible. It has nothing to do with poetic fictions. For me that was one of the problems with the law and literature movement for a long time. Because of their discovery of the role of fictions in law, many exponents of the movement came to consider law as poetry. But they never asked the question whether these fictions are the same. The fact that they are both fictions do not tell us much. All language is fiction. All language functions by means of the fictions it weaves together. You can bring in the whole post-structuralist understanding of language here, it will fit the bill completely. The fact that language is a play of differences and deferrals instead of references makes it a play of fictions. But the fact that the law is a fiction does not make it poetic fiction. The question is, what kind of fiction is it?

The law is a fiction to the extent that the norms that it uses to organise society in an ordered way, in a normative way, do not exist. Or, to be more precise, they do not exist in themselves. One has to find some kind of common expression for them that is convincing enough to make people hang onto them under the difficult circumstances that arise every time that the law needs to be enforced. The fictional formulation of general norms is most at risk when the law must be enforced coercively. Those subject to coercive enforcement can then easily say, “well, those things are not real.” So yes, they are not real, but we have nothing else with which we can organise ourselves. That is why one must hang on to them as long as one can. Of course, when a legal system is really no longer serving the purpose of creating a civilised order, it will collapse. It will be overtaken by some kind of rebellion or revolutionary overthrow. When that happens, we are back with that which my book describes as “the event” – the primordial event from which both juridical and poetic fictions derive or emerge in the first place. This return of the “event” is always possible. And the really insightful thing about Kelsen is his awareness of this fragility and contingency of the law. As long as we talk about the norm, and about the law, we have to then take the norms of law seriously.

But Kelsen knows that it takes a lot of effort and commitment to take them seriously. When the burdens of civilised existence become heavy, as they do in times of political unrest, those norms, fictional as they are, can easily collapse. When the burdens of civilisation become too heavy to carry, the legal system will not last, and Kelsen is very aware of that. That’s why he emphasises the idea of the effectiveness of law. Yes, the *Grundnorm* is the foundation of law, but it cannot survive if it does not meet the criterion of effectiveness. Kelsen uses the German word ‘*Wirksamkeit*’. When the system of legal norms fails to sustain a just and stable enough environment (‘environment’ used here in a quasi-systems theoretical sense of the word), the burdens on life imposed by those norms will simply become too heavy, and the norms will perish. Kelsen is very clear on this point. So yes, I think people are really waking up now to the radical legal thinking that is afoot in Kelsen’s work. I’ve just reviewed a book proposal from someone who wrote a PhD in Slovenia on Kelsen and deconstruction. Suffice it to say that there are clear signs that today’s legal theorists are waking up to a new Kelsen about whom we learned almost nothing when my generation began to study law.

KvM: Thank you. Wessel, I think you have questions on Gadamer and interpretation?

Wessel le Roux: Yes. Johan, I want to focus first on your conception of literature and then on your conception of law. As far as the first is concerned, could we please return to your comment about populism and crude poetry? When you spoke about populism as a poetic without poetry, you distinguished between bad poetry, on the one hand, and true poetry or powerful poetry, on the other. Could you further clarify the contrast between those two kinds of poetry, and then explain how true poetry, the poetry that you are interested in and fascinated with, enables us to escape, or deal with or respond to, this rise of populism understood as a poetics without poetry?

JvdW: It's not an easy question to answer, but I will try. Let me just begin by talking about my guiding figures. It should be clear now that Kelsen is my guiding figure when it comes to the law. But with regard to poetry, it is Paul Celan. The idea of the two trajectories of language that I develop in the book, I get from him, and more specifically from his Meridian lecture, which is probably one of the most explosively significant little texts written in the 20th century. It is in this lecture that Celan puts forward his understanding of the "direction of the poem". The poem is language that moves in a direction but moves in a direction where there is not a destiny that can be reached. It cannot reach the destiny that it sets up for itself to reach. It is because of this unreachable destiny that Celan then also begins to talk about the impossible poem, and about poetry that cannot refrain from striving to become the poem that it cannot be. The poetry that I'm talking about, to answer your question more directly, the poetry that I'm guided by in *The Literary Exception*, is this poetry that constantly struggles with its own impossibility, with its own inability to say something that it cannot say. Of concern is poetry that responds to a spectral sense of having to say something that demands expression and yet cannot be expressed. So Celan is the one figure. Another point of reference in the book is Paul Valéry. Valéry expressly says that the language and the poetry of our time turn on a regard for the limits of words. He evidently contemplates poetry then in the very avant-garde sense of the word.

I nevertheless realise towards the end of the book that one must be careful with reducing poetry to just that. This realisation is also important for the notion of the two trajectories of language that I develop in the book – namely, the poetic and the juridical. These two trajectories resist one another, but they can also not be separated cleanly. They also overlap one another. And if you look at the diagram that I have in the book, you will see that it does not portray anything like pure poetry or pure law. The spectrum of linguistic utterances that

it charts are always some or other mix of law and poetry. This, of course, seems to confirm the typical law and literature position on this relationship, which I don't want to deny completely. There's no point in that. But what I want to stress is the fact that there is, what one should respect and constantly keep in mind, a real tension between those two trajectories. The diagram endeavours to convey the sense of two things pulling in opposite directions, and thus of language itself pulling or tearing itself apart. In that pulling apart, there's a creation of space. This I developed later in the book with reference to Arendt. What she calls the 'space of appearance,' I argue, is the space that opens up because of the way language pulls in opposite directions. I put the idea forward quite literally. By resisting one another and pulling apart, law and poetry create space in which we live, in which societies exist, in which people live together. They live in that space, constantly under the tension of these two trajectories of language and these two yearnings of language. One the one hand there is the yearning for order, which we all have. When order breaks down in our lives, we want it back. We very soon wake up to the reality that we want and need these things that Joe Singer once called 'things that we want to take for granted'.³ One wants stable order around you. And yet, there is something in the human being that resists that order. That is why we are always in "a tight spot," I argue in the book (repeatedly invoking the funny refrain in the film *Oh Brother, Where Art Thou?*). We always find ourselves in this tight spot because of the simultaneous yearning for order and disorder that pulls us in opposite directions. So now, to come back to the question of avant-garde poetry, if we reserve the idea of poetry just for people reading and writing very avant-garde, pioneering, groundbreaking poetry, then we miss something important that is there also in all other forms of good poetry, which can include popular literature and popular music, and so forth, in whatever genre.

There is a paragraph at the end of the book that lists all the different genres of poetry that one can consider here. It could ultimately be a good catchy rock ballad that gets people to just feel that sense of connection for a moment, that sense of reality that they have when they are there at the rock concert that kicks in and works for them. I have had the experience of this just now. Two weeks ago, my wife and I went to a Sting concert, and we were amazed afterwards at Sting's ability to get the really big crowd into a groove with his simple songs. There is no avant-garde poetry there. All his lyrics are actually

3 Singer JW "Things that We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society" (2008) 2 *Harvard Law and Policy Review* 140.

very simple. But perhaps that is exactly what got to everyone listening to him. It was amazing to see all these now already granny and grandpa-like figures rocking to this guy and just getting swept away for a while.

And then, and perhaps even more importantly, there is sport. I make this point right at the end of the book. The role that the whole sphere of athletics and sport play in unburdening the political organisation of life of the yearning for a connection with reality is immense, I think. I do not want to present this book as a kind of a starting point of a method of rehabilitation, but if ever I would recommend something to people responsible for reconstructing societies that are falling into the temptation of fascisms and populisms, I would stress the need to offer people something else, so that they might stop looking towards politics to fulfil their yearning for reality. I would stress the need for a massive re-democratisation of sport, so that many more people can get involved and play sport, get that sense of exhilaration when you become involved in a game and part of a team, even at a low level of accomplishment. But still, when you do something well, even for just a moment and at a low level of accomplishment – you shoot a goal, or beat another to the finishing line, or whatever – it gives you that “kick,” the kick of existence. These are fictions, right? These are all fictional simulations of war. It is for this reason that athletics and sport are crucial for my argument. That which Heller called the ‘absolute ground of existence’ ultimately turns on a deep heroic yearning for mortal combat.

Contrasting approaches to legal interpretation

WIR: Turing now to your conception of law, could we go back to what you said earlier about Kelsen. I was interested in the contrast you develop between Gadamer and Kelsen, when it comes to legal hermeneutics and interpretation specifically. And as I understand it, Gadamer sees interpretation as a form of cultivation, to use an organic metaphor. There is something latent in the law that is brought to fruition or completion through the process of interpretation. Whereas Kelsen has a completely institutional understanding of the law, which makes it difficult to speak about ‘correct,’ ‘incorrect’ or ‘just’ or ‘unjust’ interpretations. You develop this contrast and then say that the Kelsenian understanding of law is fundamental to the book and your understanding of the relationship between law and literature. I was wondering whether you could elaborate on that? Do you argue against the Gadamerian move towards

purposive interpretation and, with that, a certain understanding of the fact that law and language betray law, that the letter of the law doesn't define the law, that the law therefore cannot be captured in the language of the law, which explains the increasing appeal to the spirit of the law in a certain sense.

JvdW: Gadamer's conception of hermeneutics actually ignores or underplays the fact that modern societies are pluralist, that they are ridden by deep divisions. So, when you read Gadamer, he talks about this 'effective historicity' or this 'effective history,' the famous *Wirkungsgeschichte*. It is one history, right? It's one history that unfolds in the life of the people or in the life of a community. And therefore, also one history that unfolds in its law, in its legal system. The law is a response to a coherent, homogenic, coherent history of meaning. The demands of coherence and homogeneity can be fulfilled with every new act of interpretation. The same old traditions of meaning materialise over and over again with every new act of interpretation. We all got excited about Gadamer's sense of contingency, his sense, yes, that interpretations don't last forever and that you have to interpret again and again. But his idea is still that an act of interpretation expresses the fundamental meaning that is afoot in the history of a people. Central to it is still the idea of the correct application of a rule. That's where one can really see the link between Gadamer and Dworkin. For me, their positions are very close to one another. Central to them both is the idea that the correct understanding of the rule is consummated or completed with the application of the rule. When we understand the rule properly, we apply it correctly. For me, this is an extremely Hegelian understanding of law and interpretation of law, which I don't think one can take seriously under circumstances where legal communities are so deeply divided. The law that gets enforced via the application of a rule never reconciles the divided interests that move someone to turn to a court of law for the correct interpretation and application of a relevant rule. The court may come up with an interpretation with which people will, or could be prepared to, live for a while. But no one who thinks realistically about rule-application and law-enforcement in pluralistic societies would believe that any such application of a contentious piece of law is the right interpretation that leaves everyone satisfied that justice has prevailed, leaving one to conclude that the losing party was simply wrong from the start to believe she had a valid complaint or defence worthy of the court's attention. In any case, I can simply not think about the law in this way.

Kelsen gives us a framework of juridical interpretation that responds to a very different understanding of the law. For him, interpretation is always an

encounter with the irreducible ambiguities in language. Every instance of law application will offer more than one option, he insists. I have often been asked how I reconcile my fascination with Kelsen with the enthusiastic engagement with the American Realists and the Critical Legal Scholars in my earlier work. Well, here is Kelsen stressing the fundamental indeterminacy of legal norms and rules that will have to be settled (terminated, if you wish) with some or other judicial decision, and doing so without claiming that this will be the correct interpretation and the correct interpretation that will satisfy everyone's expectation of the law.

What is it that ultimately ensures the stability of legal interpretation and rule application according to him? He invokes a whole institutional system in this regard. Someone has the authority to interpret and apply the rule. An institutional system authorises someone to interpret and apply the law. And as long as that person acted within the scope of that authorisation – that is, as long as the court or a judge acted within the scope of the formal competence and capacity granted by the legal order – the law announced and pronounced will be valid law for as long as it lasts. When another court or judge then comes onto the scene later with the institutional authority to reject the earlier interpretation (a higher court, for instance), it can do so if it deems it fit do so. And so one ends up with a new interpretation. But the validity of the interpretation depends – for as long as it lasts – simply on the authority of the one who has the right to interpret. It has nothing or little to do with the intrinsic meaning of the applied rule. Kelsen makes very interesting observations in this regard. There cannot be something like a wrong application of the law, he insists. When a court that has the authority, competence and jurisdiction to interpret a rule interprets it, that interpretation becomes law. It is simply not meaningful to talk about a wrong interpretation of the law. He literally puts it like this. There is no point in talking about a wrong interpretation when someone with due competence to do so interpreted a rule. But one can talk about a valid interpretation. One can and must do so every time that someone with the institutional competence to do so, interpreted a relevant rule.

Kelsen, likewise, also stresses that there cannot be anything like unconstitutional legislation. Any legislation that is passed by parliament and becomes a statute is valid legislation. Should a Constitutional Court later respond negatively to that legislation by striking it down as “unconstitutional”, it does not classify that legislation as intrinsically “unconstitutional”. According to Kelsen, the legislation under examination was perfectly constitutional

and remained so until a court with the required powers of review terminated its constitutionality. The court simply suspends or terminates the validity of something hitherto perfectly valid and replaces it with a rule that will henceforth be valid, until a similar “validity-terminating” review process again takes place. The same logic applies when Parliament rejects the Court’s interpretation of the Constitution. If Parliament cannot live with the judicial interpretation of the constitution and manages to muster the super majority needed to change the Constitution, it basically tells the Court: we do not agree with your interpretation of the Constitution, and since we have the power to do so, we now replace it with a different interpretation. So, one ends up with nothing more than a series of institutional interpretations, none of which can claim correctness or accuse another of incorrectness. And that is something completely different from the understanding of interpretation that one finds in Gadamer.

WIR: You expressly favour the Kelsenian approach to law and claim that it is fundamental to the thesis of your book. How is the Kelsenian view fundamental for your understanding of literature as an exception to law and for the role that the literary exception plays within liberal societies?

JvdW: Well, suppose one takes up Gadamer’s understanding of law and consider the application of the rule as the completion and fulfilment of the rule. If one would do this, one would actually be attributing a poetic effectiveness to the rule. One would be assuming that a whole community is well-served by the law. It would also mean that the whole community’s existential demand on the law is fulfilled. And that would be like a poetic fulfilment of everyone’s yearning or quest for reality. Now, the moment that one says that that is not possible because no law can fulfil the poetic yearning for fulfilment of everyone in a divided society where one has very different expectations of fulfilment and very different yearnings for reality, then one also accepts that the law and legal rules of that society cannot answer to or fulfil the poetic yearnings of that society. One then basically degrades the claims that law makes. One lowers their status. One simply says: This is just a way of establishing order, reasonably civilised order. And of course, the moment one says that, the yearning for a better and fuller expression of selfhood, that is, for an expression of who the people really think they are, will immediately be awakened.

There are two responses possible to this awakening. The one is a populist-existentialist or Schmittian response that will seek to remake the law so as to

turn it into the expression of some or other collective yearning and quest for reality. In the context of pluralist societies, this is the beginning of civil war, long before any overt hostilities follow. The other response is to accept, in Kelsenian fashion, that the law will always be an at best temporarily satisfactory but existentially inadequate solution to a political or administrative problem. The moment that one accordingly accepts that there is nothing to be done about this, the moment that one accepts that nothing – no political action and no war – can ever cure the existential inadequacy of law, is the moment in which poetic compensation evidently becomes the only real alternative. The Kelsenian insight is the threshold of the poetic alternative.

WIR: My concern is with the idea of a poetic compensation for the law in poetry, music or sport, that is, outside the law. Are there no traces of the same poetic compensation within the law? I mean, you said earlier, we can't separate the two trajectories too clearly. What I'm thinking about is the difference between appeals to the spirit of the law and the letter of the law in legal argument. Regardless of what content we give to the spirit of the law, the recognition that the letter of the law, strictly applied, will give rise to an absurdity (as is often said) is a recognition of a sense of justice that is betrayed by the language of the law; a sense that the full meaning of the law cannot be captured in the language of the law. Is that not already a recognition of the need to periodically compensate in legal judgments themselves for the limits of legal or statutory language or the positive law? Should we not understand all non-literal modes of statutory and constitutional interpretation as poetic compensations? Or, would you, from a Kelsenian perspective, also distrust those kinds of "compensatory interpretations"?

JvdW: There are many things that one has to take into consideration. Because of the constant overlap of the two trajectories of language to which Celan alerts one, and because of the corresponding overlapping of the two triangles in my diagram, I concede again that there is no such thing as purely legal language. Neither is there anything like purely poetic language. So legal language – and the language of judges – will also have its poetic flourishes, so to speak. Some judges are really quite poetic in the way they write their judgments, et cetera. And it's nice when it happens. There is also no reason to reject that. A little bit of poetic flourish may just help to make a good rule stick a little bit better or longer. So again, a complete stand-off is neither possible nor necessary. In the way that you have just put it now, in your question, I would have a little bit of

caution with regard to this idea of the spirit in the letter of the law, because there's something else at stake in that quite elementary *legal hermeneutic* or jurisprudential notion. Lawyers are sometimes confronted with a veritable breakdown of the letter of the law, with instances where the letter of the law makes no sense. Of concern are failures of proper statutory drafting which make the statute non-sensical or leave its meaning unclear, and which necessitate typical strategies of statutory interpretation. Interpreters of statutes will then typically invoke the metaphor of "the spirit of the law" that has to be honoured. They will take recourse to the broader content, purpose and logic of the legislation to make sense of the statutory clause that seems to make no or inadequate sense. But all of this is still a very juridical or jurisprudential attempt to create order. The work that is required here does not strike me as poetic at all. Consider a piece of statutory contract law in which there is something disturbingly unclear in the phrasing of the statute. A judge must then step in and find a rule that makes sense of the statute in terms of the spirit of the broader framework of legislation to which the statute belongs. This, however, is still a very legal spirit that you're looking for, not a poetic one. It is surely not poetic in the sense of struggling with the limits of language in the way Celan or Valéry contemplate. It's really just a functional endeavour to resolve an instance of inadequate legislation.

WIR: Thank you, Johan. Karin, back to you.

The memory of Bram Fischer and Nelson Mandela

KvM: I wanted to get to your view on Mandela and Fischer. Maybe I'll just make two short remarks, and you don't have to respond to them. And I think I've asked this before, but the question is about law and the role that law plays in transformation. Is transformation a yearning? I suppose I wonder if it's possible to free law, rid law from these yearnings, and maybe speaking from the South Africa context the *need*, for change or transformation. And I suppose the idea that the law can play a role in transformation. Would you say no, rather not? You mentioned Arendt, and of course, she's very interested in maintenance. Can't we say that in order to maintain, you need to transform, that maintenance and transformation are in fact entangled? I think about your argument around Fischer and Mandela, and that Mandela can be regarded as a successful revolutionary, but Fischer as a renegade. And I think you somewhere say that Fischer will not / cannot be remembered. Can you unpack that? Because

I think many of us would say of course Fisher can be and *is* remembered. Are you saying that Fischer is not remembered, or are you reflecting on how we remember him? It would be very valuable, Johan, to hear you on these two questions.

JvdW: I'll try my best. These are very difficult things to talk about. It is a little easier when you can sit down and write it out line for line, given that so many things are appealing for attention at the same time. But first, then, the question of transformation. I think one can really talk very meaningfully and logically about law and transformation and the need for transformation, when the bar of normative organisation of a society is so low as it was, for instance, in South Africa after the apartheid era, where a legal system really had to be renewed fundamentally. The law was simply not up to the standard of regular liberal democratic or constitutional democratic law. When this is the case, one can easily talk about transformation, yes. And you yourself put it very well just now by saying that it is actually still about maintenance. It's about maintaining a society in a way that includes making it better where it can obviously be improved. The argument in my book is not about the need or imperative to improve societies that can obviously be improved. This is, of course, most obviously the case in a period of "transitional justice" where the legal system had for a long time been nothing but a farce. And the exigency is, of course, not limited to these "most obvious cases." The need for transformation is often also evident in regular liberal or constitutional democracies. The law can surely also be employed to transform such societies. Any person with a reasonably sense of social justice living in the best of the world's exemplary liberal democracies will still recognise the excessive levels of social inequality that these societies pass off as normality. And this is surely also a factor in the strong yearnings that many people may have for "something else." For many people, these societies are evidently in need of social and legal transformation. But all of this is about law and legal transformation. It is not about poetic transformation. That is why I stressed in the beginning that poetic transformation is really that which aspires to give us that sense of reality that no language can give us. So that's why I would still want to insist on a clear distinction between legal and poetic transformation.

No doubt, transformation is hard to sell to a conservative status quo. And most status quos are just conservative in many ways. Even typical liberal status quos are deeply conservative. They want to remain in place. They want to retain the status quo. So, it will not do any harm, and it might just help, if the

transformers would throw in some good poetic lines to try and convince those resistant to transformation. But these poetic lines are little more than rhetoric. Rhetoric is something else. It's not really poetry. Having put this on the table, I can now come back to Fischer and Mandela, the second part of the question.

I will insist now, provocatively, that we will never remember Bram Fischer because he has never entered our memory or our memories. Something else has entered our memory. Some historical facts are known about a man called Bram Fischer. We have stories about that man, very sad stories. And some stories perhaps begin to capture something. Some stories remember him in a way that begin to capture something of the fact that we never really knew him, because of the sense that must come to one when a story enters the complete desperation into which Fischer must have fallen. I try and express that in the chapter on Mandela and Fischer. Everything was broken around him. All his colleagues had been thrown into jail. Then Molly died. There was so little of his life left. It was literally like this desert figure that had to go underground. Underground. One often says someone went underground in the effort to get away from the police. But "underground" is really also a metaphor for a place that we don't know. What do we know of Bram Fischer in that place? Nothing, except that what we can imagine from the place where we are. Of concern is the problematic that Lyotard raises with regard to linguistic references to places from which no one ever returned. We were not there when Fischer went through his darkest hours of suffering. He alone was there. This is what Walter Benjamin talks about when he talks about "unforgettable life." He talks about things that have never entered any memory and can therefore also not be forgotten. It is for this reason that Fischer is unforgettable. Why unforgettable? Well, again, you have to have a memory before something can be forgotten. Fischer was unforgettable, because there's an aspect of him which never entered any memory. I insist on that. And that is why I reserve the category of the "poetic" for any endeavour to get closer to the unforgettable Bram Fischer that no one remembers.

One must take care not to suggest that Fischer as a person was somehow poetic in a way that Mandela was not. I surely do not know enough. My knowledge of Fischer is more or less restricted to Clingman's fantastic biography. As far as I can remember, there is no suggestion in Clingman's book that he was exceptionally keen on poetry or actually wrote poetry or anything. We only know that he was a communist and a great lawyer with an acute sense of justice. So, as a person, he was actually more of a lawyer than

anything else. But because of sheer fate, his life entered the zone of existence that elicits poetry, poetry that seeks to express that which cannot be expressed. That is what I'm trying to say with regard to Fischer. One can also put the shoe on the other foot, Mandela's foot. It's also not clear that he had a particularly keen regard for reading and writing poetry. As far as I know, there's very little evidence of that. But suppose he was. Suppose he was someone like Václav Havel, there's a good example. Someone who was a real poet, a real artist, someone on whom history or destiny then also smiled to give him an opportunity to organise or reorganise a society. In that moment, Havel actually exited the essence of being a poet and became the leader of a country and the founder of a legal system. He became a lawyer, in a very simple sense of the word. So did Mandela. It doesn't concern the personalities. It concerns that which destiny made them. Of concern are the different spaces in existence into which destiny threw these two figures, Mandela and Fischer.

The intersection of law and poetry

KvM: Thank you Johan. I'm busy with a supplement for *Law and Critique*. And the one part of the supplement is focusing on the Bram Fischer memorial lecture presented by Stephen Clingman in 2023. And he repeats throughout his lecture, the question of what happens when the world becomes inhospitable, talking about Fischer. And that is what happened to Fischer, the world became inhospitable to him. Tembeka Ngcukaitobi is one of the respondents. And he has this line where he says he believes that Fischer got moral clarity in that moment when he rejected law. And I was thinking about your distinction, and I was wondering about how to read Tembeka's response also alongside your view here. Where would one place Biko and Sobukwe?

JvdW: I mention Biko in the book. There are many other figures that one could have brought in here and Biko certainly entered the same space that Bram Fischer did. And Biko, interestingly enough, was also in the regular sense of the word a poetic person. His writings are poetic. There's a real element of poetry in them. But that is not what would concern me. What would concern me is the fact that fate threw him into a space where what I say in my book about Fischer can also be said about him. One can say of Biko, too, that he is unforgettable because we have not remembered 'him'. There's something of Biko that will forever escape us. Of concern is a thought that Derrida also thought with regard to Mandela. That there is also a Mandela that we have never seen. Derrida says

that there's an element of Mandela that will always escape us. So, in his case, too, there is a certain poetic moment that will never be erased. His destiny was just not so completely determined by that moment as Fischer's was. But Biko surely, and how many other people who died in the struggle against apartheid. In that sense, the poetry of South Africa is written in blood. And yes, one can only try to remain true to the memory that cannot capture what it remembers, what it seeks to remember.