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# Dominions: Law, Literature and the Right to Death

PETER FITZPATRICK\*

*The 'curious right' attending modernity and revealed in Blanchot's 'Literature And the Right to Death' could be readily reduced to that sovereign right to take life which ultimately subordinates law. Yet, so the argument runs, with that same curious right law surpasses sovereignty. And it does so by way of its similarity to literature. What will uncover that surpassing by law, and by literature, will be a pervasive concern with death as the horizon of the law.*

Nothing that is not there and the nothing that is.<sup>1</sup>

## DEATH AS THE HORIZON OF THE LAW

The affinity between law and death is usually put in terms of law's pretension to finality. Taking indicative *aperçus* from Blanchot, this is law as 'the end', as

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As with so much else, this paper was generated in discussions with Adam Thurschwell and Colin Perrin. My precarious belief in it was sustained by Carrol Clarkson, Hillis Miller, and Johan van der Walt. Costas Douzinas provoked further thought on sovereignty.

<sup>1</sup> W. Stevens, 'The Snow Man' in *Selected Poems* (1965) 7.

antithetical to ‘life itself’.<sup>2</sup> And in a way Blanchot would go so far as to subordinate law to death for, so he finds, law is ‘less the command that has death as its sanction, than death itself wearing the face of law’; this ‘death is always the horizon of the law’.<sup>3</sup> The thought is hardly original. When death is seen as something like a constituent limit of law, this is law in its avowal of certainty and predictability, law ‘in its origin, in its very order’.<sup>4</sup> Yet it is revealing, and this is a point I will come to later, that the association between law and death is so often seen in terms of an ultimate or final assertion that is sovereign, either the law itself as sovereign or law as an ‘instrument’ of sovereignty, a giving effect to ‘the right of death of the sovereign’.<sup>5</sup>

Almost in spite of all this, death is also for Blanchot the horizon of the law in quite another way. Again, this thought does not put a great strain on originality, even if it will prove to be a more productive one. Here the horizon does not simply contain but, rather, connects integrally with what is beyond, marks some commonality with what

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<sup>2</sup> M. Blanchot, *The Madness of the Day*, trans. L. Davis (1981) 16; M. Blanchot, *The Infinite Conversation*, trans. S. Hanson (1993) 225.

<sup>3</sup> M. Blanchot, *The Step Not Beyond*, trans. L. Davis (1992) 24-5.

<sup>4</sup> J. Derrida, ‘Force of Law: “The Mystical Foundations of Authority”’, trans. M. Quaintance, in J. Derrida, *Acts of Religion* (2002) 276.

<sup>5</sup> J. Locke, “The Second Treatise of Government,” in *Two Treatises of Government* (1965) 308; I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (1965) 331-3; M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (1979) 49; and for the quotation M. Dean, *Governmentality: Power and Rule in Modern Society* (1999) 105.

is beyond, or the possibility of it. The horizon thence becomes not only the condition and quality of law's contained and distinct existence but also an opening onto all that lies beyond and is other to that existence. It is in this way that, for Blanchot, death 'raises existence to being', that 'death becomes being'.<sup>6</sup> This death 'is man's possibility, his chance, it is through death that the future of a finished world is still there for us'.<sup>7</sup> And this is death as a liberated 'nothingness', a nothingness which 'is the creator of the world in man'.<sup>8</sup> Death as horizon here is not only the end but also the beginning, the opening to and making possible of all that can come from being to existence: death is 'the Other'.<sup>9</sup> For death as this horizon of the law, however, what we have with Blanchot is not now an explicit affinity between death and law but, rather, parallel descriptions. So, law for Blanchot is (also) that which is quite 'lacking' in fixity, quite uncontained and unsubordinated, a self-affirmation made 'without reference to anything higher: to it alone, pure transcendence'.<sup>10</sup> This law takes its instituted existence from a being beyond. 'Let us grant', says Blanchot, 'that the law is obsessed with exteriority, by that which beleaguers it and from which it separates

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<sup>6</sup> M. Blanchot, 'Literature And the Right to Death', trans. L. Davis, in M. Blanchot, *The Station Hill Blanchot Reader: Fiction & Literary Essays* (1999) 391-2.

<sup>7</sup> id., p. 392.

<sup>8</sup> id., pp. 398-9.

<sup>9</sup> M. Blanchot, *The Writing of the Disaster*, trans. A. Smock (1995) 19.

<sup>10</sup> Blanchot, op. cit., n.3, p.25.

via the very separation that institutes it as form, in the very movement by which it formulates this exteriority as law'.<sup>11</sup> Such law is the same as what Blanchot would also see as the law of the law, see as 'a responsibility...towards the Other' that is 'irreducible to all forms of legality through which one necessarily tries to regulate it', but which ultimately 'cannot be enounced in any already formulated language'.<sup>12</sup>

Thence, the achingly simple point of this paper becomes that, no matter how 'necessary' this regulation, for law to be law nothing can be placed before it. Or that which is placed before it can only be nothing.<sup>13</sup> This no-thing is for Blanchot 'the savage freedom of the negative essence' that emerges from speech being insufficient 'for the truth it contains', a truth always denied in the enounced.<sup>14</sup> This truth has its revenge, so to speak, in the constant corruption of the enounced, in the 'ruin' of any 'work', in the 'sickness' of words, a sickness which is also their 'health' – the generative condition of their relation to the world, of their constituent connection to the nothingness of being.<sup>15</sup> Likewise, law for Blanchot, that law 'obsessed with [an] exteriority which 'institutes it as form' and from which it wrenches existence, such

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<sup>11</sup> Blanchot, op. cit., n. 2 (1993), p. 434.

<sup>12</sup> M. Blanchot, *The Unavowable Community*, trans. P. Joris (1988) 43.

<sup>13</sup> id., p.368.

<sup>14</sup> cf. H. Cixous, *Readings: The Poetics of Blanchot, Joyce, Kafka, Kleist, Lispector, and Tsvetayeva*, trans. V. A. Conley (1991) 21.

<sup>15</sup> Blanchot, op. cit., n. 6, p.382.

law 'exists only in regard to its transgression-infraction'.<sup>16</sup> In its 'ruin', its 'rotteness', borrowing now from Derrida, the realized law continually slides into this unrealizable exteriority, an exteriority which in turn must be 'cut' into for law's 'necessarily' contained existence.<sup>17</sup>

What we have here, in sum, are two laws or two deathly horizons of the law. One is the law inseparable from the nothingness of 'its' exteriority, the law which, as Cixous says, 'does not exist', 'has no material inside'.<sup>18</sup> This is a law which can only ever 'be' other than what it 'is', always dying in its deliquescence. But not yet. What still insists is the invariant law which in its determinate existence cannot be other than what it is, dying in a desolate stasis. This ambivalence provokes a search in-between its two dimensions, a search for the domain of Blanchot's 'literature', that literature which 'is the work of death in the world'.<sup>19</sup>

## LAW LIKE LITERATURE

Such literature is an 'opening' to what is beyond, to alterity and possibility, to 'what is when there is no more world', or 'to what would be if there were no world', to 'the

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<sup>16</sup> Blanchot, *op. cit.*, n. 3, p.24; Blanchot, *op. cit.*, n. 2 (1993), p.434.

<sup>17</sup> Derrida, *op. cit.*, n.4, pp. 252, 273.

<sup>18</sup> Cixous, *op. cit.*, n. 13, p.18.

<sup>19</sup> Blanchot, *op. cit.*, n. 6, p.393.

void'.<sup>20</sup> But this void is of the kind encountered by Blanchot's protagonist in *The Madness of the Day* for whom it was disappointing, a void which inexorably becomes 'a presence' and protean: 'one realizes the void, one creates a work'.<sup>21</sup> Between the realized and the unrealizable, between the appropriated and that which is still 'ours for being nobody's', there is a 'shifting', a 'passing', a 'movement' impelled by 'a marvellous force' which is the impossibility of the movement being otherwise.<sup>22</sup> This is an activity always situated, an emplaced 'affirmation', 'an operation' which cannot be separated 'from its results'.<sup>23</sup>

Literature for Blanchot is a work like any other – he instances building a stove – even if it is such 'to an outstanding degree'.<sup>24</sup> Law and literature, it could now be said, share the same ambivalence between existent instantiation and what is ever beyond yet incipient in it.<sup>25</sup> The comparison between law and literature more usually points to their opposition of course. Literature's realms of the imagined and the

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<sup>20</sup> *id.*, p.388; and see C. Fynsk, *Language and Relation...that there is language*, (1996) 238-9.

<sup>21</sup> Blanchot, *op. cit.*, n. 2 (1981), p.8; Blanchot, *op. cit.*, n. 6, p.395; and Fynsk, *op. cit.*, n.20, p.238.

<sup>22</sup> Blanchot, *op. cit.*, n. 12, p.29; Blanchot, *op. cit.*, n.6, pp. 363, 365, 369, 387, 389.

<sup>23</sup> Blanchot, *op. cit.*, n. 6, pp. 365, 397.

<sup>24</sup> *id.*, p.371.

<sup>25</sup> For a pointed and brilliant account of the similarity see P. Tuitt, *Race, Law, Resistance*, (in press) chapter 5.

possible oppose the all-too-solid certainty of law – the law-confounding power of Plato’s poets for example.<sup>26</sup> Yet it is exactly the aspect of literature to which Plato would object, to its illimitable inventiveness and its quality of fiction, which impels law’s making, for law is only called upon to affirm some certainty in the face of uncertainty. And despite the incessant jurisprudential efforts to render law as fact, society, economy, and so on, it refuses being in ‘a world sapped by crude existence’.<sup>27</sup> Peremptorily, the legal fiction can illustrate the formative location of law beyond existence, for with the fiction the enounced content of the particular law remains the same whereas operatively, and by way of the fiction, that content has changed to its opposite. So, and for example, in enounced Roman law certain litigation could only be initiated by a Roman citizen but foreign litigants were able to do the same because of a fiction deeming them to be citizens for the purpose.<sup>28</sup> Thus, in Blanchot’s terms, a fiction is ‘truth and also indifference to truth’.<sup>29</sup>

## LAW’S ENABLING

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<sup>26</sup> Plato, *The Laws of Plato*, trans. T. L. Pangle (1980) para. 656c.

<sup>27</sup> Blanchot, op. cit., n. 6 p.395 for the quote.

<sup>28</sup> H. Maine, *Ancient Law* (1931) 21.

<sup>29</sup> Blanchot, op. cit., n. 6, pp.396-7.

What Blanchot's 'literature' does not give us and what law does is a characteristic conceptualization of that which is in-between being, with its possibility, and a worldly existent. Granted, in its vacuity, in its rejection of any determinant anteriority, law dependently absorbs the concepts taken from its 'context'.<sup>30</sup> Yet law invests these concepts with the imminent possibility of a being otherwise so that they are not, even in their own explicit terms, exhausted by presence.

Let me take, with inexcusable brevity, some of what could be called law's enabling concepts so as to show how in them the nothingness and the possibility of being subsists with the determinate and the actuality of existence. Taking equality, equality before the law: in law's irreducible openness, in its not being tied to any existent differentiation, there is ever within it an incipience of equality. That 'pure' equality can only be before or anterior to the law made determinate, for with the coming to determinate existence differentiation and inequality will always supervene. Thence equality endures in a shrunken life of 'more or less'. Impartiality as an enabling concept can be seen in the same way. Law's lack of ties to the existent inclines towards a lack of attachment in law's 'application'. But what is, in Locke's terms, law's being needful of 'a known and indifferent Judge' is not finally feasible since the

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<sup>30</sup> Thus the law in Blanchot's *The Madness of the Day* is totally dependent on the protagonist but she, the law, 'treacherously' elevates him only to elevate herself above him: Blanchot, op. cit., n. 2 (1981), pp.14-16.

disregard of difference becomes inexorably compromised when judge and judgement are made known in the determinate scene of application.<sup>31</sup>

Another telling example comes from the requirement that laws be ‘general’. Because of this requirement, it used often to be said that a decision confined to a particular determination does not count as law.<sup>32</sup> Yet the ultimate way in which law is made determinate is in the decision, and the decision will always be specific. Neither the decision nor the circumstances provoking it will ever be exactly repeatable or repeated. Yet, if the general cannot find itself in law’s determinate existence, it cannot be so general that it falls completely into nothingness and has no bearing on anything specific, no operative content at all. Hence the common and paradoxical requirement that law’s ‘generality must be specific’.<sup>33</sup> Perhaps the ur-instance of an enabling concept in law could be that of ‘responsibility’ and I will draw on that as a bridge back to Blanchot’s concept of a responsibility which ‘is’ the law of the law, that responsibility or, in an archaic usage, responsibility ‘towards the Other’ which is ‘necessarily regulated’ in the making of the determinate law.<sup>34</sup> In this inexorable narrowing there is a setting of law’s responsive range. Yet law must, to be law,

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<sup>31</sup> Locke, op. cit., n. 5, p.396.

<sup>32</sup> e.g. id., p.409; J.-J. Rousseau, *The Social Contract*, trans. M. Cranston (1968) 82.

<sup>33</sup> F. Neumann, *The Democratic and the Authoritarian State: Essays in Political Theory* (1957) 28.

<sup>34</sup> Blanchot, op. cit., n. 12, p.43.

remain responsively open to what is within and beyond that range. For law ultimately to deny that responsiveness by inflicting death would be law's antithesis.

## SOVEREIGNTY AND THE RIGHT TO DEATH

Which brings me, with a touch of inevitability, to Blanchot's 'right to death'. This is 'a curious right' which emerges when the void, or the nothingness of being carried by literature, by law, has 'in *absolute* freedom...become an event'.<sup>35</sup> The voiding of existence is somehow made existent. He instances the Reign of Terror in the French Revolution. Here the generality of right has become universal, 'pure abstraction' – a universality which for the citizens comes to 'negate the particular reality of their lives', which fills possibility so completely that 'in the end no one has a right to his life any longer, to his actually separate and physically distinct existence'.<sup>36</sup> To be a citizen in this totalized event, to be a carrier of this strange or estranged right, is to be absolutely, is to lose the materiality of one's distinct being. Totality realized allows of no being apart from itself. There remains no space for our own, our singular life. There 'death is sovereign'.<sup>37</sup>

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<sup>35</sup> Blanchot, *op. cit.*, n. 6, p.375 – his emphasis; and cf. p.379.

<sup>36</sup> *id.*, p.376; cf. Blanchot, *op. cit.*, n. 2 (1993), p.225.

<sup>37</sup> Blanchot, *op. cit.*, n. 6, p.378.

Here, then, is a seeming affinity, even identity between death and sovereignty which would go to confirm the sovereign ‘right to death’, the right to stop our existence, even the right to our existence. And classically, sovereignty, like literature and like law, assumed a determinate, an emplaced existence yet would extend to all possibility. This marvellous combination was effected, after a fashion, through a transcendent reference joining specific rule to deific scope. Without that reference, sovereignty persists as what Derrida calls a ‘secularized theological concept’.<sup>38</sup> This sovereignty ‘throned behind / Death...heeds but hides, bodes but abides...’, borrowing from Hopkins.<sup>39</sup> With its claim to a completeness yet specificity of power, this is a sovereignty to which law has proved susceptible. Law’s constituent imperative that nothing can be placed before it leaves it a vacuity. It must ever respond to and depend on an ‘outside’ for its contents and, in much philosophical and in even more jurisprudential thought, sovereignty has been assertively advanced as that which endows law with content.

All of which would seem to wrap things up and you, dear reader, may be almost as relieved as I to conclude at that, but there would remain the problem that the right to death imports the exact opposite. It is ‘each person’, ‘every citizen’ who ‘has a right

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<sup>38</sup> J. Derrida, 2001. ‘A Discussion with Jacques Derrida,’ (2001) *Theory and Event* 5, [http://muse.jhu.edu/journals/theory\\_and\\_event/v005/5.1derrida.html](http://muse.jhu.edu/journals/theory_and_event/v005/5.1derrida.html).

<sup>39</sup> G. M. Hopkins, ‘The Wreck of the Deutschland’, in *The Poetic Works of Gerald Manley Hopkins* (1990) 127.

to death', and not the sovereign.<sup>40</sup> For Blanchot, a 'sovereign amplitude' does 'nothing'.<sup>41</sup> We may discern what the sovereign may do positively or determinately by filtering the right to death through 'a simple and redoubtable logic' – borrowing the phrase, if not the confidence, from Nancy.<sup>42</sup> For 'each person', each particulate in its 'absolute' and 'free' completeness, to be-with other persons, being still distinct yet in common, each would have to be the same as the other. Distinctness would thence be lost. Alternatively, if the 'absolute' distinctness of each is to be preserved, then there would be as many operative versions of what is in common as there are particulates, and thence the utter dissipation of commonality. The seemingly paradoxical price, then, of the distinctness of each in their relation to each other is the existence of *some* determinate being-in-common inhabiting and limiting each 'in' their very distinctness.

This commonality enabling distinct being, a commonality which is a determinate or determinable being-in-common, does provide a place for sovereignty. It is, however, a place that has been effectively occupied by other modes besides a monadic sovereignty. Sovereignty is but one specific mode of rule. As such it depends integrally on law – reversing now the standard ascription of law's dependence on sovereignty. Granted there can be sovereign acts apart from law, acts sustained for

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<sup>40</sup> Blanchot, *op. cit.*, n. 6, p.376.

<sup>41</sup> Blanchot, *op. cit.*, n. 12, p.32.

<sup>42</sup> J.-L. Nancy, *The Inoperative Community*, trans. P. Connor (1991) 4.

example by commitment to such neo-sacral entities as nation, commitment unto death, yet if sovereignty is to endure beyond the evanescence of the act, if it is to extend indefinitely yet enclose itself, if it is to subsist determinately yet traject to what is beyond its existence ‘for the time being’, sovereignty has to be bound to law. The condition of being sovereign is a claim of or to right. No amount of asserting the existence of a sovereign condition can make the qualitative leap to being-in-right. And what the sovereign condition always lacks in being stretched between determinate existence and the possibility that is within being has always to be constitutively integrated into it. Law is the amenable means of so doing, of sovereignty’s thence being sustainedly within the world. The sovereign ability to come adaptively to ‘[a]ll things counter, original, spare, strange’, borrowing from Hopkins again, is an ability carried and sustained by law through its intrinsic inability to be bound to any pre-existent, its generative incompleteness and labile openness.<sup>43</sup> Yet if law carries sovereignty through Blanchot’s ‘night’ of nothingness and possibility, it also and ‘necessarily’ returns it to the ‘day’ of an ‘enounced’ existence, and of this returning there can be ‘no end’ for ‘there is no possibility of being done with the day, with the meaning of things, with hope...’.<sup>44</sup>

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<sup>43</sup> Hopkins, ‘Pied Beauty’, in Hopkins, op. cit., n.39, p.144.

<sup>44</sup> Blanchot, op. cit., n. 12, p. 43; M.Blanchot, *The Work of Fire*, trans. C. Mandel (1995) 8.