A Critique of Conqueror South Africa, Post-1994 Liberal Democracy and Liberal Democratic Law

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Abstract

Violence and oppression in the form of conquest and colonialism, racism, patriarchy, heteronormativity and in terms of class are all inevitable effects of Western culture. This is due to the reason that Western culture is fundamentally highly materialistic, competitive, narcissistic, individualistic and takes aggressive and domineering stances towards innerworldly entities. Therefore, a Western concept of law based on such a culture is fundamentally ineffective to eradicate such violence and oppression, but rather perpetuates it. These characteristics of Western culture and the Western concept of law have their roots in the Western conception of "Being," particularly in the conception of "Being-with." This article argues that liberal democratic law and liberal democracy rooted in an individual, competitive, hierarchical and amensalist Western ontological framework fundamentally perpetuate group-based oppression. Therefore, the 1996 constitution and post-1994 South African constitutionalism secure and perpetuate the oppression of the indigenous conquered people under the guise of transformation and reconciliation.

Keywords: socio-political order; Being; Being-with; liberal democracy; liberal democratic law

Introduction

European culture is, as Nunn describes, "highly materialistic, competitive, individualistic, narcissistic, places great emphasis on the consumption of natural resources and material goods [as well as] tends to take aggressive, domineering stances toward world inhabitants" (Nunn 1997, 325). Therefore, the very nature of European culture, as described by Nunn, fundamentally engenders societal problems such as racism, sexism, classicism, colonialism and other forms of group-based oppression. Understanding law as the creation of a particular culture, set of historical and political

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realities, as well as worldview, European culture and worldviews can be understood as having produced a particular conception of law, which is accordant to European culture, as described by Nunn, and thus, facilitates the various forms of group-based oppression which are endemic to European culture (Nunn 1997, 325). For a definition of a conception of law, this article draws on Merryman's definition as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, and about the proper organisation and operation of a legal system" (Merryman, quoted in Nunn 1997, 327).

This article argues that the post-1994 South African conception of law (liberal democratic law) as a Western conception of law that is rooted in Western notions of a form of social existence and worldview, carries the markers of Western culture as described by Nunn (1997) and, thus, establishes a polity and regulates the relations between human beings as characterised by individualism, hierarchy, competition, domination, aggression and amensalism, and ultimately oppression and exploitation. As a result, liberal democratic law in post-1994 South Africa not only perpetuates conquest and the continual subjugation of the indigenous conquered people, but also engenders various forms of group-based oppression and exposes different groups of people to physical and social death.

The argument put forth in this article will unfold in four sections. Following the background, the first section will discuss the violent imposition of European forms of social existence and socio-political order through colonial conquest and their persistent existence and maintenance in post-1994 South Africa through the constitution and its master frame of transformative constitutionalism as liberal democratic law. The second section will focus on Western conceptions of socio-political order and ideas of a form of social existence, more particularly liberal democracy. In the third section, the paper will discuss the dominant underlying ontological underpinnings of Western thought and worldview, and highlight how they inform Western notions of socio-political order as the basis of the Western cultural consciousness. The last section will discuss liberal democratic law and highlight how it, being rooted in Western conceptions of socio-political order, organises a society and regulates relations between human beings in ways that engender individualism, competition, domination, aggression, hierarchy and amensalism, and thus perpetuates conquest as well as the oppression, subjugation and exploitation of the indigenous conquered people.

Background

Western Europe conquered the rest of the world, as well as violently transplanted and imposed its ideas of a form of social existence together with its constitutive social practices over the rest of the territories and populations in the world. The forms of social existence and political orders of the populations outside of Europe were thus negated and their nations and polities violently ruptured, overthrown and conquered. Serequeberhan provides that European culture and form of existence understood itself to be qualitatively superior to other forms of life, and thus, on the basis of such

understanding and through the colonial project, violently destroyed other social formations and existences in other parts of the world and replaced them with replications of itself or new versions of the European metropolitan society, including their accordant Western conceptions of law. The European worldview and form of social existence was transplanted and imposed through the use of force, which was normalised and justified with arguments drawn from various disciplines, including science, morality, ethics and philosophy (Serequeberhan 2003, 77). Subsequent to the colonial project and the removal of formal colonialism, Western Europe maintained its domination over the rest of the world and its political replicas in its former territories through universalising and imposing liberal democracy as a form of socio-political ordering.

The negation of the forms of socio-political order of the indigenous people of this territory, currently known as South Africa, and the replication of Europe over it through the multi-century wars of colonisation resulted in the establishment of South Africa, as a polity, organised according to the European worldview, culture and form of existence. Ramose explains that through being victorious over the conquered people of this territory in the unjust wars of colonisation, the conqueror claimed a questionable right of conquest and, by virtue of such right, unilaterally imposed upon the indigenous conquered people the meaning of experience, knowledge and truth, including the conqueror's form of social existence and ordering (Ramose 2003a, 138). This unjust imposition of European culture and form of social existence, that is, the socio-political order over this territory, for Ramose, constituted the first defeat of the indigenous conquered people—which was followed by a second defeat in the early 1990s, with the imprisonment of the process of the transformation of South Africa and the socio-political order over this territory by a supreme European constitution. The second defeat of the indigenous conquered people maintained the socio-political order imposed by the conqueror at conquest and thus confirms the questionable right of conquest claimed by the conqueror, as well as ensures that the fact of conquest continues to persist and remains undisturbed. This, therefore, highlights the continual exigency for the repudiation of the conqueror's questionable right of conquest and the reversion of title to territory to the indigenous conquered people to determine for themselves the meaning of experience, truth, knowledge and a form of social existence and ordering. At the level of the episteme, this requires that African philosophers, as argued by Serequeberhan, should first de-structively engage the philosophical underpinnings of the European worldview and Eurocentrism as an indispensable element of African philosophy (Serequeberhan 2003, 88). It is on the basis of this exigency that this article de-structively engages liberal democracy and its accordant conception of law.

Lefort understands law, together with other social practices such as economics, religion and politics, to form part of what he refers to as "the political," which he defines as "the very staging of a form of social existence that allows for an array of adequately coherent practices that can, therefore, be said to belong together" (Lefort, quoted in Van der Walt 2020, 106). Thus, when studying a society's conception of law, an interrogation of its accordant social and political order is indispensable. Such a study is also necessarily

concerned with ontology, as it interrogates the very formation through which a social world comes into existence and becomes knowable as a world (Van der Walt 2020, 106). This is to say that an understanding of Being, the Being-together-in-the-world of those entities which we know as human beings, as well as the Being-with of these entities in the co-disclosure of the world and its innerworldly entities to all entities with the Being of humans, all shape ideas of a form of social existence and socio-political order, and by extension how we come to understand law.

Therefore, I will discuss Western conceptions of social and political order, focusing particularly on liberal democracy to highlight its individualistic, hierarchal, competitive, dominative, aggressive, and amensalist nature and give an explication of the dominant European underlying ontological framework that engenders these characteristics in a way that is fundamental to the European worldview and cultural consciousness. Oruka provides that beliefs and propositions are only true in a given context (Oruka 2003, 69). In respect of socio-political life, the context used to assess whether to accept or reject ideological propositions or truth claims, is a particular cultural consciousness or domain. The underlying ideology of the culture, for Oruka, serves as the socio-political philosophy of the society, and it is "on the basis of the cultural domain that the ideological and other socio-political beliefs acquire meaning and truth value" (Oruka 2003, 69). Oruka defines a cultural consciousness as the "belief in and commitment to the ethics and logics of a given ideological culture, a general philosophical outlook [or worldview] noted in such a culture" (Oruka 2003, 69). In analysing the dominant ontology underlying the Western worldview, the article seeks to draw out the ethics and logic, that is, the dominant cultural consciousness as the context for Western socio-political life.

Conquest and its Persistent Reality Post-1994

The Union of South Africa was established by the South Africa Act, 1909 of the British Parliament following the conclusion of the Anglo-Boer War. The war was between two settler conqueror groups, namely the British and the Boers, over the title to territory and sovereignty over it. This territory was violently taken from the indigenous conquered people through the waging of the unjust wars of colonisation by both conqueror groups against the indigenous conquered people since 1652. The conquerors unilaterally established South Africa and determined its socio-political, economic and legal order by virtue of their sovereignty over the territory which they claimed, based on the right of conquest (Dladla 2018, 417). Since conquest lies central to the formation of South Africa and characterises the history of the country, it is imperative that our interrogation of the socio-political order of South Africa and its corresponding conception of law begin with a brief exposition of the concept of conquest.

Winter (2011) explains that conquest is a means through which states can acquire territory and subjugate populations, which is simultaneously a disruptive and an ordering force. The disruptive element of conquest refers to the violent overthrow and rupture of an existing social, legal and political order, while simultaneously, as an

ordering force, it involves the institution and imposition of a new and stable order. Following military victory and the establishment of the socio-political and legal order, Winter posits, the conqueror needs to maintain the established order through constructing a political authority and ensuring that the established polity continually reproduces and maintains the domination of the conquered (Winter 2011, 2). Therefore, conquest should be understood as a continuous activity that persists for as long as the conqueror holds title to territory based on the right of conquest, and the socio-political and legal order imposed by the conqueror over the territory and its inhabitants remains intact and undisturbed.

We agree with the assertion made by Dladla that the colonisation of Africa by Europe consists of the transformation of the territory, that is the socio-political and legal order over the territory, to reflect those of Europe (Dladla 2018, 426). The colonial conquest of Africa, therefore, violently destabilised and rejected the indigenous socio-economic systems and cultures of the indigenous conquered people and enforced the conqueror's ways of Being and form of social existence (Madlingozi 2023, 1). It is through conquest, and following the unjust wars of colonisation, that the conqueror established and maintained the European conception of reality, knowledge and truth, and simultaneously that the indigenous conquered people lost both their land and sovereignty over it (Ramose 1995, 72; Ramose 2005, 15). The ordering of social and political life over this territory, according to Western conceptions and forms of social existence, has been maintained to this day and is sustained by a European cultural consciousness and worldview which continues to permeate every aspect of life in South Africa.

We have already argued above that ideological postulations and truth claims regarding socio-political ordering are based on and sustained by a particular cultural consciousness. Therefore, before our discussion on Western conceptions of socio-political order—and, in particular, liberal democracy—it is necessary to uncover the cultural consciousness upon which it rests. Oruka (2003) describes the cultural consciousness of colonial conquest imposed by the conqueror over the indigenous conquered people as a master-slave culture, which holds the ideological position that people are born either masters or slaves. According to this logic, Oruka explains, the slave is condemned for eternity to inferiority in relation to the master, and is accordingly at the disposal of the master to be used for the master's comforts, while the slave is understood as seeking happiness in the service and admiration of the master (Oruka 2003, 71). The master and the slave each have their respective intellectual and moral qualities, and on the basis of these qualities, each of them develops their own Manichean cultures. In terms of this Manicheanism, the master is the conqueror and inherently possesses positive qualities, such as virtue, beauty, rationality, intelligence and objectivity, while the slave is the conquered and naturally possesses the qualities of being evil, ugliness, irrationality and subjectivity (Oruka 2003, 72).

Ramose understands this dualism as distinguishing between those who are human beings (animals with reason)—which refers to those beings who possess reason as their distinctive characteristic—and those who are not human (animals without reason), who look like human beings but do not possess reason (Ramose 2003b, 554). The conquerors were understood to possess reason and thus regarded as human beings, while the conquered were denied reason and thus did not qualify as human beings. In the socio-political order instituted through conquest, competencies, rights and obligations, Ramose explains, were assigned in accordance with this distinction in terms of which the conquerors were afforded the right to freedom and the competence to exercise their will, and thus, in their relationships with one another had the obligation to recognise, respect and protect the right to freedom and the freedom of the will of those they interacted with, while the conquered were denied these rights and thus could not demand the obligations that befit only the conquerors. This exclusion, according to Ramose, meant that the African was to be treated only as an animal by the conqueror and deprived of all human rights (Ramose 2003b, 544). One of the competencies of reason is to conquer nature. This, for Serequeberhan, meant that for the conqueror, the indigenous conquered people were simply a passive resource to be exploited (Serequeberhan 2003, 83).

It is this reasoning, which shaped the arrangement of the socio-political order of South Africa as a bifurcated world that consists of the domain of the conqueror and that of the conquered, in terms of which the conquerors situated themselves at the zenith of the South African polity and human existence, while the conquered were positioned at the nadir. According to Madlingozi, these two domains are governed differently. Whereas the domain of the conqueror is governed by a system of liberal democracy (which suggests the recognition, respect and promotion of human rights), the politics in the domain of the conquered are characterised by "patronage, appropriation and repression" (Madlingozi 2019, 124). Based on these positions, the relations between the conqueror and the conquered are such that the conquered peoples of this territory are dehumanised, exploited by the conqueror, exposed to the harshest living conditions and possibilities of death, as well as excluded and marginalised from the polity of South Africa, except as labour for the conqueror. It is for this reason that Modiri describes the conditions of the conquered peoples as a "wasted and abject social existence, [in terms of which the conquered people of this territory are made to be] fungible, and disposable to power and violence and exposed to ongoing cultural and psychic debasement" (Modiri 2021, 59). Although separate, the two domains of the bifurcated socio-political order of South Africa are not exclusive to one another. It is precisely the dehumanisation, exploitation and exposure of the conquered peoples to such an abject existence and possibilities of death that the conqueror acquired and can maintain an exponentially higher value and integrity of human life and standard of living.

Since the waging of the wars of colonial conquest and the inception of the Union of South Africa and throughout the history of the country, the indigenous conquered people were exploited by the conqueror and denied rights that were reserved for the conqueror,

that is, human beings proper. It was only with the 1994 transition and the 1996 constitution that the indigenous conquered people were granted formal equal constitutional status to the conqueror and human rights. Although lauded as transformation and the granting of freedom to the indigenous conquered people, as mentioned above, Ramose refers to this process as the second defeat of the indigenous conquered people. The 1994 transformative project legitimised and maintained the socio-political order instituted and imposed by the conqueror through conquest and sought to merely include the conquered peoples of this territory into the already established polity. The question of the reversion title to territory and the sovereignty over it remained untouched (Ramose 2007, 320). This maintained the socio-political order imposed by the conqueror and thus protected the fact of conquest. Modiri argues that, notwithstanding the granting of human rights to the indigenous conquered people, the bifurcated, antagonistic and hierarchical socio-political order instituted by the conqueror through conquest continues to persist post-1994 under the guise of liberal democracy, transformation and reconciliation, and is secured by the current constitution and post-1994 constitutionalism (Modiri 2021, 44). To understand the persistent and continued arrangement and ordering of the South African polity as bifurcated, antagonistic and hierarchical, the next section will discuss the political philosophy that underlies Western conceptions of socio-political order in general, and liberal democracy in particular.

Western Conceptions of Socio-political Order

Schmitt (1996) posits that what lies at the core of all human relations and every sphere of human activity is the political battle and the inevitable and interminable friend-enemy disputes which characterise the battle. The primary category of human social existence, for Schmitt, is the political; that is, the friend-enemy distinction, from which all the elements of the political, such as religion, education and social policy, emanate. This is to say that it is the ever-present possibility of war according to the friend-enemy distinction, and by extension, the ever-present possibility of physical killing or death, which is the principal presupposition that determines all human action and thinking (Schmitt 1996, 18). Van der Walt (2020) interprets Schmitt's friend-enemy distinction to mean that "the enemy" refers to those who can be annihilated or killed, while "the friend" is understood as those who are considered *iustus hostis*, meaning equal enemies, who remain enemies but are worthy of respect and are not to be annihilated (Van der Walt 2020, 39). Accordingly, drawing from Thomas Hobbes's maxim of a "war of all against all," Schmitt posits that in a society, "everyone is, therefore, the foe and competitor of everyone else" (Schmitt 2007, 31). Such an understanding of society, therefore, conceptualises the relations between human beings as organised around the inevitable fact and factor of physical force. In accordance with Schmitt's conception of society and human relations, each human individual in this society is understood to be an asocial, atomised individual, among other individuals, whose only concern is his or her individual survival and is, as Schmitt states, "possessed by passion of prestige and rivalry, [and] is at all times determined and ready to trample on reason and logic in order

to secure for himself immediate, momentary advantage" (Schmitt 2007, 36). Van der Walt (2020) argues that it is this conception of society that underlies liberal democracy.

Some authors credit the disintegration of the organic community and polity, the valorisation of the asocial and self-interested atomised individual, and the antagonistic and amensalist human relations between such individuals for power and resources in Western political philosophy to the introduction and dominance of liberal democracy (Connor 1973; Khan 1987; Van Dyke 1977). Van der Walt, however, draws the origins of such a conception of society from the socio-political order of ancient Greece and argues that it characterises the entire history of European ideas of social and political organisation (Van der Walt 2020). This position is corroborated by the works of Berlin (2002) and McClelland (1996). The strength of the argument posited by the latter group of authors lies in that each of them provides a historical trajectory and careful study of Western political thought from the classical era right through to the modern and post-modern eras and, therefore, makes a more compelling case, as opposed to the former set of authors who arbitrarily begin their historicisation of Western political thought in the seventeenth and eighteenth centuries. We will, in our discussion of Western conceptions of socio-political order, however, mainly rely on the work of Van der Walt (2020) as he, relying on various primary and secondary texts, carefully follows the development of the conception of society as a group of atomised self-interested individuals, and the idea of human relations as competitive and antagonistic (through the entire history of Western political thought from its ancient Greek origins and the influence it had on liberal democracy), rather than provide a general treatise on the history of Western political thought as Berlin (2022) and McClelland (1996) do.

Beginning with ancient Greek civilisation, Van der Walt provides that "excellence in competition and rivalry and the cruellest displays of this excellence played a significant role in their social and political imagination, long before the fifth century" (Van der Walt 2020, 56). According to Van der Walt (2020), MacIntyre posits that the socio-political order and ethos of Athens was characterised by excessive brutality and the polity's virtue was understood in terms of the competitive and agonistic spirit of the Homeric warrior-king. Thus, the Athenian conception of the natural order (kosmos) and socio-political order (nomos) was understood as a manifestation of the eternal flux of physical force (Van der Walt 2020, 87). McClelland holds a similar view and provides that, for the Greeks, competition within the bounds of law was understood as a moral principle. He posits that in the Greek polity, men were expected to compete for wealth, physical strength, wisdom, courage, self-control, justice and fame (McClelland 1996, 9). The nature of things between human beings was understood then as physis (force) and law was understood as a means to impose moderation. To make this point, McClelland writes: "In Socrates' day, the Sophists were saying that law was irksome, intolerable to strong natures, setting undue limits to what those strong natures could achieve if they were allowed their natural sway. In the rest of nature, the strong preyed on the weak, so why should this not also be the rule in the world of men?" (McClelland 1996, 13).

Both Berlin and Van der Walt hold that this conception of socio-political order persisted and influenced ideas of political order in the Middle Ages (Berlin 2022, 310; Van der Walt 2020, 87). Van der Walt provides that according to Villey, the social and political order of mediaeval Europe was organised in terms of power relations between individuals. Political power, during this period, was understood as a volatile exertion of force and pretentious displays of religious conviction rather than the proportional administration and distribution of resources (Van der Walt 2020, 100). To corroborate Villey's position, Van der Walt draws from MacIntyre, who observed that the morality of the Middle Ages concerned a subjective ethics, which could not be judged or appraised on earth. However, during the Middle Ages, the competitive and antagonistic nature of the socio-political order of Europe was concealed by the existence of the King, who stood as the putative unity and symbolic will of the people (Van der Walt 2020, 111). This individualism, according to Seligman, was in accordance with soteriological assumptions of Christian belief (Seligman 1997, 514). He provides that the responsibility of each individual for the activity of his will and the state of his soul was prevalent in the high and later Middle Ages (Seligman 1997, 517).

With the decline of religious emphasis and the secularisation of "The Political" from the mediaeval period to the modern age, we see the persistence of the self-interested, asocial, antagonistic and competitive individual detached from the rest of society, except spatially and temporally. Immanuel Kant, one of the major figures in Western philosophy and the Enlightenment era, reaffirms this logic in a more fundamental way and posits that the nature of human beings is to be inherently antagonistic by being social but inclined to isolation. Kant provides that "this opposition, it is which awakens all his power, brings him to conquer his inclination to laziness and, propelled by vainglory, lust for power, and avarice, to achieve a rank among his fellows whom he cannot tolerate but from whom he cannot withdraw" (quoted in Serequeberhan 2003, 83). For Kant, the fundamental antagonism inherent in human beings results in an incompatibility and heartless competitive vanity between human beings as well as in each individual—an insatiable desire to possess and rule (Serequeberhan 2003, 83).

Drawing from Ernst-Wolfgang Böckenförde, Van der Walt describes the social organisation of Europe during the modern age as characterised by the conflicting interests of individuals. Böckenförde observes that the very concept and consciousness of individual rights of the modern era, legitimises individual interests and, therefore, maintains the conflict between individuals. Such an understanding of the modern conception of socio-political order was also held by Hegel. Van der Walt explains that Hegel's *Differenzschrift* understands division, separation and non-identity to be the central elements of existence (Van der Walt 2020, 56). Thus, accordingly, liberal democracy, in keeping with the conception of society which characterises the history of European conceptions of socio-political order, understands society as "a group or mass of individuals who happen to live together in the same time and space and invariably compete with one another for survival, wealth and honour" (Van der Walt 2020, 113).

Malan (2012) holds the same position. According to Malan, Western political philosophy (through the works of Thomas Hobbes, John Locke and Jean Jacques Rousseau) has understood individuals outside of their social contexts as radically atomistic, and each leads a mutually detached life in terms of which each individual independently seeks to gratify his or her own personal needs (Malan 2012, 79). This position has—through these different authors—found expressions in different legal traditions, according to which Hobbes's political philosophy through Austin and Bentham influenced legal positivism, while Locke and Rousseau's iterations are expressed through natural law and liberalism. For Malan, human conduct and behaviour are at their most basic level, driven by these conflicting individual appetites and thus, human relations are characterised by the desire to maximise one's personal power and trump other individuals (Malan 2012, 79). In this way, then, a society is understood as a huge number of people, each of them being an antagonistic individual atom who are all competing against one another and embroiled in mutual hostilities (Malan 2012, 84). The purpose and function of a state in Western political theory, according to Malan, is not to create a community but to contain the antagonistic conduct of the competing individuals within its territory and ensure that the competing individuals do not destroy one another (Malan 2012, 85). Such an understanding of a form of social existence has persisted for centuries and continues to be the case today.

Having highlighted the dominance of the self-interested, competitive and asocial individual and the understanding of society as a group of such individuals continuously engaged in competition throughout the entire history of Western political thought, it is, therefore, clear that, as Van der Walt suggests, Western society has "always had to contend with excessive levels of competition, [and this] is more current today" (Van der Walt 2020, 56).

The Ontological Underpinnings of Western Socio-political Ordering

The above discussion of the nature of Western conceptions of socio-political ordering and liberal democracy raises the question: What is the reason for this consistent conceptualising of socio-political order as characterised by excessive individualism, narcissism, antagonism, competition, hierarchy and domination? Asked differently, the question is: What lies at the core of a conception of social being as fundamentally characterised by such division and antagonism?

Schmitt (2007) implicitly suggests an ontological basis for this conception of socio-political ordering by stating that human beings inherently possess an irresistible chaos and an irresistible urge to wield power for the sake of it. The political battle and friend-enemy distinction, which according to Schmitt, lie at the core of human relations and society, are rooted in this ontological claim (Schmitt 2007, 39). His statement not only points to "the Being of human beings" but also to their "Being-with." It was already contended above that a contemplation of a socio-political order involves an engagement with ontology. Therefore, this section will analyse the dominant Western ontological conception that underlies these ideas of socio-political order.

Levinas homogenises Western ontology and asserts that throughout the whole history of Western philosophy, since pre-Socratics, [Western] ontology has always been understood in a way which centralises the subject and engenders relations of domination (Levinas 1969, 48). Concurring with Levinas, we will then take Heideggerian ontology as the place marker in our analysis of the dominant Western ontology. The reason for this is that Heidegger's fundamental ontology (as an explicit and systematic analysis of the question of Being and Being-with as its primary concern) exposes and makes bare what Heidegger refers to as the "essential structures" (Heidegger 1962, 38) of the "Being of human beings," which characterise ontological interpretations throughout the entire history of Western thought. This, therefore, exposes our interrogation categories and structures that would otherwise have been concealed or taken as assumptions. Heidegger himself recognises the limits of his ontological inquiry as being culturally bound and understands it to be a philosophical anthropology, that is, as an ontological interpretation and understanding that is grounded in a Western worldview, history and pre-ontological interpretation. His inquiry into the question of Being, like all interpretations he provides, operates in a fore-structure, which is (in the case of his work) Europe's historical and common information about man and the world (Heidegger 1962, 194). The explication of the dominant Western ontological conception underlying the Western conception of socio-political order provides a closer focus on the Being-with of human beings in the co-disclosure of the world and its innerworldy entities and provides a cultural consciousness that sustains and justifies Western conceptions of socio-political ordering.

In his inquiry into the Being of human beings, Heidegger uses the term *Dasein* to refer to such Being, which is a German word that literally translates to "Being-there" (Heidegger 1962, 27). This term points to the basic state of *Dasein*, which is Being-in-the-world. For Heidegger, not only is *Dasein'*s Being-in-the-world a starting point for his inquiry, but it is a fundamental structure of *Dasein*, that is *a priori* (Heidegger 1962, 65). Heidegger provides that the world in which *Dasein* is, is a world that *Dasein* always and already shares with Others. He describes the world of *Dasein* as a with-world, which means that to "Be-in-the-world" is to "Be-with" (Heidegger 1962, 155). Such Being-with should be understood not as a categorical assertion, but rather as an existential-ontological assertion; that is to say that even when *Dasein* is alone and the Other is not visible or disclosed to *Dasein*, *Dasein* is still Being-with, and this is something of *Dasein's* character. For Heidegger, "Being-alone is a deficient mode of Being-with" (Heidegger 1962, 156). When referring specifically to *Dasein's* Being-with Other *Dasein*, Heidegger uses the term *Dasein*-with, which he understands to be essentially constitutive of *Dasein*'s Being-in-the-world. Even in encountering entities whose Being is different from that of *Dasein*, the *Dasein*-with of Others is encountered (Heidegger 1962, 156). The Being of Others in-the-world with *Dasein* is of particular importance because Dasein finds itself, understands itself and encounters the world and Others environmentally, that is to say, in terms of the world and its entities. To refer to this,

Heidegger describes *Dasein's* Being as "circumspectively concernful" (Heidegger 1962, 154). However, even as circumspectively concernful, Heidegger emphasises that the basic characteristic of *Dasein*'s Being is "mineness." This is to say that Dasein's Being is *Dasein'*s and is possessed by no other entity than subjective Dasein (Heidegger 1962, 150). Our focus for purposes of this argument will be the Being-with and *Dasein*-with of *Dasein*.

To explicate the nature of Being-with-one-another, Heidegger relies on the concept of "The They," which is a neuter and elusive term that refers to the Others, which all *Dasein* are as a unit, but not in the sense of the sum total, a particular Other nor as a group of Others (Heidegger 1962, 165). Heidegger asserts that Being-with-one another is existentially characterised by what he calls "distantiality." According to distantiality, *Dasein'*s concern with the Others denotes a constant care in how *Dasein* differs from the Others. Such distance can either be "one that is to be evened out, [or that] one's own *Dasein* has lagged behind the Others and wants to catch up in relationship to them or whether one's *Dasein* already has some priority over them and sets to keep them suppressed" (Heidegger 1962, 164). Distantiality, according to Heidegger, is grounded in another existential characteristic of "The They," which he calls "averageness." Being-with-one-another existentially concerns itself with such averageness, in which "The They" factically maintains itself. In averageness, "The They" has its own way of Being, according to which it prescribes particular ways of Being or particular possibilities which *Dasein* may take hold of. Averageness thus refers to "The They's" tendency to monitor any deviation from the ways of Being of "The They" and, through levelling down, suppresses such deviations. This suppression refers to an essential tendency of *Dasein*, which Heidegger refers to as "levelling down" (Heidegger 1962, 163). Heidegger refers to these characteristics and tendencies, distantiality, averageness and levelling down, collectively as publicness. He posits that "publicness proximally controls every way in which the world and *Dasein* get interpreted, and it is always right—not because there is some distinctive and primary relationship of Being in which it is related to 'Things' or because it avails itself of some transparency on the part of *Dasein* which it has explicitly appropriated, but because it is insensitive to every difference of level and genuineness and thus never gets to the heart of the matter" (Heidegger 1962, 165). In publicness, Heidegger explains, *Dasein* stands subjected to Others; its Being and possibilities of Being are taken hold of by Others and are for them to determine (Heidegger 1962, 165).

The centrality and emphasis of mineness in characterising and understanding the Being of *Dasein* and its related structures and modes, at an ontic level, expresses itself in the excessively individualistic and atomised conception of a human being. It has already been argued above that the notion of the self-interested atomised individual is central to the conceptions of a polity that have dominated the history of Western philosophy. This emphasis and understanding are rooted in the structure of *Dasein'*s mineness and the centrality of this structure in interpreting and understanding the Being of *Dasein* and all of its existential structures and modes. While in much the same way, the hierarchical,

competitive and dominative understanding of human relations and a society, which is constituted by a collective (in that they occupy the same time and space) of self-interested, narcissistic, atomised individuals, is rooted in Heidegger's notion of publicness and its constitutive elements. Heidegger's interpretation of Being-with is characterised by publicness and distantiality, which reveals itself in such terms as "evening out"; "lagging behind"; "catching up"; "having priority over"; and "keeping suppressed," in the first place, understands Being-with as fragmented, and secondly, presents Being-with as ontologically and existentially hierarchical, competitive and engendering the domination of the Other. Such an ontological interpretation and understanding can be described as a "Being-against" rather than a "Being-with."

For Ramose, an understanding of Being-in-the-world as expressing a separation between the self and the world, and that also takes the human being as the centre of the world, results in an entitlement in the human being as an individual entity to use all that is in the world to preserve its own life. The world is understood as being at the complete disposal of the self, in one's preservation of their own life (Ramose 1991, 27). Therefore, on this logic, the Other is perceived as a threat to life, and thus, as an agent of death, is to be eliminated, dominated or reduced to non-life. This affirms the position of the self as the centre of the world, as well as serves as a practical guarantee of its will to live (Ramose 1991, 27). Therefore, the competition, hierarchy and narcissism engendered by the conception of *Dasein*-with (as characterised by the Heideggerian notions of publicness and distantiality) are exacerbated by this ontological understanding of Being-with, which engenders the death, domination and subjugation of the Other, as well as the control and consumption of the world.

When the self is understood as a collective self or a "we" self, and the Other as a "they" Other, this fragmentative thinking engenders competition, hierarchy, domination and the exposing of the Other to death and non-life and leads to, as Ramose suggests, "divisions of humanity—sometimes deadly divisions—into noble and commoner, superior and inferior, race as well as theist and atheist" (Ramose 1991, 31). Ramose argues that human beings create identities through what he refers to as "bounded reasoning" (Ramose 2003c, 386). Bounded reasoning entails identifying and naming oneself according to a certain identity, taking possession of it and creating an enclosure that simultaneously and contemporaneously includes and excludes individuals from such an identity (Ramose 2003b, 550). According to Ramose, the problem with the Western worldview is that it fails to prescribe mutual respect and recognition complemented by mutual caring and sharing to those who are excluded from the created boundary, which ultimately leads to injustice for those who are excluded, thus engendering a life and death struggle (Ramose 2003b, 549). Such a fragmented ontological understanding of a collective self (the conquerors) and the collective Other (the conquered), as well as the understanding of Being-with-in-the-World as a Being-against, that is, as necessitating the domination and subjugation of the Other, shapes an understanding of human relations and every sphere of human activity as the political battle, characterised by the friend-enemy distinction. Thus, "The Political" comes to be

organised according to the political battle and the friend-enemy distinction, as these created divisions of humanity. Instead of the relations between the self and the Other being those of mutual respect, caring and sharing, they become understood as competition, hierarchy and domination.

The way in which we come to understand general Being-with comes to shape how we think of a social world and the ways in which we conceptualise and think of a social and political order. The narcissistic, antagonistic and amensalist conception of human nature and human relations lies deeply ingrained in the Western worldview and cultural consciousness; that is, in how a social world (according to Western philosophy) comes into existence and becomes knowable as a world in an existential way, and thus comes to characterise the very way in which Western political philosophy conceptualises of a socio-political order. As discussed above, this permeates every sphere of society. Notwithstanding the historical developments of Western political thought through the centuries and, including liberal democracy, this fundamental and existential understanding of Being-with marks a consistent understanding of socio-political ordering as characterised by individualism, antagonism, competition, antagonism, hierarchy and domination, and has led to the constant existence and recreation of deadly divisions such as racism, sexism and classicism.

Therefore, what lies at the very core of the inherence of social issues such as racism, sexism and classism in Western culture, as asserted by Nunn (1997), is the Western ontological conception of Being-with, which has plunged humanity for centuries into suffering, conflict and death.

Liberal Democratic Law

In this section, I argue that the individualistic, narcissist, materialist, hierarchal, competitive and antagonistic conception of socio-political order (as understood by liberal democracy and engendered by Western understandings of Being and Being-with discussed above), shapes an understanding of law as a mechanism to establish and regulate the socio-political order understood by liberal democracy and Western thought, more generally.

Schmitt contends that the central concern of every legal order is the question of how to restrict war (Schmitt 2006, 74). In this assertion, it is not clear whether Schmitt, when referring to "every legal order" includes in this "every" the historical legal orders of territories outside of Europe, or whether the "every" is limited to the history of European legal orders tracking back to ancient Greece. We can, however, infer that his observation regarding the central concern of a legal order is in accordance with the conceptions of social and political order in European history, as discussed above, since he focuses on the legal and political history of the West.

According to Van der Walt, for Jean-Jacques Rousseau, the social contract engenders principles of civil liberty that "allow societies to enjoy the full benefits and beauty of

competitive freedom, without allowing this freedom to destroy the conditions of civil cooperation and order" (Van der Walt 2020, 56). This notion corresponds to the Hobbesian notion of man's emergence from the state of nature. Schmitt understands the state of nature, according to Thomas Hobbes, to be a domain of werewolves, in which each individual is a wolf among other men, who themselves are also wolves in the "war of all against all." Human beings' emergence from the state of nature is marked by the establishment of the state, instituted by means of a covenant, and which organises the atomised individuals into a polity, brackets the competition and ensures peace, order and security. In order to fulfil its duty to ensure peace and order, the state requires unconditional obedience to its laws from its citizens (Schmitt 2006, 53).

This notion of the nature and role of law as bracketing competition and conflict in a society of atomised and amensalist individuals, each pursuing their individual interests, also finds expression in a liberal democratic conception of law (Malan 2012, 85). Mutua (2008) provides that according to liberal democracy, the individual is understood as being the centre of the moral universe and for whom the political system seemingly exists. As the centre of the moral universe and the political system, political society is then constructed in "such a way that it protects and nurtures this vision of the ideal individual" through the abstract endowment on the individual of certain inviolable rights; thus, liberalism finds expression through the ideology of human rights (Mutua 2008, 20). These rights, typically being the right to freedom, the right to equality and the right to dignity, give expression to what Rawls (in Van der Walt 2020, 3) understands to be the essential principles of a liberal democratic constitution. According to Van der Walt, the modern conception of subjective rights understands human rights as a power formulated as a set of norms that enables an individual to wield power over other individuals (Van der Walt 2020, 20).

In South Africa, these subjective rights that are intended to protect each individual in their subjective interests and individual pursuits against others in the "war of all against all" not only constitute the core of the Bill of Rights but are also the founding values of the constitution and state. Therefore, the antagonistic, amensalist and competitive conception of human relations (in terms of liberal democracy and which find expression through the human rights corpus) not only characterises the relations between individual human beings (through human rights) but characterises the contemporary South African constitution; that is, the social and political order of the polity itself. Understanding human relations and the socio-political order in this way, positive law, as Van der Walt suggests, serves to constrain the power relations and trade-offs in the antagonistic and competitive society. As a result, these laws will themselves reflect these contingent power relations and trade-offs and, accordingly, cannot be neutral and independent. The neutrality and independence of the law must, for Van der Walt, be presupposed (Van der Walt 2020, 202). In line with this, the universality of law must also be presupposed and stand as a symbolic notion that conceals the reality of law as partial to some particularity (Van der Walt 2020, 202).

Modiri describes the socio-political order of South Africa, established through conquest, as a social, political and intellectual Manichean divide between the settler conqueror and the indigenous conquered people, organised according to a racial hierarchy as well as the subjugation and systemic inferiorisation of the indigenous conquered people (Modiri 2021, 59). In terms of this bifurcated, antagonistic and hierarchical ordering, the conquerors organised themselves as the socially, culturally and economically dominant group, that is "insulated from vulnerability and violation, possessing an exponentially higher value and integrity of human life and standard of living" (Modiri 2021, 59) while the conquered people are organised in a "wasted and abject social existence," which Modiri speaks of (Modiri 2021, 59). This is the ontic and political expression of the fragmented ontological worldview and socio-political order of the conqueror organising the polity of South Africa according to the competitive, hierarchical and dominative individual and collective self and the individual and collective Other of the political battle. To respond to this bifurcation and multi-century oppression and exploitation, the 1994 transformative project established South Africa as a liberal democracy, spearheaded by transformative constitutionalism as the master frame for imagining the emancipatory politics of the new South Africa (Madlingozi 2019, 128). The liberal values of human dignity, equality and freedom, together with accountability, responsiveness, openness and social justice, were declared as the premier foundational values of the polity (Madlingozi 2019, 128).

It has already been argued above that liberal democracy understands a society as a group of antagonistic, individual, atomised individuals, each of them pursuing their individual interests and who are all competing against one another and embroiled in mutual hostilities. The nature and role of law in such a society is the bracketing of competition and conflict between these antagonistic individuals and ensuring that they do not destroy one another. In this refereeing function, law does not stand neutral but rather reflects these contingent power relations, albeit concealed. Therefore, this imposition of liberal democracy as the ordering ideology and worldview of post-1994 South Africa, and liberal democratic law as its accordant conception of law, maintains the bifurcated, antagonistic and hierarchical socio-political order of South Africa instituted through conquest, and continues to reflect the power relations between the conqueror and the conquered. This, therefore, sustains and motivates Modiri's assertion that the bifurcated, antagonistic and hierarchical socio-political order instituted by the conqueror through conquest is reproduced and maintained precisely by post-1994 liberal democracy, transformation and reconciliation and is secured by the current constitution and post-1994-constitutionalism ((Modiri 2021, 44).

Having organised the social and political life and social existence in a fundamentally divided, antagonistic and amensalist way—that encourages competition and the domination of others—then the attempt to bracket such competition in an effort to establish an egalitarian society will always remain futile. This observation was already made by the sophists in the fifth century BCE when they asserted that "Nature [physis]

was bound to win out against nomos [law] in the end, and only a fool could fail to see it" (McClelland 1996, 13).

Conclusion

In light of the above, this paper concurs with Nunn's (1997) assertion that social problems that are endemic to Western societies, such as racism, sexism and classism, are a result of the fundamental antagonistic, competitive and hierarchical nature of Western social and political ordering and will inevitably continue to persist, albeit concealed by the presupposed neutrality, independence and universalism of law, for as long as this form of social existence and social ordering continues to persist. By analysing Western conceptions of socio-political order, in general, as found throughout the entire history of European political thought and liberal democracy in particular, we find that division, narcissism, competition, domination, antagonism and amensalism lie at the very core of Western ideas of social and political ordering and characterise the very nature of the polity. These ideas not only find expression at the ontic level but are fundamental and deeply ingrained in the Western worldview and cultural consciousness, as they are engendered by Western ontological interpretations and understandings; that is, in the very way that a world comes into existence as world and becomes knowable as world. This way of Being-in-the-world, as Ramose indicates, has through the history of mankind led to deadly divisions between human beings. It, as a matter of necessity, leaves certain groups of people, based on different categories of social organisation (such as race, gender and class), to be dominated by others, subjected to a wasted existence, made to be fungible and exposed to violence and death. Liberal democracy and liberal democratic law, as part of the broader Western worldview, engender an understanding and regulation of human relations that are inevitably characterised by these divisions, domination and subjugation, as well as an understanding of a polity that necessarily exposes certain groups of people to avoidable death or the threat of death, and, therefore, render it ethically untenable.

This raises a serious ethical indictment on this conception and form of social and political order and sustains the exigency for post-conquest; that is, the restoration and reversion of complete, unencumbered and integral sovereignty to the indigenous conquered people, together with title to territory as at conquest. This entails the total dismantling of the socio-political order of the conqueror, and establishing a socio-political order and accordant conception of law that draws from the ontology, worldview and philosophy of the indigenous conquered people. To effectively dismantle conquest requires us to rethink conceptions of Being and Being-with at an existential and ontological level—to reclaim our right to define truth, experience and knowledge. The exigency for post-conquest, therefore, rests on both political and ethical considerations, the former being concerned with the loss and restoration of title to territory and sovereignty over it, and the latter being concerned with the subjection and liberation of an entire people, namely the conquered people, from a wasted and abject existence and exposure to violence and preventable death.

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