

THE ORIGINAL RIGHT AS LIMIT TO LAW. SOME INTRODUCTORY REMARKS ON LEVINAS' JUSTIFICATION OF LEGALITY GUEST EDITOR'S PREFACE

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ABSTRACT

Since all contributions gathered in this monographic issue of "Ethics & Politics" thoroughly interrogate from different perspectives the place of law in Levinas' work, specifically in his main philosophical books, in these introductory pages I will limit myself to a close reading of some minor and occasional texts, sometimes also extracted from his "confessional writings", providing concrete indications on political and juridical implications of Levinas' evaluation of the State. According to him, in a liberal and democratic State, where right must precede law without being exterior to its legitimacy, justice is never fully realized. Such an irreducibility between law and justice is based on the conviction that - in a State freed from tyrannic powers - law, precisely because of its inevitable generality, can always be improved.

KEYWORDS

Totalisation, Extra-territoriality, Talmud, Posteriority of the Anterior, Liberal Democracy, Levinas.

"TOTALITY AND INFINITY" SIXTY YEARS LATER

Sixty years ago, when he published *Totality and Infinity*¹, Emmanuel Levinas was fifty-five and known almost exclusively among specialists. This book was certainly an editorial case in the small world of philosophical publishing and undoubtedly made the fortune of the "Phaenomenologica" series², where little by little it became one of the (few) best and long sellers.

¹ E. Levinas, *Totalité et Infini. Essai sur l'extériorité*, «Phaenomenologica n. 8», Martinus Nijhoff, La Haye 1961.

² The first reader of the typescript was Jacques Taminioux, at that time secretary of "Phaenomenologica". For his detailed memories, see J. Taminioux, «La genèse de la publication de *Totalité et Infini*», *Cahiers de philosophie de l'université de Caen*, 49/2012, pp. 69-82 (online: <http://journals.openedition.org/cpuc/792> ; DOI : <https://doi.org/10.4000/cpuc.792>).

Nevertheless, *Totality and Infinity* was – and still is – hard to classify and, all things considered, not easy to understand in all its details, despite the guarded beauty of the style. «Miracle of an admirable learned language: all its facets shine and the edges scratch», according to the Jesuit philosopher Xavier Tilliette³. After all, the Levinasian way of writing was only a result of the originality of his way of thinking.

Jacques Derrida – who, together with Maurice Blanchot and a few others, immediately pointed out the novelty and uncommon quality of Levinas' book – in a long note of his equally long «essay on Levinas' thought», says perhaps the essential: «In *Totality and Infinity* the use of metaphor, remaining admirable and most often – if not always – beyond rhetorical abuse, shelters within its pathos the most decisive movements of the discourse. By too often omitting to reproduce these metaphors in our disenchanting prose, are we faithful or unfaithful? Further, in *Totality and Infinity* the thematic development [...] proceeds with the infinite insistence of waves on a beach: return and repetition, always, of the same wave against the same shore, in which, however, as each return recapitulates itself, it also infinitely renews and enriches itself. Because of all these challenges to the commentator and the critic, *Totality and Infinity* is a work of art and not a treatise [*une œuvre et non un traité*]⁴.

The conclusion of this passage, incidentally, is perhaps inspired by Levinas' words: «*Anterior posteriorly: separation is not thus 'known'; it is thus produced. [...] A marsh wave that returns to wash the strand beneath the line it left, a spasm of time conditions remembrance*»⁵. The «posteriority of the anterior» implied here – «an inversion logically absurd», based on the paradoxical existence of «a chronological order distinct from the 'logical' order»⁶ – needs the use of metaphor and prevents the systematic method appropriate to philosophical treatises. By virtue of time, as Levinas immediately adds, being is not *yet*, «it is not all at one. Even its cause, older than itself, is still to come»⁷.

³ Cfr. X. Tilliette, «Presentazione», in G. Sansonetti, *L'altro e il tempo. La temporalità nel pensiero di Emmanuel Levinas*, Cappelli, Bologna 1985, p. 5; see also X. Tilliette, «Emmanuel Lévinas: les problèmes de la subjectivité», <http://ghansel.free.fr/tilliette.html#tthFrefADA>

⁴ J. Derrida, «Violence and Metaphysics: an essay on the thought of Emmanuel Levinas» [1964], in Id., *Writing and Difference*, transl. by A. Bass, Routledge, London & New York, 2005, pp. 397-98, n. 7 (cfr. J. Derrida, *L'écriture et la différence*, Seuil, Paris 1967, p. 124, n. 1).

⁵ E. Levinas, *Totality and Infinity. An Essay on Exteriority*, trans by A. Lingis, Duquesne University Press, Pittsburgh 1969, p. 170. The passage in italics deserves to be quoted in its original French: «*Vague de marais qui revient en léchant la plage en deçà du point dont elle partit, spasme du temps qui conditionne la souvenance*» (E. Levinas, *Totalité et Infini*, cit., p. 144).

⁶ E. Levinas, *Totality and Infinity*, cit., p. 54 (original French edition, p. 25).

⁷ Ibid. For the general implications of this movement, cfr. my analysis in «The Posteriority of the Anterior», (trans. by D. Perpich), in: *Levinas' Contribution to Contemporary Thinking*, Special issue of *The Graduate Faculty Philosophy Journal* (New York, New School for Social Research), vol. XX, n. 2 - vol. XXI, n. 1, 1997, pp. 409-425.

This very movement, which articulates radical separation in being, entails at the same time a radical resistance to totalization⁸: *both on the level of theoretical philosophy and on the level of practical philosophy*. In such a polysemy of totalization, I would like to show the “latent birth” of the ambiguity of law in Levinas’ thought.

LEVINAS’S CRITIQUE OF TOTALITY AFTER POLITICAL EXPERIENCE OF TOTALITARIANISM

Let us come back to the original project of *Totality and Infinity*. Although not equipped with the systematic developments we would expect from a treatise, this book is nevertheless based on an underlying and fundamental motif, and the latter is undoubtedly a *philosophical critique of totality*. In retrospect, Levinas stated in this regard: «My critique of totality came indeed after a political experience that we have not yet forgotten»⁹.

In the Preface of his masterpiece, he had already specified: «We were impressed by the opposition to the idea of totality in Franz Rosenzweig’s *Stern der Erlösung*, a work too often present in this book to be cited»¹⁰.

The same could be said of the unforgettable political experience of totalitarianism, too often presupposed in *Totality and Infinity* to be named. On this basis, one of its preeminent philosophical implications can be derived from a paradigmatic reasoning such as the following: «In the measure that the face of the Other (*Autrui*) relates us with the third party, the metaphysical relation of the I with the Other moves into the form of the We, aspires to a State, institutions, laws which are the source of universality. But politics left to itself bears a tyranny within itself; it deforms the I and the other (*l’Autre*) who have given rise to it, for it judges them according to universal rules, and thus as in absentia»¹¹.

This passage, taken from the Conclusions of the book, connects some key notions that allow us to grasp in a schematic way an implicit but structural parallelism between politics and ontology. Both involve the risk of tyranny. In the very same way as politics – if «left to itself» – «bears a tyranny with itself», «ontology as first

⁸ Cfr. E. Levinas, *Totality and Infinity*, cit., p. 57.

⁹ «Ma critique de la totalité est venue en effet après une expérience politique que nous n’avons pas encore oubliée» (E. Levinas, *Ethique et Infini. Dialogues avec Ph. Nemo*, Fayard, Paris 1982, p. 83).

It should not be forgotten that Levinas presents his life as «dominated by the presentiment and memory of Nazi horror»: cfr. E. Levinas, «Signature», in Id., *Difficile liberté. Essais sur le judaïsme*, Albin Michel, Paris 1976, p. 374 (*Difficult Freedom: Essays on Judaism*, trans. by S. Hand, Athlone, London 1991, p. 291).

¹⁰ E. Levinas, *Totality and Infinity*, cit., p. 28.

¹¹ Ibid., p. 300. As is known, Lingis makes it clear in a footnote at the beginning of his translation that he translates “*autrui*” by “Other” and “*autre*” by “other” and he adds: «In doing so, we regrettably sacrifice the possibility of reproducing the author’s use of capital or small letters with both this terms in the French text» (p. 24-5).

philosophy» too entails a «tyrannic oppression»¹². Consequently, Levinas denounces ontology in terms of a «philosophy of power» and a «philosophy of injustice»¹³.

NECESSITY AND LIMIT OF ONTOLOGICAL AND POLITICAL GENERALIZATION

Generalization constitutes the linking point between ontology and politics. Their neutrality is at the same time inevitable and violent in the face of particularities or singularities. Subsequently, the generality of Being (*être*) in relation to existents (*étants*) plays the same role of the abstractness of law compared to cases. The latter and the former are unavoidable, and for this reason they need a kind of supplementary correction.

In Levinas' writings, law is generally evoked in relation to the State establishing and safeguarding it. But then, and this turns out to be fundamental, the State – «the egalitarian and just State in which man is fulfilled (and which is to be set up [*instaurer*], and especially to be maintained)»¹⁴ – has the additional task of ensuring the permanent possibility of improving and perfecting laws. Without this concern, State, institutions, and laws become tyrannical.

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EXTRA-TERRITORIALITY OF THE DEFENSE OF HUMAN RIGHTS

Let us start from his essay on “The Rights of Man and the Rights of the Other”¹⁵. As it is well known, for Levinas human rights, *les droits de l'homme*, are originally the rights of the other man, *les droits de l'autre homme*, namely *les droits d'autrui*. This point merits emphasis. In fact, in order to avoid the tyrannical upshot of «politics left to itself», the State must make room to another aspect of legality that comes here into play. Levinas evokes this new aspect of legality speaking of «an original sense [*conscience*] of the right, or the sense [*conscience*] of an original

¹² E. Levinas, *Totality and Infinity*, cit, p. 47.

¹³ *Ibid.*, p. 46.

¹⁴ E. Levinas, *Otherwise than Being or beyond Essence*, trans. by A. Lingis, Martinus Nijhoff Publishers, The Hague 1981, p. 159 (French original edition: *Autrement qu'être ou au-delà de l'essence*, “Phaenomenologica 54”, Martinus Nijhoff, La Haye 1974, p. 203).

¹⁵ *Id.*, «The Rights of Man and the Rights of the Other», in *Id.*, *Outside of Subject*, trans. by M.B. Smith, Continuum, London 2008 (E. Levinas, *Hors sujet*, Fata Morgana, Montpellier 1987).

right»¹⁶. Here right precedes law without being exterior to its legitimacy. More precisely, here «the original right » – according to the formula that gives the title to the first section of his essay¹⁷ – allows State, institutions, laws such that these can be related to the demand for justice: a demand or an exigency which is not extraneous to the instituted law and yet not reduced to it.

In this context, Levinas speaks of a «kind of extra-territoriality» which, in a political society inspired by liberal democracy, must be attributed to the defense of human rights. This reference to extra-territoriality is obviously a metaphor, evoking the necessary independence of justice or legitimacy from established legality. I quote: «This also means (and it is important that this be emphasized) that the defense of the rights of man corresponds to a vocation *outside* the State, disposing, in a political society, of a kind of extra-territoriality, like that of prophecy in the face of the political powers of the Old Testament, a vigilance totally different from political intelligence, a lucidity not limited to yielding before the formalism of universality, but upholding justice itself in its limitations. The capacity to guarantee that extra-territoriality and that independence defines the liberal State and describes the modality according to which the conjunctions of politics and ethics is intrinsically possible»¹⁸.

It is probably no coincidence that in *Totality and Infinity* the same metaphor of “extraterritoriality” is evoked as characterizing “separation”, in the sense of rupture of totality or interruption of ontological participation. More precisely, if each existent (*étant*) is uprooted in generality of Being (*être*), the only possible subject of an ethical relationship is the I; and this is exactly because of his/her radical uprootedness (*déracinement*)¹⁹. The latter «realizes extraterritoriality and sovereignty of thought, anterior to the world to which it is posterior»²⁰.

An analogous movement of separation, understood as a kind of self-limitation, presides to the Levinasian understanding of «a reasonable and liberal State or, in other words, a State at peace with other States and – an important point – above all opening up for individuals as broad as possible a domain for private life, on the threshold of which the law stops. A limit to law is necessary to humanism»²¹. Therefore, a reasonable and liberal State institutes at the same time law and its self-limitation.

In one of his last “Talmudic readings”, Levinas comes back to this point. He starts evoking the «hate [or hatred] of the tyrannical, which always 'innervates'

¹⁶ Ibid., p. 91 (p. 175 of the original French edition).

¹⁷ Ibid., pp. 91-93 (p. 178-178 of the original French edition).

¹⁸ Ibid., pp. 96-97 (p. 185 of the original French edition).

¹⁹ E. Levinas, *Totality and Infinity*, cit., p. 169.

²⁰ Ibid., p. 170.

²¹ E. Levinas, *Difficult freedom*, cit., p. 297. I have tried to develop this point in my paper on «L'humanisme levinassien et les droits d'autrui», in *Revue d'éthique et de théologie morale*, n. 303, 2019/3, pp. 39-51.

political power». In this same context, he specifies that hate «can be understood as a high degree of criticism and control regarding a political power to which a human community is pragmatically bound»; and he adds: «But power is always revocable and provisional and subject to constant and regular reshuffling». Consequently, a necessary limit to law shows itself at the core of liberal democracy: «The traits of democracy take shape in this refusal of the politics of pure tyranny, namely, of a State that is open to the best, always on the alert, always to be renewed ... And doesn't the excessive word 'hate' - hate of power and political authority of constraint - mean the democratic State as an exception to the tyrannical rule of political power?».²²

THE ESSENTIAL UNFULFILLMENT OF LAW

The liberal dimension of political democracy requires some further reflections. Even if Levinas remains faithful to his vision of *ethics as first philosophy* and even if he always stresses the priority of what he calls the «metaphysical relation of the I with the Other», according to him the State, institutions, laws, and legal procedures are never a second-best option. On the contrary, they are indispensable for the very existence of freedom. Therefore, «the universality of law in the State - always a violence to the particular - is not pure and simple abandonment, since *as long as the State remains liberal* its law is not yet complete and may be more just than present state of justice»²³.

In liberal democracy self-limitation of law implies its incompleteness, in the sense of its impossible accomplishment or necessary unfulfillment. If in a totalitarian State there is no thinkable gap between law and justice, Levinas stresses the idea of a justice that in the legal State, i.e. in liberal and democratic State, is never fully realised. Such irreducibility between law and justice is based on the conviction that - in a State freed from tyrannical powers - law, precisely because of its inevitable generality, can always be improved. Then, the very legality of law never manifests an

²² «Haine du tyrannique, lequel toujours 'innervé' le pouvoir politique... Mais haine qui peut s'entendre comme un degré élevé de critique et de contrôle à l'égard d'un pouvoir politique auquel une collectivité humaine est pragmatiquement astreinte... Mais pouvoir toujours révoqué et provisoire et soumis à d'incessants et réguliers remaniements. N'est-ce pas ainsi que se dessinent, dans ce refus du politique de pure tyrannie, les linéaments de la démocratie, c'est-à-dire d'un Etat ouvert au mieux, toujours sur le qui-vive, toujours à rénover ? [...] Et le mot excessif de 'haine' - haine du pouvoir et de l'autorité politique de contrainte - ne signifie-t-il pas l'Etat démocratique comme faisant précisément exception à la règle tyrannique du pouvoir politique?» (E. Levinas, «Au-delà de l'Etat dans l'Etat», in Id., *Nouvelles lectures talmudiques*, Minuit, Paris 1996, pp. 63-4).

²³ «L'universalité de la loi dans l'Etat - toujours violence faite au particulier - n'est pas abandon pur et simple, puisque *tant qu'il demeure libéral* sa loi n'est pas encore achevée et peut être plus juste que la justice actuelle» (F. Poirié, «Entretiens», in Id., *Emmanuel Levinas, qui êtes-vous?*, La Manufacture, Paris 1987, p.118 ; italics added).

unchangeable ontological fullness. The inevitable violence of general law against particular cases is not to be denied or removed, but rather acknowledged and corrected.

This violence of generalisation – necessary and yet in need of improvement and mitigation – constitutes the link between law, institutions, and ontology. The justice on which the State is based is still and always an imperfect justice (because it is forced to proceed by generalisations and abstractions). The awareness regarding this intrinsic limit of justice requires its necessary correction. And here the reference to human rights comes back as the concretization of their extra-territoriality.

THE DOUBLE ADHERENCE TO LAW

Hence, according to Levinas, the State itself must be thought of «in a more concrete way with a concern for human rights, which in my opinion cannot coincide with the presence of the government. The concern for human rights is not a State function, it is a non-State institution within the State, it is a reminder of the humanity still unfulfilled in the State»²⁴.

Based on the safeguarding and implementing of human rights, and not merely on the consent of majorities, the liberal and democratic State avoids the threat of ontological totalization as political "temptation" of the general and abstract law. This question is elucidated in a Talmudic commentary speaking of the various dimensions of the Law in Judaism. In fact, there are two different adherences to Law. The first one represents the «adherence to the Law as a whole» or «to the Law in its general terms»; the second one consists of «the access to the particular expressions of this general spirit»²⁵. The adherence to Law in general concerns only principles, «but adherence to the principle is not sufficient, and it entails a temptation: it calls for care and for our fight»²⁶.

Only the independent and particular attention to cases avoids the risk of the adherence to general principles. This first adherence, left to itself, proves to be very dangerously close to ontological generalisation and thus potentially violent. The essential harshness of a general law pretending automatic application must be corrected and attenuated. And this correction is not external to law. On the contrary, it constitutes a fundamental dimension thereof, and needs a second adherence to law. Indeed, the text of this Talmudic reading continues as follows: «There is in the

²⁴ «Il faut même le penser [sc. l'Etat] d'une manière plus concrète avec la préoccupation des droits de l'homme qui ne peut pas coïncider, à mon avis, avec la présence du gouvernement. Le souci des droits de l'homme, ce n'est pas une fonction étatique, c'est dans l'Etat une institution non-étatique, c'est le rappel de l'humanité encore non-accomplie dans l'Etat» (ibid., p. 118-9).

²⁵ E. Levinas, «The pacte (Tractate Sotah 37a-37b)», in Id., *Beyond the Verse. Talmudic Readings and Lectures*, trans. by G. D. Mole, Continuum, London 1994, p. 76.

²⁶ Ibid., p. 77.

particular yet another reason for it to appear in the Law as an independent principle in relation to the universality reflected by all particular laws. It is precisely the concrete and particular aspect of the Law and the circumstances of its applications which command Talmudic dialectics: the oral law is casuistic. It concerns itself with transition from the general principle incarnated by the Law to its possible execution, its concretization. If transition were purely deducible, the Law, as a particular law, would not have required a separate adherence. But it so happens - and this is the great wisdom the awareness of which animates the Talmud - that the general and generous principles can be inverted in their application. Every generous thought is threatened by its Stalinism. The great strength of the Talmud's casuistry is to be the special discipline which seeks in the particular the precise moment at which the general principle runs the danger of becoming its own contrary, and watches over the general in the light of the particular (*qui surveille le général à partir du particulier*)²⁷.

Here, the flexibility of concretisation of law, which occurs differently each time, proves to be the only possible tool for a justification of legality beyond ontological generalisations of totality. In its execution, concretisation of law does justice to the particular by respecting it in its own content, without any automatism. Levinas thus invites us to strongly assert the independence of cases in front of the generality of law. This revendication is not at all alien to law. However, the same "independent principle" that governs the defence of human rights is the one that law, in its generality, is always "tempted" to violate. That is why, after the experience of totalitarian States, the «extra-territoriality» of «the original right» as «limit to law» still constitutes an indispensable standard for keeping always open the quest for legitimacy of political powers.

²⁷ Ibid.