

THE THIRD THIRD: LEVINAS AND “WE”

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ABSTRACT

In Levinas's writings the phrase of 'the third person' is used, first and foremost, to characterize the epiphany of 'the Other' as someone who remains absent from any encounter with the first person, constituting an ever receding horizon of normativity (section 2). It is also used to introduce the instance of 'le tiers', i.e., the vantage point of law, judging between parties who are first and second person to each other (section 3). Both of these 'third persons' have major implications for our account of law. I will argue (section 4) that there is a third 'third person', remaining remarkably absent from Levinas's thought as well as absent from the scene in which the first person is summoned by the second and the third. This third third person is hiding in a polity's plural selfhood, the 'we, ourselves' whose is as evasive as 'the Other', though on different grounds. Since positive law in Modernity is a political artefact, articulating the first-person plural in a Levinasian vein is a precondition for appreciating its relevance for the idea of law. A brief rehearsal of some main lines in Levinas's philosophy (section 1) prepares the ground for the three-staged argument.

KEYWORDS

Legal Orders, The Third, Collective Identity, Levinas.

1. THE SELF ORDAINED TO THE OTHER

Let me rehearse some important lines in Levinas's thinking, so as to warrant that I depart from common ground. Since such exercise reduces two majestic books¹ to a short section of textbook prose, it will not make much sense to adorn every phrase by extensive references. I count on a rather received view, albeit my own version.

Western philosophy, says Levinas,² is a philosophy that departs from the insurmountable presupposition that nothing can be experienced, or thought, or said, or

¹ Notably (Levinas 1974a [1968]; 1974b).

² The present paragraph paraphrases mainly (Levinas 1974a [1968]) Part I, *Le même et l'autre*, 2 and 3, (e.g., p. 13 in fine).

indeed performed, without a prefix '*I*' tacitly placed ahead of such proceedings.³ It refers to an agent who performs, experiences, thinks, or speaks, in the (tacit) awareness of doing all these things *himself*, i.e. as a first-person agent. Before something is thought in either a theoretical or a practical sense, there is this 'self-positing' of an '*I*' that thinks this something. Or again, prior to any act being performed, there is this source of a first-person agent, as a bundle of needs, interests, preferences, etc., to whom the act is self-ascribed. This instance of the first person appears already before the other-than-*I*, a second or third person, can come to the scene. Anything other-than-*I* is only acknowledged in its existence within the ambit that is already ordered *for this I*. It only exists in as far as it is part of this *I*-world, and, thus, in as far as it is *of the self-same order* as this *I*. Sure, the other is regarded as the warrant of *my* view of myself and the world being reliable. However, precisely then and there this other serves *me* well. Consequently, the other is believed, by the '*I*', to be not different from the *I* in any radical sense. It exists on '*my*' conditions as a first-person agent.⁵

By this, Levinas neither means that Western thought is egocentric in the psychological sense, nor that it is egoistic in the moral sense (to wit, that each and every individual is preoccupied with his or her own interests). He aims at a general diagnosis of our idea of 'thinking' and 'acting' as exposed above – whether we pursue primarily our own interests, the general interest, or the interests of others. Even the disposition to, or the duty of, altruism can only be conceived by western thought as an attitude that originates in an *I*. The western notion of thought and action presupposes this *I*-that-thinks-and-acts, thus putting it at the centre of world order before the instance of 'the other' has made its appearance. The only event which can affect the self-evident character of this order is the rise of a question: On what title was this order or hierarchy established by the *I*? Who has acknowledged this title if it was created while anything or anyone other-than-*I* was absent from the scene? Whose standpoint was it, from which the ordinal numbers were assigned to agents: first, second, and third person? Whose order is referred to by these ordinals? The answers to these questions are at least as obvious as the self-evident character of the *I*: it is the order of the *I*, for whom there were no others to acknowledge any title whatsoever at the moment in which it established its *I*-world. So there is no title, or only a self-proclaimed one – which amounts to the same thing. Even if it were true

³ I will consistently use italicised indexical references ('*I*', '*me*', '*my*', etc.) where the first-person agent is meant.

⁴ For clarity I use gender-specific pronouns to refer to the first-person agent as masculine and to the second- and third-person agents as feminine.

⁵ Levinas does not imply in the least that philosophers like Merleau-Ponty (and also Marcel) did not engage this very problem of 'cartesianism'; well on the contrary. See various comments on Merleau-Ponty's 'historicité fondamentale' in (Levinas 1974b): 56-57; 89; 204. Regarding Marcel, see, e.g., 'Une nouvelle Rationalité. Sur Gabriel Marcel' in (Levinas 1991) 77ff.

that nothing can be thought or done without an *I* thinking and doing, even if the first person could not escape from the prefix '*I-*' ahead of every content of thought and action, it is not true, by the same token, that the *I* is *justified* in doing so. The idea of a title can only arise here on the basis of a fallacy: from an inevitable order to a justified order.

Let me elucidate a few points. First of all, what cleft can there be between an inevitable order of thought and action, and a justified one, if we have to admit that, in general, justification often amounts to showing the necessary character of an event or a state of affairs? Here the answer is relatively easy: we have to distinguish between two meanings of 'justification'. The first one is linked up with what in western culture is called 'thinking'. In each thought content (whether it concerns what is the case or what is to be done) the act of thinking performed by the '*T*' is already presupposed, together with the *I*-based ordering of the world coming in its wake. This is part of the framework from which we cannot escape. The second meaning of 'justification' pertains to what is right (just) and wrong (unjust) with regard to acts. Not everything we have to do is thereby something we rightly do. Which is not to say that we are wrong in doing it. The only thing Levinas asks us to concede is that we are not right in doing φ on account of the sole thought⁶ that we inevitably have to do φ .

A second point of clarification is this. If in the *I*-world everything is qualified in such a way that it suits the '*T*', how could something in this world have the power to challenge this very order? If the '*T*' puts himself ahead of everything existing, such that he sees the world developing from his own point of view according to what he defines as 'order', how could a question of title register?⁷ Of course, it may be ventured *in abstracto* that the first-person's claim to a title for his order is not met. But whatever the instance that would make this claim, it would be, by definition, a powerless instance. Its properties would be *I*-determined properties. They would be, therefore, of the kind that cannot really disturb or jeopardise the order of things as proclaimed by the first person. But that is precisely the only experience which *is* in a sense disturbing for the agent: apparently, *he had no right* to order the world as he did, he just did it. He has not only proclaimed this order, he has also pre-claimed it, in the sense that he has made a premature claim. As a first-person agent he has designed a realm that he believes to be different from himself, before anything different is recognised. In other words, the *I* has to admit that, from its very first act of thought or action, the other-than-*I* had to watch powerlessly his creation of an *I*-world coming about.

⁶ And note that we cannot say 'fact', as this regards a presupposition of thinking rather than a thought content we can corroborate.

⁷ For a specifically legal context in which this question arises see (Christodoulidis 2004).

A third and last point to elucidate is constituted by the reiterating expression ‘experience’. This phrase is inadequate if it were to be taken to mean the experience of a phenomenon. What the *T* experiences is an oblique awareness of unease, at the most, as the whole world bends over to him, even where and when it appears as resistance. But the truly ‘other’ simply does not register, let alone register as resistance. The *I*-agent may only sense a challenge in the lack of resistance. Thus, the admission of being wrong rather than right, can only be experienced obliquely rather than made present in awareness. For each act of reflective thinking would reinforce the *I*-world, as it is intrinsically bound up with the way thinking and acting are defined in the first place. The challenge can merely be felt as an uneasiness about a mode of relating to the world in which, apparently, the other is pushed back behind the horizons of what the first-person agent prefers to call ‘the world’. So, in what specific sense is the other an experience for the *I*? Here Levinas uses a famous formula, which he himself calls ‘a plastic form’ for what is in fact a disturbing awareness: the epiphany of ‘the naked face’ of the other.⁸ Far from being a phenomenon, the nakedness of the face represents the other in as far as she is without protective coverings and without counteracting powers. It is the other without defence, as the predicate ‘naked’ emphasises. In this very defencelessness of the other *I* may sense the quality of disarmament: the *T* has expelled the other from the world in as far as he pushed her to the subordinated places of the secondary, or tertiary, person who matters.

2. THE FIRST THIRD PERSON: THE INFINITE OTHER

This line of reasoning, though abstract, is not deprived of concrete meaning.⁹ Indeed, it allows us to critically recognise patterns in everyday social life we are familiar with. For instance, we are all familiar with an individual *I*-world which we

⁸ (Levinas 1974a [1968]), 22, 47, and *Le visage et l'extériorité*, 161ff. Levinas emphasises the plasticity of the face in an informative interview with France Guwy at <http://www.youtube.com/watch?v=tQPjVT3WU5I&feature=related> (French, Dutch subtitles); another interview (French, English subtitles) *The Right to Be* is at <http://www.youtube.com/watch?v=mC0-E67XvG4&feature=related>

⁹ Without any reference to, but almost in unison with Levinas, (Arendt 1973 [1951]) has described what statelessness (in fact refugeeship) amounts to: ‘The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them.’ (295f) ‘The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human.’ (299) See (Van Waas 2008); (Oudejans 2011).

develop from our very first moments of experience, thought and action, and in which we negotiate a hierarchy of proximity: loved-ones, friends, neighbours, colleagues, clients, etc. to which we feel ourselves related in more or less intimate ways. We are vaguely aware of the fact that this world is hierarchically ordered – for instance in terms of care and concern, shared or opposed interests, cooperation and competition – from our *own* point of view, and that we act in it accordingly. And note that, in that very awareness, we also are obliquely aware of the fact that this spontaneous and, indeed, inescapable order, is not, by the same token, a legitimate order. Some well-known moral puzzles stem from this oblique awareness.¹⁰ In a similar way, we will have no difficulty to recognise that the ‘*we*’ of our socio-political order is globally structured along the lines of certain preferred values, in which we define knowledge, power and income. One does not have to be a Marxist to believe that a lot of social institutions are the superstructures of these choices and relationships, and to bear in mind that these (super-) structures systematically make victims. These victims are the feeble, the poor, the alien. They lose because the rules of the game were made without their consent or in their absence. It is not a coincidence that the world of the deprived and the alien is called ‘the Third World’, by those who have proclaimed *themselves* to be ‘the First World’. The ordinal numbers are indices of subordination, as also the phrase ‘the West and the Rest’ conveys. Indeed, the challenge of these naked faces on their desperate way to ‘fortress Europe’ is powerless but persistent: whence the authority or the title to determine which world comes first, second, or third?¹¹ Yet we feel that we cannot do otherwise than draw a line and enforce it, if need be by the use of arms.

Thus, according to Levinas, our account of dealing with reality starts with covering up the oblique awareness of the first person *I* to have trespassed over against ‘the other’, who never had a chance in the first place. Our deepest metaphysical convictions are accompanied by this profoundly *ethical* ‘unrest’ of trespassing. And as this is an ethical awareness, it also evokes the question: what should be done about it? Levinas’s answer is that what the ‘*I*’ senses in seeing the naked face of ‘the other’ is not only a powerless reproach, but also the evocation to try to restore the fault always already committed, by taking the position of the other, putting oneself in her place like a hostage and, consequently, enduring the consequences of this

¹⁰ All sorts of so-called ‘trolley dilemmas’ in ethics are built on these I-related world order (key word: proximity). For instance: you are in a small boat with your daughter and her girlfriend. They both fall overboard, and you have a duty to help. You know your daughter’s friend cannot swim (while your daughter can), but you also know that the temperature of the water is so low that your daughter’s condition will be critical as well within a few minutes. Who should you try to rescue first? A dramatic example is provided by William Styron’s novel *Sophie’s Choice* (1970).

¹¹ For an impressive spectrum of analyses see (Lindahl 2009).

unfortunate position. Substitution should be the only, though always inadequate, answer to subordination.¹²

2.1. *The Other as a Receding Horizon of Normativity*

Why inadequate? We saw that the act of subordination does not result from wilful wickedness or weakness of the will. It is tied up with our account of thinking what is the case, or what is the right thing to do. That the *T* could not have done otherwise is not a sufficient reason to justify the act and to call it otherwise than trespassing. On the contrary, for Levinas it is a reason to enhance the incisiveness of his analysis by writing that, in fact, the *T* does not trespass over against ‘the other’ as a specific being, but over against ‘the Other’ as an ever receding instance. The capital ‘O’ indicates not primarily what Christian religion would call ‘God’.¹³ It is meant to express that the real other is the absent other: not the second person we may encounter in our social relationships but the third who does not register (yet). The second person is the one whose deprived status can be recognised by the first person. But should the first person act according to his recognition and try to undo the deprivation by substituting himself in her place, he would not have fulfilled his moral obligation to its full extent. The moment he arrives, so to speak, at the other’s position at the edge of his I-world, his position becomes a new first-person standpoint from which he proclaims a new *I*-world. And for this new I-world, there will also be a horizon, at which there will appear new victims of deprivation. The Other (as a third person) is the one *beyond* the edge of the first-person world, while the other (as a second person) is the one *at the edge*. As soon as the first person moves toward the second, the edge moves back, like a horizon, signifying that, for every change in the *I*-world, there will *always* be ‘another other’. Consequently, substitution is an infinite moral pursuit, as the other is but ‘a trace’ of the Other.¹⁴

Levinas’s philosophy may strike us as a philosophy of guilt, arguing that one cannot get rid of an original sin. In a sense this is true, but we should be careful not to understand it from the Christian preoccupations that get so easily mixed up with western thinking, even when it is expressly secular. Levinas admits that his argument

¹² Cf. (Levinas 1974b), with the 1968 essay ‘La substitution’. Also, e.g., (Levinas 1991) 206ff.

¹³ Here I have doubts about (Visker 2005) 106: Visker believes that an ‘experiment’ on Levinas’s position, by cutting out the word ‘God’ from his texts, would see them collapse into Habermas and Lyotard’s views. I think that this experiment makes no sense unless you control for the meaning of that very word ‘God’, which for Levinas is a Judaic concept, by which he ‘(...) is not explicitly guided’. Cf. (Levinas 1991) 126: ‘Dans la théologie juive – je ne suis pas guidé par cette théologie explicitement – Dieu c’est Dieu de la justice, mais son attribut principal est la miséricorde.’ See also the incisive passages in (Levinas 1974b) 190ff: ‘Témoigner de Dieu, ce n’est précisément pas énoncer ce mot extra-ordinaire, comme si la gloire pouvait se loger dans un thème et se poser comme thèse ou se faire essence de l’être.’ (190).

¹⁴ (Levinas 1963).

leads to the conclusion that everybody is responsible for what he did not 'really' do himself. Indeed, the others' misery is everybody's misery. No one in particular *did* deprive the poor of their means of subsistence, or the strangers of their means of attracting attention. Nevertheless, their existence can only be qualified as deprived, or strange, from the point of view which dominates the world *I* benefit from, while they do not. Their existence defines *my* world in a negative way, as they mark the edges of it. But by that, their existence also constitutes an evocation or interpellation, and therefore an opportunity: there is life after *I* have been discovered to be guilty of that first-person ordering which, as we saw, is both inevitable *and* premature. The evocation to make a fresh start is the reverse side of the discovery that *I* am not in the right to do φ by the sole fact that *I* could not avoid doing φ . That is what substitution is all about: moving towards those who are at the edges of *my* self-proclaimed world and who will not register unless *I* become aware of the fact that it is *me* who made them not register. Then they register *in hindsight*¹⁵ as those who did not register. The other is not a powerful judge, who can convict me on the basis of a law previously enacted between us. She is, rather, the victim offering reconciliation after the fact.¹⁶ Her very powerlessness is the basis of her authority to summon the *T* and to question his order, thus opening up the perspective of the promise of justice. Therefore, the Other is not the limit of the first person's freedom, but its very basis. It is in this sense that the Other can be characterised as *a law* (or as I will say: a norm) for the *T*, rather than *a value*.¹⁷

2.2 *A Critique of Natural Law*

By establishing the primacy of the *ethical* relationship between '*T*' and 'Other' over their ontological bond, Levinas defuses a fundamental problem underlying the very idea of law in Modernity. Some call it the problem of theodicy writ secular¹⁸: How can human freedom be preserved if social life comes with restrictions imposed by force? The scenery of the '*T*' being the hostage of the Other may make us worry about human freedom. And as our intuitions about the basic idea of law are very much tuned to law as the ultimate guarantee (Kant) or even the ultimate realisation (Hegel) of freedom, Levinas's account of the social relationship between the '*T*' and 'the other' seems to run counter to our intuitions. But let us be patient and pay closer attention to the idea of freedom involved in his account. The '*T*' cannot but

¹⁵ As does 'the Other': 'L'Infini n'est pas *devant* son témoin, mais comme en dehors ou "à l'envers" de la présence, déjà passé, hors prise: *arrière-pensée* trop haute pour se pousser au premier rang.' (Levinas 1974b) 190 [my italics; BvR].

¹⁶ Cf. Van Roermund (2001b) and (Van Roermund 2020c).

¹⁷ 'Law is what I must obey. It may confer on me certain benefits, here the immunity that my life, too, is to be respected; but fundamentally I am *under* law.' (Taylor 1989) 11).

¹⁸ Cf. (Riley 1982a).

conceive of himself, primarily, as ‘une joyeuse force qui va’:¹⁹ an instance of power that subordinates everything other to himself. Most theories of natural law see this original dynamic, this *absence of any responsibility*, as the paradigm of freedom, and proceed by showing that there is reason for the ‘I’ – including every individual or group occupying the place of the first person – why one should limit one’s power. Though these reasons may be accounted for by various strains of thought, the bottom line is that, by yielding to certain constraints, the core of the original freedom (no responsibility) can be realised. Not so Levinas’s theory. He points out that in proclaiming his I-world, the agent is not free at all. He is dependent²⁰ in a double sense: firstly, he is encapsulated in his self-proclamation, as he encounters nothing which is not the echo of his ego; secondly, he is under the permanent though powerless summons constituted by the epiphany of the other. By contrast, in responding to the call of the other, the I-agent becomes able to stand on his own feet, rather than on the shoulders of those he subordinated. He is called upon to bear ‘the weight of the world’, but without being glued to a standpoint he once and for all developed as ‘his’. This is why Levinas speaks of a dazzling and difficult freedom, one that entails radical responsibility rather than maximal non-responsibility.²¹ The only thing that can mitigate its effects on a first-person agent is the hope that others will know themselves to be responsible for *me* as I feel for them. But this reciprocity cannot be the object of a deal, or the condition of a contract, like it is in so many natural law theories. It is radically asymmetrical.²² The first person ‘I’ would destroy his independence if he would allow himself to sit and wait for the offer of reciprocity by the other. All there is, is the comfort of hope, not the certainty of warrants.

There is another angle, still, from where Levinas’s view entails a critique of natural law, even where the latter tries to steer away from Hobbesian naturalism. In such theories of (natural) law, man’s social being is mostly grounded in the belief that the other, being irreducibly different from the ‘I’, is of the utmost *value* to the ‘I’. The existence of the other is seen as a necessary element in developing reliable human self-awareness, freedom, and dignity. Norms governing social relationships should therefore find support in this ultimate value, and herald it accordingly. The basic presupposition of this line of thought is a specific epistemic hierarchy: the first person is the position *from where* the other is valued. In that sense the first-person agent precedes and governs the position of the other. Levinas’s philosophy does not just reverse this hierarchy; it changes its very nature. What this theory says is that, prior to any other having any value from the first person’s point of view, the Other constitutes a norm, indeed a *law* for the ‘I’. This is implied in the oblique awareness

¹⁹ Or ‘une force qui va’, cf. (Levinas 1974a [1968]) 146 – a phrase from Victor Hugo, often used by Levinas, also in interviews. See (Levinas 1987) 200, n. 112 by Th. De Boer.

²⁰ Ibid., part II, C.

²¹ Cf. (Levinas 1976 [1963]); (Levinas 1974a [1968]) Conclusions 11.

²² Cf. for an extensive argument on asymmetrical reciprocity, see (Lindahl 2018) 286ff.

of the agent that his *a priori* valuing of the other is a self-proclaiming act; and so, that it is challenged, too, in the epiphany of the face of the other. Without this 'afterthought' any appeal to human dignity is suspect, even if it flags a constitution.²³

3. THE SECOND THIRD PERSON: THE JUDGE

3.1. *The Emergence of Judgment*

Levinas became very much aware of the problem he had to solve, after he had put so much emphasis²⁴ on the primordial relation of the first-person's 'being ordained to the Other', or the 'Other being my neighbour', regardless of her proximity. To put it simply: my neighbour has other neighbours, who are also my neighbours.²⁵ Or again, I am a neighbour for others. Indeed, by lending the ethical relationship towards the Other pride of place, Levinas has safeguarded her singularity, at the cost of deferring an account of 'the real world', i.e., an ontology. And he knows it. He acknowledges that while ordination implies recognition of the other's singularity over and over again, it cannot evade identification and comparison of the many others to whom one is ordained. To respond to one other in a specific way, I have to find out how she is related to another other, e.g., as his wife, his employee, his suspect, etc. The first-person agent has to compare the incomparable second persons, and he cannot do so without appealing to the viewpoint of 'the third person' - *le tiers*. With this instance of 'the third', judgment enters the scene, and, thus, all the areas where judgment is exercised: knowledge, conscience, justice and its administration, labour and its division. What also enters are the predicates of judging: it comes with measuring, ordering, standardising, indeed even imposing and enforcing. It expresses itself in rules, generalisations, averages, exceptions,

²³ Cf. Art. 1 of the German *Grundgesetz* or Art. 1 of the Charter of Fundamental Rights of the European Union.

²⁴ Cf. the unequivocal 'conclusions' in (Levinas 1974a [1968]) 280: 'La morale préside (...) à l'oeuvre de la vérité.' Ibid, 281: 'La morale n'est pas une branche de la philosophie, mais la philosophie première.'

²⁵ 'Le tiers est autre que le prochain, mais aussi un autre prochain, mais aussi un prochain de l'Autre et non pas simplement son semblable. Que sont-ils donc l'autre et le tiers, l'un pour l'autre? Qu'ont-ils fait l'un à l'autre? Lequel passe avant l'autre? L'autre se tient dans une relation avec le tiers - dont je ne peux répondre entièrement même si je réponds - avant toute question - de mon prochain tout seul. L'autre et le tiers, mes prochains, contemporains l'un de l'autre m'éloignent de l'autre et du tiers.(...) Le tiers introduit une contradiction dans le Dire dont la signification devant l'autre allait, jusqu'alors, dans un sens unique. C'est, de soi, limite de la responsabilité, naissance de la question: Qu'ai-je à faire avec justice? (...) Il faut la justice c'est-à-dire la comparaison, la coexistence, la contemporanéité, le rassemblement, l'ordre, le thématisme, la *visibilité* des visages et, par là, l'intentionnalité et l'intellect et en l'intentionnalité et l'intellect, l'intelligibilité du système et, par là, aussi une coprésence sur un pied d'égalité comme devant une cour de justice ». Cf. (Levinas 1974b) 200ff.

obligations, and permissions. It gives rise to institutions and organisations, competences, and powers.

3.2. *Implications for the Rule of Law*

The appearance of ‘the third’ is also the moment in which the principles of law emerge: equality, certainty, expediency²⁶, legality, predictability, etc. However, these principles – like all exercise of judgment – remain within the scope of the primordial ordination of the first-person agent to the Other. This origin of normativity continues to enlighten all legal decision-making, whether case-based or rule-based. It accounts, for instance, for the traditional role of equity over and against harsh legal logic. It inspires domain-specific principles like, e.g., in criminal law, the *nullum crimen / nulla poena* principle, the presumption of innocence, the due process principle, etc. It is the backdrop against which we understand the rule of law, as it binds authorities to the mast of the very ship they sail. It explains, moreover, why a democratic regime is to be preferred over an autocratic one: the former warrants minorities the chance to grow to majority while the latter does not. All such normative features of a legal order converge in one presupposition: what is said in judgment ought to receive guidance from a ‘saying’ that precedes it and that is responsive to the summons of the infinite Other. Let us look in some more detail at two explicit illustrations of this basic thesis in Levinas’s texts: his interpretation of human rights as a protection against arbitrary state power; and the role of (violent) force in law.

Levinas’s thought undercuts the interpretation of ‘human rights’ as, first and foremost, a set of normative attributes to be ascribed to the members of a category, to wit the category of ‘men’ or ‘humans’. They are not a mode of representation regarding ‘mankind’ as a kind, despite a discourse that suggests as much, in particular by stressing that such rights accrue to ‘all men by birth’.²⁷ Instead, they should be seen as the upshot of ‘the right of man’, which is, for Levinas, primarily ‘the right of the other human being’.²⁸ This right is inexhaustible, as explained in the previous section, and yet it is only in the pursuit of exhausting it by a proliferating range of articulated rights that its inexhaustibility comes to the fore.

Thus, primarily, these rights are articulations of responsibility rather than liberty – a dichotomy that will only disappear if one is ready to accept that infinite responsibility is precisely the only feasible core of human freedom, taken as independence

²⁶ Cf. (Radbruch 1973 [1932]) on the antinomies in the ‘idea of law’.

²⁷ Cf. Art. 1 Universal Declaration of Human Rights: ‘All human beings are born free and equal in dignity and rights.’

²⁸ (Levinas 1984) 111: ‘*Le droit de l’homme, absolument et originellement, ne prend sens qu’en autrui, comme droit de l’autre homme. Droit à l’égard duquel jamais je ne suis quitte.*’ (italics in original; BvR)

of the first-person drive to subject everything 'other-than-I'.²⁹ By the same token, Levinas questions the principle that, since Kant, has been underlying the idea of human rights, to wit the categorical imperative.³⁰ This imperative is supposed to govern the compatibility of radically divergent free-willing agents, by imposing on each of them the duty to subsume their actions under 'a general law'. However, exercising this judgment of subsumption is either a fraud because it is just another extension of a first-person vantage point, or it is the very expression of a more original imperative which Levinas prefers to call a summons by the Other. The Kantian imperative suggests that, at bottom, recognition of the other can and should be symmetrical in the name of individual free will, whereas, in fact, it bears testimony to a more fundamental understanding, namely that the appearance of the Other as 'visage' is already a law that puts first-person freedom into question.

However, this deeper insight does not liberate us from the problems that come with articulating 'the right of the other human' in terms of 'an order of human rights'. At the latter level, the level of judgment, we have to situate the constitutional problems of human rights as lawyers know them. E.g., which human rights to enact in formal legislation, national, supra-national and international? Is there a hierarchy of importance between them, e.g., civil-political versus socio-cultural rights? What to do in cases of incompatible human rights, e.g., freedom of religion versus the ban on discrimination on grounds of sexual preference? How to diversify and measure respect for a specific right, like the right to health, in countries across the globe (e.g., in UN-reports)? These questions should be answered; but it matters whether such answers take into account from what deeper source of normativity they derive. It matters, for instance, when one pursues to respond to Hannah Arendt's well-known challenge: precisely for those who have nothing left to appeal to for protection than their rights as humans, these rights prove without meaning.³¹ Her case in point are the stateless, the non-citizens, who, by definition, cannot call on a state for protection in the first place. However, her concern is more general, and it was raised already by the critics of human rights shortly after their proclamation (for instance, by Bentham)³²: rights will not offer relief from want and fear inflicted by the state as long as such rights are to be granted by the same state. Levinas helps us to see some hardly discernible paths through the maze of statelessness and state violence. For

²⁹ This the sense which Levinas give to the idea of being 'chosen' (élu), which has nothing to do with being 'privileged'. Cf. e.g., (Levinas 1991) 234.

³⁰ Cf. (critical, by dint of the tense, the *conditione*): 'L'imperatif catégorique serait le principe ultime du droit de l'homme.' (Levinas 1991) 233.

³¹ (Arendt 1973 [1951])299: 'The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships - except that they were still human. The world found nothing sacred in the abstract nakedness of being human.'

³² (Bentham 2002 [1795]).

instance, there is, in some cases, the possibility of acquiring European citizenship without a prior title of citizenship in any of the EU Member States.³³ There is, in other cases, a limited number of criminal justice instruments under the flag of ‘universal jurisdiction’,³⁴ as well as the Rome Statute exercising pressure on states to prosecute crime under ‘*ius cogens*’, even though the International Criminal Court is currently going through a difficult period in its relatively short career. Increasingly, there are international sanctions and (even) interventions ‘for humanitarian reasons’ at UN level, although often decided in cumbersome ways and rarely warranted by unequivocal justifications.

Let us also briefly look at the role that Levinas attributes to force in law. The force of law should not be related, primarily, to the political process in which it originates or by which it was generated, as if it were its residue or rudiment. It should rather be placed against the backdrop of judgment which, in turn, derives from the first-person’s responsibility for ‘other others’. In some cases, judgment entails condemnation in the name of citizens being ‘equal before the law’.³⁵ Such judgment should be upheld with the same force as the judgment that sets one free. For the prisoner, the face of the jailer holding the key of his cell may be the face of state violence turning against him, withholding him from freedom. The prospect of seeing this face may well constitute a threat that prevents a citizen from committing a crime. However, from what Levinas calls a ‘des-interested’ viewpoint, behind the face of the jailer is the face of the victim that the criminal, or indeed his lawyer, should recognise as ultimately ‘naked’. The state and its institutions, says Levinas, ‘emerge from the limitations of charity rather than the limitations of violence.’³⁶

4. THE THIRD THIRD PERSON: THE POLITY AS A PLURAL SELF

Now we come to the crux of my argument: the first (the other) as well as the second third person (*le tiers*) bring in a third third person, who remains remarkably underexposed in Levinas’s philosophy. Yet, this third is essential in understanding law, and the role law may play in responding to the paragon of ‘otherness’, the Other as revealed in ‘the other’. Let me take my cue from what was said about law as one institution of judgment, deriving from the necessity to compare ‘others’ in their manifold, despite their singularity. This will prepare the ground for a critical appraisal

³³ Cf. (Raucea 2017; 2018).

³⁴ ‘Since World War II, more than 15 countries have used the concept of universal jurisdiction to criminally prosecute individuals for crimes that took place outside their territories [i.e. crimes such as genocide, crimes against humanity, torture, etc.; BvR].’ See <http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/>; accessed 15 March 2021.

³⁵ Cf. the interview ‘L’Autre, Utopie et Justice’ in (Levinas 1991) 259.

³⁶ Cf. the interview ‘Philosophie, Justice et Amour’ in (Levinas 1991) 123, responding to the tantalising question ‘Does the hangman have a face?’

of the relationship between the Other and 'we, ourselves' as a third third, despite its grammatical guise as a first person.

Both distributive and retributive (or 'commutative') justice go by the core formula 'to give everyone one's due'. Retributive justice addresses what is due to the other in virtue of some properties, e.g., being a refugee, being a millionaire, being guilty of a crime. Distributive justice addresses what is due to the other in terms of an equal division. Both modes of justice are attributed by exercising comparative judgment under parameters of proportionality. For retributive justice, what treatment is proportional to what crime, what capital, what hardship? For distributive justice, what is an equal division of a public good like health services, transport facilities or access to justice among a set of people? Moreover, it should be stressed that the judgment of law is the kind of judgment that ushers in action. 'To *give* everyone one's due' does not stop at the stage of design. It rather entails the proof of the pudding, which is in the eating. Thus, what comes in the wake of this type of practical judgment is a kind of gathering, bolstering up a first-person agent to perform the act of giving. It entails the composition and the organisation of a group that is capable of ascribing first-person references to itself, first-person *plural* references, to be sure. Only a society that appears *to itself* as a by and large ordered society, i.e., a polity, is able to lend form and substance *in actu* to the ordering aspired to in the pursuit of justice, i.e., to give everyone his or her due. Indeed, there is a definite, though not a definitive, 'we' hiding in the background of comparative judgment, whether it is exercised in the name of retributive or distributive justice.

Although one may readily admit that addressing these questions speaks to the rise of 'the third' as an instance of comparative judgment, it is also hard to deny that establishing proportions in either mode is crucially dependent on a 'tertium comparationis' logically preceding such judgment; and that its follow-up in action is dependent on a modes of gathering preceding the *I-You* paradigm of social relations. To put it otherwise, 'the third' as an instantiation of judgment needs a vantage point that is, itself, on the one hand much more implicit than judgment and, on the other, not retrievable from the first-person's ordination to the other. For it was precisely this ordination which gave rise to judgment, and judgment to pre-judgment or pre-gathering. Waldenfels submits it succinctly: '*The point of view of universality* should not be confused with a supposed *universal point of view*.'³⁷ This vantage point of universality is precisely where reference to 'the people' or 'society' as a first-person plural comes in, and note that it is a form of reflexive reference: 'we, ourselves'.³⁸

Now, distributive justice, in particular, cannot operate without such implicit pre-judgment; neither can retributive justice, in so far as it purports to protect, correct,

³⁷ (Waldenfels 2007) 33, referring also to (Bedorf 2003). Italics in the original.

³⁸ (Arendt 1973 [1951]) 291: 'As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually became self-evident that the people, and not the individual, was the image of man.'

and restore the outcomes of distributive justice. The reason is simple. It is impossible to divide and distribute a certain ‘good’ unless one assumes the addressees or receivers to be a finite number. The metaphor of the birthday cake may suffice here: to give everyone her or his due, one must start by counting the guests; and there will be no distribution as long as the counting has not stopped. Thus, the first pre-judgment of distributive justice is who is, and who is not, to be counted in for the distribution. In this point, the logic of everything legal and the logic of everything political converge. Where the administration of justice requires a finite number, the performance of political action demands that this finite number is referred to as ‘a bounded whole’. Precisely because politics claims to order social relations it is delivered to drawing boundaries around the terms of these relations. Bootstrapping politics entails the ability (and the opportunity) to speak of ‘society’ in the singular, without a definite article, meaning ‘we as society’.

Lefort’s insight into the logic of this endeavour is more than convincing.³⁹ It, firstly, requires a society becoming symbolically transparent to itself by reference to a quasi-transcendent realm beyond social relationships, from where legitimate power over these relationships may be exercised. This is quasi-transcendence, which is in fact a first-person plural mode of reflexive reference, is everything but the genuine exteriority Levinas purports to evoke. Secondly, the primordial act by which this power is exercised is an act of self-inclusion pervading all political discourse. Each appeal to the ‘general’ interest, to ‘public’ security, to ‘national’ income, bears testimony to the speakers’ effort to represent society ‘as a whole’ departing from a first-person plural vantage point, a ‘we’ constituted in very act of self-inclusion. This act inevitably excludes others who, for this ‘we’ become more than just foreigners: they become strangers.⁴⁰ Note that they are not, necessarily, the enemy. They register for the first-person plural as those who do not have to register. They matter on conditions set by a ‘we’.

This act of self-inclusion, again, is delivered, by definition, to certain modes of representation.⁴¹ ‘It is impossible for a “we” to say “we”’, says Waldenfels, quoting Benveniste. ‘Rather, “we” is said by those who take part, directly or indirectly, in the enactment of a constitution. A political group finds its voice only in spokespersons who speak in its name and represent it *as a whole*.’⁴² In other words, it is impossible for a ‘we’ to perform a speech act, to use performative language, or – in Levinasian

³⁹ See (Lefort 1986), in particular the essay on the permanence of political theology.

⁴⁰ Cf. (Lindahl 2009; 2013; 2018).

⁴¹ In another paper (Van Roermund 2020b), as well as in chapter 6 of (Van Roermund 2020a) I argue that there is a core of embodiment in the constitution of a ‘we’ that evades representation. However, I will not enter this discussion here.

⁴² (Waldenfels 2001). My translation [BvR]; italics in the original [BvR]. See (Benveniste 1966) 233.

term – to retreat from what is said (*le Dit*) to the saying (*le Dire*).⁴³ While this ‘we’ is, as it were, always under construction, one cannot enter the site of construction to see it happen. The saying just resonates in the background of what is said as a far echo of a performative phrase ‘we’ can never access. This makes the first-person plural quintessentially different from the first-person singular. The performative ‘Here I am’ (*me voici*)⁴⁴ is the very core of Levinas’s concept of substitution, i.e., of the *I*s only authentic response to the epiphany of the face. If a ‘we’ cannot respond to the excluded Other in this performative mode, it means that a polity cannot be genuinely responsive. By the same token, the policies of this polity cannot be responsive, not even if they are geared towards generating a legal order.

From the premisses developed in the previous paragraphs one may infer that the Levinasian ‘third person’ as the instance of politico-legal judgment, dissolves into a plurality of first-persons plural; a plethora of ‘we’s’ who may well get deeply involved in so many antagonisms. In other words, I submit that there is an ambiguity in Levinas’s early phrase ‘*Le tu se pose devant un nous*’;⁴⁵ an ambiguity that does not disappear in later writings where he characterises justice as a kind of wisdom that comes in the wake of the ordination to the Other. From a politico-moral point of view, one may concede that the epiphany of the face of the other precedes all first-person plural references. Then ‘devant’ means ‘prior to’. However, from a politico-legal point of view, this epiphany occurs before a ‘we’ always already established. Here ‘devant’ means ‘in foro of’.

Thus, I suspect, the political first-person plural strikes back in the genuine effort by any first-person singular to iteratively substitute himself in the place of the other. Such philosophical suspicion is not without empirical evidence. It is a well-established fact that many efforts to open national borders for stateless persons, asylum seekers and economic refugees – a paradigm case of both distributive and retributive justice – are guided by parameters directly derived from the dominant image in a polity of its ‘identity’ under the guise of its preferred values and features. These determine, for instance, what a state counts as a ‘credible’ story of a refugee without documents, or what circumstances it finds ‘pressing’ for ‘humanitarian’ reasons. It allows this state to hold, in point of fact, that some humans are more human than others.⁴⁶

This identity works also in less articulated ways, for instance, in a person’s incapability to overcome the distance to the other despite sincere efforts from both sides to do so. For a project on reconciliation and time, I once imagined a seminar group co-chaired by a Jewish and a Palestinian colleague from different universities and

⁴³ A summary of the distinction one finds in (Levinas 1974b) 6ff; see furthermore 39ff.

⁴⁴ (Levinas 1974a [1968]) 282: ‘Seul un moi peut répondre à l’injonction d’un visage.’ Cf. (Levinas 1974b) 190.

⁴⁵ (Levinas 1974a [1968]) 188.

⁴⁶ (Th. Spijkerboer 1999) and, in a broader perspective, (T. Spijkerboer 2013).

convened in an old coast town in the State of Israel. However, this is the town which Palestinians call 'Akka' and Jews 'Akko'. This difference of just one vocal made it impossible for the two colleagues to speak on behalf of the other one and jointly welcome the rest of the participants in the seminar to the town of ... They would have betrayed their polity by substituting their preferred proper name for that preferred by the other, and they would have reiterated the political conflict by sticking to their own proper name for the town. They could see each other's 'preference in the difference'⁴⁷ of the two names but they were unable to step beyond it and genuinely respond to the 'nakedness' of the other. The scene is meant to demonstrate that the political 'we' of the people can only respond obliquely. The most it can do is to hold back in the very act of self-closure by which this 'we' is constituted as the vanishing point of representation. This, I submit, is what law, qua positive law, ultimately amounts to: an order of norms by which a polity, on its own account and without being forced to do so, remains open to the other in the very act of self-inclusion. It is self-written question mark in the margin of the self-ordering acts by a first-person plural which is called politics.

This may sound contradictory, but it is in fact 'only' paradoxical.⁴⁸ Self-reference constitutes 'a preference in the difference' between the self and *the other relative this self*. Hence, the manifold of acts including a plural self *obliquely* refer to those who are excluded from this self. Moreover, the plural self referred to remains partly *opaque* to the very agents who refer to it in their representational acts. There is 'otherness' within, and not just beyond, the boundaries of the included self. Important features of a political order under the rule of law, mentioned in section 3.2., acquire a deeper sense in the light of this double bind. They should be understood in the light of comparative judgment, as Levinas advises. But this comparative judgment is mediated by the reference to a first-person plural and the representation by which this plural self is constituted. The judgment of 'the third' does not come to fore without a preference in the difference deriving from its political origin. A clear example is the functioning of democracy as an integrated part of the rule of law. By periodical elections minorities get the opportunity to become the majority. But this does mean that such opportunity is granted to *any* minority. Some are included, some excluded, depending on the majority's decision. Indeed, the very idea of a 'minority' is dependent on parameters of dominance rather than number, even when these parameters do not steer the majority's considered policies or explicit ideologies. Another example, equally clear, is the much debated 'ranking' of human rights. Do civil-political rights take priority over socio-economic rights or *vice versa*? It is all well and good to argue that they are 'co-original' or 'equi-primordial';⁴⁹ however, as soon as this philosophical wisdom, embodying the viewpoint of 'third'

⁴⁷ Cf. (Waldenfels 1994) 202f.

⁴⁸ See (Waldenfels 1999) 195ff. ('Paradoxien der Selbstabgrenzung').

⁴⁹ As (Habermas 1992 [1992]) famously and rightly does.

becomes part of a political programme, it gets affected by the ranking that is always already entrenched in a polity's plural selfhood. There is indeed, I submit, a third behind, though not beyond, the third, more innermost than the innermost of the first-person singular.⁵⁰

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⁵⁰ I play on St. Augustine's characterization of God as 'interior intimo meo et superior summo meo.' See *Confessiones*, III, 6, 11.

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