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# Law and Compassion: Between Ethics and Economy, Philosophical Speculation and Arche-ology

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## Abstract

This paper examines the relationship between law and compassion from the perspective of two diverse scholars. For philosopher Emmanuel Levinas, rejecting the idea *homo homini lupus*, there can simply be no organized society *but* for a primordial, unauthorized, human vocation for compassion (egoism and violence, for him, are nothing but attempts to repress this). Levinas, however, must be understood, as speaking of compassion not in the usual sense, that is as involving a human capacity for, and cultures of, empathy; he defines it, rather, in phenomenological terms, as an irreducible excess of affectivity for the ultimately meaningless suffering of another, beyond all theodicy and causality, whom one is ethically commanded to offer succour to as if s/he is a 'higher' and absolutely unique Other, prior to any comparison and judgement. General legal principles and rigorous rules, Natural Justice and positive law are equally 'born' of such an-archic, individuated, compassion for which one can only retroactively account. Justice is 'born' as one attempts to justify to third parties why one's care benefits some but not others; the paper argues that this perspective is preferable to prioritizing empathic compassion over law for it binds compassion with responsibility. Turning to Giorgio Agamben, the role of compassion takes on a darker character; his historicized investigations of the 'western-Christian' paradigm shows how the Greek and Roman legal principles of *epieikeia*, and *aequitas* merged with the Christian postulates of God-dictated philanthropy and 'divine economy' (Gr: *oikonomia*), leading – instead of ethical anarchy followed by with infinite responsibility (Levinas) – to *anomie*, legal exceptionalism and social control via patronage and other bio-political practices to spectacles of compassion. This suggests that what Levinas calls 'ethical anarchy' has been captured by economic rationality and endless processes of anomic management that are equally free of ethical constraints as they are from legal and political decision. With reference to contemporary examples from the 'law and emotion' debates, medical laws and humanitarianism, the paper asks the reader to ponder upon the importance, if any, of Levinas' thesis in a world where the expediency of managerial rationality, the secular heir of divine *oikonomia*, prevails over moral, legal and political principle.

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## I. Introduction

While some marginalise and others emphasise the importance of the emotion of compassion as an aspect of legal justice each of the two continental philosophers examined here offer a distinctive perspective.

For Emmanuel Levinas compassion is not to be studied as part of a philosophy of moral feeling or a psychology of empathy but, as a key aspect of an existential, pre-reflexive human 'ethical vocation' for infinite ethical responsibility towards the other *as other*, which precedes language (and thus consciousness and the unconscious) and which makes possible all social phenomena, starting with language. Society presupposes existents that cannot but direct *thoughtless* compassion at *specific* others who 'obsess' us causing us to act without thought for *third* persons. Justice is born as we reflect upon this anarchic privileging of only some and *strive* to account for it before all those third others. Legal as well as political justice are the domains in which said striving takes place continuously and inconclusively. In sum, for Levinas, compassion is both the irreducibly 'anarchic' condition of possibility of sociality and a source of embarrassment that causes us to *try* and deal with others dispassionately for instance by recourse to general principles of legal or social justice. This effort is inconclusive and never-ending in so far as critique reveals that such dispassionate sobriety is always found lacking, that is, in so far as we are exposed as caring for some more than others (our children, our fellow-citizens, those whose suffering we can empathise with). In this sense compassion is both the reason for and the limit of theories of justice (for example, as is well known, in John Rawls' *Justice as Fairness* the application of principles of equality and liberty that are meant to ensure that the "least advantaged" are benefitted and not hurt or forgotten, rests on the presumption of a "veil of ignorance." But while the latter may be efficacious on the level of conscious cognizance, this is not necessarily the case once we consider the psychoanalytic category of the unconscious or the Levinasian category of 'ethical vocation'.)

Moving from Levinas's universalist ethics to Giorgio Agamben's genealogical study of the *bio-political* Western-Christian legal and political paradigm the emphasis on compassion remains even if in an entirely different sense. As explained above, Levinas depicts anarchic compassion as the condition of all sociality which legal and political philosophies try to structure and justify. By contrast, Agamben argues that specifically in the Christian and post-Christian Western imagination compassion signifies as an instance *anarchic economy* that is assumed as always already 'justified' because *providential* not only in theology but also in political theology. A part of his historicised argument is that the related Greek and Roman legal principles of *epieikeia* and *aequitas* merged, in Christian Byzantium, with the postulate of providential 'divine economy' (Gr: *oikonomia*) in a way that serves to justify legal exceptionalism or/and social control via pastoralism. Thus, we must beware lest spectacles of selective suffering and compassion are used to justify the *ad hoc* suspension of the rigor of domestic or international laws, for instance in relation to 'humanitarian' interventions. Equally, compassion should not be an excuse for populist politicians offering selective patronage and the usual gap between their electoral promises and post-electoral policy u-turns.

This paper reads Agamben's thesis as suggesting that, at least in the Western legal and political paradigm, what Levinas calls compassion's 'ethical anarchy' is instrumentalised at the expense of both the rule of law and of democracy, and in favor of bio-politics and anomic management. With reference to contemporary examples from the 'law and emotion' debates, medical law and humanitarianism, the paper asks the reader to ponder upon the importance, if any, of Levinas' ethical thesis in a world where the expediency of managerial rationality, the secular heir of divine providential *oikonomia*, prevails over moral, legal and political principle in all but name.

## II. 'Law is born to anarchic compassion': an ethical relation.

'Is not the evil of suffering... also the un-assumable, whence the possibility of a half opening that a moan, a cry, a groan or a sigh slips through – the original call for aid, for curative help, help from the other me whose alterity, whose exteriority promises salvation? [...] For pure suffering, which is intrinsically senseless and condemned to itself with no way out, a beyond appears in the form of the inter-human.' (Levinas, 2001, pp. 165-166.)

Emmanuel Levinas wrote that legal and political judgements are 'born of charity...' (Levinas, 2001, pp. 165-166); to understand that we have to also take on board his view that at the 'diachronic' level, society is not reducible to either economy, politics, law or religion all of which are meaningful at the 'synchronic level". To say that, *diachronically* and universally, legal and political systems are 'born of charity...' is to presuppose an irreducible, as well as inescapable, existential human vocation for asymmetrical openness to and hospitality for the vulnerable other. Throughout history sectarian religions with the help of theodicies, have provided suffering with meaning and justifications. In Levinas' atheist ethics, however, all suffering is evil beyond meaningfulness and redemption. Strictly speaking 'to suffer' is to undergo an impact that is *too* much; it is passivity; it is to be subjected to what is too intense for it to be objectified by the suffering self as a coherent experience; when for example another steps on my foot, for a split second, I undergo a strong sensation without yet reflecting, before I recuperate and can think of what happened and pass judgement. Thus, Levinas spoke of suffering as an impasse, an absurdity, and, so, utterly 'useless' (Levinas, 1998, pp. 91-101), Now, in so far as such pure, pre-reflective, meaningless, suffering that shows in the face of the unfortunate other is witnessed, it is a

“scandal”; the witness, scandalized by meaninglessness, is thus prompted to reach out to the sufferer: either to provide succours or to try and hide it. Although Levinas sometimes called this ‘compassion’ he more regularly called it *gratuitous responsibility for useless suffering*; this is *not* empathy (which some people feel more than others) but an inescapable human condition: to care for the other. Unconditional hospitality and succour of the suffering other are offered, as one of two possible options, when confronted with a scandalous shameful realisation: (i) first, the realization of non-interchangeability and *alterity*: although it is totally reasonable to assume that another person enjoys and suffers in ways similar to mine, *I cannot enjoy or suffer in his or her place*; (ii) second, the embarrassment that comes with the realization that, simply by occupying ‘a place under the sun’ *I/we displace another* or rob them of a possible refuge (consider the current European immigration crisis). Indifference is not an option; the only alternative to offering hospitality and succours is violence against the disturbingly suffering other: examples abound in history with the Nazi’s treatment of the ill still fresh in our memory; but the elimination of the sufferer so as to avoid exposure to the absurdity of suffering is an ultimately vain attempt to remove the embarrassment; even when the sufferer dies – the mind goes to those refugees drowning in the Mediterranean sea – or is locked out of sight – say in a closed refugee camp – her ghost continues to haunt us.

To gauge the relevance, if any, of Levinas’ take on compassion qua inescapable, gratuitous responsibility for useless or ‘absurd’ suffering to contemporary secular and non-fascist political and legal orders, Levinasian terminology must be first be introduced and explained. A central role in his godless metaphysics is played by the expression *face-to-face* which connotes a *pre-reflective* phase of human proximity; irrespectively of what I can make of a neighbour her ‘face’ signifies pure irreducible *alterity* and demands to be cared for as if s/he was an absolutely unique and also higher ‘Other’; it cannot be stressed enough that such proximity refers to a pre-reflexive experience of sociality which the daily confrontation with any empirical others’ *face* epitomizes; starting with the parent’s face whose unintelligible voice commands the infant and summons it to come out of its stupor and become a responsive human. It is from this *primacy of affectivity over reflexivity* that Levinas derives the ‘irreducibly ethical’ dimension of his *face-to-face* ethics. The capital ‘O’ of the term ‘Other’ suggests that the encounter with an empirical other produces an

affective surplus over the idea and image 'of' said other held by myself/my community. Though knowable, as member of a species or genus, the absurdly vulnerable or actually uselessly suffering other obsesses me as 'Other' through her 'disincarnate' *face*, that is: as a unique site of vulnerability or subjection to meaningless suffering in excess of identity, essence, representation, knowledge and meaning and, hence, of theodicy and causality. Consequently, in the here and now of every encounter with a concrete being – even if this is taking place in the very formal setting of the law court – its 'naked', uniquely vulnerable, *Face* 'summons' me/us *not* as a knowing 'I'/'we' and self-same subject (for example, the legal judge or the social worker as professional or/and as a particular kind of psychic structures with specific inclinations, biases etc.) but the individual/collective Self as *Me/Us* in the accusative – an *ethically individuated subjectivity* called forth by the other whose suffering I/we cannot ultimately reduce to a matter of theodicy or scientific causality. Every suffering, no matter how caused, even self-inflicted, concerns me/us personally as a 'scandal'. This scandal signifies the situation of our proximity as inescapably personal no matter how formal or mediated the setting, and proscribes me/us with an 'infinite' and 'anarchic', pre-reflective (thus pre-legal, pre-political, pre-religious) responsibility for the other's 'nakedness' (that is, vulnerability to suffering) in excess of law, politics, religion etc. This is producing a 'counter-intentional' affectivity in the adult subject who feels responsible for a 'unique' Other even as it knows him/her to be comparable and interchangeable. In sum, Levinas' phenomenological terms the Self as ethical subjectivity, or *Me* (by extension *Us*), refers to a pre-conscious, pre-reflexive, non-intentional, state of affectivity in which both the conceptual and iconic distinctions 'self-other' are not yet established or, if they are, they implode; hence the individual/collective ethical subjectivity as *me/us* is distinguished from the idea of the singular/collective 'ego' of self-same identity ('I'/'we') that includes consciousness and 'the unconscious'.

In turn, one must ask, who is my/our neighbour who compels *me/us* to gratuitous concern with alleviating their pain as a matter of priority? Anyone with a 'face', answers Levinas, including Bobby the dog!<sup>2</sup> No matter how near or far in spatio-temporal or even

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<sup>2</sup> Bobby the dog strayed into the German camp where Levinas was held during the war and unlike the Nazis continued to treat the prisoners as human. 'This dog was the last Kantian in Nazi Germany, without the brain needed to universalise maxims and drives' (Levinas, 2015, p. 153).

species terms each vulnerable/suffering other demands my/our exclusive attention as if s/he or it was the only one that matters. Realizing this makes me/us question the possibility of authority of, say, legal precedent or consensual political desideratum, be they based on categorical imperative, utilitarian calculus or an idea of the end of History as the overcoming of contradictions (in either its neo-liberal version; for example, Fukuyama, or neo-Marxist versions; for example, Žižek, Badiou, Balibar). In critical jurisprudence Levinasian ethics has thus allied with deconstruction (Critchley, 2014 [1992]). For example, using Levinasian terms, I have written of the *face* of the permanently vegetative patient (PVS) in English medical law (Diamantides, 2000a, 2000b; 2000c). Unclassifiable as either alive or dead, known to harbour no thoughts or feelings yet commanding responsibility for his absurd and ‘useless’ suffering, the PVS patient in the leading UK case of *Airedale N.H.S. Trust v Bland*<sup>3</sup> stretched the judges’ ability to authorize their decision through use of a patient’s ‘best interests’ test found in a dissimilar case concerning a fully sentient mentally-ill person which was nevertheless accepted as the most relevant legal precedent. Reading the summary of the judgment one is struck that the patient’s alterity spoke through the gap between, on the one hand, their personal judgements (in which most judges admitted that in the case of PVS patients *there is no* ‘interest’ to speak of in either continuing to be in this state or not) and, on the other hand, the final, ‘authoritative’ judgment that states that it was in the vegetating patient’s interests to be left to die because he had no interests to speak of! If I focus on the incongruity of this decision it is because their failure to properly justify their decision exposes the judges personal ethical and gratuitous responsibility for the fate of the PVS patient. By contrast, any justification in terms of law or policy for why this particular patient is better off let go, or not, immediately raises the suspicion that some partial *economy of compassion* is presumed in which some sufferings matter more or less than others. What the discourse of both law and policy will not entertain is precisely what Levinas referred to: the idea of human intimacy as ‘ethical subjectivities’ namely in terms of each existent’s ‘obsession’ with gratuitous, impossible responsibility for each other’s absurd suffering; without authority nor limit each empirical other primarily commands me/us as if utterly unique, incomparable or ‘absolute Other’, to the point of ‘persecution,’ destabilizing individual and collective self-consciousness and shaming identitarian closure.

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<sup>3</sup> [1993] A.C. 789.

To appreciate Levinas' admittedly complex thesis one must do no less than set aside key assumptions in the dominant paradigm of legal and political anthropology; that legal and political institutions were created by man in order to 'put an end', or at least to give meaning or a useful structure, to suffering and violence; and that man is either absolutely free in his relations with the world and the possibilities that solicit action from him (idealism), or mere prey to material needs (reductivist materialism). In Levinas' materialist metaphysics the human is neither free spirit nor bound matter but an existent that experiences the absoluteness of materially-based individual and social existence *dramatically*, as an unbearable 'burden,' or an inescapable contract into which s/he never voluntarily entered. It is on the basis of such premises that Levinas analysed human society in terms of the *face-to-face* as 'primary sociality' (Levinas, 1969, p. 304) '...whose whole *intensity* consists in *not presupposing* the idea of community' (Hand, 2001, pp. 83-84) but, instead, the idea of *infinity* (Levinas, 1969). The idea of infinity, per Levinas, obsesses us even as it is a signifier without a signified; it is, rather, experienced in the flesh as an excess of affectivity and responsibility over knowable and calculable duty in the onerous, indeed unaffordable, proximity to the face of my/our neighbour who, in terms of my/our ethical responsibility, comes complete with the claim of having to be approached as if absolutely unique and as if, therefore, 'higher' rather than as another member of the *genus* to which s/he or it might belong. The idea of infinity as a sign of such godless transcendence is central to Levinas' ethics of proximity, based, as it is on obsessively dedicating one's self to the other who is approached *as if* s/he was absolutely Other. Thus sociality is the result of an infinite ethical command: open up to the stranger! Obviously this is quite distinct both from constructing a community out of an egocentric perspective or, alternatively, an ego out of a conventionalist or social point of view *and* from master-slave type dialectic. Because of this, Levinasian ethics is at odds with any ontology of the state or any other political association since it exposes the contingency of sociality and demystifies/denaturalizes any existing bonds.

Overall, Levinas' ethical ontology of society entails: (i) a fundamental pre-reflexive, pre-political and pre-legal, human experience of anarchically welcoming each other as an important stranger; and of obsession with the stranger's always 'absurd' (meaningless and



thus incalculable and incomparable) suffering; (ii) bearing the burden of, subsequently, reflecting on this experience, comparing sufferings and attributing causes, *and justifying to third parties* why this or that instance of suffering mattered to me/us while another was neglected. This *double limit* to the (individual or collective) ego's sovereignty (an existential/ethical 'impulse' and social/justice-related need to justify it) is supposed by Levinas to be more fundamental than, and irreducible into, any *idea* of moral duty either in particular religions – traditional or 'civil' – or in universalist 'secular' philosophies such as Kant's or Hegel's. Thus, in Levinas' scheme, the traditional Western *binary* model of relating law (understood as the domain of rationality) and compassion (seen as an irrational emotion) – namely first distinguishing them and then seeking to balance one against the other – is set aside, in favour of a model based on genesis (of law/politics born to compassion) and forgetfulness (legal and political discourses forget their anarchical birth by compassion). In particular, modern legal and political philosophies forget that both legal and political judgments are 'born of charity...', as instances of *anarchic* responsiveness in the numerous daily events of 'face-to-face' sociality where each empirical (singular or collective) 'other' obsesses the (singular or collective) 'self' as if s/he were the only one that matters.

Said differently, what we tend to forget is that legal or political justice proceed *from* the individuated, daily human experience of a pre-reflexive, obsessive, hyperbolic, extra-legal and extra-political, *anarchic* ethical obligation to open up to and alleviate another's suffering as always meaningless and absurd (that is, irrespectively of any theodicy or natural causality) and 'as if unique' (prior to any comparison and calculation). As soon as by political/legal 'justice' and right' we mean a public reasoned discourse of measured and accountable sociability, however, one must account for what now can appear to third parties ('the Third' in Levinas' jargon) to be merely one's compassionate predilections; hence the importance of publicly demonstrating that one treats equally, or at least equitably, comparable cases. One simply can't say: 'I did x for y outside the frame of extant law because my conscience so demanded' unless one is prepared to die like Antigone did. On the other hand, human laws rarely demand of us to justify why we empathize with and care for 'our own' (our children, our friends, our compatriots) more than for others (in Genesis, God, the religious version of the absolute Other, *did* ask Abraham to love him to the point of sacrificing his son; in human history this demand is almost always repeated by

the collective, in the form of sacrificing ourselves and our children in war *against others*, but never *for others*, save in recent 'humanitarian wars' of which I write below).

If indeed our established legal and political orders tend to 'forget' that inter-human compassion is their condition of possibility, rather than the other way around, however, Levinas did not propose that *remembering* alone suffices to reverse this situation. In other words, his was not a plea for a return to some version of natural law prioritized over positive law. Rather, he described the relation of ethics to law/politics as an interminable existential drama with ethical consequences. For example, I spoke above of those British judges in the *Bland* case who tried but failed to hide their personal ethical responsibility for the PVS patient. The failure shows amply in the absurd statement, made by one judge, that ending his life is in conformity with his 'best interests' (the legal precedent) because he has no interests to speak of whatsoever. At such moments, as Levinas put it, the (individual or collective) Self *as* ethical subjectivity ('Me'/'Us') appears 'in the form of an ego, anachronously delayed behind its present moment, and unable to recuperate this delay – that is, in the form of an ego unable to conceive what is "touching" it' (Levinas, 1999, p. 101). It is in such diachronic circumstances that any particular other appears as an awesome, unique, 'higher', Other whose suffering requires us to risk providing succors, and that my/our Ego (say, as judges bound to follow, not make, the law) is left shocked, speechless, humbled, its self-referentiality interrupted. Thus the '*me/us*' connotes the (individual or collective) Ego as constituted in *persecution* by and *obsession* with 'alterity.' This, Levinas argued, gives rise to the only truly universal, human right-cum-duty to responsibility which, anarchically, dislodges the rational quest to determine once and for all the right 'relation' of law/politics and compassion. In other words acting compassionately can only retain an 'ethical' character if the subject is understood as individually responsible for having failed to authorize its compassion with reference to a theory that settles or synthesizes its legal/political responsibility with its anarchic desire to act compassionately.

The fact that we become social animals out of inescapable, gratuitous, individuate compassion that fails to be justified but that, subsequently, we tend to think of society as our, or our ancestors', (political/legal) accomplishment is an important aspect of our existential condition. At its most fundamental level, however, the Self ('I' or 'we') does not

only 'mirror itself' in the facts of the knowable and comparable others around it where the distinctions I/you, us/they pertain. It remains confronted with the radical alterity of *each* other before it who demands to be treated as if the only 'Other' that matters at that instance, demanding compassion. If so, selfhood should not be understood as it is normally, that is, as the sum-total of its actual and potential, conscious and unconscious, intentions, namely as the 'sovereign,' self-same, point of identity. Underneath the 'veneer' of said sovereign self ('I'/'we') lies an ethically persecuted *me/us* before *each and every* proximate vulnerable other who demands our exclusive care. In this sense the (individual or collective) self is neither an actor or a non-actor but the unique locus of inescapable 'radical passivity': a Levinasian neologism that aims to convey the inoperability of the normal distinction activity-passivity in the exposure to an other-as-Other facing *me/us* – and no one else – and commanding *me/us* neither to act nor to stay indifferent but *to become a Self-for-the-other*, or to be-for-the-other, to open up to alterity and offer succors to whoever suffers. In Europe today, for instance, the question regarding the refugees' crisis is not 'what should we do/not do?' but: who must we Europeans become now that many strangers show up, exposing their vulnerability to our sight? Thus, the 'I'/'we' is relational not only in a dialectical sense but hyperbolically, since in my/our exposure to another's face 'I' am *me* and 'we' are *us* in the accusative, that is by virtue of my/our obligation to another: 'as if I were devoted to the other man before being devoted to myself' (Hand, 1989, p. 34). Apart from deconstructive readings of the law this perspective has also had already a (hitherto modest) reconstructive impact on jurisprudence. As Desmond Manderson puts it: in just the way that Levinas sees ethics as 'first philosophy', so, in (the common) law, the status of 'first law' should be attributed to the law of torts and the so-called 'duty of care' (which describes a personal responsibility that we owe to others and which has been placed on us without our consent) (Manderson, 2006, p. 206). The wider implication is that, instead of assuming that the law has its basis on individual rights, freedom, autonomy and contract, we can see it as based on the individual's un-chosen obligations, where their autonomy and freedom are questioned. This model reverses the sequential precedence afforded to the austerity of law over compassion in all dominant Western accounts. I will come back to the deconstructive and reconstructive uses of Levinas in critical jurisprudence in the conclusion.

Coming to the matter at hand, I submit, the Levinasian premise of an anarchic

compassion in the form not of empathy but of a gratuitous and excessive ethical responsibility for 'useless suffering' overcomes some of the most serious problems associated with compassion as empathy whereby the latter is understood, contrary to Levinas, as a quality *of* the ego and its counter-part, the 'unconscious.' First, whereas: '[w]hat renders the "I forgive you" sometimes unsupportable or odious... is the affirmation of sovereignty';<sup>4</sup> and whilst: '[t]he power to pardon is but the counterpart of the power to condemn' (DiSalle, 1964, pp. 71, 74); Levinas spoke of compassion for the other as a *non-power* that makes possible the legal and political sovereignty to condemn/pardon this or that person only to expose it as lacking in justice vis-à-vis third persons. Secondly, his thesis neutralizes without negating Hannah Arendt's criticism of those who wish to substitute reasoned debate, decision and action by the 'rash decisions and thoughtless actions' expressing the 'boundless emotion' or 'passion' of compassion (Arendt, 1963, pp. 70-90).

If Levinas is right that any legal/political justice always presupposes anarchic compassion, there is no need, in order to be compassionate, to imitate Jesus who came 'not to destroy but fulfil the law' and make exceptions or discounts to the extant law. Thus, for example, the manner in which, in the last few decades, aggressive military expeditions in contravention of international law have been exceptionally justified as 'humanitarian' and, eventually, have been accepted as a new species of legal intervention, without proper debate, is *not* something that we could defend with reference to Levinasian ethics. Rather, the latter's insistence that one can *never* fully justify one's concern for an instance of suffering means that, in his scheme, it is precisely such unjustifiable concern that gives rise *to the necessity to justify it in the eyes of third others*. This, however, is a conversation that can never end: if the very law in our disposal is always already born to charity we need to set aside the lies we tell about its 'foundations' and acknowledge that all law is destined to remain as unfounded, as charity is anarchic; we can never truly justify why we prioritize the suffering and vulnerability of some (say of our own children, or compatriots etc.) over others'. In sum, while Levinas wrote of the ontological primacy of the 'anarchy' of compassion over legal and political right, he did *not* advocate anarchism. All he suggested, I

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<sup>4</sup>Jacques Derrida, 'The Century and the Pardon', *Le Mondes des Debats*, No. 9 (December, 1999), 16: <http://hydra.humanities.uci.edu/derrida/siecle.html> (accessed on 1 August 2016).

understand, is that right does not proceed from might but from the weakness of man and that it is not a formula; as we try and fail to account for our compassionate predilections we construct vulnerable, de-constructible and necessary visions of (legal and political) justice.

### **III. Law and compassion in the Western theo-political tradition: an economic/anomic relation?**

As we saw, Levinas felt the need to argue that law and politics are born of an ethically demanded anarchic compassion, which they subsequently attempt to retroactively authorize. I am turning now to a very different thinker, Giorgio Agamben, who defends the thesis that in the western tradition, at least since Christianization, the prevailing rationality is only ostensibly one which centers on legal and political authority (Agamben, 1998; 2000; 2004; 2010; 2011; 2013; 2016); in reality, he argues, the prevailing mode of governance is *administrative/managerial* and *anomic*. Juxtaposing these diverse theories is interesting since the relation of 'ethical anarchy' to legal/political authority, central in Levinas' account, may turn out, from an Agambian perspective, to be one of un-ethical *anomie*. Moreover, as I presently discuss, in Giorgio Agamben's historical account of the Western (Greek-Roman-Christian) legal and political paradigm the issue of the relation of law to compassion gets special mention and acquires a different, darker, character than in Levinas' a-historical ethics. As Agamben points out, Byzantine rulers set the scene when they began to suspend laws ostensibly in the name of Christian compassion but, in reality, as part of a shift away from Greek democracy, early Roman republicanism and Roman autocracy, towards a *bio-political manner of government* (Agamben, 2011); the latter entails strategies for managing social life under an *anomic*, administrative, or 'economic' rationality. In this bio-political paradigm, which Foucault dated to modernity but Agamben backdates to Byzantine times, government dispenses easily with legal or political principle in the name of what Agamben calls in Greek *oiko-nomia* (household management).

Some key elements of Agamben's overall approach must be mentioned first. The 'western paradigm' he takes as his object of study comprises: (i) elements derived from Greek philosophical metaphysics, especially as filtered via Stoicism; (ii) and the Roman statist-juridical legacy especially after it merged with Christianity's *economic-political*

*theology* as Agamben defines it. That latter term refers to the idea, in the Trinitarian *dogma*, that God is One yet also three persons, in a way that an all-encompassing unity is predicated upon the arrangement of its internal relations. God, and by extension organized society, is thus imagined as containing all differences as well as consisting of their organizing arrangements. Obviously, such an imagination, to return momentarily to Levinas, does *not* allow for the radically conceived exteriority the latter called ‘alterity’; nor does it allow for Levinas’ idea of ‘infinity’ other than as *endless process* of re-arrangement and management of beings and things; nor, lastly, can a religion like Christianity accept Levinas’ thesis that all suffering is meaningless, beyond all theodicy and causality, and requires gratuitous responsibility: instead all suffering is given an economic meaning and managed accordingly (with some sufferings mattering more than others). In as much as Agamben is right, for the reasons summarized below, that said economic-political theology still over-determines our legal and political imagination in the secular era, the aforementioned Levinasian idea that the human condition involves caring for the proximate other’s suffering (or not) in a manner and to an extent which always remain un-authorized and, thus, always remain to be further and further justified to third parties, has to be revisited. Could it be that in the western paradigm – where unity is predicated upon constant anomic management of differences – what Levinas called the ‘scandal’ of human vulnerability and suffering (that, for him, prevents us from being indifferent to meaningless suffering or, said differently, from caring only for suffering we empathize with or are legally or politically required to care for) is no more? In a tradition where contingency is explained as a set of relations we can master if not by decision then at least by management, can any suffering really scandalize us into shame and embarrassment simply for occupying a space under the sun instead of another and for not being able to suffer in her place as Levinas suggested?

This composite western paradigm examined by Agamben involves two aspects. First, thinking according to a series of binary distinctions inherited from classical philosophical metaphysics such as, for our purposes, the binary compassion/law that historically derives from the distinction emotion/reason (other such distinctions in classical literature are body/mind, *zoe/bios*, private/public, *dynamis/energeia*, *auctoritas/potestas*, autonomy/heteronomy, etc.). *Ipsa facto*, as Agamben’s series entitled *Homo Sacer* makes clear, we tend to disregard (or ‘abandon’) any ‘form-of-life’ that cannot be neatly placed on

either side of these binary distinctions. In Agamben's discourse *Homo Sacer* or 'bare life' stands precisely for the vulnerability of the human animal that we forget or discount when we think in binary terms. Thus, in the aforementioned example from English medical law, the PVS patient's unique vulnerability was lost as the judges tried to represent him *either* as alive *or* dead (Diamantides, 2000b, 2000c). The second aspect of the composite western paradigm, postulates a third element that encompasses, without dissolving, these binary-relational encryptions of reality and stabilizes their 'tension'. The Stoics introduced for this purpose the ideas of *Logos* and *Pneuma* (Gr: spirit), which were then substituted in the medieval period by the Christian postulates of the Triune God but also the idea that the world is organized as a huge *household* (Gr: *oikos*). In this regard, I have already mentioned the possibility that Trinitarianism still over-determines our thinking; as for the idea of the world as an *oikos* it is apposite to say that if this was originally believed to be a house 'owned' by God, later, with secularization, it is the 'people' as nation and, now, as 'humanity' that are expected to play the role of house master.

Here, what is important to retain from Agamben's complex narrative is, first, that in the scheme he presents all differences are imagined as contained by the idea of a relational unity (according to the image of the Triune who is one and yet consists of the relations of its constituent hypostases); and that the classical Greek distinction between the *oikos*/household and *polis*/politics was enveloped in the Christian imagination by the notion of *oikonomia*; heralding the beginning of bio-politics and managerialism the rise of the Trinitarian God and the vision of the social as household gave rise to an imagination whereby all binary distinctions – for example, for our purposes: law/compassion – require *not* synthesis or resolution but flexible management and administrative, rather than legal, political or ethical rationality. In fact, this (Trinitarian) *economic* political theology eventually made possible, in the sixth or seventh century canon law of the Byzantine Church, a *new* meaning of 'exception' (to a rule or principle) referred to as *oikonomia*. *Oikonomia*, which in classical Greece had meant the a-political administration of a household, had by then become the mysterious divine praxis undertaken for the salvation of humankind.<sup>5</sup> The

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<sup>5</sup> The Byzantine Patriarch Photius, for example, wrote: '*Oikonomia* means precisely the extraordinary and incomprehensible incarnation of the *Logos* ...it means the occasional restriction or the suspension of the ...

second lesson from Agamben's thesis is directly relevant to the discussion at hand. The theological idea of exception-as-*oikonomia* came to coalesce with, respectively, the Greek and Roman legal concepts of *epieikeia* and *aequitas*, fairness and justice, and ultimately came to justify the *anomic dispensation (dispensa)* that relieves one from too rigid an application of the canons in imitation of divine compassion for humanity (Agamben, 2011, p. 49). This process marked a shift in the exercise of power in the Byzantine political and legal system: dispensation from the law gradually replaced legislation as the main expression of sovereignty and Byzantine rulers found it equally expedient to gain legitimacy by appearing as merciful Christians, for example by annulling onerous contracts binding the meek but also pardoning their corrupt officials.

Now, Agamben is not a historian and what he says about the medieval is supposed to help us understand contemporary problems. In fact he is just one among a growing number of critics of contemporary liberal democracy and his insights into political theology are meant to support his criticism by providing a historicized perspective to today's crisis of legitimacy. Whereas democracy theorists as well as constitutional lawyers like myself speak of modern government as based on free, rational, public deliberation, for Agamben and others there has not been an effective democracy since classical Athens. Deliberation, he claims, has long been substituted, first, by carefully orchestrated ritualistic acclamations of the 'charitable' sovereign in the medieval era (with the decisive input of religious authorities) and, today, by media-manipulated construction of 'public opinion' regarding the public good (with the decisive input of 'experts' – say, on the economy or security). The crucial point then and now is that the 'sovereign' (be it the Christian monarch or the 'people') do not really rule through their decisions; rather, their decisions follow the dictates of those who know or purport to know how 'to manage' the situation.<sup>6</sup> Today, this

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rigor of the laws and the introduction of extenuating circumstances, which "economizes"...the command of law in view of the weakness of those who must receive it.' (Cited in Agamben, 2011, p. 49.)

<sup>6</sup> Thus, in Byzantium effective power lied not solely with the emperor as 'legibus solutus' but also with the civil and clerical bureaucracy. Likewise, in the case of the occidental medieval king effective power rested with the *majordomo* of the occidental anointed King. Eventually, as the king's household servants gradually transmuted into a nation-wide civil service and impersonal bureaucracy, the latter's effective power often replaced in all by name the much criticized royal absolutism. At the same time, the western trajectory from the High Middle Ages onwards is marked by the rise of increasingly differentiated professions (lawyers and politicians, economists and scientists, etc.) as well as interest groups. Arguably, their input into political and legal decision-making is more decisive than we like to think. Hence, for example, the reticence of Parliaments



critique is becoming increasingly relevant what with the constant talk of crisis of legitimacy and trust in government. As many now talk of imploding political sovereignty (say, in Greece) as well as protracted legal exceptionalism (for example, wherever, open-ended states of emergency have been declared), it is easier to be persuaded by the critics that ours is not a culture of legal and/or political *krisis* (Gr: decision) but of perpetual *crisis* requiring not principled decision/judgement but *management*. Said differently, Agamben's challenge is that for over two millennia of western history, behind the 'façade' of (legally or politically defined) sovereignty there is *anomic administration without government*.<sup>7</sup> This alleged historical gradual passage from principled *krisis*/decision to the 'economic,' flexible and, ultimately, anomic management of interminable crises, casts in a new light the topic at hand.

Wilkinson (2017)<sup>8</sup>, after a substantial review of the relevant literature, identifies the 'relation' of compassion to law (and, we could add, to politics, too) as a *perennially controversial* one. That is, law and compassion neither merge nor separate, remaining locked together in a way that invites not resolution and synthesis but constant management of controversy. The suspicion arises that the perpetual controversy regarding the 'relation' of law (and politics) to compassion, and more generally regarding the relation of reason and affect, is, perhaps *not* best understood as a dialectic (that can actually lead to a more complete understanding of judgement and decision on suffering). Rather, the controversy can be said to function as a permanent source of dispute and tension which, thus, occasions ever more *oikonomia* namely the prevalence of administrative over legal or political rationality. In fact, as the critics of the 'law and emotion' literature today elaborate (see below), the various 'economies of compassion' that accompany contemporary Western

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to remove many historical 'prerogatives' of the Executive but also to legislate so-called framework Acts' that leave wide discretionary powers to the executive (e.g. in pardoning criminals, waging 'humanitarian wars or choosing to save private banks from bankruptcy by using public funds) subject only to the advice of bureaucrats who derive their legitimacy neither from democracy nor from law but from their expertise.

<sup>7</sup> For one contemporary example of the discussion of our advanced stage in replacing law and politics by management in all but name see for example, Somek (2010, pp. 267-287).

<sup>8</sup> '...the *controversy* about compassion might well be identified as a *constant* companion to law; or perhaps it is more accurate to portray this relationship as one in which law [...] is fatefully set in a position where it is made to negotiate with the social meaning and morality of compassion' Wilkinson (2017, p. xxx)

legal and political practices can be seen as offering no more than a moral gloss to *anomic* biases and exceptions that frequently lead – in fact, but also, not seldom, by intention – to horrific consequences or/and to anomic preferentialism/patronage, for example, in the development aid industry that (allegedly) perpetuates dependencies of south to north even after de-colonization.

Thus, for example, few Greeks today would accept that the violation of EU's own rules (prohibiting helping member states address the results of their own violation of Eurozone's acceptable deficit levels) in order to 'save' Greece from official bankruptcy was mostly, if at all, an act of compassionate solidarity. Most see it as a means of putting Greece in the position of a 'protectorate'. Irrespectively of where one stands on this, it is difficult to deny that, as administrative/managerial logic prevails, clarity on issues that are central to philosophy, ethics, political science and jurisprudence in this regard is hard to find. For another example, on the level of international law and relations no one is in position to categorically state why a humanitarian intervention is truly justifiable here but not there, or whether its illegitimacy under international law can still be excused by reference to its humanitarian motives when confronted with millions of dead and displaced people that constitute the intervention's 'collateral damage.' In national law, too, it is an impossible task to ascertain solid grounds for compassion in, say, key medical law cases. Is compassion at all relevant when a court is confronted with an insensate permanently vegetating patient and the dispute between a Catholic nurse who considers any life as 'sacred' and the doctor and relatives who wish to offer the patient an easy-way out as in the aforementioned *Bland* case? As far as we know, the very definition of death that western courts use (in that case and beyond) was made up in the late sixties not on the basis of some scientific discovery but on pragmatic reasons.<sup>9</sup>

It is in the light of this confusion that I understand how it is possible that, today, 'compassion' is appropriated on behalf of *both* liberal and conservative political agendas, and used as a pretext to promote the extension both of leftist state welfare policies *as well*

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<sup>9</sup> As Peter Singer explains the re-definition of death from cardiac- to brain-death happened in response to new technologies that had made it possible to keep artificially alive patients whose consciousness had been irretrievably lost but whose vital organs could now be used as transplants (Singer, 1996).

as neo-liberal ethics of self-reliance (Amble, 2011). It is always important to note the actual prevailing conditions in which debates take place and the same of course holds true of the law/compassion debate. In this regard I note how in the rich Global North immediate exposure to suffering and death is rare (for example, critically ill and dead relatives are quickly isolated as opposed to pre-modern customs of mourning the dead at home<sup>10</sup>). Also no pre- or extra-legal compassion is actually allowed (for instance, suicide is permissible but assisted suicide is prescribed in most jurisdictions even in cases of the terminally ill). On the other hand, however, media-tised, graphic reports of *specific* distant sufferings, carefully contrived to elicit shock and upset are ubiquitous, and often instrumental for the crafting of public opinion so as to focus on specific causes and campaigns.

In the context of such abundant compassion-by-proxy, carefully manipulated by both governmental powers and non-governmental organizations eager for donations much of which go towards their operational costs, some, like Martha Nussbaum, see a need for cultivating an ‘intelligence of compassion,’ while others find that this task is compromised because emotional experience is all but confined to ephemeral ‘intensities’ or fleeting ‘sensations’ (Woodward, 2002, p. 224). Moreover, ours is a culture of unstoppable commodification, where it is possible to buy a ‘fair trade’ coffee from a multinational company thus indulging the fantasy that by doing so one has discharged a ‘political’ duty inside a new ‘cosmopolitan political community’ sustained by globalized compassionate sentiment towards instances of suffering that receive media coverage. Whereas some see the advent of a new ‘empathic civilization’ others note that the routine exposure to graphic scenes of human suffering from one’s television or computer makes people feel politically powerless and frustrates and denies any dispensation to true compassion (Boltanski, 2012 [1990]); one thinks of those ‘likes’ in *facebook* of postings relating to various tragedies or injustices. Yet others, such as Slavoj Žižek, see in such ephemeral modern humanitarianism the actual preclusion of any genuine commitment to radical, *structural* social change.<sup>11</sup>

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<sup>10</sup> See, for example, P. Woodrow Nuring *Accutely Ill Adults* (Routledge, 2016), p. 221.

<sup>11</sup> Žižek makes this claim in various documentaries such as *The Pervert’s Guide to Ideology* (2012). In short he identifies a new trend in modern capitalism: marketers tell us we can achieve personal redemption not through hard work and amassing savings, but by consuming eco-friendly products, fair trade goods, or products that yield some kind of charitable dividends.

As populations display ‘compassion fatigue’ and, inversely, public opinion falls prey to carefully crafted plays on compassion,<sup>12</sup> Agamben’s skepticism that ethics, politics and law have fallen prey to management and manipulated consensus-making, seems to have more explanatory power rather than Levinas’ appeal to a universal ethics of ‘anarchic compassion.’ The latter refers to a fundamental, pre-political and pre-legal, ‘anarchic,’ ethical right to show compassion on the (very un-Hobbesian) understanding that without such ‘ethical proximity’ there could be no politics of law, a debt that legal and political orders ‘tend to forget’. But in the light of the genealogy of Christian government as presented by Agamben said ‘ethical right’ appears compromised since law and politics are themselves substituted by bio-political processes of social control and management of populations that include the manipulation of compassion.

In sum: Levinas speaks of an existential drama that involves ethically demanded ‘anarchic’ compassion *and* ‘infinite’ personal responsibility for directing this compassion to some but not others. Behind this drama lies Levinas’s conviction that neither liberal nor Marxian humanists can relate to: occupying ‘a place under the sun’ can *never* be ‘righteous’<sup>13</sup> in as much as one enjoys it *instead of* another, *even* if I hold a legal title to it and even if I do welcome and share with *some* others. Both liberal and Marxian economies of compassion repress alterity and infinite responsibility whereas the Levinasian idea of compassion as persecution maintains the asymmetry and distance constitutive of the non-totalizing relation to the other. Following Agamben, however, one could say that this drama of anarchic compassion and infinite responsibility has been appropriated by impersonal, anomic, perpetual management.

Characteristically modern humanitarianism can be easily stripped of its ethical, legal and political significance and, instead, be suspected as yet another feature of a society of spectacle, to use Guy Debord’s phrase, in which manipulated public opinion (appearing as genuine democratic ‘consensus’) is seduced by simulacra of compassion – be they of the

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<sup>12</sup> E.g., S. D. Moelller *Compassion Fatigue How the Media Sell Disease, Famine, War and Death* (Routledge 1999)

<sup>13</sup> Levinas, E. *Is it Righteous to Be?* (Palo Alto, Stanford University Press, 2001).

liberal or the Marxian variety – and provisionally accepts unprincipled exercises of public power often in the form of legal exceptionalism but also political u-turns and broken promises. It has even been suggested that humanitarianism is ‘sold’ to the masses as a form of ‘the pornography of pain’, a way of relating portrayals of other humans’ suffering as a ‘delicious horror’ (Rozario, 2003). In any case, any attempt to suggest that compassion should play a bigger role in public affairs can easily be attacked as enhancing a situation of expedient anomie. Consider the episode in 2016 when the televised cries of a Palestinian refugee child embarrassed the German Chancellor who had just given said child a televised lesson in Kantian morality while explaining to her why she could not stay in Germany: the politician decided to suspend the ‘Dublin Treaty’, first in connection to that one girl, then to as many refugees as the German economy could absorb before, finally re-closing the borders. In these circumstances, Levinas’ ethical thesis that law (and politics) are ‘born’ to anarchic compassion which then ‘forget’ their provenance, must be revisited and questioned in view of the thesis that the real triumph of our era is not of the rule of law or/and democracy but of *oikonomia*/anomic management falsely presented as principled exercise of sovereignty. In bio-political settings – where the *polis* is in fact substituted by *oikos*, and law (and politics) by administration and crisis management – the ‘remembering’ and ‘forgetting’ of compassion occurs incessantly, their ‘controversy’ kept alive, *so as* to provide us with the widest imaginable margin of freedom *to manage* human populations.

#### IV. Conclusion

I have presented two perspectives, which are difficult to reconcile but I hope, useful to juxtapose. In conclusion, allow me to re-present each with an example from my personal experience. Holidaying on a rented yacht in the sea between the Greek islands the Turkish coast in August 2015, we came across one of the overcrowded inflatable dinghies on which Syrian refugees were making their perilous trip to Europe. Our skipper called the Greek coast guard who ordered him not to allow any refugees on board (which is considered Greek territory) and, instead, to wait for them who would arrest them. As hours passed and the children were crying the skipper and we decided to let some on-board. From a Levinasian point of view this compassionate defiance of the law is ethically warranted: diachronically speaking there can be no organized society without welcoming the stranger

and prioritizing her suffering. But from a synchronic point of view other questions arise: were we not, by allowing these people aboard, not contributing to an economy of compassion that includes, say, the humanitarian interventions of the West in some parts of the Middle East – which led to unintended disasters such as the rise of fundamentalism and civil war – and the non-intervention in the Syrian civil war? Could it be that we had been particularly influenced by the sight of Chancellor Merkel on TV making a temporary u-turn in her policy and allowing a certain number of refugees in Germany against the Dublin Treaty just before re-closing the border? Were we being ‘ethically anarchic’ or duped by economies and spectacles of compassion?

For Levinas, ethical compassion for the proximate other ‘as the only one that matters’ is not fundamentally based on empathy (which some have less than others) nor on general, moral, legal or political duty; it is, rather, the sign of inescapable, inexhaustible responsibility for the ‘scandal’ of suffering which is always, in each instance, too much and too meaningless, beyond theodicy and causality. As such it is the *sine qua non* of sociality on the basis of which moral, legal and political orders – religious or secular – are built. This suggests that law and politics must recognize the subject’s ‘relation’ to the idea of infinity which is ‘not in fact a relation’ but an experience of the *anarchy* of the other’s alterity and uniqueness even if the price is the breaking of law’s self-same identity and the shaming of the egoism of politics of self-interest. In jurisprudence these ideas have both generated deconstructive readings (for instance, my discussion of the *Bland* case earlier) and reconstructive proposals (for instance, the aforementioned position by Manderson that we should substitute un-chosen obligations as the basis of law instead of individual rights, freedom, autonomy and contract). Do such readings ‘break’ with the western economic-theological political tradition Agamben describes? The latter’s investigations point to a Western paradigm of *anomic* governmentality, derivative of a theological past, which suggests that what Levinas calls ‘ethical anarchy’ has been captured by economic rationality and endless processes of anomic management that are equally free of ethical constraints as they are from legal and political decision.

I fear that Manderson’s reconstructive approach, commendable as it may be, is not able to dislodge the depressing reality Agamben exposes. Manderson’s proposal is, in my

opinion, nostalgic of pre-Christian or non-Christian pre-modern traditions that western-led modernity has swept aside; the primacy and excess of responsibility over rights and of ethics over law has been used before, for instance in order to evoke a contrast between responsibility-centred Jewish law and a rights-based western model of law;<sup>14</sup> there is little to add here apart that this retraces a distinction that has, by now, been contained in the globalised occidental paradigm postulating an economic relation between all 'positive' and all 'natural' laws the tension of which is structured by the idea of a sovereign working on the advice of his managerial staff. This suspicion also casts its shadow on those within so-called 'critical jurisprudence' who invoke absolute ethical responsibility both to denote the deficiency of law without justice and to call on us to assume the all-compassing, extra-legal responsibility before 'the Other'. Levinas, by contrast, deliberately described *ambiguously* the relation of ethical compassion to principles of legal or political justice, and more generally of transcendental ethics to immanent law/politics, of infinity to finitude. This, in my understanding, means that there can be no closure or synthesis: we cannot synchronize compassion and law; instead there remains only the scandal of human suffering that we have not yet tendered to. Yet it is precisely the hallmark of Western economic political theology-cum-secular governmentality to identify autonomy and sovereignty *with* the perpetual management of such binary 'relations' as between ethics and law/politics, transcendence and immanence, natural law and positive law, affect and reason, compassion and adherence to rules/policies. My fear is that what Levinas called the ethical anarchy of compassion of one for the other-as-Other, and which must result in ever greater responsibility, has, in the western paradigm, been collapsed into the notion that the tension between established legal and political orders and universal ethics both requires and justifies constant processes of anomic management that allow for opportunistic legal and political exceptionalism.

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<sup>14</sup> R. Cover (1987) *Obligation: A Jewish Jurisprudence of the Social Order* M 5 J. *Law & Religion* 65.

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