

Is Law Necessarily Unjust?

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Law has found itself in a very difficult situation. It has been challenged by both theorists who claim that it is in principle always incompatible with justice and others who offer real-life proof that law is unjust in practice. Scott Veitch has contributed lately to the latter by arguing that law is fundamentally irresponsible. This article analyses the current predicament of law. Is law a failure?

According to Veitch, even postmodern jurisprudence is unable to overcome the modernist dichotomy of law and ethics (Veitch 1997, 97). That law is an autonomous field separated from morality and ethics is an idea that postmodern thinking has tried to question. This questioning has not been a complete success. In postmodern jurisprudence law is positioned ambiguously as both the protector and the enemy of justice (Veitch 1997, 97). This article sees Jacques Derrida's famous text 'Force of Law' as a significant example of this way of thinking, which maintains the dichotomy between law and justice. His work is influenced by Emmanuel Levinas, whom Derrida also refers to in the text. It can even be held that a Levinasian way of seeing the difference between ethics and law is at the heart of the problem. In Levinas's theory the relationship between law and ethics is difficult as it leads, at least on certain readings, to the conclusion that it is impossible for law to be responsible or just. This follows from the way law and ethics are categorically separated. From the perspective of a legal theoretician, this way of describing law and justice may seem odd. Can such a distinction be upheld, and if so, on what grounds?

Unlike these philosophical theories, Veitch's recent research on law's responsibility focuses on law. Contrary to what is usually thought to be the case, he argues in his book *Law and Irresponsibility* that law is in essence irresponsible. It is in the nature of law that it produces and allows for irresponsibility. Veitch

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discusses actual legal material including legal practices, categories and concepts. He also analyses several cases, through which he tries to show how law has fooled us all. The traditional idea of law as a system that produces responsibility and compels wrongdoers to carry the consequences for their actions is false. I shall discuss Veitch's argumentation in detail below. His analysis also seems to imply the postmodern ambiguity that law is both the protector and the enemy of justice, although the nature of law as enemy is highlighted. The dichotomy between law and justice is confirmed in his analysis, even though it is argued differently in his book than in the theoretical expositions. Is this the conclusion that must be drawn? Is law necessarily unjust?

Justice as ethical law

Levinas has been criticised for leaving unanswered the question concerning the relationship between ethics on the one hand and politics, society and law on the other.¹ Law and the legal sphere are a special problem for Levinas's theory because it seems that law is fundamentally unethical. His theory also implies quite a sharp distinction between law and justice. In the following, I will sketch a reconstruction of what a Levinasian theory of justice could entail.

At the core of Levinas's ethics is an infinite responsibility for the other person. Ethics stems from an encounter with the face of another person. In meeting the face of the other we realise our infinite responsibility for him. Ethics means for Levinas that we always put the other person first. Responsibility for the other is not reciprocal. According to Levinas, I am responsible for the other, but his responsibility for me is his affair. The ethical relation is by definition not symmetrical: it is the face-to-face relationship with the other wherein I carry responsibility for the other. (Levinas 1969, 199, 1982, 94-95.)

According to Levinas, the question of justice is not something that comes after ethics, neither temporally nor otherwise. The problem of justice is awakened when we encounter the face of the other and realise that there are numerous other people. These other others are thirds. Any one of them can be the other person for whom we carry responsibility. The question thus arises of whom I am responsible for. (Levinas 1995, 145-148.) My responsibility cannot be an infinite responsibility for everybody. It is in this instant that we move from ethics to society, politics and law, where there are always more people to take into

¹ See e.g. Critchley 2002, 23-28.

consideration than just one. We are forced into a situation which is much more complicated than a face-to-face relationship, in which I have responsibility for the other person. We have to compare people, to make calculations, to obtain information and knowledge – to compare something that strictly (ethically) speaking cannot be compared. (Levinas 2000, 230.) We have to turn away from pure ethics as the questions of equality and fairness become pressing. The vast field of problems that are opened by the third are legal and political. They concern social organisation and complex social relationships. If there were only two people in the world, we would in Levinas's view not need law or courts of justice, for there would only be the other for whom I would be asymmetrically and infinitely responsible. (See Levinas 1984, 58.)

Levinas does not see the state as evil but acknowledges the importance of it. However, he does question the possibility of a political and totalising way of thinking of being able to give answers to all social and political questions. According to Levinas, society and political structure are dependent on the ethical face-to-face relationship.² Ethics needs a just society.³ Thus ethics and the social-political sphere are interdependent. Even if the law limits our infinite responsibility for the other, a legal system is nevertheless necessary. It is a field where we are, similarly as in the face-to-face relationship, responsible for each other. In law, as well as in other spheres of life, responsibility is based on and awoken by the face of the other. (Levinas 2000, 229.)

However, there are fundamental differences between ethics and law. Ethics cannot in Levinas's theory dictate norms and rules for how to act in different situations. It is simply an infinite responsibility. When we move from the level of face to face to the level of thirds, the situation is different. Ethics hardens its skin. (Levinas 1984, 65.) How does ethics, then, play a role in politics or law? Can it play any role? According to Levinas, ethics as responsibility should inspire morality, politics and law. (Levinas 1984, 65-66.) The foundation for the different institutions of law is the relationship between people, and the institutions can be controlled, criticised and changed if need be on the basis of this.⁴

The challenge for law in Levinasian way of thinking is how to respect the singularity of every person. A responsible and just law takes notice of particular persons, including their special circumstances and situations. It does not reduce

² See also Critchley 2002, 24.

³ According to Levinas, 'charity is impossible without justice, and [...] justice is warped without charity'. Levinas 2000, 121.

⁴ See e.g. Levinas 1996, 76 and Levinas 2000, 229-230.

people to a faceless crowd but takes care of every person in his or her uniqueness. Law has to stay open to exceptions, to difference and to otherness in order to be just. Ethics as infinite responsibility is the bad conscience of law. It should lead law in the right direction. In this way law and justice can be part of a common structure, in which justice as the ethical or rather moral backbone of law defines law, and law gives a concrete shape to ethical demands.

In Levinasian theory the justification of the legal system is the way it respects and carries responsibility for the other.⁵ The intrusion into the lives of people by force can be justified only in relation to faces, or people. Levinas's view is opposite to the Hobbesian way of thinking in which the state is born from the need to restrict and limit the citizens' violence. In such a view there is, according to Levinas, no way of restricting the state's power if the state is necessary in keeping violent people in check. (Levinas 2000, 105.) Levinas's own thinking has quite different presuppositions. There is not war, but a peace in which people come together. Justice, the state and law are born in peaceful encounters. The justification of the legal system is assessed from this point of view, in which it is necessary to limit the state's use of power and coercive force. Thus Levinas's ethics is radical, but it does not lead to anarchism: 'but if one speaks of justice, it is necessary to allow judges, it is necessary to allow institutions and the state; to live in a world of citizens, and not only in the order of the Face to Face.' (Levinas 2000, 105.) But, Levinas continues, a legal system, in which face-to-face relationships are impossible, or a state, which does not respect otherness and carry responsibility for the vulnerable, is a totalitarian state. (Levinas 2000, 100, 105, 120.) Justice is thus defined as ethical law and ethics as responsibility.

The other side of law

Levinas did not say much about actual legal practices. How does a responsible law function? What would be required of law in order for it to be just? Marinos Diamantides offers a reading of Levinas in which he considers the role of the judiciary and the rule of law. He points out that Levinas referred to law on the one hand as a set of state-sanctioned rules that are applied nearly mechanically. On the other hand, he sometimes identified law as adjudication and interpretation, where the judge's own experience is central and should be supervised by ethics. The judge is not outside the conflict but in the midst of proximity. There is an

⁵ See also Diamantides 2000, 164-166.

ambiguity to these two ways of seeing law. If law is simply rules that are applied mechanically, then the importance of the judge is not very great, but if he is in the midst of the conflict that he is solving, then rules are not applied mechanically. In Diamantides's reading Levinas's theory does in fact place a great responsibility on judges. He says that what he construes to be Levinas's view of the role of the judge includes a conception of responsibility

whereby what judges do or don't do is central to the effort to distinguish law from politics but only to the extent that they are exposed as having to decide *without* having access to 'moral resources' with which to challenge sovereign power *nor* being able to 'capture' the object of judgement as adequately (that is as reductively) as political or indeed legal judgements require. It is the judicial sensibility in excess of experience and cognition that defines the function of the judge as 'not outside the conflict but in the midst of proximity'. (Diamantides 2007, 192.)

The judge has a judicial sensibility that makes him an active agent in deciding the case. He does not mechanically apply the law, but has to decide without having access to morality or being able to ever fully capture all the meanings and possible facts of the case. Without these it is the judicial sensibility, which is an excess of experience and cognition, that is needed of the judge.

Diamantides's analysis of law is a kind of psychoanalysis. He claims that the modern judge's ethical responsibility cannot be discerned on the basis of the institutional character of the judge, not his reasoning, the legal process nor the judgement itself. It can be traced to the 'other side' of law. The judgement's other side includes the unintended meanings, double negatives and other incoherencies that cancel what is said and allow the other to be expressed. In difficult legal situations where the law does not seem to offer anything on which a decision could be based, situations where it is difficult to distinguish between lawful and unlawful or which seem to be somehow on the limits of law, it is in these situations that the anarchic personal responsibility of the judge can be seen. (Diamantides 2007, 193.)

No judge can claim to rely on an apolitical 'inner morality' of law or to mechanically apply somebody else's legislative intent. The judge is a mini-dictator or legislator. What does this mean? Diamantides explains that to the extent that the judge appears capable of deciding a case on the basis of some selected facts and construing it under the binary opposition of legal-illegal, her actions cannot be distinguished from politics. In the ethical sense they are political, as is the principle of separation of powers that is sometimes used as a way of at least theoretically limiting the power of the judge. Also rights are political. The judge acts as

a political being though he speaks as if he were politically neutral. In contrast to this judge, Diamantides presents another, the judge who has anarchic responsibility, who is foolish and a site of non-intentional affectivity and sensibility towards the other. The foolish judge recognises his infinite responsibility towards the suffering and individuality of the other. This leads to his decisions being faulty in terms of politics and legality. (Diamantides 2007, 192-193.)

Diamantides explains what is wrong with the dictator-judge. He has a tendency to disregard his responsibility in the face of suffering. The legal construction of suffering as harm, that is, objectifiable, quantifiable, comparable and attributed to agency or otherwise legally irrelevant, is the result of the very un-foolish judicial labour of turning a blind eye to the nonsense at the heart of every dispute. Law has a cold heart. It constructs itself in the way that responsibility for the other's individual suffering cannot really be seen or heard. Diamantides says that

The prudent judge's function is literally to distil *sense out of senseless suffering*, filter out that which is publicly innocuous and portray publicly an elementary list of what it means to suffer. In this role the prudent judge must have no illusions of a special, extra-political role. The role is rather proto-political. (Diamantides 2007, 196.)

According to Diamantides, the state promises safety, health and abundance while defining obscure suffering as politically indifferent. It voices over the silent scream of suffering and allows it on the basis of the general good. It even delegitimises expressions of anarchic compassion for suffering people. For instance, helping the poor should be done through paying taxes, not giving to beggars. What is more, the state substitutes elections for ethics. (Diamantides 2007, 196.)

Diamantides's argumentation, in which Levinas is read in a certain way and developed further, places law in a difficult situation. It is based on the idea that a judge when deciding a case is a political actor. He is a dictator who makes a decision based on certain facts and norms. There seems to be no room for ethical deliberation, nor does the judge carry responsibility. He turns his attention from suffering to objectifiable and legally important facts. But there is hope. In very difficult cases where there seems to be nothing in the law itself on which the judge could base his decision, that is, situations that are more or less on the limits of law, we can see that the judge in fact must carry a responsibility. This responsibility is anarchical as it is not shaped or dictated by law, but takes place on the boundaries of it. In these anarchical situations there is room for ethics,

for sensibility towards the other and for responsibility for suffering. It seems that law *can* be just, but only when it is upside down.

Impossible law?

The way Derrida defines law, justice and their relationship is inspired by Levinas's thinking and leads to the conclusion that a just law is in principle impossible. However, Derrida's perspective is not the perspective of a lawyer, somebody who takes part in legal practice. Justice, therefore, seems to get all the attention, with law getting much less. What happens if we look at the dichotomy from the point of view of law itself? It seems that through the distinctions that divide law and justice into two completely different things, also law, not only justice, becomes a problem. It is not only justice that is impossible. Equal attention should be paid to the difficult situation that *law* finds itself in, not only justice.

I will restrict my discussion to the essay 'Force of Law', which does not do justice to the breadth and scope of Derrida's thinking but is important for the subject at hand. The expression 'force of law' implies, according to Derrida, that law always carries within itself the possibility of being enforced, that is, applied by force. Even if there are laws that are not enforced, there is no law without enforceability. Applicability or enforceability is not some exterior supplement added to law. Law is always connected to authorised force. How can we distinguish between this force of the law and an unjust force? What difference is there between a force that can be just and violence that is unjust? (Derrida 1992, 5-6.)

We can distinguish between law and justice in the sense that justice requires force (because there are also wicked people who do not follow it if it is not enforced) and in the sense that law is not the same as justice, for one obeys laws because they have authority. There are two structures at play here. Firstly, the way law hides and reflects the economic and political interests of the dominant forces of society. More importantly, there is another more intrinsic structure. Derrida says:

The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force: this time not in the sense of law in the service of force, its docile instrument, servile and thus exterior to the dominant power, but rather in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence. (Derrida 1992, 13.)

Law implies an internal force or power when it justifies itself. The moment when law is inaugurated and justified is a moment of interpretative violence that in itself is neither just nor unjust. It cannot be justified, guaranteed or validated by any previous law nor by justice. Here the discourse, that is, the law-justice discourse comes up against its limits. This is what Derrida calls mystical. It is the mystical foundation of authority. There is silence around the foundation of law. The origin of authority and the ground of law cannot rest on anything but themselves. They are violence without grounds. (Derrida 1992, 13-14.)

Law is deconstructible because it is on the one hand founded, that is, constructed on interpretable and transformable textual material and because it is on the other hand essentially unfounded. This is not bad news, says Derrida. It may be a stroke of luck for politics and historical progress. Derrida seems to imply that law can be studied, deconstructed and changed. Its legality, authority and legitimacy can be questioned. However, justice cannot. He says that justice in itself, if such a thing exists, outside or beyond law, is not deconstructible. (Derrida 1992, 14-15.)

Justice is for Derrida an *aporia*. Every time that something turns out well in law, that is, a good rule is applied to a particular case or to an example according to a determinant judgement, we can be sure that law finds itself accounted for, but certainly not justice, says Derrida. He holds on to the central, perhaps even founding distinction that law is not justice.

Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule. (Derrida 1992, 16.)

The decision between just and unjust is never insured by a rule. No rule can insure a just decision. If we follow Wittgenstein, though, we see that it is questionable whether any rule alone can insure anything at all. This goes for ethics, responsibility and justice as well as for law. Thinking of the distinction between law and justice from the point of view of a legal theoretician, it seems that at the level of the interpretation of a legal text and the application of it to a case (that is, the sphere of law in Derrida's law-justice distinction), there can be as little insurance as there can be in the sphere of justice. Does Derrida think that law is something simple, whereas justice is difficult? He says that *law* finds itself accounted for when rules are applied to a case, but justice does not. However, it is far from evident whether and in what ways law finds itself accounted for. Legal

theory continuously questions what law is and what it should be. Even if it were (only) the application of rules to a case, this activity itself is filled with both practical and theoretical problems. The criteria for a correct interpretation and application of a legal rule are far from clear.

Derrida agrees with this. He says that each case is other, each decision is different and requires a unique interpretation, which no existing rule can or ought to guarantee. This is in Derrida's view, however, more a problem for justice than for law. Justice is in a difficult situation. Derrida agrees with Levinas in the way he identifies justice and responsibility. For a decision to be just it has to be made freely so that the decision-maker carries responsibility for his actions. The problem is that for a decision to be just it must be both regulated and without regulation. If the decision is determined by a rule so that the judge is a calculating machine, we do not say that the decision is responsible and just. But we would not say that it is just either if he does not refer to any law or rule, if he improvises or if he leaves principles aside. According to Derrida, it follows from this aporia that no decision can be just in the present. Instead of just, we can, however, call the decision legal or legitimate. (Derrida, 1992, 22-23.) This is the way law, according to Derrida, finds itself accounted for, but justice does not.

I would like to question whether it is not only on the level of justice that impossibilities sneak in. Law is equally problematic. What is there to guarantee that a decision is legitimate? How are we able to distinguish criteria for the legality and legitimacy of a legal decision? The distinction between law and justice as a distinction between law as calculation and justice as uncertainty is not clear. Law is not pure calculation or application of rules. Sometimes it might be just that, but more often it is not. Rules are seldom easily applied to cases. There is uncertainty in *law*. As Derrida says himself, each decision is different and each case is other. But he still identifies law as the order of the calculable and the rule. (Derrida 1992, 24.) From the point of view of legal theory, this is something that can be put to question.

One of the reasons why Derrida finds justice and law difficult to unite is that justice is something singular and law something general. This, too, is a Levinasian thought. The problem of justice is that it demands singular decisions that pay attention to the individuals and the specific character of the case, that is, to the other, whereas law as rules or norms is essentially general. Respecting the singularity and the otherness of the other seems to be an impossible task for law, because in law the idiom is that of the third party, not that of the other. Justice as right, which for Derrida means justice the way it appears in law, implies universality. (Derrida 1992, 17.) Law requires fairness, equality and objectivity, where-

as justice operates in completely different modes. It may be, however, that this problem is exaggerated by the absoluteness of the way it is formulated. It turns into an either-or problem. Why is it so that a general rule cannot respect singularity? We could well have a legal norm that commands us to respect otherness, individuality and singularity. Many constitutions in fact imply such respect for persons. Why is this not enough? It is perhaps not enough for Levinas, because it means that otherness is not really respected as otherness. But the problem is that if otherness is respected in a truly ethical manner (as passivity in which the other takes me hostage), then this results in a law that is scarcely able to protect or carry responsibility for anybody, neither the other nor the third. And this cannot be what anybody wants. Levinas certainly does not want this. He sees law for what it is, as something else than ethics. But this does not mean for him that law could not be responsible in its own way.

Is law, as in any and all kinds of legal systems, necessarily and completely incompatible with justice? It would be preferable in my view, at least in theory, to withhold from a dichotomizing yes or no discourse, in order for us to be able to make distinctions such as 'more just' or 'less just', and not only 'just' or 'unjust'. There has to be a way for us to make a difference between a decision given by, for instance, a legal system that upholds a tyranny instead of protecting citizens on the one hand, and a decision given by a judge in a legal system of a democratic state on the other. And there must also remain a space for us in which to debate the responsibility or irresponsibility of a decision with respect to the parties, their special circumstances and the consequences of the case for them in comparison to other decisions that have been made in such and other cases. The discussion has to be able to compare and differentiate between injustices. Therefore it would be very unfortunate to simply define law as the opposite of justice.

Derrida sees the legal decision as an instance, a cut or a disruption, not a process. He says that the decision cannot really be guided by anything, because no amount of knowledge or information can dictate it. The instant of decision is madness (Derrida 1992, 25-27). This is quite an extreme position. From the fact that a decision cannot be completely dictated by any amount of information, the conclusion is drawn that the decision is therefore not guided by anything. So, a decision cannot really follow a rule. The decision maker is free to the point of madness. This means that he is able to make decisions that are his own, but there is no way that they can conform to laws. The different *aporias* that Derrida discusses can be read this way. They make justice impossible, and do so because of their very extreme presuppositions. But what they imply even more is that law, in fact, is impossible. If law requires that rules and laws are followed in legal

decisions, so that the decision is dictated by the rules, then there can be no law. Derrida's conclusion is that justice is aporetic, whereas it seems to me that his analysis, if it is correct, has just as severe consequences for law.

Derrida does not want to give up, however. He gives law hope and a task to fulfil. Incalculable justice can lead to terrible things. Left to itself it can go bad. And so justice requires us to calculate. We must calculate and negotiate the relation between the incalculable, that is justice, and the calculable, namely law, politics, economics, ethics, literature etc. This requirement, Derrida says, 'does not properly belong to either justice or law. It only belongs to either of these two domains by exceeding each one in the direction of the other.' (Derrida 1992, 28.) Thus the relationship between law and justice has to be considered and re-considered. There seems to be no getting over the fundamental dichotomy that separates law from justice and justice (as responsibility) from law. But the way these are related has to be calculated and negotiated.

The idea that the relation between law and justice has to be continuously reconsidered is certainly a welcome one. But in this reconsideration we should not forget law itself. Veitch argues similarly. He says that we must ask questions of the law itself, its limitations and prejudices and the functions it serves or should serve.⁶ What law is and how it works is not easily explained. It is a simplification to state that law is calculation and justice is the incalculable, or that law is irresponsibility whereas justice is responsibility. All such dichotomies lead us astray firstly because they draw such sharp *a priori* borders between law and justice and secondly because of the simplistic way that they define law. Law is multifaceted, polymorphic, diversified. The diversity of it should be respected, not reduced. The way it functions varies greatly if we compare different fields of law from family to tax to international law, or different legal institutions from legislation to implementation to application. It is not a thing that can be easily defined nor can it therefore be easily compared to different ideals of justice.

Law's irresponsibility

Veitch's argumentation is different. He does not start off from a founding distinction between law and justice or law and responsibility. But the results that he ends up with are just as discouraging from the point of view of a lawyer as

⁶ Veitch 1997, 108. This suggests more of a classical libertarian stance because it does not demand a rejection of norms as such, Veitch says, but an enquiry into their source as a function of their authority.

are the results of theoretical discussions concerning the impossibility of justice. The implications for law that can be drawn from Veitch's book *Law and Irresponsibility* are downright depressing, as it seems there is no hope for justice to ever be reunited with law. Law is condemned to being evil. Veitch argues that the traditional way of seeing law as a system that creates responsibility is a false one. According to him, law takes part in producing irresponsibility. Legal institutions, practices, concepts and categories involve organised irresponsibility. This is seen especially clearly in massive human rights violations. Law produces suffering and irresponsibility.

Veitch claims that it is not only unlawful acts that cause harm and suffering. Lawful acts that are accepted by the legal system also can, and in fact do, cause massive suffering. Acts that do not break any legal rule can nevertheless do harm. In this way law makes irresponsibility possible. It is not a question of bad legal decisions, false interpretations of rules or corrupt politicians. It is in the nature of law that when it functions as it should, it still results in irresponsibility. Law itself has an irresponsible nature. The UN sanctions against Iraq in the 1990s are an example of this. These sanctions were lawful. They required legal practices, administration and implementation. They were legitimate from the law's point of view. And they were no mistake. From the point of view of the suffering people the situation is totally different, however. Law was an accomplice. (Veitch 2007, 12-24.) The legal system caused suffering that nobody should be able to get away with.

Veitch's exact claim is not that the law or legality in itself delivers massive harm in a causal way. And he does not think that legal institutions are completely incapable of holding people and institutions responsible. He says that legality can and in fact does allow the production of suffering. (Veitch 2007, 10.) His main point is that we should not see the production of suffering and irresponsibility as a mistake, as something that takes place when law fails, but as a natural consequence of the way law really works. It is part of the normality of law.

So our concern here is not with that which is illegal or criminal, but with that which is *legal*. It is with exposing and coming to terms with the fact that the cultural, conceptual and institutional crucible of legal organisation is able to carry out an alchemy that can turn mass tragedy into legitimate action, genocidal annihilation into the prerogative of sovereign right. So much more complicated and challenging it is, then, to see the task as coming to terms with the fact that the excesses are rooted in the normal. (Veitch 1007, 12.)

Veitch points out that from the perspective of the victims, suffering is not complex. Certain echoes of Levinasian thinking can perhaps be seen in his argumentation in the way he emphasises the individual and his suffering and the law's failure to carry responsibility for it.

Veitch draws a sketch of how law that is meant to organise responsibility paradoxically ends up organising irresponsibility. This happens through different processes. When large-scale suffering is concerned, it is especially difficult to make any individual person accountable for it. The responsibility for the harm done is shattered in complicated organisations. It is impossible to find the person(s) that are guilty of producing harm. (Veitch 2007, 29-34.) Veitch's central claim is that responsibility is defined in different responsibility practices, which all have their own origins and history. The reason why responsibility disappears is that responsibility practices are power practices. He writes:

In order to understand the asymmetries between suffering and the ability to establish responsibility for it, we must understand how these very 'technologies of responsibility' themselves, as part of the broader social forms of power, also provide some of the major resources through which dispersals and disavowals of responsibility in society can occur. It is through analysing the complicitous relationship with these broader forms of power – in their diversions and distinctions, their priorities and interests – that we will come to a fuller understanding of the proliferation of irresponsibilities in the rise of responsibilities. (Veitch 2007, 41.)

One of the examples that Veitch discusses is the truth and reconciliation process of South Africa. The South African Truth and Reconciliation Commission made findings of responsibility for the organisation of the old regime and for gross human rights violations committed or allowed by its agents. Many former state security service operatives came forward to seek amnesty for crimes they confessed to. Many were granted amnesty. Veitch argues that the process led to the fact that those who were most to blame got away with it. The people who had most responsibility for apartheid, who had established and delivered its policies, who had established the political, military and to an extent judicial establishment were not punished. It turned out that the carefully assembled and tightly secured links in the chains of command quickly broke apart, became unidentifiable and disappeared. It became impossible to piece together responsibility and to establish a link between action and consequences then and now. Veitch uses this example to illustrate his main claim that there is an asymmetry between the production of suffering and establishing responsibility for it. This asymmetry works always

as an inverse proportion: the greater the suffering is, the less responsibility is established for it. (Veitch 2007, 30-31.)

Veitch's argumentation is familiar from a postmodern point of view. His project includes revealing hidden power structures in society. The roles the social, ideological or political spheres play are underlined. He claims that responsibility structures are never innocent, but form part of an overall view of the social system. Responsibility, in its various incarnations, is an expression of the requirements, interests, divisions and expectations of a social order. And responsibility practices are always connected to power. The production of suffering is normalised in the interpretations and legitimations of the political and economic spheres through responsibility (or rather, irresponsibility) practices that organise impunities. (Veitch 2007, 37-60.)

What is the role of law in all of this? Veitch thinks that law is one of the responsibility practices that is most important in the production of irresponsibility. What is more, the meaning of legal irresponsibility is enhanced by the very strong role that the law plays in society. Other normative structures, for instance morality, are influenced by the ways in which responsibility is defined in law. In addition, in most societies law has invaded most social relationships, which are regulated by law at least to some extent. Non-legal activities are influenced by law. Instead of this being a sign of a responsible society, Veitch thinks that it rather shows how other responsibility practices have failed. (Veitch 2007, 74-77.)

Law produces irresponsibility also through its concepts and definitions. Legal normativity is a tool for escaping responsibility. The law makes a distinction between different types of harm: there are illegal harms and there are legal harms. Certain harms are not the product of actions that break rules and constitute therefore legal suffering. If the act is lawful, the harm caused goes usually unpunished. This means a shift in responsibility from the actor to the legal norm. It is actually the norm that carries responsibility, or to put it otherwise, the responsibility for suffering ends with the norm, it does not stretch to an actor. The same kind of abstractness can be seen concerning legal roles. A judge is seldom seen as personally responsible for his decisions. It is the law itself that carries the responsibility for the consequences of the decision. It is the legal argumentation that is to blame, not the judge. (Veitch 2007, 85-95.) Here we discern a trust in the law and in legal argumentation, which de-emphasises the fact that no legal rule is applied by itself. However, there is always someone who makes the legal decision and interprets the norm.

There is an ambivalence in Veitch's discussion concerning the role of law. On the one hand he seems to see law as something that produces irresponsibil-

ity through its categories, definitions and concepts. So law is something definite, something clear or at least something sufficiently organised and systematic, in order to produce such effects. On the other hand he seems to imply that the legal actors, for instance judges, avoid their responsibility, even though they in fact are active agents who play a large role in interpreting and shaping law. There is a conflict in these two elements of law. On the one hand law is determinate, on the other it is flexible and always subject to different actors' decisions. Veitch thinks that it is law that draws boundaries for responsibility roles and takes part in the production of irresponsibility. But it is also the legal actor who makes irresponsible decisions. The irresponsibility of law that Veitch says is the real nature of law therefore turns out to be fuzzy. It is shattered in a similar way as Veitch claims responsibility to be. How can law itself, if it is always subject to interpretation, be at fault? Moreover, how can legal actors, who apply already irresponsible categories and concepts, be blamed? The question arises, what is the nature of the responsibility that Veitch would like law to carry?

Does Veitch succeed in proving that law is by nature irresponsible, that it is not so by accident or mistake? Is his proof generally convincing? That law and legal structures both make irresponsibility possible and produce it in the field of international law is perhaps easy to accept. But that it is in the nature of law that it is an irresponsible practice is another matter. Veitch's examples concern mostly massive human rights violations and suffering on a large scale. But does Veitch really claim that also in smaller, comparatively easy routine cases, law is not able to function in a responsible way? Are all legal fields equally bad? Veitch does not say that law is completely unable to ever hold people, institutions or states responsible. The scope of his accusation against law is unclear. Are the instances in which law does work well, responsibly and in a just manner only mistakes and irresponsibility the norm? Is he saying, as Diamantides does, that law can only be responsible when it turns against itself, and thus instances of responsible practices in law are instances when the law is upside down or does not function as it should?

Furthermore, does Veitch's analysis imply that law is necessarily, always and forever irresponsible? Can we not imagine a responsible law? Can we not strive to make law better so that it becomes more responsible? Veitch's analysis has an air of fatalism in the way he claims to expose the real nature of law. However, he also seems to be after some kind of change. But how could law be changed so that it would no longer be irresponsible? Veitch says that law's ability to legitimate the delivery of extensive suffering is, and very likely continues to be, part

of the tradition of modern Western law. (Veitch 2007, 132.) 'Very likely', but apparently not necessarily.

When discussing the possibilities of law changing into something more responsible Veitch refers to Australia and the suffering of the Aboriginal people caused by the colonial regime. Veitch argues that Australian law has been founded on racist assumptions. Even if the society nowadays is committed to legal principles of equality, democracy and the rule of law, racial discrimination still occurs. He tries to show by analysing the Australian High Court decision *Mabo v The State of Queensland (No 2)* how legal reasoning comes up against its limits when addressing its colonial foundations. The case concerned land. When Australia was colonised by the British in 1788, the official doctrine held that the land was uninhabited. Even though the Aboriginals already lived on the land, their society was seen as inferior and lacking social organisation, which meant that the land could be colonised. In the *Mabo* case the Meriam people claimed that they had native title to their land. The problem for the court was how to acknowledge principles of justice and equality when the Australian state and its law were founded on racist assumptions. The court recognised the people's native title to land for the first time in this case. Veitch analyses this case in detail, but I will only point to some of the criticism he directs against it. Firstly, it left the old racist doctrine and the founding act of the state intact. *Mabo* takes part in whitewashing responsibility for the damages caused by the invasion of Australia. Secondly, the case sets conditions for the recognition of native title, which require demonstrating continuous association with the land since the time of colonisation. This, in fact, produces ongoing discrimination. Many Aboriginals have been removed from their traditional lands, which makes their claims to land unsuccessful. According to Veitch, we see here the power of common law reasoning in legitimating on the very grounds of equality, freedom and formal justice the ongoing dispossession and effective disavowal of the past. (Veitch 2007, 99-105.)

The *Mabo* case is an example of how principles of modern law and legal reasoning are not able to redress colonial and discriminatory practices when these principles have been and still are complicit in the legitimation of these practices. Veitch asks whether law could be changed, for instance by a new case, so that it could redress what has until now been impossible to register as suffering. This would be inadequate, because at the root of the problems are the forms of sovereignty and property that are distinctive to Western legal conceptions. No new case can shake these foundations. (Veitch 2007, 113-114.) The irresponsibility of law is situated somewhere in its very foundations.

Veitch's analysis implies that modern Western law is neither able to carry responsibility itself, nor to ascribe responsibility to people for harmful acts. If we connect justice with responsibility, then this is the conclusion we must draw: justice is impossible (at least in law). However, I am not giving up. I cling to the minimal hope given by the most obvious of objections to Veitch's argumentation: the fact that law and legal institutions have not been successful in organising responsibility does not mean that they cannot organise responsibility in the future.

Conclusions

The solution to the problem of law's justice that Diamantides presents is the Levinasian judge who is anarchical. Justice can only be done by overcoming law. Law as we know it has to fail in order for justice to be possible. From this point of view, ethical law can function only on the limits of law and in a logic that is somehow not legal. Law has to forget itself and become something else than what it is in order to be ethical and just. This is a conclusion very close to Veitch's: law (as it is) cannot be responsible and it cannot be ethical. What separates these two views is the question of whether law could change so that the situation could be rectified and justice become possible. On Veitch's account it seems that law, at least modern Western law, is fundamentally irresponsible. He does not say if this is absolutely necessary, or if and how a responsible law could be possible. Diamantides argues that in difficult borderline cases there might be room for justice to be done in law. Here we at least have some hope for law, albeit a foolish hope.

So, law has a cold heart and a thick skin. It is a failure. Why do we hate it so much?⁷ Has law in all its different tasks and occurrences really failed to carry the tasks that we have given it? Is it truly impossible for law to be responsible and protect those in need? The simple fact that law includes calculation and comparisons is not convincing enough evidence from the point of view of a legal scholar to make law incompatible with justice, even if justice is defined as responsibility for the other. We have to look at law itself, the way it works in different fields and in a variety of cases before we can determine whether it really is a failure. Veitch's recent book is a step in this direction, as he analyses actual

⁷ See e.g. Douzinas & Gearey 2005, 305-335 for a psychoanalytical discussion of law.

legal cases and practices. This kind of research can be a way for legal theoreticians to overcome the predestined dichotomy of law and justice, or at least to put it into motion. This is what Veitch has done. But his results are as depressing as any. His persuasive argumentation constitutes a severe challenge for law, as he claims that law is in its nature irresponsible. However, his argumentation has a hint of extremism built into it. He condemns law, all law, on the basis of certain cases and (admittedly extensive) examples. Also, his analysis ends up in dichotomising claims, according to which law is irresponsible full stop. The problem with this kind of argumentation is that it makes it difficult to study the irresponsibilities of law in a way that would differentiate between more and less irresponsible. Law is made into a villain who is bad to the bone. Instead of demonising it, it might be more fruitful to keep in mind the plurality, variety and diversity of law. Otherwise it is hard to conceive how law could be reconsidered and remodelled, both in theory and in practice, so that it could (at least to some extent) be compatible with justice.

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