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Svenungsson, Jayne

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LUND UNIVERSITY

PO Box 117  
221 00 Lund  
+46 46-222 00 00



# JUSTICE IN THE PROPHETIC TRADITION

JAYNE SVENUNGSSON

When does the sense of justice enter a human life? When I reflect back on my own childhood, two memories, in particular, stand out. The first relates to the way in which my grandmother on my father's side tended to always favour my elder brother over my younger sister and myself. My grandmother was a kind and loving old lady, of whom I keep many warm memories. Yet I will never forget the awkward feeling that arose in me as I watched her slip an extra coin into my brother's hand whereas my sister and I had to content ourselves with our single coins. The second memory relates to my grandmother on my mother's side, also a kind and loving old lady, albeit in her own peculiar way. The particular episode that has engraved itself in my memory took place in the aftermath of a fight between my sister and me. The cause of the fight was a nicely decorated little paper bag of which my mother had received only one exemplar when buying a pair of earrings. While my mother was struggling to handle the accelerating conflict between her two young daughters, grandma managed to snap the paper bag and began, calmly and meticulously, to rip the paper bag into innumerable tiny pieces. When her work was done, she threw all the pieces on the kitchen table exclaiming: 'Look, now there is no more reason to fight!'

These two childhood memories, I believe, offer a couple of revealing insights into the topic of justice. First, the fact that our sense of justice arises only negatively. The child does not wake up one day finding itself endowed with an 'idea of justice'. On the contrary, to quote Nancy Fraser, 'justice is never actually experienced directly', [...] 'we do experience injustice, and it is only through this that we form an idea of justice'.<sup>1</sup> A second and closely related insight that my memories offer is that justice is never only about principles, but also about singularity, embodiment and about what is concretely felt. Recalling my two memories, a seemingly fair conclusion is that my grandmother on my father's side, who favoured my brother, acted in an unjust way, whereas my other grandmother saw that justice was done when she tore the paper

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<sup>1</sup> Nancy Fraser, 'On Justice: Lessons from Plato, Rawls and Ishiguro', *New Left Review*, 74, March-April 2012, 43.

bag apart leaving my sister and me in equal positions. And yet the lasting memory of the episode with the paper bag for both my sister and me is not one of justice, but rather the memory of a shared feeling that something very *unjust* had taken place, that something had been destroyed and that we had been deprived of something beautiful, if only in the shape of a nicely decorated paper bag. Why didn't grandma use her wisdom and imagination to come up with a more constructive idea of how justice could have been done, an idea more sensitive to the temper, feelings and desires of her two little granddaughters?

Whilst these two insights – that justice arises from experiences of injustice and that it is inseparable from our embodied selves – tell us something about the way the sense of justice evolves in the individual life, they also shed light on how the idea of justice has developed in a historical perspective. This is in particular the case with the biblical tradition, which will be the focus of this paper. When the biblical notions of justice (*mishpat*) and righteousness (*tsedakah*) first evolve, it is in a context of geo-political exposure and powerlessness, a context, in other words, of a collectively experienced sense of injustice. A striking feature of these emerging ideas of justice and righteousness is furthermore that they have little to do with ethics in a formal sense. On the contrary, justice is intimately linked to concrete situations and embodied life. In what follows, I wish to explore this particular idea of justice and ultimately point to its continued value and pertinence today. I will pursue this task in three steps. First, I will turn to the Hebrew Bible and describe briefly the context in which the prophetic idea of justice first evolves. Second, I will try to capture some of the defining characteristics of this idea. Third and finally, I will indicate the relevance of this prophetic tradition for our contemporary politico-philosophical debates on justice by relating to the discourse on law and justice initiated by Jacques Derrida in the nineties and followed up by Giorgio Agamben in the last decades.

## **THE EMERGENCE OF THE IDEA OF JUSTICE IN THE HEBREW SCRIPTURES**

There is a well-known stereotype of the Hebrew Bible – Christianity's Old Testament – as a benighted compendium of fierce prohibitions and retaliative laws. Even among educated people this disparaging view of the Hebrew Scriptures is widespread, as is testified to in bestselling books such as Jack Miles's *God: A Biography*, Regina Schwarz's *The Curse of Cain* or Richard Dawkins's *The God Delusion*. It is also no

secret that Christianity throughout history has partly defined its own identity by means of a contrast between the 'legalistic' ethos of the Old Testament and the merciful spirit of the New Testament.

For anyone who takes pain to study the Mosaic laws carefully, the inadequacy of our inherited depreciation of the ethos of the Hebrew Bible becomes conspicuous. As the American novelist and essayist Marilynne Robinson has remarked, in a number of respects the Mosaic laws were far more humane than the judicial systems of early modern Europe. As a thought-provoking example, Robinson brings up the comparison Thomas More made in *Utopia* between the legal system of his own sixteenth-century England and the legal codes of Hebrew antiquity. Whereas English thieves at the time were hanged in great numbers, the laws of Moses, More observed, 'punished theft by the purse, and not with death'.<sup>2</sup> Unlike most European regimes at the time, the Mosaic laws in other words valued life above property.

This is but one example of the incongruence between the ethos of the Mosaic laws and that of early modern Europe. As another example, Robinson relates the consequences of the policy of clearance and enclosure described by More in *Utopia* and contrasts it with some of the defining features of the Mosaic laws. As is well known, the enclosures drove the rural poor out of the English countryside and resulted in poverty, starvation and despair. Against this background, the capital punishment for theft and the general zeal for brutal corporal punishment appear in even grimmer light. The contrast with the Mosaic laws here is striking. Not only does the Bible not know of capital punishment for theft, the Mosaic laws are imbued with a concern for the poor and vulnerable. Thus, for example, they prescribe that every seventh year slaves are to be set free and debts are to be forgiven, just as the land is to lie fallow, 'so that the poor of your people may eat' (Ex. 23:11).<sup>3</sup> Furthermore, people are commanded not to reap the corners of their fields or to harvest their vineyards and olive trees thoroughly, so that 'the alien, the orphan, and the widow' may find provisions (Deut. 24:19-21). Many other examples could be given, such as 'You shall not pervert the justice due to your poor in their lawsuits' (Ex. 23:6) or 'You shall not withhold the wages of poor and needy labourers' (Deut. 24:14), but let me instead summarize by stressing, with Robinson, that the kind of laws described here were established precisely to 'preserve those who were

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<sup>2</sup> Thomas More, quoted in Marilynne Robinson, *When I Was a Child I Read Books*, London: Virago, 101-102.

<sup>3</sup> All Bible quotes are from the New Revised Standard Version (NRSV).

poor from the kind of wretchedness More describes [in *Utopia*] by giving them an assured subsistence'.<sup>4</sup>

I find this comparison with Thomas More's England particularly intriguing, for the reason that there are a number of similarities between the historical context in which More wrote his *Utopia* and the context in which the prophetic idea of justice, mirrored in the Mosaic laws, first emerged. Historically, we find ourselves in the centuries following the Davidic Kingdom, that is, from the ninth to the seventh centuries BC. To be sure, the monarchy of David was less a 'kingdom' in the sense the mythological imaginary has suggested and more a precarious tribal and territorial unity, which lasted only through David's son and successor Salomon. Yet it was a time of relative stability and equilibrium, based on an agreement between the king and the elders of a number of tribal groupings. When the kingdom was split into two after Salomon's death, this equilibrium was rapidly undermined. Especially in Samaria, the Northern Kingdom, the centuries that followed were marked by political instability, but also by an extension of state power and a growing contrast between the ruling elites and the subsistence-level existence of the people living off the land.

This is also where the parallel to early modern Europe becomes apparent. Just like in England and other European countries later in history, this transition from a traditional kinship-based society to a centralized state system took place partly through a series of enclosures that drove the small independent farmers off their land with the result of increased hardship for the great mass of the population. This situation of social disorientation is also the context in which the earliest biblical prophets appear. Thus Micah, the figure who has inspired (and perhaps authored parts of) the Book of Micah, turns adamantly against the ruling classes who were driving the people off the land: 'When the morning dawns, they perform it, because it is in their power. They covet fields, and seize them; houses, and take them away; they oppress householder and house, people and their inheritance' (Mic. 2:2-1).

As the biblical scholar Joseph Blenkinsopp has stressed, the concern for the poor and disadvantaged expressed in these and many other words is one of the most powerful strands in prophetic preaching, a strand that we also recognize in the ethos of the Mosaic laws.<sup>5</sup> There is,

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<sup>4</sup> Marilynne Robinson, *When I Was a Child*, 102-109.

<sup>5</sup> See Joseph Blenkinsopp, *A History of Prophecy in Israel* (revised and enlarged), Louisville and London: Westminster John Know Press, 1996, 5. As for the link between the legacy of the earliest prophets and the Deuteronomic reform movement – which is

however, another equally powerful strand present in the prophetic as well as the historical literature of the Hebrew Bible. To capture this feature, let me revisit a couple of passages already quoted. When Deuteronomy prescribes that ‘You shall not withhold the wages of poor and needy labourers, whether other Israelites or aliens who reside in your land in one of your towns’ (Deut. 24:14), the paragraph continues: ‘You shall pay them their wages daily before sunset, because they are poor and their livelihood depends on them; *otherwise they might cry to the Lord against you*, and you would incur guilt’ (Deut. 24:15, my emphasis). Equally, when Micah turns against the ruling classes who seize fields and houses from people, he adds: ‘Therefore thus *says the Lord*: Now, I am devising against this family an evil from which you cannot remove your necks; and you shall not walk haughtily, for it will be an evil time’ (Mic. 2:3, my emphasis).

What happens here is not only a social shift in focus from the mighty to the poor and disadvantaged, but also a *theological* shift in the sense that God is thought to be on the side of the latter and not the former. This marks an important contrast to the rules governing the world of classical mythology, in which the gods are generally allied with the powerful and victorious. Nowhere is this shift in theological focus more striking than in the criticism of the sacrificial cult that accompanies the social criticism of several prophets of the eight century BC (primarily Amos, Micah and Proto-Isaiah). At this time there existed an advanced sacrificial system in which different forms of animal sacrifice were held to regulate the relationship between God and his people. In several of the prophets, perhaps most forcefully in Amos, attention is nonetheless focused elsewhere. If the proffered sacrifices were intended to form part of a relationship with the God who had redeemed the sins of the people, it is here implied that the entire lavish apparatus of sacrificial rituals and holy festivities in fact covered over a deeper sin – the injustices done to the poor and the defenceless. Having thrown accusation after accusation at those who ‘trample on the poor and take from them levies of grain’ (Amos 5:11), who ‘afflict the righteous, who take a bribe, and push aside the needy in the gate’ (Amos 5:12), Amos has the Lord ruthlessly declare:

I hate, I despise your festivals,  
and I take no delight in your solemn assemblies.

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generally held to lie behind the codification of the Deuteronomic laws (Deut. 12-26) where much of the social legislation of the Hebrew Bible is summarised – see, apart from idem., also Eckhart Otto, *Das Deuteronomium*, Berlin and New York, 1999.

Even though you offer me your burnt offerings and grain offerings,  
I will not accept them;  
and the offerings of well-being of your fatted animals  
I will not look upon.  
Take away from me the noise of your songs;  
I will not listen to the melody of your harps.  
But let justice roll down like waters,  
and righteousness like an ever-flowing stream. (Amos 5:21-24)

When reading these verses one needs to bear in mind the extraordinariness of the way in which the prophets challenge the practices of cultic sacrifice. To challenge the premises of the established cult was not merely to position oneself against a supreme political authority that, at least since the days of Solomon (in the tenth century BC), had enjoyed an intimate alliance with institutionalized religion, it was to seek to dislodge the very cornerstone of a cultic practice for which sacrifice represented a means of establishing community with God. When human beings brought forth an animal sacrifice, they were quite simply offering a proxy for themselves.

Given the central role of cultic sacrifice in ancient Israelite culture it is nevertheless equally important to avoid over-interpreting the degree to which the prophets counterpose sacrificial offerings to justice. Such over-interpretation has been characteristic of much modern biblical scholarship, in which an older, cult-based religion has been pitted against the higher 'ethical religion' of the prophets, thought to anticipate Christianity. To claim that eighth-century prophets rejected worship as such in favour of a 'higher' spiritualized religion is a fairly unreasonable assertion. It is therefore important to stress that their critique was directed not at cultic practices per se. What they were objecting to was the political abuse of cultism: the exploitation of the cult in order to legitimate and sustain an unjust social order.<sup>6</sup>

There is yet another aspect that needs to be brought to light when considering the context in which the prophetic idea of justice evolves. Whilst there has been a tendency to over-interpret the contrast between cultic practice and justice in modern Christian scholarship, there has also been a tendency to over-emphasize the uniqueness of the 'ethical religion' of the prophets. A case in point is the sharp contrast René Girard painted between the prophetic spirit of the Hebrew Bible (thought

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<sup>6</sup> See Blenkinsopp, *A History of Prophecy in Israel*, 80-81.



to culminate in the Christ-event) and all other mythological legacies.<sup>7</sup> To be sure, Girard identified something important by asserting that the prophetic tradition gave rise to a mode of opposition to the human tendency of sacralising violence and thereby glossing over the innocence and vulnerability of real victims. As I have already pointed out, the prophetic claim that God is on the side of the poor and needy indeed deviates from much classical mythology. That does not, however, mean that social concern for the disadvantaged was unique to the Hebrew prophets and the social legislation inspired by them. On the contrary, concern for widows, orphans and the poor was a point of honour also in the wider culture of the ancient Near East as is testified to as early as in the Code of Hammurabi.<sup>8</sup>

It is also important to bear in mind that the prophetic literature was authored from the vantage point of a people that found itself in a vulnerable position in relation to the vast empires that were displacing each other during antiquity – from the Assyrian Empire to the Babylonian and Persian Empires and on to the various regimes of the Hellenistic era. And yet what strikes as remarkable is the little extent to which the moral critique of the prophets is turned against the invading powers. Rather the critique is turned inwards, in the form of a severe self-scrutiny and self-judgement. Thus, for example, Amos does not hesitate to include Israel among the nations that God condemns (Amos 9:7-8), and when Micah predicts destruction of both Samaria and Jerusalem, these disasters are ultimately linked to God's wrath against the moral corruption of the ruling elites (Micah 3:1-12). To the critical prophet, in other words, the fundamental reason for the geopolitical afflictions that Samaria and later Judah suffer seems to be disregard for justice and righteousness.

## **JUSTICE, TRANSCENDENCE AND CASUISTRY**

In an attempt to capture some of the defining characteristics of the idea of justice that emerges in the prophetic tradition, I shall focus on two concepts: transcendence and casuistry. In order to pinpoint the first feature, let me briefly recall the critique of the cultic practice launched by Amos, but also present in Hosea, Proto-Isaiah and Jeremiah. When the

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<sup>7</sup> See e.g. René Girard, *Des choses cachées depuis la fondation du monde*. Recherches avec Jean-Michel Oughourlian et Guy Lefort, Paris: Grasset, 1978 and *Je vois Satan tomber comme l'éclair*, Paris: Grasset, 1999.

<sup>8</sup> See e.g. F. Charles Fensham, 'Widow, Orphan, and the Poor in Ancient Near Eastern Legal and Wisdom Literature', in James L. Crenshaw (ed.), *Studies in Ancient Israelite Wisdom*, New York: KTAV Publishing House, 1976, 161-171.

prophet condemns the entire apparatus of festivals and sacrifice as sinful in the eyes of God, this condemnation is based on a conviction that there is a divine power and a divine justice that does not necessarily endorse the prevailing earthly power. This habit of invoking divine power to condemn human power is a recurrent feature in the prophetic literature. Consider for example the words directed by Jeremiah at Jehoiakim, one of the last rulers of the Kingdom of Judah before the Babylonian exile of the sixth century BC:

Woe to him who builds his house by unrighteousness,  
and his upper rooms by injustice;  
who makes his neighbours work for nothing,  
and does not give them their wages;  
who says, 'I will build myself a spacious house  
with large upper rooms',  
and who cuts out windows for it,  
panelling with cedar,  
and painting it with vermilion.  
Are you a king  
because you compete in cedar?  
Did not your father eat and drink  
and do justice and righteousness?  
Then it was well with him.  
He judged the cause of the poor and needy;  
then it was well.  
Is not this to know me?  
says the Lord.  
But your eyes and heart  
are only on your dishonest gain,  
for shedding innocent blood,  
and for practising oppression and violence. (Jer. 22:13-17)

The decisive factor here is that the prophet regards himself as a mouthpiece for God. The claim being advanced is thus nothing less than that God himself in his majesty and power condemns King Jehoiakim for abusing his earthly power. It is precisely this assumed gap between existing earthly orders and a higher divine order that I wish to capture by the term transcendence. Justice, as understood by the prophets, *transcends* existing political, judicial and cultic orders. This means an unwillingness to assign transhistorical authority to any worldly institution or social order. Looking back at history, but also at contemporary societies, it is difficult to overstate the value of this notion. Not only does it include an awareness that existing social and cultural security, where such exists, should never be taken for granted. It also offers an incentive to criticize, protest and perhaps even overthrow corrupt and unjust social

orders. Conceiving of justice as transcendent, in other words, fosters a belief that oppression can be abolished and that opposition warrants the effort, a belief that has shown its cogency throughout history, from the Jewish people's self-understanding and capacity to endure a wide range of modes of historical oppression, to the many forms of liberation theologies within both Jewish and Christian contexts.

Having pinpointed this central feature in the prophetic idea of justice, one may however ask whether this is not to romanticize about the liberating force it potentially carries. At the end of the day, what makes this theological notion of justice different from the old habit of invoking religion in order to bring legitimacy to a particular political regime (what is sometimes referred to as 'constantinism')? Does reference to a form of justice superior to actual politics not run the risk of creating yet more subtle varieties of theocratic rule? This risk is, of course, something that thinking inspired by the prophetic tradition can never fully disavow. But one can also turn the question around and ask whether an institutionalized, divinely sanctioned form of political order does not mean that the prophetic call to justice has already been betrayed. Indeed it has, if prophetism is understood as the invoking of a form of justice that does not allow itself to be ossified into a fixed political, legal or cultic order, but rather transcends all such orders. The prophetic vocation, in other words, is not about exerting theological authority in order to unfairly appropriate a position superior to the prevailing political order, but rather to act as a critical voice from *within* the existing system. The idea of justice that finds expression in the Hebrew Bible should thus not be confused with the notion of a higher divine order, which a chosen elite (kings, priests or even prophets) can claim to embody. Rather, the prophets indicate that justice is something that can never be taken as a given for all time.

The assumption that justice can never be reduced to existing systems of moral regulations, laws and norms brings me to the second feature I wish to pinpoint as characteristic of the prophetic idea of justice: its casuistic nature. Although the prophetic literature is imbued with references to 'justice' and 'righteousness', these notions are never conceived of in terms of abstract principles or sets of values. On the contrary, allusions to justice and righteousness are made in relation to specific situations involving concrete figures: false prophets who prognosticate for money, estate owners who expropriate the poor from the land, judges who take bribes and merchants who manipulate their scales. Abraham Heschel, the great 20<sup>th</sup> century Jewish scholar, aptly

captures this feature when he observes that justice in the prophetic tradition always exists ‘in relation to a person, and is something done by a person. An act of injustice is condemned, not because the law is broken, but because a person has been hurt’.<sup>9</sup>

To claim that justice is something that emerges from concrete situations of injustice is simultaneously to claim that every individual in every new situation is called upon to exercise his or her moral judgement. The use of justice quite simply requires more of human beings than passive reliance upon an abstract or cultic order, as becomes clear, e.g. in the following words from the Book of Micah:

‘With what shall I come before the Lord,  
and bow myself before God on high?  
Shall I come before him with burnt offerings,  
with calves a year old?  
Will the Lord be pleased with thousands of rams,  
with tens of thousands of rivers of oil?  
Shall I give my firstborn for my transgression,  
the fruit of my body for the sins of my soul?’  
He has told you, O mortal, what is good;  
and what does the Lord require of you  
but to do justice, and to love kindness,  
and to walk humbly with your God? (Mic. 6:6-8)

The insight that justice requires independent moral judgement can also be applied at the macro-historical level, shedding further light upon the isolationist tendencies observable in some of the prophets. Their injunction to the sovereign to follow the path of God rather than that of great empires can quite simply be understood as expressing the view that serving justice requires more than merely allowing oneself to be swept along by the geopolitical forces of the moment. It is in this light that Martin Buber, another prominent Jewish scholar, reads Isaiah’s opposition to the trust placed by monarchs in military armaments and strategic political alliances (see Isa. 31). From a harshly political perspective, such an attitude is certainly opportunistic – as a tiny kingdom Judah stood to gain by playing its cards carefully in the larger geopolitical context. From a theological perspective, by contrast, it reflects the conviction that history’s ultimate outcome is not determined by the rise and fall of mighty empires.<sup>10</sup>

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<sup>9</sup> Abraham J. Heschel, *The Prophets*, New York: Harper Perennial, 2001 (1962), 276.

<sup>10</sup> See Martin Buber, *The Prophetic Faith*, trans. Carlyle Witton-Davies, New York: Collier Books, 1949, 126-145.

With this conviction that there is a superior historical loyalty that enjoins us to keep a critical distance to prevailing political orders, we once more touch upon the notion of transcendence. In fact, we can now discern how the two seemingly contrasting features of the prophetic idea of justice – transcendence and casuistry – converge: the assumption that there is a justice that transcends existing orders allows for a critical examination of these orders, but such critical assessment requires precisely a case-sensitive moral judgement. ‘Transcendence’, in this context, should therefore not be understood in the sense of being ‘intangible’, stuck in a lofty divine sphere beyond the concreteness of historical and political reality. On the contrary, it is only ever in specific situations involving real persons (to refer to Heschel) that justice, in the prophetic sense, acquires any content.

### **JUSTICE, LAW AND DEMOCRACY – THE PERSISTING VALUE OF THE PROPHETIC IDEA OF JUSTICE**

The prophetic idea of justice has inspired ethical, political and theological movements throughout history. Needless to say, the preaching of Jesus of Nazareth was deeply steeped in the prophetic tradition and there are good reasons to believe that he saw himself as one in the line of Jewish prophets promising redemption. Examples of further influence of the prophetic notion of justice can be drawn both from subsequent Jewish thought and practice and from Christian moral teaching down the ages, but arguably also from secular liberation movements during modernity.<sup>11</sup>

In this last section, I want to turn to our own context and ponder the relevance of the prophetic tradition for our contemporary politico-philosophical debates. It is my contention that the prophetic idea of justice cuts right into these debates, and perhaps most acutely into the debates on law versus justice initiated by Jacques Derrida in the nineties and continued in the following decades by Giorgio Agamben (among others). It was in a series of lectures given in the US in 1989-1990 that Derrida first articulated the theme by drawing up a productive tension between law (*droit*) and justice (*justice*), by means of which he argued that our existing legal principles should be continually tested against a notion of justice that never allows itself to be reduced to any given

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<sup>11</sup> I explore the impact of the prophetic tradition on secular visions of redemption in *Divining History: Prophetism, Messianism and the Development of the Spirit*, New York and Oxford: Berghahn Books, 2016, and in *Jewish Thought, Utopia and Revolution* (co-edited with Elena Namli and Alana Vincent), Amsterdam and New York: Rodopi, 2014.

system of justice. Although Derrida, to my knowledge, never explicitly referred his reflections on justice to the prophetic literature of the Bible, it is difficult not to see the affinity to the prophetic tradition, something that should come as no surprise given his profound rootedness in a Jewish intellectual heritage (including Emmanuel Levinas as one of his major influences).

Despite its unmistakable affinity to a specific Jewish discourse on justice, Derrida nevertheless elaborated his reflections on the tension between law and justice within the conceptual framework of his own philosophy. Thus, in *Force of Law*, the publication that followed the lectures, law is described as ‘deconstructible’, whereas justice itself, ‘if there is such a thing’, is characterized as ‘undeconstructible’. Furthermore, it is clarified that justice, in this philosophical context, is not to be mistaken for a pre-formulated ideal or regulative idea in a Kantian sense. On the contrary, justice is associated with radical indeterminacy or even impossibility. The trust of this argument is that political and judicial action, to remain just, can never blindly rely on a fixed norm or rule. Justice always demands unique decisions in unique situations – decisions that always run the risk of being to justice’s disadvantage. But for this very reason the critical conversation about justice must continue. What makes justice possible is thus the insight into its impossibility – into the possibility of ever fully realizing it.<sup>12</sup>

A decade later Giorgio Agamben picked up Derrida’s distinction between law and justice in his widely discussed book *State of Exception*. Whilst Agamben here only vaguely refers to Derrida, their reflections on law and justice are bound together by an explicit common reference to Walter Benjamin’s reflections on justice in his famous 1921 essay on violence.<sup>13</sup> However, their approach to this emblematic text differs in a way that captures an interesting tension in their positions vis-à-vis the notion of justice. Whereas Derrida in *Force of Law* remains deeply sceptical about Benjamin’s worship of a ‘pure’ or ‘revolutionary’ violence that neither establishes nor maintains law, but rather aims to abolish it, Agamben takes a more approving stance and insists that Benjamin’s critique of the existing legal system does not mean that the idea of justice as such should be abandoned: ‘The decisive point here is

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<sup>12</sup> Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’, trans. M. Quaintance, in E. Anidjar (ed.), *Acts of Religion*, London and New York: Routledge, 242-258.

<sup>13</sup> See Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, trans. E. Jephcott, New York: Schocken Books, 1986, 277-300.

that the law [...] is not justice, but only the gate that leads to it. What opens a passage towards justice is not the erasure of law, but its deactivation and inactivity [*inoperosità*] – that is, another use of the law.<sup>14</sup>

This suggestion of a justice beyond the law seems almost identical to Derrida's deconstructionist understanding of law and justice, as becomes apparent in the following quote from *Force of Law*: 'I want to insist at once to reserve the possibility of a justice, indeed of a law [*loi*] that not only exceeds or contradicts law [*droit*] but also, perhaps, has no relation to law, or maintains such a strange relation to it that it may just as well demand law as exclude it'.<sup>15</sup> The difference between them first appears when Agamben ends up fully embracing a position of a pure resistance and simultaneously links it to Benjamin's call for a 'real state of emergency' expressed in his 'Theses on the Philosophy of History' in 1940.<sup>16</sup> Transferring Benjamin's words to our own political and economic situation, Agamben makes the following statement: 'From the real state of exception in which we live, it is not possible to return to the state of law [*stato di diritto*], for at issue now are the very concepts of "state" and "law" '.<sup>17</sup> There is much to be said about Agamben's reading of Benjamin, not least about his neglect of the specific and urgent historical context in which Benjamin made his call for a 'real state of emergency', but let me here only summarize Agamben's position by citing the concluding words of his *State of Exception*: 'We will then have before us a "pure" right, in the sense in which Benjamin speaks of a "pure" language and a "pure" violence. To a word that does not bind, that neither commands nor prohibits anything, but says only itself, would correspond an action as pure means, which shows only itself, without any relation to an end.'<sup>18</sup>

As indicated, it is precisely such claim to purity that made Derrida feel uneasy about Benjamin's essay on violence. There simply is no pure violence beyond the violence implied in the foundation of law and the violence implied in the conversation of law, no more than there exists any pure position of resistance beyond the system against which that resistance is directed. On the contrary, as history teaches us, the very

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<sup>14</sup> Giorgio Agamben, *State of Exception*, trans. K. Attell, Chicago: University of Chicago Press, 2005, 64.

<sup>15</sup> Derrida, 'Force of Law', 233.

<sup>16</sup> Walter Benjamin, *Illuminations*, trans. H. Zorn, London: Pimlico, 1999, 248-249.

<sup>17</sup> Agamben, *State of Exception*, 87.

<sup>18</sup> Agamben, *State of Exception*, 88.

quest for purity itself tends to give rise to a kind of violence that is anything but pure. For precisely this reason Derrida also had little patience with a resistance that in advance positions itself beyond the rule of law:

This excess of justice over law and calculation, this overflowing of the unrepresentable over the determinable, cannot and should not [*ne peut pas et ne doit pas*] serve as an alibi for staying out of juridico-political battles, within an institution or a state, between institutions or states. Abandoned to itself, the incalculable and giving [*donatrice*] idea of justice is always very close to the bad, even to the worst, for it can always be reappropriated by the most perverse calculation.<sup>19</sup>

What is ultimately at stake between Derrida and Agamben is the question as to whether justice needs institutions or not, a question that also mirrors two different positions with regard to liberal democracy. While Derrida, to the very end, was careful to defend liberal democracy as the least bad among existing forms of government, Agamben represents a generation of political philosophers that have expressed a growing dissatisfaction with parliamentary democracy as such. In light of how the notion of democracy has been *de facto* compromised during the past decades – the ‘War on Terror’, the subtle shift from legislative to executive power that has taken place in several Western democracies, etc. – Agamben’s position is in many ways understandable. And yet the solution can never be to take leave of democratic institutions *per se*. In the rhetoric of ‘purity’ and ‘violence’ characteristic of the anti-parliamentary left to which Agamben belongs, there is a problematic flight from the complexity of realpolitik, that is the contradictions, tensions and unstable conventions that define the arena on which issues of justice are usually played out. Ultimately, the recourse to a ‘pure’ justice through ‘pure’ means risks becoming as empty and insensitive to concrete ethical situations as the often sterile reference to ethico-political principles (individual freedom, equality, *laïcité*, etc.) in the liberal democracies against which Agamben turns.

Faced with the complexity of real ethical conflicts – such as the burkini dispute in France or the debate (in Sweden and other countries) over whether public baths should provide women-only hours – empty or principled claims to justice are simply not sufficient. On the contrary, such conflicts demand moral judgment and sensitivity to the specific context, including concrete bodies in their exposure. The two mentioned examples are good cases in point. In both France and Sweden debates

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<sup>19</sup> Derrida, ‘Force of Law’, 257.



about Muslim women's preferences when going to the beach or to a public swimming pool immediately tend to get locked in principled positions of secular versus religious, equality versus individual freedom. When listening to the arguments of the Muslim women in question, however, it soon becomes clear that their arguments often have little to do with such principled reasoning. Rather they are about bodily integrity, about not feeling comfortable being bodily exposed to people of the opposite sex – for the simple reason that one may not be used to it.

It is in the light of this kind of complex ethical situation that the prophetic idea of justice, echoed in Derrida's politico-ethical reflections, shows its strength. As I have tried to show in this paper, the notion of justice expressed in the Hebrew Bible never begins in abstract moral principles, but is always fleshed out in a concrete world where there are wars, slaves, sacrifices, corrupted priests, material interests, jealousy and crimes.<sup>20</sup> I have tried to pinpoint the defining characteristics of this idea of justice in terms of a combination of casuistry and transcendence, a combination that, on the one hand, never allows discourses on justice to direct focus away from the predicament of concrete bodies in their exposure, and yet, on the other hand, points to the possibility of transcending such predicaments in the name of a not yet realized justice. The prophetic idea of justice, I wish to suggest by way of conclusion, returns justice to where it belongs, that is to concrete experiences of injustice – but always with the faith and hope that these experiences can be overcome.

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<sup>20</sup> See Emmanuel Levinas, *Difficile liberté. Essais sur le judaïsme*, 3<sup>d</sup> ed., Paris: Albin Michel, 1976 (1963), Le Livre de Poche, 156.