

A Few Thoughts on Justice and the Legal Imagination

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We know from Hegel that the desire for recognition is the engine of everyone's life. He also discovered that the foundation stone on which our personality is built, and from which originates this desire for recognition, is the appropriation of one's own body, the only perfect synthesis between being and having (the intuition of such synthesis was first imagined by the English who, a long time before, in the *habeas corpus* procedure, consolidated in 1679 by the Habeas Corpus Act, but shaped throughout a long evolution, which started in 1166, with Assize of Clarendon and was completed in 1862). It would not, however, be possible to fulfil this desire without an area of freedom, identified by Hegel in the form of the Prussian state, as *staatsrecht*. In the middle of last century, Alexandre Kojève, perhaps the most subtle among the thinkers who developed the conceptual infrastructure of the European construction, was animated by this Hegelian idea; for him, the unification of the old nations within a new European homeland meant, first of all, the widening of the area of freedom in order to increase the chances of fulfilling the desire for recognition. At the end of last century, excited by the implosion of the communist system, Francis Fukuyama hastened to proclaim the end of history (another Hegelian idea) and the reign of freedom in a globalized world; Hegel's late disciple, this American-born philosopher of Japanese origin associated the end of history with the last man, so that the desire for recognition could have been accomplished - from that moment on - within an area of freedom extended to the size of the entire planet. *Nota bene*: none of these philosophers understood that the fulfilment of the desire for recognition of a single man would require the gradual expansion of the area of freedom, until it reaches a global dimension; this extension would only be a prerequisite for everyone - irrespective of their ties of belonging (ethnic, racial, national, religious or cultural) - to have access to the area of freedom in which it is possible to achieve this desired goal of recognition. It is easy to identify in this evolution the utopian project of the universal republic, present, explicitly or implicitly, at first in the ideology that triggered the French Revolution, then, on a larger scale, in the ideology that prepared the Bolshevik Revolution, and finally, in the globalized ideology of political correctness. The desire for recognition is not to be blamed for this evolution; the "guilty" one is the rational fervour that nourished the utopian project for a universal, undifferentiated space of liberty, capable of dissolving the boundaries between diverse, and, often, adverse community identities. It is reasonable to believe that, for the fulfilment of our desire to be recognized, we need an area of freedom, but it is equally reasonable to associate the realization of this desire with the virtues of those who recognize and those who are recognized, as well as with a decent state of prosperity, understood not as a target, but as a premise on which the natural efforts to find and identify the personality's river bed can be grounded.

It is no coincidence that today I share with you these thoughts about the desire for recognition.

Being awarded the *honoris causa* title by the West University of Timișoara is, for me, undoubtedly, a sign of recognition of what I have done so far in the field of law. Many a times, those who recognize are more virtuous than those who are being recognized. Anyway, modesty should prompt us not to accept any kind of recognition.

Otherwise, we would be lured by the temptation of vainly glory, a sinful capital against which St. John “golden-mouthed” Chrysostom railed with grace and a verb of fire. But, today, it is not about any kind of recognition, but one that honours me deeply since it comes from an elite institution. The prestige of the academic community of this university, as well as that of the entire academic community from Timișoara, is associated with the prestige of a city that was not only a capital of a kingdom and a Pashalik, but also of a region which, beyond its exemplary multiculturalism, managed to preserve the Romanian identity. The area of intellectual freedom, built and perpetuated in Banat and its capital, Timișoara, made it possible to revive the sentiment of national dignity at a time when it seemed to be lost forever. From December 1989 until today, the citizens of this city have associated virtue, freedom and prosperity in order to offer to the whole of Romania a model appropriate for the fulfilment of the desire to be recognized. That is why, without abandoning modesty, I am glad to be awarded this title, especially as in the academic community of the University of the West there are friends and professors whom I cherish: Ion Lulă, Mircea Mihăeș, Marcel Tolcea, Vasile Popovici, Daniel Vighi, Victor Neumann, Radu Motica, Silviu Cernea, Lucian Bercea, Irina Sferdian, Loredana Pungă, and, beyond the boundaries of this community, I have friends who make me feel at home in Timișoara: Eugen Ciorăcă, Andrei and Delia Herzeg, Alexandra Răzvan and Florian Mihalcea.

Although united in the Timișoara model, virtue, freedom and prosperity have long been, and still are today, dissociated in the moral, political and legal thinking about justice. More specifically, each of these three elements has established a distinct model of justice and, implicitly, of the most appropriate form of society to fulfil the desire for recognition.

The most succinct description of the first model of justice, the one based on the idea of virtue, was given by Ulpian, in a text kept in Justinian’s *Digest*: *Justitia est constans et perpetua voluntas jus suum quique tribuere. Juris praecepta sunt haec: honeste vivere, neminem laedere, suum quique tribuere.*

The repetition of *suum quique tribuere* in two different phrases does not have a stylistic function only. In the first phrase, the syntagma is related to justice, understood not as an institution, but as equity, righteousness. Understanding righteousness as a constant and perpetual will to give everyone what is right brings to light the moral significance of this notion. Before being a legal value, justice is a moral value, and the will to constantly pursue justice as a goal is merely an expression of the virtue of pursuing good as the ultimate goal of life. In a similar, but more direct sense, Celsus, quoted by Ulpian in another text from *Digest*, has defined law (*jus*) as *ars boni et aequi*. In other words, the law would lose its moral foundation if it were founded only on the idea of equity, abandoning the good as an ultimate goal. In order to preserve its function of creating order in the city-state, justice must be a form of accomplishment of the good. Thus understood, the first sentence from Ulpian’s text is a takeover, in the lapid form specific to the Latin language, of the conception on justice that Aristotle puts forth in the 5th Book of his *Nicomachean Ethics*.

Before building up the architecture of the concept of justice, Aristotle emphasizes the natural connection between virtue and the practice of virtue. It is not enough that the acts performed according to virtue “possess in themselves the respective qualities in order to be accomplished”; furthermore, the one who acts “must do so in a certain way: firstly, by being aware of what they are doing, and then by having a precise intent, namely, to perform that act in accordance with virtue, and thirdly, by performing that

act with great firmness". Only in this way "any virtue, in its quality of virtue, perfects the possessor, as well as their work". Only the one who practices virtue "could become a virtuous man". In this context, righteousness as virtue is "the moral disposition by which we are fit for acts of righteousness, and by virtue of which we actually accomplish them or wish to accomplish them". But righteousness is not just one of the virtues; it is, as the philosopher says in a poetic language, "a sovereign of all virtues, brighter than the evening stars, brighter than the daylight", while also quoting a proverb "justice concentrates in itself the whole virtue", and then it adds: "Justice is not a part of virtue, but virtue in its entirety...; injustice is not only a part of vice, but vice in its entirety". A special reason justifies this position of righteousness as sovereign of all virtue: "He who possesses it uses his virtue also for the sake of others, not only for himself". And then, Aristotle resumes and strengthens this idea: "Justice is the only virtue that does something good for another, manifesting itself in favour of another". It is the point where justice as a moral value meets with justice as a legal value.

Since morality aims at perfecting and harmonizing inner life, its norms and values relate to the relationships we have with ourselves. It is the luminous significance of Kant's famous saying "The starry heaven above me and the moral law within me", words also written on his funeral stone in Königsberg (it is still an irony of history the fact that the city where he was born, where he lived - without ever travelling beyond its borders - and where the German philosopher died, is today called Kaliningrad). However, as virtue and moral value, justice does not only relate to the relationships we have with ourselves, but also to the relationships with have with others, thus entering into the regulatory field of the law, which pursues the harmony of the city-state. Therefore, justice is aimed both at the harmony of inner life and that of the city-state.

For this reason, Ulpian emphasizes in the first sentence of the quoted text the moral and legal, double senses of justice, and in the second sentence, its legal dimension, transposed into three rules. *Juris praecepta sunt haec: honeste vivere, neminem laedere, suum quique tribuere.*

For the Romans, as well as for the ancient Greeks, the moral foundation of the law was self-evident, so that it was not unnatural at all for a moral value to be explicitly included in the legal rules. Aristotle himself states in "Nicomachean Ethics": "the legislators make the citizens become good, by accustoming them to the good ...; there lies the difference between good and bad law". And then he concludes: „For justice exists only between men whose mutual relations are governed by the law ... This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant ... He who is vested with authority is the guardian of justice". One could easily recognize in these words the roots of the modern concept of supremacy of the law, whether asserted in practical terms, as English law does (rule of law), or in rather theoretical terms, as under German law (Staatsrecht) or French law (L'Etat de droit).

The double reflection of justice, in our relations with us and with others, allows the mathematical expression of the criterion of justice, respectively of equality. By identifying this criterion, Aristotle begins building the architecture of the concept of justice. It is easy to say that justice means to give to each his own, but it is harder to answer to the question: what is one's own?

To answer this question, starting from the equality criterion, Aristotle states that justice functions as a middle term between two pairs of terms: two things and two people. Equality is this middle term. Mathematically expressed, equality, as a criterion of

justice, is not only purely arithmetic but also proportional. Proportional equality better reveals its meaning in the context of the two types of justice described by the philosopher: distributive justice and corrective justice.

In case of the first, the distribution of what is to be allocated will be based on merit. Everyone's part is equal to what they deserve. The criterion of justice functions in this case as proportional equality. There are thus two criteria when it comes to distributive justice, that of merit and that of proportional equality. Today we would say that, from the viewpoint of substantive law, distributive justice is applied in hierarchical structures such as labour contractual relations, corporate entities, public administration, competitions and exams in the education system and competitive activities.

Corrective justice will apply whenever there is an imbalance in equality relations, so that one person gets a benefit to the detriment of another, and this appears as an injustice. Aristotle said that it is better to suffer injustice than to cause it to another. By this idea, Nicomachean Ethics anticipates the ethics of Jesus. To restore equality, it is necessary to repair injustice. As in the case of distributive justice, there is also a second criterion in this case, but not of merit: the idea of equality is doubled by the idea of reparation or, more generally, by the idea of sanctioning. In current terminology, it would either be the case of tort or contractual liability, or of a relation arising from a lawful legal fact, which implies an obligation upon the recipient to make restitution, or of criminal or administrative sanctions.

Corrective justice presupposes the existence of the judge, as an intermediary, respectively as a middle term between plus and minus, that is, between the one who suffers injustice and the one who causes injustice or benefits from it. It follows that, by default, corrective justice has not only a substantial meaning, but also a procedural one.

The equality criterion is emphasized by Aristotle through the etymological meanings of the used terms: *dikaion* means not only just, but also division into equal parts; *dikha* means equal parts; *dikhaion* means divided into equal parts; *dikastes* means judge, *dikhastes* means the one who divides in two.

Equality is therefore the common criterion for both distributive and corrective justice.

In addition, this criterion also works in reciprocal relations. Although Aristotle does not state it expressly, it follows that he has in mind the third sense of justice, which we can call mutual justice. After recalling the Pythagorean idea that "It is right to suffer in your turn the wrong that you have done to others", a formula in which we recognize the law of talion, Aristotle specifies that economic activity is the true field of reciprocity "as an exchange governed by the principle of equality" through the common unity of measure that is the currency. The legal form specific to this activity of economic exchange, based on reciprocity, is, as we would say today in the terms of civil law, the onerous, commutative *synallagmatic* contract.

In all these three, distributive, corrective and reciprocal meanings, "justice is a kind of mean... because it relates to an intermediate amount, while injustice relates to the extremes."

Reuniting these three concepts, which configure the architecture of the concept of justice as a legal value, and the idea of virtue, Aristotle returns to the moral meaning of the concept. The definition he elaborates is comprehensive for both of the dimensions: "justice is that in virtue of which the just man is said to be a doer, by choice, of that which is just, and one who will distribute either between himself and another or between two others not so as to give more of what is desirable to himself and less to his

neighbour (and conversely with what is harmful), but as to give what is equal in accordance with proportion; and similarly in distributing between two other persons”.

Aristotle's concept of justice underpins Roman law, and it preserved its relevance for a long time, to the fall of the Western Roman Empire, and of the Eastern Empire, in its Byzantine form, and long after, throughout the Middle Ages, as Roman law was applied, directly or indirectly, in many parts of Europe, beyond the borders of the state that once created it.

In modern - moral, political and legal thinking - Aristotle's concept of justice gradually lost its influence, though it is still to be found, in more or less disguised forms, in most codes of the Romano-Germanic legal system. It is modern Anglo-Saxon thinking that has especially contributed to the development of a new concept of justice.

The theory of justice based on the idea of prosperity, called utilitarianism - elaborated, in its classical form by Jeremy Bentham, James Mill (father) and John Stuart Mill (the son) - states that just actions are the ones that provide the greatest good possible for most members of the community, thereby maximizing the benefits of these actions.

The idea of freedom has founded distinct concepts of justice. It could not have been otherwise, as liberalism is an extremely diverse family of thought, covering a broad doctrinal area, from left to the right, which explains why the concepts of justice based on the idea of freedom are sometimes opposed to each other. In the United States, especially, a net polarity occurred between left-wing liberalism, a promoter of egalitarianism, on the one hand, and right-wing liberalism, called libertarianism, a promoter of the minimal state, on the other. John Rawls's theory of justice, drawn from the position of left-wing liberalism, opposes the concepts of justice elaborated by Robert Nozick, a radical libertarian, and David Schmidtz, a moderate libertarian.

John Rawls believed that differences in democracies are natural, and that liberal society is only possible if one recognizes the existence of comprehensive, conflicting and irreconcilable doctrines, on the one hand, and one identifies the constitutional foundations that allow for the coexistence of these doctrines. From this perspective, liberal society must be founded on mutual recognition. The recognition, as an official doctrine, of a set of values and principles, with the consequence of cancelling other doctrinal identities and ideological heterogeneity, would contradict the very foundations of liberal society. It follows that justice implies respect for human rights, with all the involved identity diversity. John Rawls, however, makes a distinction between reasonable and unreasonable comprehensive doctrines, the former agreeing, and the others disagreeing with the constitutional foundations of society, but he is not further preoccupied with finding a solution to the conflict arising from this disagreement. Instead, he builds a theory of equal spaces of freedom for all individuals, with the consequence that the emergence of inequality justifies redistribution for the disadvantaged. The theory of equal freedom spaces is doubled by the theory of positive discrimination.

Robert Nozick and David Schmidtz prove, with different but convergent arguments, that not all inequality is unjust, but only that whose sources are unjust. The concept of justice cannot solely be based on the criterion of equality and, to a lesser degree, on egalitarianism. David Schmidtz especially develops a theory of justice based on a plurality of criteria.

In addition to equality, other criteria are to be regarded - either complementary or separately, according to the context taken into consideration - such as the criterion of merit, the criterion of reciprocity or the criterion of need. I share this author's

preference for the criterion of reciprocity, emphasized, as we have already seen, by Aristotle as well, but this time considered autonomously, and not as a mere complement to equality. Schmitz's thesis is that "No single principle is more than an element of justice. Principles of reciprocity, though, are the core of a just society". Unlike Aristotle, who understood reciprocity as a way in which the parties maintain their initial position, without any loss or gain, the only hypothesis compatible with the criterion of equality, David Schmitz highlights the reciprocity's role in increasing cooperation, that is, a mutually beneficial exchange. This understanding of reciprocity explains, to a great extent, the potential of capitalism to create prosperity. Moreover, without necessarily implying the absolute equality of reciprocal benefits, exchange is the binder that gives cohesion to any kind of community, not only in economy, but also in culture and in political organization. Societies based on constitutional democracy and on market economy are just due to the freedom of their individuals, which is not only guaranteed, but exists in the patrimonial and non-patrimonial communication relations between individuals, through which they mutually enrich. In this way, justice is associated not only with freedom, but also with prosperity.

Are these modern theories of justice - based on either the idea of prosperity or the idea of freedom - incompatible with the concept of justice, founded on virtue, as envisaged by Aristotle, Ulpian and Celsus?

I gave a partial answer to this question in 1999, at a conference entitled "Moral and Institutional Reform" held at the Institute of Liberal Studies. My starting point then was the way in which Kant defines virtue, calling upon the idea of courage. Just as courage is the well-thought determination to oppose the action of another brave and powerful, but unfair man, virtue is the will to face the unjust action of the enemies existing in our own selves, which implies an inner dialogue, that is, the discovery of our own moral knowledge. Only in so far as we are talking to ourselves, confronting our inner enemies, we have the possibility to discover *alterity*, which may be either a friend or an enemy. From this perspective, *virtue* is precisely the power to confront our inner enemies, in order to gain the moral competence to face our external enemies and their unfair actions; we must first face the unfair action of ourselves, in order to later face the unfair action of the outside world.

Such an interpretation of virtue is not incompatible with the concept of justice founded on the idea of freedom. Ultimately, the area of freedom cannot be built without virtues and values compatible with this idea, such as tolerance, dialogue, trust, contract and property. Certainly, liberal ethics is a minimalistic one, for, while defending these values, it remains neutral in relation to other sets of moral values shared by different groups in society. This type of ethical minimalism avoids the danger of ethical maximalism, that is, of any ideological or religious fundamentalism. At the same time, I used to affirm that ethical minimalism must not be mistaken for indifference, which is as dangerous as fanaticism.

I must confess that, although I have not lost the liberal beliefs I used to embrace twenty years ago, they have clearly been tempered by an increasingly conservative perspective I have acquired, not only due to age, but also to a series of events I have witnessed in the last two decades. The nature of these events and the accelerated rhythm in which they have taken place opposed the idea of "the end of history" and revealed new and dangerous forms of injustice, in Romania as well as in Europe and all over the world. I do no longer believe that the minimalist and neutral ethics is always an effective way of preserving our national identity and the identity of the European

culture and civilization, or of coping with the aggressions threatening them. Ultimately, beyond the neutral values of tolerance, dialogue, trust, contract and property, there are other values showing that we belong to both these identities. All these values must be defended, for those defining our European identity cannot survive without those expressing our national identity. And the law - without becoming an instrument for regulating moral principles - has to be based on the values of both categories. Otherwise, we will be the sad spectators not only of the disintegration of national identities, but also of the loss of the Euro-Atlantic identity and civilization. Respect and tolerance towards others are indeed defining virtues of both the national and the European constitutional and legal space, but in order for this true homeland of ours not to dissolve in the future, we must redeem the virtues promoting the feelings of national and European affiliation. Certainly, the revival of these feelings must not be aggressive, but only defensive, aiming at protecting the identity of the European culture and civilization as well as of the national identities comprised in it: *si vis pacem, para bellum*.

I also believe, following an idea expressed by Mircea Dumitru, that a concept of *justice* based on a variety of criteria, acting jointly or separately, depending on the context, and bringing together *virtue, freedom and prosperity*, is to be sought. Such a concept cannot, however, be applied in an abstract space, without identity determinations; it is functional only within concentric community identities, starting from the narrower ones, such as the family and the neighborhood, continuing with the village or the city we live in, and eventually climbing up to the national and the European community.

But no matter how comprehensive a theory of *justice* is developed, it remains inefficient in the absence of *legal imagination*. Freedom, prosperity, equality, merit, need and reciprocity are not rigid units for the measure of justice. They can be operational only through the virtues of those who are animated by the ideal of righteousness. Legal imagination is the ferment and the catalyst through which these virtues can make justice in a given context. All jurists must have legal imagination, regardless of their specialty and the position they occupy. Legislators must have legal imagination. The administration must have legal imagination. Judges are, however, the most important characters in the work of doing justice. In the adagio *Justitia est fundamentum regnorum*, the term justice has both the meaning of righteousness and the meaning of institution meant to accomplish it.

This is why judges must, first and foremost, be animated by the virtue of equity, which is the vector of legal imagination.

Let us go back to Aristotle now. For him, equity is the superior form of justice: "And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law... For when the thing is indefinite the rule also is indefinite... It is plain, then, what the equitable is, and that it is just and is better than one kind of justice". Moreover, the Stagirite defines the nature of the equitable man: "the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law oft his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character".

Even though Aristotle does not use the notion of *legal imagination*, it is obvious that the way in which he defines equity implies legal imagination.

Much later, Edmund Burke will use the concept of "moral imagination" in his "Reflections on the Revolution in France" (1790). This is a book which he speaks about "the super-added ideas, furnished from the wardrobe of a moral imagination, which the

heart owns and the understanding ratifies as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation". And later on, Russell Kirk, a profound conservative American thinker, will resume and develop the concept of *moral imagination*, defined as "that power of ethical perception which strides beyond the barriers of private experience and momentary events... The moral imagination aspires to the apprehending of right order in the soul and right order in the commonwealth".

If Edmund Burke has properly appreciated that moral imagination is manifested at a higher level in poetry and art, and Russell Kirk added that "moral imagination was the gift and the obsession of Plato and Vergil and Dante," we can nowadays add, following Aristotle, that legal imagination, the pendant of moral imagination, must be the gift and the obsession of jurists, in general, and of judges in particular. And all of them must always return to the cultural sources of justice, the only ones able to feed legal imagination.

In conclusion, the virtue of justice and the legal imagination are consubstantial. This is how they are depicted in the *Sermon on the Mount*, which is reproduced in the Book of Matthew, in the passage of the *Beatitudes*: "Blessed are they which do hunger and thirst after righteousness: for they shall be filled.... Blessed are they which are persecuted for righteousness' sake: for theirs is the kingdom of heaven."