

Equity, justice and law

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Abstract

Although an absolute separation between law and morality is not possible, we can assert that law and ethics approach in different manner notions such as equity, righteousness and justice. It is precisely this different approach, the different acceptations of these notions, that permits us to analyze the principle of equity and justice as a law principle and not only as an ethical one. "Equity" may be considered as both an ethical and juridical principle, which is underlying the social relations in the spirit of righteousness, equality and justice. "Justice" also has a twofold meaning: jurisdictional authorities from a state, an ensemble of laws and courts and, the second meaning, an ideal of impartiality and equity. Once such principles are consecrated by a rule of law, they will act, they will produce specific effects, inside the frame of juridical systems, giving us thus the possibility to analyze them from a juridical perspective.

Keywords: *equity, justice, morale, ethics, legal values*

INTRODUCTION

Considering that some of the general principles of law originated from values that are not exclusively juridical ones, their content cannot be regarded as being solely juridical. Accepting that between law and morale, between the law and the protection of fundamental societal values and behavioural patterns there are still very strong connections, we must acknowledge the existence of a general principle of law which can be referred to as the "principle of equity and justice". The joining between justice and equity in this principle surmises the equal, unbiased distribution of justice in a society, but also it may express a sense of ideal, an ultimate goal, or at least a direction that law must follow. The general principle of equity and justice offers a better cohesion to other principles of law. The principle of equity requires the legislature to have an advised behavior in the activity of creating new laws and in maintaining a state of equilibrium for all the recipients of a rule of law [1]. *Aequitas* has precisely the meaning of fairness, symmetry and equal treatment in similar situations.

EQUITY AND JUSTICE, AS INSEPARABLE LAW PRINCIPLES

According to an author, "Acknowledging that rightly locates the law not behind the wizard's curtain, or the judge's robe, or the bureaucracy's labyrinth, but on the table between the state and its citizens"[2]. Justice has become a less abstract

concept, a product of negotiations and thusly it has even become, somewhat, a concept closer to the idea of democracy. Both Kant and Rousseau were considering justice as an innate quality of human beings. From a Christian perspective, justice has an external source, as it originates from God (Saint Augustine). In another perspective, righteousness and equity appear as a convention between people. Such a conception can be intuited in the works of Plato, who asserts, in *Gyges* [3], that everyone believes justice is more profitable than injustice and they are right. However, if anyone was to have such powers as Gyges, and he would not touch the property of others, he will be considered as foolish. According to Plato, human beings are not born with a sense of justice, but rather is the fear of punishment that guides their actions, and if they would have the possibility to elude punishment, any human being would violate the rules for obtaining a benefit. In the same work however, Plato supports the idea of good and justice, as an idea that must be transformed into reality by the state, an idea that brings us closer to the gods. Justice is “in itself the greatest good for the soul” and that “you should perform good deeds even if u where to have the ring of Gyges and the helm of Hades also”[4] and thus, by “cultivating virtue one would resemble the gods”[5]. Aristotle begins his *Nicomachean Ethics* [6] saying that any art (skill, craft), any investigation and any action, as well as any decision should seek a good purpose. The “good” is considered either relative or absolute [7]. The intention of any legislator is, according to Aristotle, to make the citizens better, by accustoming them with the good. This is considered to be an important element that differentiates a good law from a bad one. Plato`s disciple was defining justice as a moral precept due to which we can achieve just deeds or we desire to achieve them, and injustice determines us to be complacent in perpetrating or wishing to perpetrate unjust deeds [8]. Aristotle considers as obvious that the one who is acting according to law and honours equality will be considered righteous, therefore the notion of “righteousness” signifies legality and equality and the notion of “unjust”, illegality and inequality; we call “just” that which creates and maintains a political community happy and that also maintains its constitutive elements and justice cannot exist without law [9]. According to Rousseau, the sense of justice is innate in human beings and it is less affected by external constraints.

Whatever the reason would be, that determines peoples not to commit unjust deeds, the idea of equity and justice relies, gains legitimacy today, through its accomplishments, through its efficiency, rather than from the authority that is acting

in order to impose justice. The utility of a rule of law tends to replace the personal characteristics of the legislator or the enunciation of a “good purpose”. It would be unacceptable however, to consider the rule of law, and law in its entirety, as having a sole purpose: the solving of conflicts; or as being only the result of a negotiation between the subjects and the state. Accepting this idea would imply that there is a total separation between law and any moral idea, would mean the abandonment of any ideal of justice and equity. Most of the rules of law are, in fact, statements of value, thus protecting essential aspects of the society as a whole. Law justifies itself by both its capacity to solve conflicts and by the fact that it must follow a finality, it must be lead by certain principles and ideals. Law finalities designate a desirable model of evolution for the legal realities, model that should satisfy the needs and the aspirations of the human individual, the requirements of social progress, in agreement with the values of an historical period, model that should contribute to fulfilling the specificity of law, but also in avoiding its distortion, in its concertation with other systems of social norms [10].

Although between law and morale there are certain common grounds, the obedience towards the rule of law is independent of the moral autonomy of individuals, of their own conception regarding what is just and what is unjust. We should also note that the law cannot be conceived outside the sphere of fundamental human rights, which guarantee the equality of individuals [11]. Admitting that law is, at least in some of its aspects, separated from morality, or amoral, we must also admit that law must also have finality, a purpose that should lead to what is considered as being good. Even if a law cannot be described as “good” by itself, any juridical system must fulfil a positive role. If law is at least partially amoral, that would imply that it can also harm the society. This is why it is not sufficient, for example, to acknowledge certain fundamental rights, without having the possibility of guaranteeing their efficiency, or without ensuring that those rights are not recognized in an equitable manner. A system of law cannot surmise, cannot protect the totality of values that exist inside a society. However this does not mean that it cannot identify behaviours that are compulsory and that it cannot distinguish between the rational and irrational promotion of such values [12]. This is one of the reasons for which law is still connected with morale, the reason why any law system must achieve a hierarchy of values, even if, unlike law morale is a closed normative system [13]. In the state governed by the rule of law, any hierarchy must tend to an ideal of justice

and must imply an equitable enforcement of the rule of law. The ideal of justice surmises the idea of equity, which implies that all individuals must receive equal treatment, in similar situations, but also different treatment when there are significant differences. The idea of rational equality between free individuals is closely related to the idea of justice. The rule of law is guided by the idea of just and the elementary precepts of not harming, of giving to each his own, of maintaining an equilibrium between the conflicting interests, in order to ensure essential order and the progress of the human society [14].

The almost definitive separation between law and religion, as well as the evolution of the social life lead to the emergence of multiple systems of values that coexist, that are more or less clashing in a society, within the boundaries of a legal system. Accepting that between law and morale (laic morale) there are still important interpenetrations, we must admit the fact that the law cannot be considered merely an arbiter, which oversees the clashes between social values, without interfering in any way. There is a certain line that once crossed, the conflicts between values seize to have a constructive role, seize to protect the values that are fundamental for a society and can even contribute to their destruction. In order to avoid such an outcome and to ensure the functioning of the state governed by the rule of law, it is necessary to have a basic knowledge of the values that are becoming axioms for the members of a society, values that are “coagulating” around ideas such as equity or justice. Equity and justice are in fact fundamentals of the state governed by the rule of law, state which is an ideal that seeks to be achieved [15].

Law may demand us to act in the interest of other individuals or following a general interest. Law imposes behaviours, values. Such actions would not be achievable, in the state governed by the rule of law, without the acknowledgment of a minimal set of values, which are common to the majority of the citizens and that are not ignoring, in an unjust manner, the value systems of other citizens. Recognizing and guaranteeing fundamental human rights and freedoms is an essential requirement for any modern state. However, human rights cannot be perceived without resorting to principles such as equity or justice. A fundamental right, no matter how beautifully proclaimed, would be nothing but a void statement without equity. Any guaranteed law is a promise, an insurance, which the state is not able to withdraw at a latter point. This is the reason why the recognition of new rights should be carefully analysed. It is certain that the state governed by the rule of law cannot

survive without human rights. However, at the same time, it is clear that acknowledging a large number of rights that cannot be guaranteed, would compromise the idea of equity and justice. Law however cannot be reduced to human rights, as it also has to maintain the legal order, to protect certain values, in a state that is capable of respecting the promises made to its citizens. The doctrine [16] has identified the existence of a “juristocracy”, as a danger that threatens the existence of the democratic state, danger that appears as a result of the excessive independence of the judicial power. The independence of the judges must be a means to an end and not a purpose in itself [17]. It is necessary for the judicial power, as well as for the other powers in the state, to be limited, by the balance of power (or, in other words, limited by the “conflict” between themselves) and also by human rights. Not recognizing the judicial enough power in order to fulfil its goals may also lead to inequitable solutions, especially due to the high degree of generality that the rule of law has, which has to be applied to any particular situation that might occur. Recognizing too much power for the judicial might lead to abuses, arbitrary and disregard towards the separation of powers. Equity imposes a constant revaluation in order to correct the incapacity of the law giver to foresee all the situations that might arise [18]. Such a rectification corresponds with a change that the legislator would have made, provided that he would have known that particular situation. Thus, applying a law in an equitable manner, interpreting a rule of law does not constitute, in most of the cases, a violation of the principle of legality. In fact, equity is also a principle of international law. Article 38, paragraph (2) of the Statute of the International Court of Justice provides that the Court has the right to solve a case *ex aequo et bono*.

As history has shown repeatedly, the harshness of punishment is usually related to poor normative rules. The majority of citizens comply with laws that are effective, equitable and just, even if the punishment is not severe. The expectation for a law to be just may be considered as a legitimate one in a democracy. It becomes thus necessary for the legislator to avoid oppressive lawgiving. Modern law has separated itself from the justice imposed by the gods. Hence the obligation of the state was born, to continuously improve laws, to aspire to an ideal of perfection. Justice, equity, other general principles of law, the powers of the state, the judicial system in its entirety are interdependent. Therefore, in order to reach just decisions, the “whole” must function in a flawless manner. Even totalitarian regimes sought

ways to simulate, to give a just and equitable mask to their law systems, knowing that obedience towards laws and responsibility of the citizens are possible only way the individuals trust the rule of law and the fact that their values and ideals are being protected.

Aristotle has defined distributive justice, according to which, if the individuals are not equal, than the rewards that they are receiving cannot be equal either. This fact becomes a source of quarrel and mutual accusations, when the equals have and receive unequal parts or when the unequals receive equal parts, according to the principle “to give to each his own” [19]. The idea of proportion is decisively, as what each receives from the society must be proportional to his merits and his own contribution. It is obvious that, in this acceptation, distributive justice seems harsh and not necessarily just. This is exactly why joining together equity and justice, as a general principle, is not at all redundant, since the two notions are not synonyms. In a certain degree, justice has to be harsh, cruel, blindfolded (as the famous representation, omnipresent in our courts of law, probably a combination between Themis and the Roman goddess Iustitia), immune to human sufferance, as it pursues its only purpose: to give to each his own, to re-establish the ruling of the law. Equity along with other principles, such as the recognition of human rights are the ones that are imposing a certain sensibility, a justice “with a humane figure”, even if this would also imply a certain degree of subjectivity in the decisions of the courts, a justice that may even, in some situations, infringe social or legal norms (for example the principle of *error communis facit ius*), in order to ensure an equitable decision. According to the European Convention on Human Rights, article 6, paragraph (1), “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]”. Similar provisions may be found in multiple international human rights documents (and even other documents that don't have the value of a treaty, such as the Universal Charter of the Judge).

According to Kant, human beings can never be considered as means, but only as purpose. We would dare assert that the purpose is not necessarily the human being, but his becoming. The violation of fundamental human rights cannot be justified, even if such an action would lead to what may be perceived as a benefit for the society. It is certain that human beings must be put in the centre of legal

concerns, but they too are limited, at least to a certain extent, by the fundamental rights and freedoms we have to acknowledge for future generations. Superiority of the law compared to any other human rules comes with a cost: that of the promise that the state makes that he will enact and enforce the rules of law in an equitable manner, while following an ideal of justice, inevitably based on the idea of equity, thus effectively guaranteeing fundamental human rights and freedoms and maintaining the legal order.

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