JUSTICE BETWEEN REALITY AND LEGAL FICTION

Professor Emilian CIONGARU, PhD.
University Titu Maiorescu Bucharest, Romania;
Associate Scientific Researcher – Romanian Academy,
Institute of Legal Research „Acad. Andrei Radulescu"
emilian.ciongaru@yahoo.com

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Abstract:
Justice as a public activity seen between reality and legal fiction is a topic of deep reflection, but also a continuous challenge for legal professionals who have to analyse the close connection between the purpose of justice and the artificial legal constructions of legal science, that is, between real and fictional justice or, in other words, formalised justice. Law as a science, in all its endeavours to regulate various conducts and situations, has found the solution to resort to a legal construct called legal fiction, a construct which has become almost indispensable, but which can sometimes irreversibly distort the profound purpose of justice as a civilising act of any civilised society. At the same time, it is necessary to analyse, with a great deal of prudence and professionalism, the double perception of justice in the first sense as this symbolic and normative construct called legal fiction, and in the other sense as a real, concrete and institutionalised public activity with a real impact on the subjects of law, exercised as an exclusive attribute of the rule of law in establishing and maintaining the legal and constitutional order.
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Justice - conceptual elements

The theory of justice [1] represents the normative essence of law and the social order and which underpins the values that are defended by laws and legal institutions, whether it is procedural, distributive, commutative or corrective justice, this theory provides a social framework without which a just and functional society cannot be built, a basic characteristic of a functional rule of law.

Justice as a theory must and it is absolutely necessary to evolve to respond to the inevitable challenges of globalisation [2] in the sense that it is no longer sufficient to discuss fairness and justice in a single state but must reflect those global responsibilities, transnational solidarity and institutions capable of upholding justice across borders.

In this sense, global justice is not only a moral necessity, but also a condition for stability and peaceful coexistence in today's world. The unavoidable and much-discussed globalisation almost automatically triggers an extension of the scope of justice from nation-state to global justice and implicitly from a system of domestic law to a system of international law and implicitly of transnational rights.

Justice must therefore be seen both as a moral value and as an institutional mechanism, with the role of ensuring a balance between rights and obligations, between states and the international organisations and treaties to which they are party, between the individual and the state, between law and ethics, between law and morality. Achieving effective justice requires not only the interpretation and application of the law, but also a critical and rational awareness of its meaning, which is continually adapted to the social and cultural context existing in society at a given historical moment.

Justice must represent that normative principle which expresses justice [3], fairness and respect for the rights of every person, and is associated with the idea of fair and impartial treatment of individuals within an effective legal or social system, in an effective and functioning rule of law.

Throughout its history as a concept and theory, but also as a concrete activity, justice is both a legal construct called legal fiction, the aim of which is to provide order and coherence, and a public activity with a real impact on people's lives. In the tension between these two aspects, justice and legal fiction, the very credibility and effectiveness of the rule of law is called into question, and the balance between them can only be achieved by interpreting and applying legal rules with reason, sense and responsibility, exclusively in the service and in the interests of the citizen as the ultimate recipient of the law.

Justice is also characterised as a fundamental constitutional guarantee [4] and in this sense it expresses the idea that the right to fair and accessible justice is a fundamental characteristic of a functioning rule of law, a right enshrined in modern constitutions as a supreme guarantee of respect for all other fundamental rights and freedoms of the citizen.

Legal fiction - conceptual elements

The concept of legal fiction [5] is a fundamental legal construct in the study of general legal theory and can be defined as a statement which is considered to be true by the legal rule, even if objectively the statement is considered to be non-existent or false, but which is used for the purpose of enabling the interpretation, application or extension

of the provisions of the legal rule in a rational, coherent and efficient way in order to resolve the cases before the court and to ensure legal certainty.

Legal fictions are totally different from hypotheses, errors or suppositions, because they are consciously assumed by the legal system, they cannot replace reality, but only help to shape it in order to better help the fairness and functionality of legal rules [6], but their use must be made with great discernment, the aim must be not to turn the achievement of law into a mere formal exercise that is totally divorced from reality, because real justice requires that legal rules, even if they are fictitious, must serve the common good as the sum of the individual good in society and have a real and effective impact on the litigants. [7]

Functions of legal fictions

For a better understanding of the importance of legal fictions and their usefulness in maintaining the coherence and effectiveness of law it is necessary to list their most important functions, as follows:

- Extending the applicability of the provisions of legal norms [8] to the law and implicitly to the legal protection of the litigants - this implies that by means of a certain legal fiction it is allowed to include atypical or unregulated situations into the scope of legal norms with the purpose of the achievement of law. An example of this is the principle "nemo censetur ignorare legem" - no one is innocent of ignorance of the law, a generally applicable principle by which legal fiction is used to prevent a possible challenge of the law on the basis of ignorance of the law. [9]

- Resolving legislative lacunae [10] - a function which is intended to reflect the way in which the law, through recourse to legal fictions, fills regulatory lacunae where the laws do not expressly provide for a particular legal situation but regulation is absolutely necessary to avoid a legal vacuum and ensure the continuity of the legal order. An example is the situation where the legal death of a natural person is established under the strict conditions laid down by the law, i.e. where that person has been missing for a long time, which allows the marriage to be terminated or the estate proceedings to be initiated.

- Ensuring the stability of the legal system [11] - a function that reflects the essential role that this conceptual legal construct plays in maintaining the continuity, coherence, adaptability and predictability of the law, even in the face of the social changes inherent in the evolution of the world or situations that escape direct regulation. In the absence of stability in the legal system, legislative incoherence, arbitrary decision-making and a crisis of confidence in the law can arise, which can lead to the principle of legal certainty being distorted from reality to desire.

- Normative adaptability [12] - this function of legal fictions expresses the ability of the legal system to adapt and respond to social, technological or cultural changes without the need for immediate legislative changes, by means of legal constructs that assume as if certain situations already exist in the form necessary for the application and achievement of law. As an example, some digital entities or artificial intelligences are assimilated as subjects of law in situations where there are no explicit regulations to this effect.

- Facilitating legal reasoning and interpretation [13] - a function that is intended to help legal professionals to find equitable solutions using analogies and rational legal constructions in the absence of a direct legal rule. For example, the existence of will, as an ad valididatem element, in adhesion contracts, where one of the parties has no real bargaining power.

Therefore, on the basis of these functions of legal fiction, it can be pre-concluded that this legal construct [14] is a very important but also necessary tool of normative modelling, which helps law to be flexible, coherent and applicable by those entrusted to do it; however, it must be used with great caution and above all with discernment, so as not to turn the law into a formal exercise divorced from reality, because real and effective justice requires that legal rules, even if they are fictitious, must serve fairness and the common good and must take account not only of purely formal rules but also of the truth as experienced by the citizens.

Justice as legal fiction

Justice as a legal fiction represents a profound but also challenging analysis of legal professionals [15], which assumes that justice, in its two forms, institutional and

normative, cannot necessarily be just an objective reality, but is a highly elaborated conceptual construct that is created, adapted and maintained by a legal system with the aim of guaranteeing legal order and social balance in society, thus it can be said to function as a regulated legal fiction, necessary and functional for the legal certainty of the subjects of legal norms, the litigants.

In this context, it can be concluded that justice is supposed to be perfectly fair, impartial and objective - although or even if legal reality does not always reflect these features. However, justice is constructed as that normative ideal - towards which the application and achievement of law is directed, even if this goal is not completely fulfilled. This justice is also legitimised both symbolically and institutionally, through the courts, their decisions and the legal norms applied by them, which reflect the will of the law and the legislator.

The legal fiction of justice would be that the state, as the holder of the monopoly on the achievement of justice as a public activity and public power, achieves justice through the courts - as if the state were infallible and equidistant, although the courts entrusted with the achievement of law may err or even be influenced by various internal or external factors.

Manifestations of justice in its existence or approach to it as a legal fiction are reflected in the comparisons between the legal aspects of justice and its conventional character in the following senses:

- Regarding the total independence of justice [16] in a strictly legal sense, in reality there political or social pressure may be exerted on it in such a way that it may lead to more or less wilful mistakes in the act of achievement of law;

- Regarding the absolute impartiality of judges taken strictly legally, however, it must be borne in mind that judges are "the living law" and they have their own beliefs, interpretations and potential biases; [17]

- Regarding the similar application of the law to all litigants, however, it must be borne in mind that there are many discrepancies in application depending on the context in which the law is applied, there being similar but never identical cases;

- Regarding equal and free access to justice, in reality there are many inequalities in resources, time and representation of parties in court.

- Regarding the normative ideal that justice represents and not a universal reality, it must, however, be taken into account that each historical period and its corresponding system of government defines justice differently;

- Regarding the fact that the legal system is based on presumptions and legal constructs, legality is always different from the concept of fairness;

- Regarding the possibility of miscarriages of justice in the sense that human justice is imperfect and subject to interpretation and that is why it is said that an unjust settlement is often much better than a just judgement, because it reflects the understanding of the parties.

However, reality has shown that justice is much more than a legal fiction if the following points are borne in mind:

- Justice is and must remain a real ideal towards which one strives, even if it is not attained to its fullest extent and thus completely directs the entire legal system;

- Through legal institutions [18], through the procedures regulated by law and implicitly by guaranteeing the rights of litigants, certain concrete forms of justice are achieved, i.e. justice is considered to be achieved by simply applying the law.

- Modern basic legal rules enshrine justice as a fundamental principle, not just a conventional one, once justice is established, enshrining the principle of legal certainty.

Therefore, this kind of legal structure, legal fiction, as justice can be categorised, has a character of necessity, at least because without it the rule of law would become ineffective and would collapse, but also because citizens accept the authority of the state through the dispensation of justice because they assume that justice is done. Also, even if sometimes unjust or imperfect, justice is still applied and accepted by citizens as a legal fiction in order to maintain social cohesion in the state.

Ignoring justice [19] as a legal fiction can lead to significant risks in the sense that:

- Moving towards an excessive idealisation and overuse of justice as a term can lead to a lack of trust in the judicial system [20] and implicitly in the rule of law as the guarantor of the achievement of justice and the protection of the rights of its citizens;

- The existence of a mere legal formalism [21] may lead to the risk of the perception that the legal rule is applied unprofessionally and without the interests of the citizen being emphasised, thus ignoring the human and social context of the effects of the legal system;

- In the event of a blockage in the reforms of the judicial system, it may lead to the maintenance of illusory perceptions of a 'perfect justice', without any real correction and adaptation of the dysfunctions of this system.

It is therefore imperative that justice should be transparent, given that it is a public activity, that it should be an activity directed towards the interests of citizens, not a purely formal activity, and that it should also be continually adapted to social relations and not remain an abstract systemic form.

Conclusions

In conclusion, therefore, it can be said that the theory of justice remains essential for the evaluation and orientation of current legislation because in a rapidly changing society, legislation must not only be lawful, but also legitimate, i.e. it must be in full agreement with the moral principles of fairness, liberty and respect for the individual. Thus, contemporary justice must go beyond formalism and adapt to new social and technological realities without losing its fundamental values. In fulfilling its role as guarantor of the rule of law, justice is seen both as a legal fiction designed to provide order and coherence and as a public activity with a real impact on people's lives. In the tensions between the two approaches, the very credibility and functionality of the rule of law is essential. Legal fictions are a necessary tool in the achievement of justice and in the construction of the system of justice, but they must be used with reason and prudence, under constant ethical and democratic scrutiny. It should be borne in mind that fictions can in no way replace reality, but can only reshape it in order to better serve the fairness and functionality of the legal rule. Justice, interpreted as a legal fiction, must not be a lie, but exclusively an ideal legal construct with the ultimate aim of guiding the achievement and application of law. Justice is and must remain a form of fiction created and supported exclusively by the state, with the aim of guaranteeing social order, legal balance and respect for legal rules and the legal system. Awareness of this fictitious nature of justice does not diminish its importance, but is intended to make it more accountable and to make justice less a legal fiction and more a legal reality necessary for the functioning of a society characterised by respect for the law and ensuring the legal security of its citizens as the final subjects of legal rules. Justice must be a legal fiction only insofar as it is

treated as perfect, automatic and infallible, but it must not become a mere illusion and must tend towards a necessary, constructive, balanced and functional ideal, which is the very purpose of law, because without this kind of legal fiction - justice - confidence in the functional rule of law and in the legal order would turn into an unachievable ideal.

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