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TRANSCENDENT JUSTICE? LEGAL AND PHILOSOPHICAL PERSPECTIVES

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ABSTRACT. In this paper, we shall use the perspectival view on justice in an attempt to accommodate the transcendent view on justice with the adversarial practice of justice. Its main idea is that, before seeing justice as administration, it has to be seen in itself. The first section of the paper discusses the meaning of justice from a phenomenological point of view, which enables us to envision justice as transcendent. The second section of the paper describes the pluri-perspectivism of law and justice on the procedural level. Through a series of reflections upon the procedural aspects as they are operating in the Romanian judiciary, we show how the plurality of perspectives tends to converge and finds its resolution in the rule of law and Modern democracy.

Keywords: *justice, law, perspectivism, judge, democracy.*

Introduction

When people think about justice, they think inevitably about the law, but, unfortunately, one usually thinks of justice or righteousness when the law is breached and he or she is harmed. Law and justice cannot, then, be separated from the "subjective" meaning that the individual attaches to it. Alfred Schutz was one of the few philosophers who reflected upon the non-coincidence of the "subjective" and "objective meaning":

> It can easily be shown – writes Schutz – that, strictly speaking, subjective and objective meanings can never coincide, although institutionalizations and standardizations of social situations and interaction-patterns make possible their assimilation to an extent sufficient for many practical purposes. We shall encounter the dichotomy of subjective

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> and objective meaning on various levels and in connection with various problems: the ways of life of a group as seen by in-group and outgroup; the definition of the individual's personal situation within the group by himself and by the group; the notion of "group" itself as defined by its members and by outsiders; the formation of domains of relevances; the dialectic of prejudices; the concepts of discrimination and minority rights; the rank order of discriminations; equality aimed-at and to-be-granted; and, finally, the concepts of opportunity and chance.[1]

The general concept of law, previously seen as neutral, is now to be considered as relative to a "subjective" sense; the "objective meaning" is now dependent on the attitudes of various persons who judge, evaluate, and interpret a particular situation from their respective points of view.

> A norm has a certain meaning for the norm-giver and the norm-addressee. Any law means something different to the legislator, the person subject to the law (the law-abiding citizen and the lawbreaker), the law-interpreting court and the agent who enforces it. Duty has a different meaning as defined by me autonomously and as imposed on me from outside.[2]

These questions are leading us to the problem of "legal pluralism". Pluralism appears as intrinsic to the law – not only to the everyday life of the law, in which different points of view are confronting themselves, but also to the core of the law. Although it manifests itself as "transcendent", both its transcendence and its internal pluralism are manifested through institutionalised modes of expression, which are making the law react to the cultural and social environment. This movement of transcending particular perspectives paves the way for envisioning the law as more than a mere mode of governance of people's lives in everyday contexts, to reimagining it and, in certain situations, even changing it.

Both ordinary people and philosophers are thinking that "justice is the legal or philosophical theory by which fairness is administered."[3] Leaving aside the question whether justice can be reduced to fairness, we notice nevertheless that it cannot be effective unless it is administered. Is this by accident or is it an essential trait of justice? Our insight on the concept of justice consists of preserving its "transcendent" sense

[1] Alfred Schutz, Equality and the meaning structure of the social world. In A. Brodersen (Ed.), Alfred Schutz, collected papers, vol. II: *Studies in social theory* (pp. 226–273). The Hague: Martinus Nijhoff, pp. 227–228.

[2] Schutz, A. (1964b). Some equivocations in the notion of responsibility. In A. Brodersen (Ed.), Alfred Schutz, *Collected papers*, vol. II: *Studies in social theory* (pp. 274–276). The Hague: Martinus Nijhoff, p. 276.

[3] https://en.wikipedia.org/wiki/Justice

while considering it in its application in complex frameworks, which includes systems of norms and duties, hierarchical rules and, last but not least, subjective perspectives of the involved individuals, as well as their specific ways of internalization of their professional roles.

Before seeing justice as an administered process, it has to be seen in itself. The phenomenological method will allow us to see through the veil of norms and the myriad of cultural practices and to envision justice as transcendent. That does not mean that our intention is to transform justice in a metaphysical, static concept[4] or in an eternal truth.[5] Our view does not support the idea that it would be a "fundamental difference between the ordinary and the profound"[6]; on the contrary, justice will be seen rather as a transversal concept, i.e. a concept that goes through different layers and spheres of the constitution of the world.

I. The meaning of justice – phenomenological approaches

Recent approaches in legal studies suggest that the administration of justice is indissociable from the meaning of justice and cannot be overlooked. The term "administration" points to those activities related to the management of the courts (strategy, objectives, systems of evaluation and control), to their organisation (structure, distribution of the tasks, responsibilities, work load, systems of quality), management of resources (human resources, financial resources, information, buildings), as well as the operational administration.[7] The sphere of the administration of justice is by no means to be considered as insignificant. On the contrary, it influences deeply the actors in the judiciary and the overall quality of justice.[8]

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[4] *See also* Nythamar de Oliveira, "Husserl, Heidegger, and the task of a phenomenology of justice", In: *Veritas: Revista de Filosofia da PUCRS*, Vol. 53, No. 1, 2008, pp. 123-144.

[5] *See* Louis E. Wolcher, *Beyond Transcendence in Law and Philosophy*, Psychology Press, 2005.

[6] Ibidem.

[7] Andreas Lienhard, Daniel Kettiger et Daniela Winkler, "Status of Court Management in Switzerland", *International Journal for Court Administration*, Special Issue, 2012, *apud* Lorenzo Gennaro De Santis, « Une justice plus commerciale qu'industrielle? Comparaison des attentes d'une 'bonne justice' en Suisse », In: *Canadian Journal of Law and Society / La Revue Canadienne Droit et Société*, Volume 30, Issue 3, December 2015, p. 422.

[8] *Ibid.*

The above mentioned author relies on the research of Loïc Cadiet (« La théorie du procès et le nouveau management de la justice: processus et procédure», In *Le nouveau management de la justice et l'indépendance des juges*, sous la direction de Benoît Frydman et Emmanuel Jeuland, Paris: Dalloz, 2011) and Philippe Bezes et al. (« New public management et professions dans l'État : Au-delà des oppositions, quelles recompositions ? », In : *Sociologie du travail, Vol.* 53, No. 3, 2011).

The managerial culture exerted in the last decades a constant pressure on the judiciary and changed the way in which society as a whole is regarding it. The juridical culture has been deeply transformed. As a consequence, the values of the judge as an individual, as well as the values embedded in the judges' organizations, became more complex and more visible. The modern judiciary finds itself therefore exposed to the perils of bureaucratization. In this context, the discussion on justice moves itself from the fundamental insight of a "transcendent" justice to the field defined by the multiple approaches, coming from all the actors involved in doing justice and applying the law.

Edmund Husserl, the founder of phenomenology, conceived justice as independent of particular social or psychological aspects. Husserl's concept of law, state and justice can be reconstructed on the basis of his correspondence with some significant thinkers of his time, such as Kelsen, Jellinek, Scheler, and through the reading of his courses on ethics. In his attempt to secure what we would call "transcendent justice", Husserl adopted a form of transcendentalism that relies on universal structures (of consciousness and finally of inter-subjectivity). For him, the authentic community was basically rational and ethical, i.e. personal and inter-personal, and therefore independent of the state.

Although the concepts and methods that he forged are of utmost importance for the research on law and justice, the little place that he gave to the concept of "state" remains problematic. The fact that he considered the state more like an artificial construction as opposed to basic inter-personal community had the outcome that the research on state and law, i.e. on the „administration" of justice, has been neglected. But there are also exceptions. Edith Stein, one of Husserl's followers, developed a social ontology in which those formations which have a role in administering justice receive a more prominent place. She does not describe the state, for example, merely in functional terms, but as a

> "middle form of community whose sense is given in a specific social relation among law-givers, law-enforcers and those subject to the law: The state articulates and protects its sovereignty through conscious solidarity in and with its other members."[9]

For Stein, the state is a community of law-creating, -abiding, and –enforcing persons. Placing justice in this type of community offers us the ground for understanding it both as "transcendent" and administered in specific conditions. It is important to note that this community has to preserve the individual's capacity for independent

[9] Antonio Calcagno, A place for the role of community in the structure of the state: Edith Stein and Edmund Husserl,In: *Continental Philosophy Review*, Volume 49, 2006, p. 404.

thinking and judgment. As Hannah Arendt underlined, the capacity for creativity defines the uniqueness of human beings, without which we would certainly lose our humanity.

Another way of thinking about justice both as "transcendent" and "administered" is that of the "higher law", which exceeds positive law.[10] It was Heidegger, in his *Der Spruch des Anaximander*, who showed that the thinking of Being has been forgotten by Western metaphysics. In Derrida's reading of Heidegger, something which precedes Being's gathering, disjoining or dissemination is pointed to. So, the French philosopher focuses on that which precedes Being and is related to the contemplation of the law. This condition of possibility involves a "higher law", seen as a "measure" for the evaluation, interpretation and transformation of positive law.[11]

However, it is possible that Heidegger might have succumbed to this temptation to think that justice is "absolute", i.e. in a static way, and that he might not have seen "the intersection of principled norms with life as we find it."[12] Heidegger's critique of our failure to think highlighted the principle of self-legislation as a central manifestation of modernity, i.e. as a potential danger to humanity. This idea leads us to the conclusion that modern constitutional democracies are intrinsically dangerous. A further step in investigating the transcendence of justice would be then to answer the question concerning the concept of power. The relation between constituent and constituted power encapsulates the entire ambivalence of the concept of collective self-legislation. Instead of reducing Modern collective self-legislation to one or another of its aspects (legal order vs. collective self), it would be probably wiser to preserve, rather than dissolve, this ambivalence.[13]

These are the reasons why we consider that a series of investigations to be found at the crossroads of (constitutive) phenomenology and social and human sciences would open the door to an approach to law and legal practices in a modern judicial society that would take into account both the transcendence of justice and the (essential) circumstance of being done by particular subjects – as the outcome of a long process of subjectivation - in a complex interaction. Thus, phenomenological descriptions of the making of justice has to be complemented by a practical-hermeneutical approach on the ways of doing (the professions) and the milieu of doing (the organizations) in a specific judiciary.

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[10] J. de Ville, Rethinking the Notion of a 'Higher Law': Heidegger and Derrida on the Anaximander Fragment, In: *Law and Critique*, Volume 20, Issue 1, 2009, pp. 59–78.

[11] *Ibid*.

[12] G. Fried, Retrieving *phronêsis*: Heidegger on the essence of politics, In: *Continental Philosophy Review*, 47, 2014, p. 293.

[13] H. Lindahl, "Collective self-legislation as an Actus Impurus: a response to Heidegger's critique of European nihilism", In: *Continental Philosophy Review*, Vol. 41, p. 2008, p. 323.

II. Transcendent justice and pluri-perspectivism

Every person is capable of seeing what is just and what is unjust, what is right and what is wrong. We could say that unjustness actually doesn't exist; one simply cannot see the justness due to the obstacles that has not been overcome yet. Anyway, people make this dichotomy – right/wrong, just/unjust, good/bad, justice/injustice, etc. – when they feel harmed in a certain way.

Our point of departure is the question on the meaning of justice for the judge, for the party who won the trial and for the one who lost it. Going even deeper, we could ask whether the perspective of the public generally, of the society as a whole, is different from the one of the subjects enumerated before.

Sometimes, when we try to solve a certain problem, we start by thinking about the answer we would like the most. In our case, the answer would be yes, justice should have the same meaning for everybody. We want to think that justice has the same meaning for all of the actors involved in the trial: the judge - the objective and impartial arbiter – and the subjective parties – the plaintiff and the defendant[14], irrespective of which of them wins or loses eventually. In the end, the judgement also addresses the public, in order to prevent similar acts of infringing the law. This is the reason for which judgements nowadays are easily accessible to the general public, being pronounced in public sessions, published online, etc.

Considering the position of the party who won the trial, justice means, in a very narrow perspective, in the case of the plaintiff, that he obtained what he asked for in the complaint and, in the case of the defendant, that the complaint filed by the plaintiff against him was dismissed by the court. We used the term "very narrow perspective" because sometimes the parties target a total different result by filing a complaint or preparing their defense during a trial, such as gaining some extra time for the performance of a certain obligation.

Let's examine some possible situations. In the case of someone who won the trial, presuming that this one is *the plaintiff*, is it sufficient for him to read the judgement and see that the judge compelled the defendant to do what he asked? Our first answer would be affirmative. In fact, for the plaintiff other things might matter as well. If he is a person with a high moral sense, he will want to know that the rules have been followed and that the defendant had the possibility to defend himself. The reasoning

[14] We have to mention for our lay readers that while the plaintiff and the defendant are the most common parties to a trial, there can also be third parties who may intervene in a pending case by making use of various procedural instruments. This paper, however, is not about procedural rules, but a philosophical approach of justice, as the title suggests. We therefore only use scholastically suitable examples to illustrate what we want to say about the main topic.

of the ruling is also important. Only a well-reasoned judgement which correctly determines the facts, in a way that explains how the norms have been interpreted and why the defence was not taken into account, may be acceptable for the plaintiff and *for the entire society*. Besides that, if the decision has lacunae, the plaintiff may expect that it will be reversed by the higher court.

If *the defendant* is the one who won the case, he is interested in observing the rules of procedure and the grounds of the judgment for the same reasons, namely to prevent the appeal or at least the success of an appeal lodged by the plaintiff. These are not, however, the only reasons. For instance, when the court rejects the applicant's claim on the basis of an incorrectly admitted procedural defense raised by the defendant, such as the inadmissibility of the action in the form in which it was filed (for example, an ordinary evacuation lawsuit was filed instead of a territorial claim), it merely prolongs the agony of the defendant who sees the possibility of being engaged in a future trial, regardless of the applicant's chances of success (the mere use of time and financial resources to prepare for defence is a sufficient reason for dissatisfaction).

The Romanian Code of Civil Procedure, in its current version, regulates the possibility for the parties to appeal if, although apparently they have won the trial, according to the operative part of the judgment, they suffered harm because of the way the judge chose to reason the ruling.[15]

The same reasons can be transposed into the *criminal trial*, but taking into account its specificity. Thus, in the case of an acquittal, in very general terms, we can say that the *defendant* won the trial, so he was right. And in the criminal trial there is the possibility for the defendant to appeal the judgment with the mere purpose of trying to change of the grounds of acquittal.

From the perspective of society, we can say that an act of justice was done, because an innocent had a fair trial, his defense denouncing the position of the prosecutor who indicted him. In other words, the conviction of an innocent was avoided.

In the event of a conviction, we can say that the state which has exerted the criminal action through the prosecutor's office has won, on behalf of society, punishing the person who has, by his deed, transgressed a social value so important that it had to be protected by the criminal law. In such a situation, the judicial decision ordering the act of justice also performs its general prevention function, drawing the attention of those who in the future would be likely to carry out similar acts to the consequences, namely the punishment that could be applied. Of course, here we may

[15] Article 461, paragraph 2.

think of the various nuances of the applied punishment: if we speak about a correct conviction solution, the sentencing may have been wrongly individualized by the judge, being disproportionately harsh or lenient in relation to the severity of the deed committed by the felon. This analysis can go even further and discuss the execution of punishment, postponement of execution, suspension of execution of punishment in various forms, etc. Without going into too much detail about various hypotheses, we believe that the individualization of punishment is just as important as the conviction itself. For example, if the penalty is too lenient, it does not perform its function of special prevention, preventing the person who has been convicted from repeating the act, or the general prevention function, preventing others from committing similar criminal offences. If the punishment is too severe in relation to the severity of the criminal offence, the judgment did not carry out the act of justice expected by the society, this situation being equivalent with the case of an unfair conviction. Establishing an excessive punishment for an individual proven to be guilty of committing a crime, though not as serious as condemning an innocent, does not ultimately mean an act of justice.

Let us examine further the situation *when someone lost the trial*.

Can we say that justice was done from the point of view of someone who lost the trial? Would the plaintiff who believed in his case feel that justice was done in case his claim was dismissed? Was justice done in case of the defendant who repudiated the claim and the court acquiesced to his position?

We believe the answer to this question is also affirmative. The plaintiff, as well as the defendant, may accept an unfavourable outcome as an act of justice, provided that the ruling is motivated by the judge in a manner that determines the parties to believe in its fairness. In fact, many court decisions are not subject to judicial scrutiny and most of those appealed are actually upheld by the higher courts. The reasons for this may vary. For example, the party who lost the trial, even if he agrees the decision was fair, could have an interest in postponing the enforcement of the judgment, in Romanian civil procedure, as in many other continental law systems, because appeals have a dilatory effect. From the point of view of our study, however, we are interested in another possible motivation, namely the acceptance, as well as the non-acceptance of the ruling. Sometimes a straightforward and well-grounded solution may still cause discontent to the party who lost the case. Reasons of such conduct are social and psychological rather than juridical or philosophical, depending on the intimate beliefs of a person, his or her flexibility, level of knowledge or understanding, the values he or she embraces, etc. We can say that justice was done there, but the party did not have the eyes to see it.

What about justice through the eyes of a judge?

For the judge who oversees the trial, justice represents many things. Instead of making an exhaustive analysis (which is almost impossible), we prefer to provide some illustrative examples.

Maybe the most important meaning of justice for a judge is that of seeking the truth by way of ordering that all possible evidence be produced.

Apart from establishing the facts, justice also means determining the applicable provision even in cases where the judge has to override the opposition of the parties – the so-called *iura novit curia* function.

Another important facet of justice for the decision-maker could be the way he interprets the law. In practice, not very often though, judges give different interpretations to the same provisions. Why is that? Is there a guiding principle in interpreting the law? What is the source of non-unitary interpretation? If we listed the principles that should guide the judge when he interprets the law, we would realize that actually it is almost impossible to clearly point them out. In fact, thinking about some possible interpretations of the law and trying to choose the most adequate one to resolve a particular dispute, one could eventually realise that what determines the judge to adopt a certain solution in interpreting the law is his system of values.[16] The judge's guidelines are represented by the values that animate him to practice his profession and live his life generally, values such as truth, justice, adaptability, generosity, acceptance of diversity (of opinions, but not only), harmony (the role of justice being to ensure social peace), etc. However, the judge cannot exercise this attribute of creative interpretation of the law in a discretionary manner, with the sole purpose of satisfying his subjective perceptions of how a just regulation should be, because this would exceed the powers of the judiciary and create legal uncertainty. In a democratic state, the judge becomes the guardian of the fundamental values of the society and of the rule of law, without, however, being transformed into a legislator and implementing, instead of the latter, constitutional and legislative reforms.

Romania, like many other European states, has passed through a brutal totalitarian experience. We can ask legitimately what a judge could do in such conditions, when the Constitution and the legal system cease to operate properly. Although it is theoretically possible to take refuge in the more technical areas of law, even in systems characterized by dictatorial tendencies we will always find judges who fulfil their duty honestly, in good faith, in a progressive and courageous manner. However, the abolition or significant aggression of the judge's independence generates a significant

[16] *See* A.A. Chiș, Gh. L. Zidaru, *Rolul judecătorului în procesul civil,* Universul Juridic Publishing House, Bucharest, 2015, p. 289-291.

risk of self-censorship and even external explicit or implicit interferences. It is therefore reasonable to assert that a truly independent and just justice can exist only in a state in which the fundamental requirements of the separation of powers and of their self-restraint in relation to the natural rights are truly fulfilled, not only in theory. Justice is not functional in a state in which the other powers deny the fundamental values of the rule of law and democracy[17].

Who judges the judge? Or, put differently, what does society think about justice?

Almost a century ago, Lord Chief Justice Hewart became famous for having affirmed in a court opinion[18] that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". The sentence became widely known among lawyers, legal scholars and beyond, particularly for its second part. We have already talked about how justice should be done; at this point, we look at how justice, after having been done, is perceived from the outside. The quote itself seems so demanding and imperative that one can almost read it as implying that if justice is not "manifestly and undoubtedly" *seen* to be done, it cannot be called justice. Would one be wrong in stating that, from this external standpoint, the only thing that really matters – or, in any event, matters significantly more – is the *appearance* of justice being done? We think not. Upon reflection, there is enough sense in saying that the society does not give too much weight to the actual substance of this or that dispute that was brought before a given court. After all, why would it? It is quite natural to think that the merits of the dispute are a concern for the parties and the parties alone. The society, however, does care about *how* justice is delivered. Is there enough reason to believe that judges conduct themselves in a neutral and generally ethical way? If not, do the parties have effective ways of requesting the removal of a judge who has been displaying a questionable behaviour in court? Both the former—the legitimate belief of the people that judges are impartial—and the latter—the possibility of the parties to challenge their judges—are of decisive importance for the public eye. Equally important for society is to know that, should issues concerning partiality be raised by the parties to a lawsuit, there is a higher forum—or, at any rate, a different one—that is entitled to contemplate and ultimately rule on those issues for, as another grand phrase of the law puts it, "no man shall be the judge in his own case."

[17] "When democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out", European Network of Councils for the Judiciary - *London declaration on Judicial Ethics 2010.*

[18] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)

Surely, there are other layers to the issue of the appearance of justice being done than the ones contemplated above. For instance, from a macro perspective, a self-aware society would expect the judiciary to be a body of professionals that reflects the social fabric of the country because such expectation would speak to the element of trust that we have seen is so important. For present purposes, however, suffice it to conclude that whether a given ruling is able to generate a trustworthy appearance of justice is by no means something *externally attached* to the idea of justice, but very much intrinsic to it.

In this paper, we hope to have shown how the idea of justice is an organism in its own right and very much alive, not by coincidence but by design: through the crafting of the legal professionals and the preferences of its end users, justice, as well as the process of administering it, have indeed come to accommodate a plethora of views and expectations, some contrasting, some complementary. Beyond all its ways of being done, however, justice can still can be one for all.