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"Justice is conflict" (Heraclitus)

In this paper I shall attempt to establish that the idea of Justice- as the ideal regulator or criterium which serves to evaluate positive law critically – has intimate ties with the notion of Argumentation.

How is justice related to legal reasoning? At first sight we can see a relationship
(i) in the method of rational argumentation (the thesis of the unity of practical reason);
(ii) in the object of the Theory of Justice (the first principles of social or distributive justice, and their justification), and
(iii) in the (logical) consequences of the model or rule of justice that we adopt (the positivising and development of principles in Law). A theory of Justice – whether a moral or a political theory – is, like reasoning in law, a part of practical discourse.

Since ancient times the distinction has been drawn between law as it is and law as it should be. The discrepancies, in existing literature, have been rooted in the epistemological feasibility of establishing the second of the terms in the proposition. In my opinion, a democratic system – Politics – demands that the question be admissible, and a rational discussion of what is fair be possible.
On the one hand, the idea of what is fair has been linked to the fulfilling of positive duties; that is to say, duties imposed by the law. According to this point of view the fairness of an act is measured by its conformity with the laws in force. The trouble with this point of view – one which has the advantage of allowing a person to know what is fair, by referring to the laws currently in force – is that it does not allow for guidance over the workings of the legislator or for a critical evaluation of legislation. Dogmatics turn into mere commentator´s work, the judge becomes a blind instrument of the law, and the legislator – the will of the

majority – reigns supreme as judge of what is fair. This point of view (Kelsen 1982, for example) gives up any possibility of finding a criterium of fairness beyond positive law, since it considers that project to be irrational. However, it is clear today that Positive Law can be, and must be, evaluated from an external point of view. In fact, judges do get away from the written text on some occasions (although judges generally see justice as consisting of the application of positive law), and scholarship makes critical analyses of current standard practice. Justice does not always consist of adapting oneself to norms which govern society at one particular moment.

Kelsen himself was conscious that a relativist theory of knowledge is exposed to two dangers:
(1) a paradoxical solipsism, since if one´s ego is the only reality which exists, it must then be an absolute reality (which entails an egotistical negation of the you); and
(2) a pluralism which is also paradoxical: if we have to admit the existence of many egos, it seems inevitable that there will be as many worlds as there are subjects to be known. To avoid these problems, Kelsen considered as true knowledge the one resulting from the mutual relationship between different subjects to be known. It is supposed that the subjects to be known are equal, and that the processes of rational knowledge are equal, in contrast to emotional reactions. This enables one to presuppose that the subjects to be known, as a result of these processes, are in conformity with each other. Moreover, a restriction of liberty is needed under which all the subjects are equal (Kelsen 1982, pp. 113-125).

It is possible – or, at least, we must act as if it were – to deal rationally with the term justice, and elaborate rigorous conceptual constructions, in order better to understand the set of problems of justice. Justice, then, exists prior to Law and it operates as the legislator´s goal. Only in line with this second point of view can we speak of a Law – Nazi Law, for example – as being unjust. The trouble lies in deciding what is fair and what basic criterium will sustain a theory of justice.
Once the attempts at a substantial definition have been abandoned (justice is not just something available over there, among the universe´s furniture, registered in nature, and attainable by the senses), a rational approximation to the problem of justice is still feasible. What is fair is what derives from a particular procedure of rational debate, where the participants see each other as free and equal. It is not

enough that the precept should be a reflection of the will of the majority, because the majority may cease to be such, and its laws may be repealed. What is required is a procedure which ensures the truth of the norm – at least, a truth arrived at by consensus.
The main contribution of theories like those of John Rawls or Jürgen Habermas is the possibility of positively evaluating our institutions. The question they try to answer is this: How to have at one´s disposal a common rational basis for our institutions without betraying their diversity? The answer is the argumentation model underlying a Theory of Justice. In other words, a Theory of Justice must be based on a methodological construction – a theory of argumentation – that recognizes and channels the opposition which is essential to politics.
To this effect, we understand argumentation as an act of complex language which it is only appropriate to practice in a dialogue (whether real or ideal) when a declaration (or something which presumes to be the truth) runs into problems, and we accept that the problem must be solved by discussing it, without resorting to physical force (Atienza 1996, p. 235).

In this line of thought there is a close relationship between justice and argumentation, since the problem of justice is always worked out in a situation of dialogue, in which the parties solve their conflicts and balance their interests, using criteria which must be justified and not coerced.
Rawls (1985) works out a method of "pure procedural justice", where there is no previous criterium of justice, but where what is just is determined by the procedure itself (in other words, a normative statement is correct if it can be obtained by applying the procedure).

Starting from the idealization of the conditions under which moral and political discourse is developed ("the original position" plus "the veil of ignorance") he attempts to derive principles of justice applicable to the organization and distribution of political power ("the basic structure of society"), with the aim that such a public conception of justice be acceptable for all reasonable comprehensive doctrines currently in force in society ("overlapping cosensus"). The method goes from critical to positive morality and vice versa, from principles thus reached to our most deeply rooted moral intuition, continually being adjusted ("reflexive equilibrium") and eluding metaphysical questions ("method of avoidance"). Rawls thus places argumentation right in the centre of his Theory of Justice.

The nucleus of one of Rawls` theories is an argumentation model which combines the idea of "rational" with that of "reasonable". The rational means directed action – the choice of means – for the satisfaction of the desires or ends of the agent (the good); while the reasonable consists of coordinating one´s actions with those of others, starting from a principle of impartiality from which the agent and the others can reason together. The key – shades of Kant´s influence here – lies in the priority of what is right over what is good, of what is reasonable over what is rational (Rawls 2003, pp. 67 et seq.).

Communicative rationality, in turn, expands the possibility of coordinating actions without resorting to coercion, and of resolving conflicts of action by consensus. Communicative practice refers to "the practice of argumentation as an instance of appeal which allows communicative action to go ahead with other means when disagreement arises which can no longer be absorbed by daily routines, and which, however, can not either be decided without employing power directly or strategically" (Habermas 2002, p. 36).
At this point there arises the tension between two models of Rationality, one understood as "reconciliation" through the public use of reason, and the other as a choice between alternatives put to debate, in which a one and only correct answer is not necessarily expected to be reached (a deliberative conception of democracy, which leaves open important questions – or which, at least, leaves open more important elements than the first one – and which submits the choice of alternatives put to debate to nothing more than "the coercion of the best argument").
Aristotle – heir to the tradition of the sophists – understood that conflict is the force generated by politics, and the phenomenon that needs to be regulated by Law. It is the potentiality of conflict that makes social power necessary, together with and a set of norms which put society "in order", coordinating the action of individuals and groups (Aristotle, 2000).
For Habermas the Rule of Law makes it possible to extend the principle of discussion to the field of human action governed by law. "Valid norms, in conditions which neutralize any motive other than that of the cooperative search for the truth, in principle have also to be able to gain the rationally motivated assent of all those affected" (Habermas 2002, p.38). In virtue of their susceptibility to criticism, rational declarations are prone to correction (and for that reason the concept of a rational basis is closely related to that of learning). The democratic nature of the norms acts as an assumption (prima facie) in favour

of the morally justified character of the same. But it is always possible to convert once again a problem into a proposition, and pass a law with a different content, following the same procedure.
Thus Habermas turns on its head the categorical imperative of Kant, saying that those norms are justified whose consequences can be accepted by all those affected given ideal conditions of dialogue. In other words, the right path is to act in accordance with a maxim that all, in a situation of freedom and equality, and respecting the rules of rational argument, can agree to as a universal norm. In Habermas the individualistic model is replaced by discourse or dialogue (Atienza 2003, pp. 203-204).

Communicative reason (action orientated towards agreement) is upheld, according to Habermas, by four idealizing presuppositions (suppositions that the actors must adopt when they enter this practice with no reservations):
(1) the supposition of a world of objects which exists independently;
(2) the reciprocal supposition of rationality or "responsibility";
(3) the inconditional validity of the pretensions of validity which, like truth or moral rectitude, go beyond any particular context; and
(4) the necessary dependence on discursive justification: rational discourse as the final and inexhaustible form of all possible justification (Habermas, 2003).

In order to advance in the successive and, it seems, irreversible adjustments towards a "Social and Democratic Rule of Law", it is necessary to emphasize the contractualist aspects of Rawls' theory and the procedural and communicative aspects of that of Habermas. The source of democratic legitimacy of the norms, as opposed to retreating authority and tradition, is real participation – their consent – on the part of the people affected.

So what is fair is reached by following a particular procedure of rational dialogue. Following in the steps of Alexy (1985), in a legal theory the ways of presenting the procedure depend
(1) on the individuals who take part in the procedure;
(2) on the exigencies imposed on the procedure, and
(3) on the particular nature of the process of decision.

In this last respect, the rules of discourse and the process of decision may or may not include the possibility of modifying the normative convictions of the individuals which exist at the beginning of the procedure (the starting point of the

discussion). This possibility does not appear to be open in Rawls´ model regarding the choice of the principles of justice individuals make in their original native position (ideal individuals who must comply with the demands of the "veil of ignorance"). On the other hand, a theory of discourse like that of Alexy, which is inserted in the very tradition of Habermas, has these precise characteristics because

(a) "an unlimited number of individuals can take part in the procedure, in the situation in which they really exist", and

(b) "the real and normative convictions of the individuals can be modified in virtue of the arguments presented in the course of the procedure" (Alexy 1985, pp. 46-47).

The aim of the Law is to resolve conflicts between people, and conflicts of rights (which already appear in the Greek tragedies) have much to do with the equitable distribution of benefits and burdens. In this case, what is equitable has to do with a rational and reasonable justification. We, human beings (logikon zoon kai politikon) can, by our arguments, reach agreements to regulate our rights.

What are the possible criteria of what is fair as a result of the procedure of rational and democratic debate?

(a) Since Aristotle the idea of justice pays tribute to the idea of equality. Commutative justice seeks to establish or ensure the position of equality between people. Distributive justice is that which guides the action of the state so as to ensure rights, benefits and burdens. The former is proper to private law, the latter to public law. In order that equality should operate in the private sphere, a precise act of distributive justice is needed, which recognizes the rights of people as equals.

In the public sphere justice likewise presumes to recognize the other person as an equal (Kant, 1973). In a democracy everyone is recognized as having the same capacity to take part in the process of forming the basic political-juridical system. Equality is a basic condition of society (Rawls 1985, Dworkin 1984). If an act or an institution harms the principle of equality, then it is not just.

(b) Justice, as Aristotle also said, is common usefulness. An act is just, not according to how much it benefits the author of it (or the title-holder of a right), but rather in the measure of its favouring or increasing common welfare. If it harms public welfare, then it is not just.

The primary version of common welfare is social peace (or the idea of order, of society as a cooperative enterprise), the eradication of violence, the solution of conflict through agreement or the decision of a third party – after hearing the arguments of both parties – based on proofs whose acceptability points towards the universal auditorium (of that particular community).

(c) Another attempt, on the part of Aristotle, is the distinction between the general and the particular dimensions of justice: justice as fairness. Justice sometimes obliges one to get away from the general mandate contained in the norm in order to attend to particular features of the particular case (and then it is the judge who is creating law). What is fair, being just, is not just according to the law, but a correction of legal justice. The reason for this is that the law is always something general, and there are cases of such a nature that it is not possible to formulate a general proposition for them which can be applied with certainty (Aristotle 1970, pp. 86-87).

What is just is what is foreseen by the legislator, but where the foresight of the legislator does not reach, it is the judge who is called upon to hand down a just solution. That is why positivism has recognized the judge's margin of discretion: "The Law (or the Constitution) is what the courts say it is" (Hart 1994, pp. 141-147). All the same, it is still possible to control the judge's decision rationally, incorporating the principles into the concept of law as guide and limit of the judicial use of discretion.

In any case, a private Justice would be a contradiction of terms; every legal solution should be universalizable; this is one of the criteria – the first one – of rational argumentation in MacCormick. In a few words, the requisite of universality is implicit in deductive justification. This demands that, in order to justify a normative decision, one must at least have a premise which may be a general norm or a principle (MacCormick, 1978).

Dworkin, as is well known, has centred his criticism of positivism (as far as a model referred to rules) in that it does not mention the fact that, frequently, jurists and judges – when they have to justify their decision or reasoning in difficult cases (cases which can not be subsumed, that is, cases where the solution is not to be found in the rules) – resort to standards or principles which one supposes derive, or are inferred, from the system; that is to say standards or principles which are not the product of the mere discretion of the judge or jurist.

According to Dworkin the judges can, and indeed do, take decisions based on three kinds of standards, which it is convenient to distinguish suitably: “policies”, “principles” and “rules”. “I call a policy the sort of standard which proposes an aim which must be achieved: generally an improvement in some economic, political or social feature of the community (although some aims are negative, for example when they stipulate that some existing feature has to be protected from contrary changes). I call a “principle” a standard which has to be maintained, not because it favours or ensures an economic, political or social situation which is considered desirable, but because justice, fairness or some other dimension of morality demands it. Thus the proposition that traffic accidents must be reduced is a policy, and the proposition that no man may benefit from his own injustice is a principle” (Dworkin 1984, pp. 72-73). Principles and policies cannot be identified by their origin (or pedigree) like norms; but rather by their contents and argumentative force.

Regarding the argumentative use of principles and policies – the nucleus of the argumentation in hard cases – most authors think the fundamental issue is the greater importance of the reasons for correctness over the reasons of an instrumental or strategic nature. Alexy expresses it thus: “the result of a rational discourse would be a system of fundamental rights which includes a prima facie preference for individual rights over collective welfare”(Alexy 1994).

The first step in legal argumentation consists of putting into their corresponding relationship the hypothesis and the norms: of identifying and relating the contents of the legal norms in force which regulate the situation concerned. The next step is to examine the hypothesis compared with the text of the norms and with the help of the tools of legal method. This implies tackling the problem of the meaning of the normative propositions (with the eventual problems derived from the vagueness, ambiguity and open texture of legal language), and then to resolve eventual contradictions and “lagoons” that may appear.

Now, as is well known, even if we are to assign the words the usual meaning with which they are used in a linguistic community, we still have to resort to consideration of value or pragmatism (one can refuse to follow the meaning commonly attributed to a term if that leads to a result at variance with the values which justify the norm or which underlie the system). On the other hand, traditional methods of interpretation are not axiologically neuter, nor do they serve to ensure univocal results (legal discourse, backed by the rules of traditional method, on occasions tends to reproduce the vision of a dominant world, and therefore it is sometimes necessary to make an additional effort not to

get carried away by the “siren songs”). Besides, conflicts at the level of principles – like those that confront equality with efficiency – can not be resolved according to the three classic criteria for solving normative contradictions (the principles of “lex superior”, “lex specialis” and “lex posterior”). This is so because, generally, tension is produced at the constitutional level, within the constitution itself (and therefore of similar rank and of period of coming into force); because we do not have principles in dictionary order; and because, since we have an atmosphere of open application, principles do not lend themselves to being catalogued a priori as general or special.

So we have to resort to techniques of interpretation and reconstruction of the system, techniques which operate on the basis of norms (in a wide sense) which are officially recognized and which can be considered rational, in the context of and in accordance with the demands of the democratic and constitutional Rule of Law.
On one hand, as Alexy has observed, the understanding of a norm supposes the understanding of the system to which it belongs. On the other hand, it is not possible to understand a system of norms without understanding the particular norms that form part of it. This leads us to the problem of establishing unity and coherence (Alexy 2004, p. 42).
Coherence is one of the basic criteria for interpretation and argumentation in law; it has to do with the ideas of systematic unity, order and absence of contradiction. The idea of coherence constitutes, from the point of view of dogmatic labour, the purpose of building the system of legal order and the foundation of criticism of it. Alexy and Peczenik have attempted to come up with a concept of coherence and the criteria to measure it with: “The more the statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory” (Alexy & Peczenik 1990, pp. 130-147).

One of the tasks of dogmatics consists, then, of contributing to overcoming the deficit of coherence which the legal systems displays, invoking principles to justify or reformulate particular norms which induce inconsistent results. It is, then, a matter of “coming and going” from rules to principles and from principles to rules, with the aim of;
(a) deriving from the set of existing rules, the principles which underlie them and which justify them, with a reach that goes far beyond the set of rules in itself: that is to say,

(b) in a way that such principles serve as a method of interpretation of the said rules, but allow us (in future) to orientate their interpretation, and to infer other rules too.

The idea of justice which one thus obtains is a formal concept; that means that it only determines the need for equal treatment and the general form of the law (Perelman, 1964). It does not tell us, most of the time, what content the law must have: the criteria of equality and how those defined as equal should be treated.

In any case, this does not imply an absolute relativism since from that formal notion of justice are derived absolute demands for the Law. Thus the Law, while it cannot impose or demand the fulfilling of certain ethical duties, can indeed make the project of life of each person possible, in the sense of ensuring such a margin of exterior freedom as will make people´s moral freedom possible. In this way Human Rights arise as principles with a general value.
Certain basic principles of general application also emerge, which arise from the formal idea of justice, such as the independence of the judges, due process, and the presumption of innocence. In the same order we can place the principles that demand that the norms should be general, clear and not retroactive (Fuller, 1969).
Society is thus conceived as a contractual relationship, and the community (together with the law which regulates it) as a building being built (Atienza 2006, p.33).
To sum up, in order to be just, a positive norm must contribute to common welfare, respect the principle of equality, and be derived from a determined procedure of rational discussion. If a normative act damages common welfare, if it treats people as unequal or if it is not justified – in the sense of not being a product of a procedure of rational dialogue – then it is unjust.
In consequence Law – and the idea of justice which underlies it – is being built and created anew constantly, through practices of public discussion aimed to configure and give meaning to principles and norms which are socially relevant, in order to find a correct solution for each case. Thus the right of might, and the right of cunning (to which the Iliad and the Odyssey are dedicated) give way progressively to the idea of justice; and the sovereignty of will opens the way to the rule of reason.

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