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Main Doctrinal Theories of Justice

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1.- Introduction

From the return of moral philosophy in the 1950s to the beginning of the 1970s, the outlook for ethical and political philosophy was especially calm, with no particular novelties or variations. This was due to a wide consensus surrounding meta-ethical skepticism, with philosophical positions such as moral emotivism, subjectivism, and relativism. The position maintained was that it is difficult to know what justice is, that all depends on personal and subjective evaluations beyond any absolute or objective and hence unquestionable 'justice'. People perceive the idea of justice differently depending on their own ethical codes and value systems.

Utilitarianism offered an exception. According to this line of thought, the pursuit of pleasure or wellbeing is key, complemented by a series of empirical calculations that would allow the realization of this pursuit. What would be just is whatever would allow wellbeing to be achieved, with more objective parameters for measurement and hence an escape from ethical relativism. If conduct is useful it is just, and it is useful if, having calculated and measured the pros and cons, the former outweigh the latter.

However, in the 1970s the aforementioned calm philosophical outlook was replaced by a detailed questioning of the predominant trends of meta-ethical skepticism and utilitarianism. The new movement, represented in the Anglo-Saxon tradition by John Rawls, defended rationalism and cognitivism in matters of justice. He reopened a democratic public discourse, in dialogue with other possible options and approaches. The renowned academic, who led legal philosophical thought during the last century, argued that it was possible to rationally calculate what the idea of justice consists of, such that it would no longer be a merely subjective viewpoint but could be represented by objective parameters.

The reaction to this liberal movement was clear, distinct, and did not take long to appear. Not everyone agreed that an objective and rational understanding of the notion of justice was possible. In the 1980s, there was a strong attack on Rawls' views by various Anglo-Saxon writers who were known as 'communitarians'. They set out to offer an alternative to the liberal proposals, recalling the ethical views of Hegel and Aristotle. Thus occurred the exhaustively studied debate, about which rivers of ink have been spilt, between liberals and communitarians.

Perhaps the authors with most weight and influence representing the communitarian theoretical stance were the North Americans Alasdair MacIntyre, Charles Taylor, Michael Walzer, and Michael Sandel. The discussion centered on "atomism", which defended the importance of the individual as opposed to society, and "holism", which supported the prioritization of society over the individual. In other words, while liberalism placed the will of the individual at the center of its theories, communitarianism did the same with the will of the group.

Reaction was swift. The various liberal theorists did not wait long to criticize the communitarian standpoints. After almost fifteen years of intense debate, today it appears that the argument between liberals and communitarians has by and large been overcome, giving rise to the current hybrid trends.[1] In general, thought oscillates between extremes, with mixed, eclectic, and unified theories then emerging which seek to identify synthetic solutions lying between a thesis and its antithesis. Advances can then be made from intermediate stances.

[1] Ronald Dworkin, *La comunidad liberal*, Preface by Daniel Bonilla and Isabel Cristina Jaramillo, Universidad de los Andes, Siglo del Hombre Editores, 1996, pp. 17-40.

Apart from considering classical theories of justice, from Aristotle, Plato, Saint Thomas Aquinas, the Bible, and the Quran, our aim is to focus on the contemporary vista. In the following pages, we hence review some of the modern ideas of justice advanced by legal philosophers of our time. We refer, among others, to justice as fairness in the work of Rawls; to the thinking of the German philosopher Jürgen Habermas; to the theory of one of the leading exponents of Anglo-Saxon thought, the recently deceased Ronald Dworkin, who was globally renowned particularly following his work *Taking Rights Seriously*; and, also, to other important contemporary ideas of justice, including those of Nozick, Posner, Sadurski, Marxism, and Feminist theories.[2]

We hence cover the subjective matter of the various thinkers who have considered our central theme of justice. A second part of the work deals with the objective part of the problem, analyzing some of the principal themes relating to justice.

2.- Justice in the Bible

The Bible offers numerous passages on justice. Genesis 3: 1-24 describes the expulsion of Adam and Eve from the Garden of Eden for having infringed the Creator's order not to eat the fruit from the forbidden tree. Genesis 18: 20-33 and 19: 1-28, in the context of the destruction of Sodom and Gomorrah, considers the number of just men required to prevent its occurrence and whether a single just man in those cities would be sufficient to avoid their destruction. In turn, a reference is found to the law of retaliation (*lex talionis*) in Leviticus 24: 17-22: "eye for eye, tooth for tooth". Matthew 5: 1-12, 38-42 lists the beatitudes, proclaiming the poor in spirit, the persecuted, those who hunger and thirst for righteousness, etc. to be blessed, in a clearly reformatory and revolutionary spirit that would place the lowest and most disadvantaged as first in the Kingdom of God. Luke 15: 11-32, another interesting passage, contains the famous parable of the prodigal son who, after leaving home and having misappropriated and misused his father's assets, returns to his father, who in turn accepts and forgives him because he was a son who was lost and has been re-found, in the face of the scepticism of the other son who had always remained at his father's side. Finally of note is the passage in Matthew 25: 14-46, the parable of the talents unequally distributed among various people, of whom some limited themselves to burying their talents without achieving any gain whatsoever, while others multiplied their initial value.

Retributionist yearnings, to a certain degree, approximate revenge instincts, the returning of evil for evil. Many writers reject, as vile and petty, the abandoning of oneself to the blind, *vindicta* instincts. Some theologians arrive at the same conclusion (especially is this true among Protestants). For them, the throne of punitive justice is only claimed for God. They base this finding on many sacred texts which put the accent on justice being only in the hands of the Lord and not in those of men.

Such a belief is nothing new. Chapter 22 of Exodus places in the mouth of God the commandment "Thou shalt not kill", and Chapter 13 of St. Matthew tells of, and comments upon, the parable of the wheat and the chaff: "Men do not rip them up... That is a task for the Father along with his angels". There are many other Biblical quotations which could be used to back up the contention that punishment is the negation of Christianity, whose essence is, on the contrary, forgiveness. Thus: "Judge not that ye be not judged"; "Do not allow yourself to be overcome by evil, rather strive to overcome evil with good"; "Love thine enemies"; "Do good unto those that hate thee, pray for those who persecute and revile thee"; "Do not return evil for evil, nor curse for curse, rather indeed offer blessings"; "Do not take justice into thine own hands, beloved, give first place to the wrath (of God)"; "For it is written, Vengeance is mine, I shall do justice –saith the Lord; Rather, if thine enemy is thirsty, let him drink, if he hungers, let him eat"; "Whosoever doeth thus, heaps up burning coals upon his own head". Here is the idea that evil is not wiped out by another evil (*malum pasionis*), quite the opposite, evil is only conquered by the good (*bonum actionis*).

[2] Geert Demuijnck, *Les conceptions de l'equité dans la theorie économique et la philosophie politique*, Lille, Laboratoire de Recherches Economiques et Sociales, 1998. Rainer Forst, *Kontexte der Gerechtigkeit: politische Philosophie jenseits von Liberalismus und Kommunitarismus*, Frankfurt am Main, Suhrkamp, 1994. Tom Campbell, *La justicia. Los principales debates contemporáneos*. Translation into Spanish by Silvina Álvarez, from *Justice*, Barcelona, Gedisa, 2001. María José Falcón y Tella, *Equity and Law*, translation into English by Peter Muckley, from *Equidad, Derecho y Justicia*, Madrid, Editorial Universitaria Ramón Areces, 2005, final revision by the author, Leiden-Boston, Martinus Nijhoff, 2008, pp. 231-249.

Below, we shall examine some Biblical texts which serve as basis for justice, as also with the idea of forgiveness, and we shall distinguish between the teachings of the Old and the New Testaments. [3]

Sacred Scripture, in various passages, admits *ius puniendi*, for instance, the above cited Chapter 22 of Exodus, where the precept of punishment by death is envisaged for the worshippers of idols, for those who kill a thief who robs by day, and the like. In general terms, present-day exegesis of Biblical texts, with rare exceptions, agrees with the conclusion that the Old Testament does not reprove *retributive* justice. [4]

As concerns the New Testament, exegetes debate much more over the theme of punishment. In fact, there do also exist New Testament texts which have punitive features. Recall, for instance, the classic quotation from Saint Paul to the Romans:

> For the Prince is a Minister of God for your good. But should ye work evil, tremble, because not in vain hath he unsheathed the sword, as the Minister of God, to exercise his justice, punishing he who did evil. (13. 4).

There are also Christ's words to Pilate: "Thou wouldst not have power had it not been given thee from on high".

Nevertheless, one of the characteristics of the New Testament, as opposed to the Old, is, precisely, that it is based on love and not fear, on a god become Man and friend, not on a god the Father who is quick to anger, on forgiveness and mercy rather than on vengeance and retribution. [5]

> Indeed, the Evangel demands forgiveness, though he admits the necessity for human penal justice:
> If thy brother offend thee, see him and make him see, alone together, the two of ye. If he heedeth thee, thou hast won over thy brother. Should he heed thee not, call upon another or upon another two, so that the whole question be cleared up, supporting thyself with two or three witnesses. Should he not heed them, tell it to the community, and, if he heed not the community, consider him as a pagan or as a tax collector. (Matthew, 18. 15-17; Luke, 17. 3)

Along the same lines of forgiveness and mercy, the Scriptures say: "Do not repay evil with evil, nor insult with insult, but answer with blessings, for this are ye called upon"; "Should thine enemy be hungry, give him to eat, should he thirst, give him to drink, thus shalt thou bring out the colours to his cheeks"; "Do not be overcome by evil, overcome evil with the force of good" (Peter I, 3. 9; Romans, 12, 20ff). Forgiveness is thus set out as the salve between victims and delinquents. *Homo faber* works, but, should he abandon *homo pius*, he does not create.

How might one resolve this opposition between certain texts favourable to *ius puniendi* and others which recommend an endless mercy? According to Beristain:

When the New Testament forbids retribution, it refers to individuals insofar as they are private persons, stripping away the attributes and the obligations of social authority. On the other hand, where social relations are treated of, punitive authority is permitted quite clearly.

The Biblical injunction to forgive does not exclude punitive sanction. Forgiveness destroys the punitive demand on guilt, but not the re-balancing demand of punishment. Forgiveness destroys the punitive exigency of third parties, but not the delinquent's self-requirement nor that of the common good. The State may and must recognize and meet the demands of punishment.[6]

What is unworthy and cruel is vengeance, a very different thing from social vindicta or punishment. Greek mythology already symbolizes this in the dualism between *Nemesis* and *Themis*. The two lead in diametrically opposed directions.

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[3] J. Arthur Hoyles, *Punishment and the Bible*, London, Epworth Press, 1986. N. Lillie, "Towards a Biblical Doctrine of Punishment", in *Scottish Journal of Theology,* 21, 1968, pp. 449-461. Jeffrie G. Murphy – Jean Hampton, *Forgiveness and Mercy*, New York, Cambridge, 1989.

[4] *Cf*. Richard Adamiak, *Justice and History in the Old Testament: the Evolution of Divine Retribution in the Historiographies of the Wilderness Generation*, Cleveland, J.T. Zubal, 1982.

[5] Antonio Beristain, *La pena-retribución y las actuales concepciones criminológicas,* Preface by Eugenio Raul Zaffaroni, Buenos Aires, Depalma, Criminología contemporánea, 1982, p. 127.

[6] Antonio Beristain, *La pena-retribución y las actuales concepciones criminológicas, op. cit*., pp. 31 ff., especially p. 35.

Revenge grows from the blind passion of the offended, while retribution is born of the personal, legal guilt of the delinquent. Private persons, in no way superior to the delinquent, exercise private revenge, but retribution is carried out by public authority, with a right delegated by God through the People. Whim, force, unlimited passion are the stuff of private revenge, while proportional equality between crime and punishment limits retribution. Private revenge seeks the utmost harm for the offender as its supreme goal. In contrast, retribution attempts to secure reparation, and the recreation, of the legal order and social well-being.

In conclusion, taking into account modern exegetic orientations, and the text itself of Holy Scriptures, we might affirm that the objection of those who deny retributive justice, basing their arguments on Scriptural texts, lacks consistency. Reason forbids private revenge, but approves of public, social *vindicta*, of retribution. A private person may never impose punishment, not even the smallest, not even upon the greatest criminal, not even should he himself have been the victim of the crime. All right to punish is energetically refused the private man, though legitimate self-defence is recognized. Were it otherwise, the subject would be blinded by being the judge in his own cause.

Nevertheless, theologians, the classics, like the Spanish Theological School from the XVIIth century on, allow of retribution in the hands of legitimate authority, which has received *ius puniendi* directly from God, and not from mere subjects, though by means of them. This theme is also seen when studying the rightness of the Death Penalty and of war, or when discussing: whether masters may whip their servants; teachers, their pupils; husbands, their wives, and so on... adding the comment, somewhat shocking today, "only and always when it is necessary".[7] This is the idea that:

1) Authority "may" punish because God, Lord of All, has delegated power to it.
2) Authority "must" punish because Society's conservation and the legal order demand punishment of crimes.

3.- Plato's *The Republic*

Justice is the central issue for the whole of Plato's philosophy, and this thinker developed his famous theory of Ideas purely to resolve this issue.[8] Ideas are transcendental entities existing in an ideal world. They represent the absolute values that ought to materialise in this world, though they never do so completely. The main idea, to which all the rest are subordinate, is the absolute Good. This idea presupposes that of justice, to which knowledge almost all Plato's dialogues aspire. The question of what justice is coincides with the question of what the Good is. Plato himself admits that elucidating the idea of the absolute Good is beyond any rational knowledge. Seeing the absolute Good is only possible through an experience which is mystical in nature, available only to a chosen few through divine grace.

In his celebrated work *Republic*, Plato presents "what is justice?" as one of the major questions of his philosophy, reflecting upon conversations held by his mentor Socrates with colleagues, as often occurs in Plato's dialogues. He focuses on the issue of the concept of justice. Faced with the suggestion that justice is paying one's own debts and giving everyone what is due to them, Socrates argues that it would not be fair, for example, to pay a debt to an evil or mad man. Faced with the suggestion that nobody would be just if they were able to avoid punishment by being unjust, Socrates argues that one must be just simply for the sake of so being and because it is good in itself for the person that acts justly.

Plato also suggests that, in addition to being political, justice is a linguistic matter, as two terms were used by the Greeks to define the concept. On one hand is the word *isotes*, which means 'equality' and is the term most commonly used to talk of justice. On the other hand is the word *dikaiosune*, used by Plato and Aristotle for justice and meaning 'righteousness'. The Greeks are not in agreement over the use and interpretation of these terms, as occurs in other languages and cultures.

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[7] *Cf*. Francisco de Vitoria, *Relectio de potestate civili*.

[8] Plato, *La República*, Spanish translation by Conrado Eggers, Introduction by Álvaro Vallejo Campos, Milano, Silvio Berlusconi Editore, 2012. Robert C. Solomon – Mark C. Murphy(eds.), *What is justice? Classic and Contemporary Readings,* 2nd. ed., New York-Oxford, Oxford University Press, 2000, pp. 21-22.

4.- Aristotle's *Nicomachean Ethics*

Aristotle, in his *Nicomachean Ethics* –a series of notes of lectures, supposedly edited by his son, Nicomachus – begins by dividing justice into two categories: a general concept of justice as "law abiding", and a particular concept of justice as "equitable or fair".[9] As with Plato, the concept of *dikaiosune* as 'righteousness' must be taken into account, understood in Aristotle as a form of 'virtue', not absolute but relative to others. Particular justice is then divided into "distributive" and "rectificatory" categories, and at this point his idea of justice approaches our notion of fairness. Distributive justice relates to what people deserve. Aristotle also refers to justice in exchanges and transactions – a form of rectificatory or "commutative" justice – both in voluntary acts such as purchases and loans and in involuntary acts, such as being insulted or being the victim of murder. It is in the discussion on distributive justice that Aristotle introduces the idea of 'equality', understood as "proportion", or, to be more precise, "geometric proportion: equals must be treated equally, and the unequal unequally, in proportion to their inequality".

Central to Aristotle's *Ethics* is the idea of justice as a state of character, a collection of dispositions, attitudes, and good habits, a virtue of fundamental importance for legislators and judges. In the aforementioned rectificatory justice, the idea of equality comes into play not as a 'geometric' but as an 'arithmetic' proportion, as where two men before a Court must be considered equal 'before the law' – formal equality – though they may be very different in other respects. This idea comes into play, for example, on the matter of punishment. Finally, Aristotle briefly discusses in his aforementioned work his famous theory that justice, as with all 'virtues', is the middle ground between two extremes.

Aristotle claimed to have found a perfect scientific and mathematical-geometric method to define virtue, as a point equidistant between the two extremes, both vices (one of excess and one of defect), of a straight line. In this regard, courage would be a virtue, to be found halfway between cowardice and rashness. This is his famous doctrine of the mean ("*mesotes*"). Just as a geometrician may only divide a straight line into two equal parts if they know which are the two extreme points, Aristotle can only find the virtue he seeks, according to his geometric system, if he knows the two extreme vices.

Applying the doctrine of the mean to justice, Aristotle affirms that "just behaviour is the halfway point between doing and suffering injustice", along the lines of Socrates' statement that he would prefer to suffer injustice than to cause it.

5.- Justice in Islamic Law

The Quran, the sacred text of Islam, has much to say on justice, the key to such justice being submitting to Islam and the fear of the Islamic God, Allah, who is described as "fearsome in his vengeance", though also as "compassionate and forgiving". Justice ultimately resides in faith, but alongside this are a series of details and requirements concerning how one must lead one's daily life. Another central theme in the Quran is that of 'debt', as Islamic culture is rich in commercial transactions. For example, it is stated that thieves must have their hands cut off as a just payment for what they have stolen. The concepts of vengeance and retribution prevail, though attenuated by the idea of mercy.[10]

6.- Saint Thomas Aquinas' *Summa Theologica*

Saint Thomas Aquinas combines the Christianity of the Catholic Church with Aristotelian ethics and metaphysics. Aquinas, in his *Summa Theologica*, defends Aristotle's analysis of justice against potential views and criticisms. He focuses particularly on the idea of 'desert' in distributive justice, according to which each person should receive what they deserve.

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[9] Aristotle, *Ética a Nicómaco*, translation by J. Marías and M. Araújo, Madrid, Centro de Estudios Constitucionales, 1985. Id., *Política*, translation by J. Marías and M. Araújo, Madrid, Centro de Estudios Constitucionales, 1989. Id., *Retórica*, translation by A. Tovar, Madrid, Centro de Estudios Constitucionales, 1990. Francesco D'Agostino, *BIA. Violenza e Giustizia nella filosofía en ella letteratura della Grecia Antica*, Milano, Giuffrè, 1983. C. Despotopoulos, *Aristote sur la famille et la justice*, Bruxelles, Ousia, 1983. A. O. Rorty (ed.), *Essays on Aristotle's Ethics*, Berkeley, University of California Press, 1980. W. Von Leyden, *Aristotle on Equality and Justice. His Political Argument*, London, MacMillan, 1985. G. Zanetti, *La nozione di giustizia in Aristotele. Un percorso interpretativo*, Bologna, Il Mulino, 1993. Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*, pp. 34-35.

[10] Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*, p. 44.

The Aristotelian idea of justice as a virtue relative to others, as a halfway point between extremes, is also central to Aquinas. Finally, Aquinas considers the issue of whether distributive justice should, as in Aristotle, be exclusively related to desert, or whether the mercy and benevolence proposed by Saint Augustine and the generosity suggested by Cicero also come into play.[11]

7.- Confucius in China

Confucian philosophy, in China, emphasised the idea of correction and rectitude on the part of the Prince and of docile obedience on the part of the subjects. It introduced the central terms in Chinese thought and ordinary language: the idea of '*li*', or rules of behaviour, and of '*rén*', later to be translated by Western thinkers as 'benevolent love'.

One of the feelings to which humanity always clings is love. It is said that love, together with hate, is one of the engines that move the world. Against the pagan concept of love as '*eros*' or '*philia*' is the concept of love as '*rén*'. This is a pure, spontaneous, unmotivated, and creative love, not driven by the quality of the beloved object. '*Rén*' is a disinterested love. It is a love in which the subject does not seek their own benefit, but that of others. '*Rén*' does not begin by discriminating between people deserving or undeserving of being loved, between friend and enemy, but is directed toward all. '*Rén*' is not a weak or passive love, but an active one. Ultimately, this type of love is rooted in the idea that all men are brothers and equally deserving of justice. It is a free rather than a partisan love, understanding by freedom not licentiousness but "being able to do what we should wish to do". It is a disinterested love, not moulded by the emotions.

The ideal of justice would be a virtuous governor, supported by the pious adulation of subjects. One should note that, both for the Prince and for the subjects, these ideas have a personal character, being virtues to be possessed rather than merely a question of norms and obedience. A just State, according to Confucius, ought to be the envy of the tyrannical States that surround it. Justice would triumph over tyranny. In Eastern philosophies, prevalent over the idea of the mind is that of the soul, of a deep spirituality, which goes beyond simple mental aptitudes.[12]

8.- The conquest of America

With the Spanish colonisation of America, for the first time in the history of humanity there was an awareness of the existence of a discovery of different cultures and peoples, with interpersonal relations forming part of the act of conquest and the undertaking containing a moral dimension, given that from the beginning attempts were made to ground colonisation in principles of justice, as against what has been labelled the 'black legend', which classified the conquest as an undertaking centred around looting. What is certain is that many voices from all the sectors involved – the Crown, religion, and thinkers, both in American and Spanish territories, and even many of the colonisers – argued in favour of indigenous rights and in favour of acts being carried out in a just manner. It was sought to recognise the human condition of the indigenous peoples, both in terms of their legal rights and their being considered as equals. These are the ideas that governed the search for justice in the process of colonisation of America.

With respect to the idea of equality it is necessary to clarify that, as seen at that time, indigenous peoples were understood to be equal to Spaniards before God, that is, fit to join the Christian faith, and also to be capable of learning to live like Spaniards. This is precisely what defines the difference between the conquest and Spanish colonisation and the actions of this kind undertaken by other European countries. Anglo-Saxon colonisation involved populating and exploiting. On the contrary, Iberian conquest and colonisation involved incorporation and salvation: incorporating a new world within the orbit of the Catholic Empire, and saving souls for Christ. Spanish colonisation thus had a human dimension not present in the English version.

Opinion was divided. One side involved the idea of the corrupted savage. The other saw the American Indian as personification of the natural and virtuous life, giving rise to the myth of the Noble Savage. If one considered the indigenous person to be half animal, a savage, it was easy to conclude that Spanish rule and slavery were legitimate. If, on the other hand, one defended the humanity of the indigenous person, their enslavement must be rejected, affirming their right to freedom, to possess goods and to be treated in a just manner.

[11] Saint Thomas Aquinas, *Summa Teologica,* Salamanca, BAC, 1988.

[12] Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*., pp. 56 ff.

This was the response given by the majority. Reference must here be made to the debate between Bartolomé de las Casas and Juan Ginés de Sepúlveda.[13]

9.- Machiavelli: "the end justifies the means"

Though we might admit that the end justifies the means, along the lines of Niccolo of Machiavelli, what is in all cases clear is that the means do not justify the end. The final justification for our behaviour is not then in itself a means to another end, but the final end.[14]

10.- Jürgen Habermas' Theory of *Diskursethik*

10.1.- Content of the Theory of *Diskursethik*

According to Habermas, society exists thanks to the fact that intersubjective communication and understanding is possible through language between the subjects who comprise it. All communication tends towards understanding of individuals, and ultimately seeks a social agreement. All communications entail an implicit indication of intersubjective validity: the person who carries out the act of speech, offering his or her interlocutors an opportunity for understanding regarding a subject. This act aspires to a full understanding, of universal scope, and not to a relative agreement which may be acceptable only for some. The consensus which may be reached on occasion is intended to be universal, valid beyond space-time limitations.

All indications of validity are considered absolute. Notwithstanding, this may vary and evolve over time as the historical context is modified by new discoveries. This is not about demanding that subjects have an absolutely accurate vision at all places and times. It suffices to have the belief that at the specific moment in question, the argumentative conditions shall arise so that communication may take place and a consensus be reached.

There exists what is called the "ideal situation for speech," i.e., the pure situation of communication wherein all the argumentative rules are verified so that the intersubjective consensus pursued takes place. What occurs is that, in practice, this ideal situation is never verified in its pure state, since this is interfered with and bombarded by special interests and individual goals. But it does serve as a guideline or ideal model with which real-life speech situations may be compared.

What is so special about this ideal speech situation? This is not about criteria or substantial content and specific materials, which change with the times and with cultural tastes, but rather this is limited to establishing a formal procedure which belongs to any time and any historical condition. This formal procedure is summarised in two rules: the elimination of all coerciveness and the elimination of all inequality in discourse. This is the principle of ethics or communicative action. Though the content may vary over the course of history, this formal principle remains.

It is through the observance of this formal principle that valid results may be reached for all circumstances; "universal" results, wherein everyone can be in agreement. If we apply the principle of discursive ethics, also known as the principle of universalisation, to the field of law and norms, we obtain the criteria whereby a norm is valid: a norm is valid when it belongs to a legal system which is also valid. And a legal system is valid when "it is able to achieve the acceptance of all, to be universalised, to obtain a consensus." The legitimating key of a norm would lie, according to this author, in its ability to deserve general adhesion due to its content being universal. This situation would only be possible when the norms defend general interests, when they involve the will of all. This is not about offering orientation of any content whatsoever, but a formal procedure, the principle of universalisation, as principle of discursive ethics ("*Diskursethik*").

The only indication Habermas makes regarding what the content consists of is likewise of a formal nature. The content is basically comprised of two elements: human rights and popular sovereignty. Observe that pointing out these two postulates is not contradicted by Habermas' concept as a process of determination for legal validity of a merely formal nature.

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[13] María Xosé Agra Romero – Luis García Soto – Beatriz Fernández Herrero – Cristina Caruncho Michinel – María Luz Pintos Peñaranda, *En torno a la justicia. Las aportaciones de Aristóteles, el pensamiento español del XVI, J. S. Mill, la fenomenología y Rawls*, La Coruña, Eris, 1999, pp. 87-128.

[14] Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*., p. 302. Niccolò Machiavelli, *El Príncipe*, Madrid, Gredos, 2010.

10.2.- The Concept of Justice in Habermas

Many contemporary debates on justice try to extract "substantive" principles of justice. The great merit of the German philosopher Jürgen Habermas, in his prolific output, is to have tried to follow a purely procedural path towards justice, by way of his idea of Discourse Ethics or an Ethical Discourse, which implies the existence of a real, continuing and sincere dialogue, which he calls "the ideal speech situation", which bring with it conditions of liberty and equality to generate a "communicative rationality". He has built up his theory through many works. We would especially point out his: *Knowledge and Human Interests* (1971); *The Theory of Communicative Action* (1984 and 1987), and, more recently, *Between Facts and Norms* (1996).[15] The important thing to ask is not what we find at the end of the communicative path. This would be to prejudge the results of the real, deliberative dialogue. In Habermas, we find a theory of justice which is formal, which is mainly aimed at the question "what is justice?", rather than at the question "what is just?". It is a pure, procedural theory, a method which allows communities to transcend their own culture and arrive at universal norms of justice. Further, Habermas holds that some societies, such as post capitalist, pluralist democracies, approach ideal dialogue situations already.[16] Here, legal philosophers like Rawls stand out. Rawls himself postulates an unreal and a-contextual ideal. Some unexpected substantive ingredients of Habermas' theory arise from Rawls, such as a compromise between political freedom and social equality. This, according to Habermas, stems from the fact that equal and just participation in the type of dialogue where communicative rationality takes place presupposes a fair quota of social and economic equality.

A potential contradiction in Habermas' theory might be the combination of radical, participative democracy and a legal veto. Insofar as a system of institutionalized, legal control in the guise of Constitutional Courts exists, justice is taken from the procedural norms of deliberative democracy. It is interesting, having reached this point, to outline Habermas' view regarding constitutional justice, that is, as concerns those questions about what is right and what not, as these are taken from the normal, deliberative, democratic process of party politics, elections and legislative decisions, in an open public discussion, and transferred to the Courts, in particular to the Constitutional Courts, in order to decide on them. This constitutional jurisdiction, in an ideal democratic society perhaps would not be necessary. However, given the flaws in the ideal speech situation, Habermas gives an important role to real life, as a control over possible mistakes and existing injustices, in real democracies and, on the other hand, also as a precondition of the democratic process, urging legislators to bear in mind, from the very outset of their deliberations, the normative content of constitutional principles. The admission of constitutional justice, by Habermas, is made with care.

For Habermas, it is impossible to have a real perspective on the nature of human existence from the point of view of the natural sciences, and it must be understood from an internal or participatory angle –something close to Max Weber's idea of interpretive understanding –"*verstehen*". It is not enough to understand "rationally", one must understand as a participant. Neither are empirical methodologies enough for the social sciences because they may give an "explanation" of reality which would serve to dominate human beings by making them believe that the version these give is the only possible version and that humans have no choice but to adapt themselves to it. We know that people have an autonomous capacity and cannot –or rather should not– be manipulated and controlled. In the legal sciences, as an example of a social science, everything, or almost everything, is defensible so long as it can be defended by argument. This is not arithmetic reasoning and it is not binary, as in "all or nothing" exclusive arguments, proper to the natural sciences, where two and two always make four.

Habermas seizes on "language" as Man's distinctive capacity. It permits us to appreciate human society. He shows himself in favor of dialogue, of critical reflection, of what he calls "an ideal speech community". This is a prerequisite for successful communication and for the justification and legitimation of what is discussed. This focus leads to a kind of ideal type of "communicative rationality", where people struggle to reach agreement on truth and justification under conditions of no coercion, and where participation is open to all equally.

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[15] Jürgen Habermas, *Conocimiento e Interés*, Madrid, Taurus, 1989. *Knowledge and Human Interests*, Boston, Beacon Press, 1971. Spanish translation by Manuel Jiménez Redondo, José F. Ivars and Luis Martín Santo, revision by José Vidal Beneyto, Id., *Teoría de la acción comunicativa*, I and II, Madrid, Taurus, 1987. Spanish translation by Manuel Jiménez Redondo. Id., *The Theory of Communicative Action*, Boston, Beacon Press, I, 1984. II, 1987. Id., *Facticidad y validez*, Madrid, Trotta, 1998. Spanish translation by Manuel Jiménez Redondo. *Between Facts and Norms*, Cambridge, Polity Press, 1996.

[16] Tom Campbell, *La justicia. Los principales debates contemporáneos*, translation into Spanish by Silvina Álvarez, Barcelona, Gedisa, 2002, p. 223.

The search for knowledge calls for a "compromise" to establish an "agreement" which transcends mere beliefs. Justice comes as a natural corollary, being a prerequisite of communicative rationality, given that dialogue implies the equality of the participants in it. In this way, truth and justice go hand in hand as indispensable presuppositions of dialogue.

Following John Searle's Speech Act Theory and other philosophers of language since Wittgenstein, Habermas explores the idea that speaking is a "strategic" sort of action, where "critic" affirmations about the world may be made. These may have or may not have "validity" depending on whether they might be defended. Some conditions necessary for communicative action to be "rational" are that the linguistic expressions must have an identical meaning for the different speakers, making them interchangeable amongst speakers, and not merely subjective, this would transcend the purely individual sphere. Further, terms must bear a constant significance. On the other side, the participants must accept responsibility for the positions they take up, pledging to accept only valid claims and the practical consequences of the agreement. Those who take part in the dialogue must be sincere, tell the truth, seek a non-forced agreement, and believe in the normative correction of their assertions, in a context where they share a common language and seek to coordinate their actions. In the ideal dialogue situation, the individual who treats others as a means to reach his own ends and particular interests is excluded, even though such are common in the real world. In Habermas' scheme, certain forms of speech are favored: telling the truth, for instance, and seeking justice when this is done in good faith and sincerely, as against any idea of interested persuasion and deceit. Might this not leave an opening for a certain degree or minimum content of natural law –in Hart's terminology– in a discourse which at first sight would seem to be purely procedural, isolated from substantive material content?

Only those norms which attain the approval of all participants in the practical discourse may be affirmed valid. This situation is known as counterfactual, in the sense that it does not exist completely in fact, but is rather a regulative ideal. Unlike Kant's conception, and, at basis, that of Rawls, for whom the procedure that takes the decisions may be carried out by one single person, for Habermas, the process is inevitably "interpersonal", a socialized version of discourse. Along the lines of Hegel and Marx, Habermas seeks for rationality in the development of human society. Knowledge and justice are not individual achievements. They are enmeshed in social development. In this context, Habermas speaks of the "discursive formation of the will". This is an "empathetic" consideration. A norm is just if it is universal in the sense that all may desire that it be obeyed in every similar situation. This is not a particularly original idea. It already occurs in Kant's universal principle. The truly original thing about Habermas' thought is that it has combined a social and normative theory with a realist-sociological theory which, from tip to toe, makes for, what the author calls, "facticity". Force in itself is never enough, there must exist an agreement as to what force might be used and then enforce it.

11.- John Rawls' *Justice as Fairness*

Justice as fairness is the theme tackled by American legal philosopher John Rawls in *A Theory of Justice* (1971) and developed in his later writing.[17] Rawls bases his work on procedural justice from an "original position". This is Rawls' version of the state of nature invoked by the classic social contract theorists. In his "original position", all causes of partiality are eliminated. He thus arrives at an impartial and just state. We speak here of procedural justice because what determines the just result is the procedural justice followed in order to arrive at it. In other words, it is supposed that a just negotiation will produce just results. The method to be followed is "reflexive equilibrium", which consists of selecting one's strongest and most deep-seated moral convictions as provisional points of departure, and then working over whatever principles justify these intuitions retrospectively.

[17] John Rawls, J*usticia como equidad. Materiales para una teoría de la justicia*. Preface by M. A. Rodilla, 2nd. ed., Madrid, Tecnos, 1999; Id., *La giustizia come equità: saggi 1951-1969.* A cura di Giampaolo Ferranti, Napoli, Liguori, 1995. A briefer versión was presented to the Congress of the *American Philosophical Association. Eastern Division*, the 28th. December 1957, and was published in the *Journal of Philosophy*, 54, 1957, pp. 653-662; Id., *Teoría de la Justicia,* Spanish translation by María Dolores González Soler, Madrid, Fondo de Cultura Económica, 1993; Id., *La justicia como equidad. Una reformulación,* edited by Erin Kelly, Barcelona, Paidos, 2002; André Clair, « L'affirmation du droit: Reflexions sur la 'Théorie de la Justice' de Rawls », in *Rivista Internazionale di Filosofia del Diritto*, 67, 4, October-December 1990, pp. 537-575; Bruno de Filippis, *Il problema della giustizia in Rawls*, Napoli, Ed. Scient. Italiane, 1992; Raul V. Fabella, "Rawlsian Nash Solutions", in *Theory and Decision*, 30, 2, March 1991, pp. 113-126.

So, for instance, we attempt to justify our conviction that slavery is evil via the fundamental idea of the equality of all men. We must always be open to revise our original intuitions, since they might be distorted, and thus, through a reflexive process, going back and forth, during which principles are developed and revised, tested and polished up, we arrive at a reflexive balance and at some "meditated convictions on justice". A coherent synthesis must be achieved of the principles chosen in the original position and of the meditated, moral judgements.

To this moral correction theory of Rawls, it might be objected that moral intuitions which one works over are not reliable in themselves as pure data, and it is debatable that these perceptions approximate moral truth. Moreover, there are as many perceptions and moral truths in existence –and ideas of justice– as there exist individuals. Rawls answers these objections by saying his theory of justice refers to the sense of justice most deeply-rooted in modern, liberal, democratic societies –of Western type societies, like the USA. He defends the possibility of arriving at a certain degree of consensus, in spite of differences, in what he calls a "well-ordered society".

To reach justice, people in the original position must be free and equal, that is they must not be pressurized or subjected to some prior limitation, they must be independent and autonomous. Rawls denies that the participants will be egoistic, and presents them rather as mutually disinterested, with human desires for their own welfare, of course, but without that bringing with it any envy, or desires to prejudice or harm other people, this would be in their own interests.

Rawls considers justice a virtue of social institutions. It is not justice as a specific virtue of people. The theory of justice as fairness is a political, not a metaphysical, theory. The author's idea of justice is based on the following principles: 1.- Everyone who participates in a practice has an equal right to the same freedom as all the others, compatible with an equal right for the rest; 2.- Inequalities are arbitrary unless they are deemed reasonable to the good of all, and on condition that the positions and charges to which they are attached, or from which they might derive, are open to all. These principles describe justice as the synthesis of three ideas: liberty, equality, and compensation for service contributing to the common good.

The second principle looked at, defines what types of inequality are admissible, as exceptions to principle one. By inequality we should understand nothing but the differences existing among people. People taking part in a game do not protest because they play in different positions, nor because there are different public charges, such as Presidents, senators, governors, or judges. Each of these positions has its specific rights and duties. The sort of inequality which we should oppose, says Rawls, is that which does not imply an advantage "for all of us". Everyone must benefit from the inequality for that inequality to be acceptable. Inequalities are unjustifiable where they give disadvantages to some and advantages to others.

Further, any position enjoys special rewards, positions must be won through just competition, where participants are judged on merit. If certain advantageous situations prove "inaccessible", those excluded from them have every reason to feel themselves unjustly treated. No rational person should feel despised when he sees others occupy better positions than his own, unless he has grounds for believing this state of affairs is the result of an injustice. The idea of the impartial distribution of benefits and of charges is essential.

On the other hand, possessing an ethic should imply the recognition of impartially applied principles, as much insofar as one's own conduct is concerned, as concerning that of others. It should not recognize principles used for pursuing one's own interests. A person whose moral judgements always coincide with his own interests may well be considered as having no morality whatever. These ideas, already familiar since the Greek Sophists, consider the acceptance of the principles of justice as a compromise among people endowed with approximately equal powers which, although they might impose their will upon one another, for the sake of peace and safety, and in view of the equality of force they share, prefer to submit themselves to a "pact between interested, rational subjects" –to the degree this leads to what they all most desire– and to reach an agreement on a balance of interests.

In Rawls, justice is conceived of as the practical virtue to be pursued by beings who have overlapping interests in competition, and with ambitions which conflict, and who try to look out for their own rights at the expense of those of others. In a community of Saints, it is difficult to come across any disputes concerning justice; all adapt themselves altruistically to one common goal, the Glory of God. Questions of justice arise when free people, all of whom have no authority over one another, embark upon common enterprises and establish and recognize rules amongst themselves which define and determine a respective quota of benefits and charges. The parties concerned see a certain practice as legitimate when none of them has the feeling that someone else is exploiting him, and when no-one feels obliged to accept any pretensions he does not view as legitimate.

People involved in a just and fair practice should be able to openly confront and maintain their respective positions, whatever they might be, and all should accept the set-up. The idea of mutual recognition of principles on the part of free people, each having no authority over the others, is basic in the idea of justice as fairness. So, in ordinary language, equity is above all applied to practices in which one chooses to participate –for instance, games or the job of judge. Justice in practices not of one's choosing are such things as slavery. Though Rawls speaks of "justice as fairness", this does not imply the two are the same thing, similarly, one might speak of "poetry as metaphor" and not mean they are identical notions, though they may coincide. If "*justice as fairness*" is an interesting topic, a step further would be to speak of "*rightness*" as equity.[18]

In the game that is equity, there exists the duty to "*play fair*". Thus, in general, you cannot back out of an obligation, denying the justice of the practice, only when it is your turn to obey. If someone is going to refuse to do something, he should, insofar as is possible, warn everybody of his intentions beforehand, hence cutting himself off from any benefits which might derive from that practice. A "*free rider*" is someone who has his own way and, should he be in a union, would enjoy the advantages of union action but refuse to accept any duties, such as paying the union dues. The duty to "*play fair*" is closely related to other "*prima facie*" duties, like the duty to be trustworthy or grateful. The recognition of the "*fair play*" obligation is a necessary part of the criterion for recognizing "the other" as a person with interests and feelings similar to one's own.[19]

Rawls' most obvious theoretical innovation is his idea of the "original position" behind the "veil of ignorance". Equity is the objective which marks out a society as a well-ordered one. Still, equity is, in principle, already there at the beginning and characterizes the "original position". For Aristotle, equity has no need to appear initially. Equity is justice realized in full only in the act. Rawls' view is completely different. Equity is the beginning and the end. The original position defines a situation among members who find themselves in a situation of equality. This is what makes such a situation equitable.

The two principles underlying John Rawls' idea of justice as fairness are: the principle of "equal liberty", and that of "difference". We have already looked at these. These principles are found in a serial or lexical order –the right word would be "lexicographical". That is, it is an order where the first principle must be completely satisfied before passing on to the second, the second before the third, and so on, successively. No new principle can be put into play unless all those preceding it have been completely satisfied already, or else deemed inapplicable. Any type of reasoning which implies a balance of gains and losses for different people, any society which does not assure liberties, and basic civil and political rights, is excluded. Such cannot be negotiated or waived. Justice must have priority.

A lexical order never compares principles with each other. Those coming before have an absolute value over those which follow, and this allows of no exceptions. Hence, according to the lexical order, there is a first principle: the greatest equal liberty for all. This refers to the basic liberties of any society: political and civil liberties; and, a second principle: a) equal *fair* opportunities, united with b) the principle of difference. In truth, these are the three postulates of the French Revolution: liberty, the first principle; equality, the first principle, and part a) of the second principle; and fraternity, which is part b) of the second principle. Liberty and equality are two clear Rawlsian principles. Fraternity is expressed in reciprocal social esteem and presupposes the feeling of civic amity and social solidarity.

The tension between the two principles of justice is already present in the idea of equity, as a condition which imposes upon all equally, and which also devolves upon each the need to treat every individual with due regard to his needs and interests. In the original position, individuals do not distinguish themselves from others. However, in effective, social life, everyone is entirely a single entity. Justice governs the step from the formal identity of all to the specific, substantial individualization of each one.[20]

[18] Sebastiano Maffettone – Salvatore Veca (a cura di), *L'idea di giustizia da Platone a Rawls*, Laterza, 1997, pp. 319 ff., esp. p. 333.

[19] John Rawls, *La giustizia come equità. Saggi 1951-1969*, a cura di Giampaolo Ferranti, Napoli, Liguori, 1995, pp. 70 ff.

[20] André Clair, « L'affirmation du droit: réflexions sur la Théorie de la Justice de Rawls », in *Rivista Internazionale di Filosofia del Diritto*, IV, 1990, pp. 545-564.

12.- Ronald Dworkin's *Taking Rights Seriously*

The Anglo-Saxon legal philosopher Ronald Dworkin, though he never refers to the idea of taking a decision in justice directly, or to a Court which makes its findings in the light of justice considerations, clearly considers this possibility when he refers to the formation of sentences and legal findings which are more based on principles and standards than on rules and legal norms. In this case, the legal tools would be these principles, rather than legal norms. Dworkin, however, never falls into relativism or absolute subjectivism, and he does not attribute an excessive role to intuition. He holds there is nothing extra-legal about the judge's decision based on justice –in what he calls principles regarding justice. There is nothing irrational nor intuitive about them. When faced with the same case where various legal principles may be applied, the principles applicable do not exclude one another, in an all-or-nothing way, as happens when there is a conflict of norms, rather, the form of applying principles is relative and more complex, in relation to the weight and importance of the principles at stake. These may co-exist together to a greater of lesser degree, while none need be left entirely out of play.

According to his famous phrase, justice is based on rights and rights are "triumphs". When a basic right is applied, nothing should be allowed to stand in its way. Dworkin places his emphasis on equality, he puts this before liberty, and his fundamental moral principle is "equal consideration and respect". He maintains that law contains "principles" as well as rules. The principles are not distinguished by their greater generality or vagueness, but by the fact that, in legal reasoning, they have a certain "weight", not an all-or-nothing effect. That is, giving reasons for a particular decision, these principles offer a specific force to the reasoning, though they do not thereby conclusively determine the case in question. Principles operate in legal argumentation especially where "hard" cases are concerned –that is, cases which are not clear-cut. There, there are no relevant rules which are not ambiguous or else the rules produce results unacceptable to certain basic principles of justice. These principles encompass rights whose normative hierarchical standing is higher than those of the common positive law. Should these principles be accepted, then judges have a sufficient basis upon which to arrive at correct decisions, in accord with justice, in every case, no matter how difficult such cases may be. Dworkin holds judges, when determining what principles of law there are and what weight to award them in specific cases, decide according to their own personal judgements what exactly the law is. Their task is not merely limited to complementing the already existing law. Following Dworkin, there exists one "correct answer" for hard cases. This is by way of an ideal which we must try to approximate in an objective fashion. The process involved is similar to that of writing a "chain novel", where a group of writers, taking account what has been written before, develop a new and fully-coherent chapter. They then pass on the baton to the next author. Each author is limited to an extent by what preceded his contribution, still, he also enjoys a fair margin of freedom. From this, the conclusion falls out that the idea of justice, and the legal enterprise in general, must be coherent. This means that judges may appeal directly to principles of justice in order to see, amongst various, alternative decisions, which best suit existing law, choosing from them which is the "best possible decision", in the same way in which each of our hypothetical authors in the "chain novel" tries to write the best chapter he can.

For this professor, the ultimate, basic right is the right to "equal consideration and respect". This is a right different from real "equal treatment", a term which he uses to refer to those situations where each person ends up receiving and having the same quantity of a valuable good being distributed. Justice implies the right to be treated as an equal, not the right to equal treatment. This former principle is found in the very essence of the concept of justice, by means of an abstract principle which may be satisfied via many different, specific, political ideals. These might be egalitarianism, meritocracy, general utility, or Rawlsian fairness, amongst others. Justice consists in this, not in distributing goods unequally because some citizens are held to deserve more consideration than others, but in accounting no-one is more noble or in any way superior to his fellows, in stressing we are all worthy of being treated with equal consideration and respect.

Dworkin rules out various types of equality. He discards "welfare" equality, since there is no practicable and acceptable way to measure welfare. Equality "of satisfaction" must go too, because it depends on tastes and individual goals. These are morally arbitrary and controversial. It would be especially unjust to take expensive tastes into consideration. Equality "of achievement" is likewise excluded since it is relative to subjective factors like individual preference and ambition, and it would be highly unjust to take note of unusual ambitions. On the other side, he shows himself in favor of "distributive" resource equality, easily measurable and controllable by way of market mechanisms. Such an equality should not take pure luck into account, not even that which is at work in natural endowment distribution –what the writer calls the "non-sensitive to special gifts" provision–, however, not for that is it sensitive to personal ambition.

We will not be compensated for expensive tastes, nor for those gifts we possess which are below par, but we will be protected against circumstances which might gravely affect us adversely and against serious incapacities. All of this is to take place via a just agreement similar to that reached by the hypothetical survivors of a shipwreck, hurled upon a desert island which has an abundance of resources, and where there are no native peoples. The fair division, in these circumstances, would be that which passes the "envy test". This test sees whether anyone would prefer a different lot from that which the draw has given him. If he would, the test has failed, if not, it is successful.[21]

Dworkin sets out from the idea of equality as equality of resources. Resources are necessary to satisfy basic needs, but, at the same time, they are scarce. Individual life is good to the extent that, in an autonomous manner, the challenge of skillfully obtaining resources is met. The "envy test" is one parameter serving to measure how far the challenge has been overcome. It implies that each person taking part should ask himself whether he is content with the resources he has received during the distribution, one has been carried out through the "Walras auction" –named in honor of the investigator who thought it up, Leon Walras. This auction, a thought experiment in an ideal world, may only finish when no person bidding remains envious of the recourses any and all of the others control of all resources available. The test must be applied throughout the history of any society, that is, in a diachronic fashion. For instance, should we ask Mary if she envies Peter, she will probably answer "yes", since, at that moment, Peter has more than she. On the other hand, if it is made clear to Mary the type of life Peter lives and has lived, in comparison with her own, which has lead him to have more resources (his work decisions, his free time with family and friends, and the like), she might well reply that she does not envy him in the least and would therefore consider their respective amount of resources about equal.

In the "*Walras auction*", the auctioneer gives to each of the shipwrecked who arrive on the island an equal number of counters which they may use, perhaps shells. The counters serve to acquire any goods desired. Later, the auctioneer divides up the available resources by lot. Here "opportunity costs" come in. Given that, in human life, time and incomes are limited, the value of the alternative chosen is measured by comparing the decision effectively taken with that which was passed up. The decision is the right one if, according to the parameters of each individual, it proves more valuable than the options rejected. It would be the wrong decision if it proves less valuable. In Dworkin's formulation, State intervention must be limited to form the "correct circumstances" background for the process to be possible under conditions of liberty and equality. From his liberal perspective, all forms of State paternalism must be rejected. This idea is found in the distinction between negative and positive freedom, first put forward by Isaiah Berlin, at a lecture in Oxford, in 1958.

What role does luck play here? For Dworkin, there are two sorts of luck: "option luck" and "brute luck". When, for example, I go strolling down the street and a meteorite smacks down into my head, we might say that I had bad luck of the "brute" kind. Similarly, if an accident caused me to lose 95% of my mental capacities, we could say I had bad luck of the brute variety, again. However, if I had been offered insurance against the possibility I should be left incapacitated by an accident and I had not taken out the insurance, choosing rather to invest in high risk bonds, and then I was left incapacitated, then, bad, brute luck would, for me, also turn into bad option luck, because I did not take up the insurance. Unequal distribution of resources and personal skills must be located in the brute luck sphere, since no-one chooses to be born ugly, silly, or incapacitated. Still, our bad or good brute luck may be neutralized or potentiated *ad infinitum* through the options and choices each of us goes for when giving direction to our lives. Here "emotional" intelligence plays a much greater role than any intelligence quotient. What is important is the ability to manage our lives and our emotions well.

[21] Ronald Dworkin, "What Is Equality? Part II: Equality of Resources", in *Philosophy and Public Affairs*, 10, 1981. Id., "In Defense of Equality", in *Social Philosophy and Policy*, 1, 1983. Id., "Why Liberal Should Believe in Equality?", in *New York Review of Books*, 29, 1, 1983. Also in *A Matter of Principle*, Cambridge, Harvard University Press, 1985. Id., "What Is Equality? Part III: The Place of Liberty", in *Iowa Law Review*, 73, 1987. Id., "What Is Equality? Part IV: Political Equality", in *University of San Francisco Law Review*, 22, 1987. Id., *El imperio de la justicia*, Barcelona, Gedisa, 1988. Spanish translation by Claudia Ferrari, revision by Ernesto Abril: *Law's Empire*, London, Fontana, 1986. Id., *Ética privada e igualitarismo político*, Barcelona, Paidos, 1990. Id., *La comunidad liberal*. Preface by Daniel Bonilla and Isabel Cristina Jaramillo, Universidad de los Andes, Siglo del Hombre Editores, 1996.

In the *ideal-ideal* world, the principles and parameters which should mark out the system, whereby we carry out the "auction" above referred to, would be: the principle of "security", in line with which the system must include norms that reduce people's liberty to maintain the lives of others, and allow them to keep control of the resources they have acquired; the principle of "abstraction", which sets out that goods must be auctioned in the most abstract way possible. Thus, rather than auction a field sewn with wheat, steel, or furniture, an uncultivated field should be auctioned, iron and wood should be auctioned. Our experiment also requires the principles: of "correction"; "of authenticity" (or the possibility of forming an authentic personality with views of one's own, as regards affairs of conscience, religion, work, interpersonal relations and the like, before the auction gets underway; also, the possibility of changing these opinions); of "independence", which cuts out social prejudice consequences from the auction (that is discrimination due to race, gender, sexual orientation, and the rest). As against this ideal-ideal world, in the *ideal-real* world there is a lack of equality, shown in a lack of resources and of liberty. Finally, in the *real-real* world there are situations of enormous inequality and a dearth of commitment to others, on the part of citizens and political leaders. Here, in this world, the principle of "*victimization*" rules. A person is a victim when the value of his freedom is less than that which it would have been in any "defensible" distribution, proper to the ideal-real world.[22]

Though Dworkin does not set it out thus, this departmentalizing of worlds into the *ideal-ideal*, the *ideal-real*, and the *real-real* has a great deal to do with justice and equity. Justice, as an ideal, functions rather in the first two worlds, and it is when we approach more the real-real world that we see the need for the abstract ideal to be converted into "fairness", adapted to the specific realities of life.

13.- Robert Nozick's *Anarchy, State, and Utopia*

Apart from the theories canvassed, there are other ideas of the just in contemporary legal debate. Amongst them, the theory of justice as "a title", or an entitlement, as it were, can be seen in Robert Nozick –in his work *Anarchy, State and Utopia* (1974), a 70s classic, published three years after Rawls' *A Theory of Justice* (1971). There he shows himself an advocate of the libertarianism of the minimalist State, with his rampant "*laissez-faire*", all very much in tune with the new right-wing politics of Margaret Thatcher and Ronald Reagan.[23] Rights, like justice, are, in Nozick's terminology, questions of "*entitlement*", a term referring to the fact of being in possession of powers or rights. Entitlements do not depend on the grace or favor of others. They are duties owed to whoever has a title to rights and who may demand them because they are his due. Here, rights are especially connected with the analysis of "formal" justice. This sort of justice may be defined as the treating of persons according to their existing positive rights, rights which are socially recognized. Question of "material" justice are dealt with apart, have recourse to something other than the appeal to rights. A bridge linking formal and material justice is the recourse to the idea of human rights. This would allow the extension of the justice as "formal justice rights" hypothesis to include material justice. Amongst these entitlements, or rights, where the idea of justice is expressed, Nozick especially treats of property or "tenures", by which he means possessions.

A holding would be just if:[24]

- The acquiring person does so in accordance with the principle of justice in the acquisition of title of the holding.
- The holding is acquired by transfer from another titleholder, if such transfer takes place in accordance with justice.

The distribution of holdings is just, then, if these holdings always belong to their legitimate titleholders after the distribution. But not all situations are so just: the justice of an acquisition or an exchange cannot always be verified. There are people who rob, defraud, or forcibly exclude others from participating in transactions in a competitive manner. None of these practices are admissible in accordance with justice. A past injustice corresponding to either of the two aforementioned principles may exist, giving rise to the need to formulate a third principle: the rectification of injustice in holdings. This is known as patterning, meaning that the distribution of holdings relates to moral desert, and that no person has a larger portion of the distribution than others with greater merit.

[22] Ronald Dworkin, *La comunidad liberal, op. cit.*, pp. 55-110.
[23] Robert Nozick, *Anarchy, State and Utopia*, Oxford, Blackwell, 1974. Spanish translation by Rolando Tamayo y Salmorán, *Anarquía, Estado y Utopía*, México, Fondo de Cultura Económica, 1988.
[24] Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*., p. 302.

The ideas of moral desert, usefulness for society, and need must be introduced into the distribution of holdings. This may be described thus: each receives what they choose, taking into account what others have already chosen.

14.- Justice as "Efficiency"

14.1.- Richard A. Posner

Another contemporary theorist of justice is Richard A. Posner. His work follows the traditional utilitarian line. He presents his theory of justice as "efficiency". In his book *The Economics of Justice* (1981), it emerges that his interest in justice mainly has to do with the application of the law's "efficiency".[25] He offers an economic idea of justice which compares it to economic efficiency, though he never falls into the extremism of reducing justice to just profits in the maximizing of wealth. Posner's theory's main achievement is the application of a sort of individual economic theory to the content of legal doctrine in such areas as the law of damages, contractual law and criminal law. He offers, like Nozick in this, an enthusiastic defense of libertarian capitalism.

Posner defines "efficiency" as the "total satisfaction of those preferences which are backed up by money". In these terms, an efficient society is one where goods are in the hands of those with the ability and the desire to pay the highest prices for them, since these will be the people who most value them.

Maximizers of wealth project themselves through a system of rules and sanctions administered by judges and lawyers. Citizens break the law when the economic benefits one might receive outrun the advantages to be had by respecting the law, and submit their disputes to litigation if they hope thereby to obtain more economic benefits than the equivalent legal fees come to. The Courts, for their part, decide cases coming before them in the most economically efficient way, applying the most severe sanctions to the most economically destructive behavior. They adjudicate rights to those litigants who are willing to pay the highest price for them in a free market, and they decide upon responsibility and damages in a way which ensures resources go to those who have the greatest ability to capitalize on them. Whichever party most values a right will always pay more for such a right, or its benefits, accordingly to that party the Courts adjudicates that right.

14.2.- Differences among the Concepts of Effectiveness, Effectivity, and Efficiency

Terminological arguments are frequently rooted in conceptual questions. It is thus worth, as a conclusion, undertaking a conceptual clarification with relation to three notions which are not equivalent, but which few use correctly. We refer here to the ideas of efficacy, effectiveness, and efficiency. The three are found on the plane of facts, as against other related notions such as those of validity and legitimacy.

Though writers who have considered the matter do not always coincide in the concepts and terminology they propose, it is possible to find a common denominator in all the theories on the issue.

- LEGITIMACY.

A norm is *legitimate* when its content is in accordance with the ideals of justice.

- VALIDITY.

A norm is *valid* when it belongs to a specific legal order due to emanating from the competent body in accordance with the regular procedure established by that order.

- EFFICACY.

Efficacy arises where a legal provision is obeyed in practice by citizens and courts.

Each of these three notions – legitimacy, validity, and efficacy – is respectively found on the three-dimensional planes of values, norms, and facts.

[25] R. A. Posner, *The Economics of Justice*, Cambridge -Massachusetts-, Harvard University Press, 1981.

- EFFECTIVENESS.

Efficacy must be distinguished from *effectiveness*. Though at first glance this notion corresponds with efficacy, the terms are not exactly equivalent in a technical sense, as certain writers point out. The 'effectiveness' of the law is a necessary but not sufficient condition for its 'efficacy'. Effectiveness has a formal or technical element. 'Compliance' with the legal norm would be sufficient. In contrast, the essence of efficacy would be its material character, hence going further and requiring the achievement of the sought-after 'end' of the law. For example, effective or even total compliance with a law on inflation may nonetheless fail to eliminate it, with the continuation of an economic crisis which such law sought to prevent. The same may occur with a legal provision prohibiting public prostitution. Though technically complied with, such provision would probably not achieve the eradication of prostitution in a particular society, which would be the ultimate aim. In both cases, the laws against inflation and prostitution are formally observed, and are effective, but do not achieve their material aim. They are inefficacious.

- EFFICIENCY.

Other points of distinction may be identified between the concepts of effectiveness and *efficiency*. It is said that, while effectiveness is a clearly legal notion, efficiency has a political-economic element. Nonetheless, the notions are related. The efficiency of a society provides a 'budget' for its effectiveness, elevated to legal requirements.[26]

15.- Justice and "Desert"

15.1.- Precedents

Another idea of justice is that where justice is seen as "*merit"*. This is a very old idea, and anciently it was said that to be just was to give to each his just deserts –the "*suum cuique tribuere*" of the Roman "*tria iuris praecepta*". There has been a recent return to the idea that merit is an essential component of the idea of justice, given the limits of utilitarianism. The enthusiasts for the theory of merit might be traced from Adam Smith and Immanuel Kant, up to John Stuart Mill and Henry Sidgwick. A special mention should be made of the Australian-Polish philosopher, now living in Italy, Wojciech Sadurski, and his *Giving Deserts Its Due: Social Justice and Legal Theory*. His theory of the "equilibrium" of duties and benefits hypothesis, of which justice consists, rests upon the central notion of merit.[27]

15.2.- Wojciech Sadurski

According to the theory of merit, justice is achieved when there is a balance or proportion in the distribution of that which is well deserved –that is, which is positive– and that which is not deserved –the negative, especially via the administration of awards, punishments and suitable compensation. Although the term *"desert*" may be used in a broad sense, in the theory of justice here outlined it is to be understood as "moral merit", in a dual sense: as a counterweight to conventional or "institutional" merit, in the sense in which it presupposes no pre-existent social norms or distributive rules; and as a contrast to the "natural", that is deserts which accrue neither by choice nor by human intervention, those obtained through a sort of blind chance, and which require no effort whatever. Many merit theories also demand merit be linked to goodness, to morally commendable motives. This is not Sadurski's case. He demands no individual, moral merit in his theory. He only calls for a beneficial effect upon society, though this is not his essential purpose. What Sadurski does require, so that we might speak of merit, is behavior which must in some way be "burdensome", that is, it must involve an element of "sacrifice", work, risk, responsibility or bother.

The theory of desert does not prevent us from viewing justice as a "distribution" model nor as a possible "rectification" of injustice, with respect to the idea of human dignity. Alleviating basic needs might be a question of justice where needs are unmerited. That is, they are not the result of any immoral or thoughtless choice on the part of whoever is suffering from them. On the other hand, the theory of deserts might explain that, when –through intelligent choice and people's effort– the fruits of their labors greatly "exceed" their level of deserts, this apparently unjust situation should be recompensed. The idea is that the equilibrium between every member of society's duties and rewards must be the same.

[26] María José Falcón y Tella, *Lecciones de Teoría del Derecho*, 5th. ed., Madrid, Servicio de Publicaciones, Facultad de Derecho, Universidad Complutense de Madrid, 2010, pp. 209 ff.

[27] Wojciech Sadurski, *Giving Desert its Due: Social Justice and Legal Theory,* Dordrecht, Reidel, 1985.

Thus, someone born with important disadvantages should be compensated with rewards which make his position approximate to the utmost the position of other, non-disadvantaged people, in the same way that the thief who steals should be deprived of the goods he has stolen, thus returning him to the same position as that of someone who has stolen nothing.

The problem resides in the insuperable theoretical and practical problems which exist when it comes to measuring desert. It requires considerable knowledge of the inner functioning of the mind and of people's emotions should we try to measure their merits. Those who criticize merit theories of justice also allege that these tend to confuse the moral with the legal, creating an unjustified and coercive interference in the life of citizens. Further, institutionalizing reward for desert undermines the bases on which merit is acquired. People would behave in a meritorious fashion just to get the rewards, that is out of self-interested motives. In the same way, the conduct of someone abstaining from committing a crime simply out of fear of punishment would not be considered meritorious. The problem comes down to whether we admit prudential conduct as a basis for desert, since avoiding sanctions and trying to obtain remuneration might be considered common examples of just and prudential behavior. Another prickly difficulty for Sadurski's theory of desert is that effort is not always the same as a charge since the latter may be welcomed and enjoyed. To get over this hurdle, the writer appeals to the concept of the choices the "average person" would make, that is, the majority of individuals in society.

16.- Marx's Justice as a "Critique"

16.1.- General Considerations

Another important idea of justice is Marx's justice as a "*critique*" of a situation of exploitation. Most contemporary theories of justice have their origins in the U.S.A. This explains the predominance in them of liberal, capitalist ideas, and the Marxist affirmation that justice is intrinsically a bourgeois, capitalist, individualist idea is well-taken. From that angle, the socialist theory of justice critiques the idea of received justice, calling it ideological, an artifact at the service of dominant class interests, bourgeois interests. It is beneath ideas like this, that are presented as universal and immutable, that there lies a reality of domination. Bourgeois justice is but a deliberately deformed idea of that unpleasant reality. It is an ideology, part of the "superstructure", an instrument of exploitation which alienates the dominated class, the proletariat. Justice, for Marx and Engels, is nothing but the glorified expression of existing economic relations.[28]

Nevertheless, the recent debate on Marx and justice takes up the question of whether, at a deeper level of analysis, there might be some normative ideas of legal justice which would be characteristically socialist, which would tackle some of those values that could only be realized in a socialist society. More specifically, it is held that socialist societies approximate the principle of "*distributive*" justice: from each according to his ability, to each according to his needs, a maxim Marx himself adopted in the *Gotha Program*, a sort of communal egalitarianism.

16.2.- Internal and External Critique

Everything depends on whether we adopt a "strong" version of Marxist dialectic materialism or a "weak" version. The strong holds that all ideas of justice –since they are instruments of the bourgeois class– should be rejected, and the only important thing is the economic infrastructure. The weak version allows socialism to express its own counter-values to capitalist justice.

The Marxist idea of justice might be approached by an analysis which distinguishes between formal justice and material justice as contrasting concepts. Thus Marx differentiates between a formal justice –a legal concept, in conformity with prevailing norms, as a justice of a specific system or "internal" justice, the which consists in the efficient application of the system's norms– and an "external" justice system. This latter may serve as an instrument to critique the other. At first view, a system is unjust unless it efficiently applies the rules regulating it. From another angle, justice is not something relative to a specific system. It is an "absolute ideal". Its light may be shed to criticize all the different systems. In accord with the first model, a society is unjust to the extent that it does not coherently apply its own norms. In this sense, justice is a morally neutral concept, a formal justice. It restricts itself to verifying its own coherence from the "internal" point of view, to adopt Hart's terminology. Still, there is a material idea of the just, a justice with content, one which is not morally neutral.

[28] Karl Marx, *Obras escogidas*, Madrid, Fundamentos, 1975.

This justice allows us, from an "external" observer's stance –the Marxist, for instance–, to criticize societies, and capitalist systems, and to conceptualize law as a phenomenon typical of those systems which might disappear with the disappearance of social classes, achieved via the revolution and the setting up of a communist society. According to this idea of the just, rights are instruments which legitimate possibly antisocial behavior and which are assuredly self-interested. This is justice as "critique", proper to Marxism.

16.3.- Distributive Justice, according to Need

However, reality has revealed the communist idea to be utopian. As a utopia, it works by giving priority to equality over liberty, the liberal capitalist prime value, society over the individual, and where the most important vector would be distribution according to need and a contribution according to ability. Contrary to "distribution following merit", the capitalist ideology -where social inequalities are explained by appeal to the different value of the contributions made by those who take part in production and its financing, where those who triumph in the system of free trade and private property "deserve" greater profits because of their intelligent decisions, their hard work and their greater skills-, the socialist alternative offers distribution according to social needs. Whether we call these improvements which communism promises in questions of justice -or call them the demands of simple humanity, community and self-realization-, the truth is that it prioritizes the needs of all considered as beings of equal value, whose sufferings are accounted equal, regardless of social class or wealth. The communist ideal is one impregnated with the discourse of justice and equality.

17.- Alasdair MacIntyre

Rawls and Nozick appear to be diametrically opposed in their conceptions of justice, but according to Alasdair MacIntyre, the disagreement between the thinkers and their conceptions of justice as fairness and as title, respectively, can be easily reconciled. In everyday language, justice means giving each person what they deserve, but the concept of merit appears irrelevant and is of scarce interest in the theories of both Rawls and Nozick. Both reject the concept of desert as central to issues of distributive justice. The concept of desert becomes relevant when we refer to the community in which there is a consensus or agreement on what is good. In the absence of such agreement, the concept of desert is not applicable and we find disputes such as that between Rawls and Nozick.[29]

18.- "Feminist" Justice

18.1.- Carol Gilligan

Finally, we might make mention of the conceptions of justice developed from the liberal, *feminist* perspective. These have been voiced from the XIXth century on, as a question of gender, of the equality of rights between men and women. More, postmodernist feminists point to the existence of multiple gender perspectives, there being important differences to mark when considering women of distinct races, classes, and circumstances. We find, for instance, Carol Gilligan's famous thesis. She distinguishes between the masculine vision of justice, where emphasis is placed on norms and rights, and the feminist perspective, which centers more on interpersonal relationships. Here, what is important is to maintain good relations and not, primarily, which rights have been violated; humanity must triumph over justice and not the other way about. [30]

18.2.- Iris Marion Young

Another important voice in this debate is the contemporary feminist Iris Marion Young, who sets out her views in her most important work *Justice and the Politics of Difference* (1990).[31] There, she signals two social conditions which define justice. They are oppression –the institutional limit on self-development– and domination –the institutional limit on self-determination. Injustice comes about when domination leads to oppression. Oppression, as much as domination, are both well exemplified in racism and sexism.

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[29] Alasdair MacIntyre, *After Virtue*, South Bend, Ind., University of Notre Dame Press, 1981. Id., *Whose Justice? Which Rationality*, South Bend, Ind., University of Notre Dame Press, 1988. Robert C. Solomon – Mark C. Murphy (eds.), *What is justice? Classic and Contemporary Readings, op.cit*., p. 309.

[30] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Mass., Harvard University Press, 1982.

[31] I. M. Young, *Justice and the Politics of Difference*, New Haven, Princeton University Press, 1990. There is a translation into Spanish by Silvina Álvarez: *La justicia y la política de la diferencia*, Madrid, Cátedra, 2000.

Oppression divides into five important types or categories: exploitation –taking up the Marxist idea; marginalization – of those with no work or no house, or who suffer from some mental illness; powerlessness –applicable to those who have work but whose experiences of work are a flagrant negation of their freedom to be themselves and develop their abilities, for instance, the case of the non-professional, ordinary worker; cultural imperialism –when the culture expresses the ruling group's vision, as if it were the only possible vision; and violence –when force is used to humiliate and terrify the victims, be it physical or psychological violence, as for example, domestic violence.

Certain unacceptable dichotomies have to be overcome. Thus, we must get rid of that idea which opposes the *private* sphere, a "woman's place", to that of the *public* sphere, reserved for men. This is unacceptable given that oppression is as much a characteristic of the private as of the public world. Another otiose dichotomy is that between *feelings* – private and female– and *reason* –public and male. This is not only because reason is influenced by feelings, but also because, as cognitive theories demonstrate, reason also influences the sentiments, and we only feel things we have previously thought, so much so that changing our thoughts may have an effect on our emotions and feelings, causing a modification in both.

For Young, it would be a mistake to look for "impartiality" as a virtue. When we are impartial, we separate ourselves from our own situation and from the peculiarities of our own selves. This is this the very opposite of equity as justice in the specific case. It is part of the false belief that the moral is the universal, that is, the case where justice is but an abstract idea. A completely detached person is an empty person, more amoral than moral. I am myself and my circumstances, as Ortega y Gasset said. As against Rawls' idea of the "original position", behind the veil of ignorance, the fact is that "the vision embracing all points of view converts into a vision from no particular point of view whatever". It is like trying to describe the "normal man", the average man. What would such a man really be like?: neither tall nor short, neither clever nor stupid, neither good nor bad; a neutral man. In the same way as "normality" does not exist, as Freud said –it is rather an ideal to hold onto–, so too is reality plagued with differences and peculiarities. Moreover, in practice, impartiality is condemned to failure since it overlooks all inequalities and oppressions to which the dominated are subject. Young's alternative to impartiality is justice, precisely understood as equity. She proposes "affirmative action" programs which seek to award priority in employment to black people or to women so they might be better represented. All this means for Young that the problem is not discrimination, but the oppression linked to it. Equality of treatment, understood as an absolute non-discrimination would be equality as sameness, as assimilation, as homogenization, overlooking group differences which may make affirmative measures necessary. Non-discrimination should not be seen as an end in itself. It is only one possible means of achieving greater justice.