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On Justice

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Many of our collected cases revolve around the concept of justice. People's sense of justice responds strongly to any perceived violation. The reaction is so visceral that it is easy to imagine that a singular, universal, timeless principle of justice orients the universe and humans in it. Indeed, this is what proponents of **natural law** maintained from Aristotle to Aquinas. However, critiques of the natural law theory contend that laws are man made, and in this sense, they are not natural but "**positive**". From an anthropological perspective, If there is something universal about justice, then it is rather its idea than its content. People all around the world see the difference between justice and injustice, but what revolts them as unjust varies considerably from place to place and across different points in time. Societies' moral systems evolve,, and their evolution is in close relation to the social structures that support them. Luckily, because if this was not the case, we surely would still consider slavery or eugenics normal practice.

Understanding anthropologically the idea of justice involves finding a narrow passage between a rock and a hard place: it necessitates keeping a healthy distance from absolutist tendencies to universalisation, on the one hand, and from nihilistic relativisation, on the other. Universalising the sense of justice facilitates a dangerous shift from order to oppression, because the one that holds the power can claim to hold the one single universal truth. Conversely, an excess of relativity threatens the collapse of all moral order by creating an artificial levelling between the claims of victims and oppressors: if there is no universal measure, who would ultimately decide whose rights should prevail?

Studying the cultural variability of justice, either by getting familiar with non-European concepts of justice or by following the history of justice-thinking in Europe, should not lead us to reject our faith in the possibility of finding justice. We can and should cling to our conviction that recognisable forms of injustice exist and should be prevented or repaired, by all means.

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However, learning about the complexities of justice might make us more receptive to the eventuality that our own sense of justice is not absolute. Ultimately, that recognition can save us from involuntarily committing injustices. After all, being open to, listening to and considering contradictory justice claims is the very foundation of all conflict resolution mechanisms, including that of the highly codified Western penalty system, with which we are the most familiar.

As our cases illustrate, our sense of justice often puts us in trouble. Not only justice might mean different things across cultures, even two people within the same community can strongly disagree on what is just or unjust. What is more, the very same person can harbour conflicting ideas of justice - as some of our cases prove. It is because behind a single idea, there are a number of different values and principles, like: **fairness, harmony, balance, satisfied need, equality, equity or order**. These principles are not always consistent with each other. An implicit internal tension may threaten the balance between the two main social functions of our sense of justice: the maintenance **of order** and the protection **of fairness**. Obviously, people can contest the prevailing order by judging it unfair. If a lot of people think in the same way, this can lead either to social reforms or to revolutions.

It is precisely because ideas of justice are complicated, principles of justice might collide and questions of justice may lead to controversies, that most societies have codified their social norms and enshrined their rules in law. In complex societies an autonomous institutional system is built on the law and its enforcement - we call it the **legal system**. In societies with a formal legal system, the double nature of justice is most clearly revealed: we have **justice as an idea and justice as action.** These two faces of justice are interrelated but not consubstantial. The separation between the two reflects the existing tension between the two principles: **fairness (morality) and order (legality).** Not all societies have written laws and formal courts, but all societies are governed by a more or less consensual moral system and have developed some form of conflict resolution mechanisms. Ideally, too, there is some degree of correspondence between the two systems.

Conflict resolution procedures tend to bend either towards fairness or towards order but an internal tension remains, as they cannot lose sight of either side. Fairness would require considering each case carefully, admitting that justice could look different each time; order needs fixed rules - as the law is sensed to be “blind” to difference. Casting the law in letters

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facilitated the standardisation and universalisation of the legal system, but it has not liberated us from having to answer complicated ethical questions all the time. To the contrary, the separation between the moral system and the legal system opens several possible rifts: people can disagree on what moral principle should prevail in a specific case, they can contest the moral basis of legal decisions - asking the question if a judgement is just or not - and in some societies where traditional and modern legal systems co-exist, they can even decide which legal system they would accept as morally binding. We **call legal pluralism** the instances of recognised coexistence of different legal systems. Although in Hungary legal pluralism is not officially recognised, we find examples for all these rifts in the cases that we have collected.

We do not need revolutions to see the principles of fairness and order collide, this can happen in ordinary circumstances too. In the following case, the uncertainty about which principle should prevail leads to a clash between two teachers, and maybe even causes an internal moral conflict for the teacher who talks:

"*In a disciplinary hearing, a little girl had an unexcused absence because she was in the countryside for 3 days for a funeral (of Roma origin), but unfortunately the parent did not report it, and the deadline set in the house rules later expired. The disciplinary committee wanted to act fairly (eventually they did), but the class teacher wanted to send a message to the community and wanted a bigger sanction. We made it clear that the individual would not be punished for setting an example. The main purpose of discipline is to set limits, but preferably so that the student can remain a worthy member of the community. We had (and still have) differences of opinion about the purpose of the rule making and how to enforce it*."

The teacher who tells the story exposes the dilemma: she wants to make sure that the student is "fairly" treated, but she also sees the need for sanctions and discipline. We are not sure about what the criteria of fairness would be for her, but we can suggest that it is somehow related to the fact that the student is Roma. That is probably why this detail is revealed in a somewhat strange way, almost accidentally, between parentheses, but still emphatically. The teacher might have learned something about "Roma culture" – such a training after all is not unusual in Hungary. Or, she might have some similar experience with Roma families or at least she might have some ideas about the importance of funeral in Roma communities. She wants to be understanding. For her, the reason for the absence appears at least partially legitimate. She does

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not think that the student (and through her, the family) deserves a strong punishment for having attended a funeral.

Fairness implies that the circumstances and the identity of actors involved are taken into consideration. Order knows no exception. Also, in formal legality, ignorance of the law does not exonerate the culprit. So, when the problem arises: "unfortunately, the parent did not report it"- nobody asks the question why, they only ask how to re-establish order when the house rules were violated. When order is the superior principle, the rule is more important than the context and the identities involved. In front of the law, all is equal, or at least is supposed to be. The law, i.e. the rule is conceived as "blind", neutral, universal and abstract. Even the empathic teacher does not contest the importance of the order: "the main purpose of the discipline is to set the limit", but she wants to ensure that the punishment is proportional and the child is not hurt in her identity. We do not know what the decision of the disciplinary committee was in the end, the teacher who tells the story seems to imply that finally, relative fairness was achieved, but she still finds the affair morally perturbing, that is why she brings up the case, and she finds it important to establish her difference of opinion.

What is the function of **justice as action?** All justice systems aim at resolving conflicts and re-establishing order. But the means by which they tend to achieve that goal vary a great deal. The Western penalty system is a good example of **coercive justice** based on ideas of punishment and deterrence. These ideas are so much ingrained in our societies that it is difficult to imagine a non-coercive justice system. Such systems however do exist. We find them amongst small-scale traditional societies. The Wayana, one of the indigenous ethnic groups in Amazonia count a population of just a few thousand people. They live in very small villages, led by a "cacique"

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(in Portuguese) or chief. The cacique is responsible for the maintenance of order. In doing his job, he cannot rely on a court, there are no prisons in the village and he cannot resort to violence without losing his authority. All he would do to settle a conflict is talk. A conflict resolution ceremony is a public event. The chief would sit in front of the culprit, but instead of looking at him, he shows his back to him, never confronting him face to face. He would talk in a very calm, very low voice, seemingly without worrying about being listened to or not. He would talk calmly for a long time. He does not expect a response. He does not need to find "justice" or the "truth, he does not collect evidence. His task is to achieve peace, which he demonstrates with his own behaviour.

In cases of serious violation of the peace there is however punishment. The most severe punishment that the Wayana know is excommunication. There is no coercion; there is ostracism. After all, what could be more fearsome for someone from a **collectivist society** than not to belong? The Wayana is a good example of what Pierre Clastres (1987) calls a society against the State. Clastres argues that Amazonian Indians failed to build state societies not because they were too few, or because they would have been too "backward", but because their whole social system is based on a very flat, egalitarian structure which does not tolerate sharp hierarchies. Without hierarchy, there is no base for coercion.

Black (1976) distinguishes four styles of **justice systems,** depending on the function they perform. According to him, we can speak **about penal, compensatory, therapeutic, and conciliatory** functions. Comparing a modern tribunal with the Wayna's method to restore order, we see the difference: the former represents the penal function; the latter has therapeutic or conciliatory aims. Law and justice articulate the value system of a society (Nader 1986): the nature of power and the style of justice correspond to each other somehow. It is for example suggested (Nguyen and Peschard. 2003) that more tolerance to (economic) inequality (a trait of the North American society) goes with higher levels of violence, an unhealthier population- and also, with a more punitive penal system. The American incarceration rate is indeed the highest in the world, despite the fact that many studies show the penalty system's peculiar inefficiency in fulfilling its function to increase safety (Miller 2015). The American penal system is a clear example of **retributive justice**. The emphasis here is on the penalty. The culprit must pay! He may pay with money or with his freedom, as in **individualistic societies** freedom is the highest value (just next to life, which in extreme cases might also be taken). In the penal system, the

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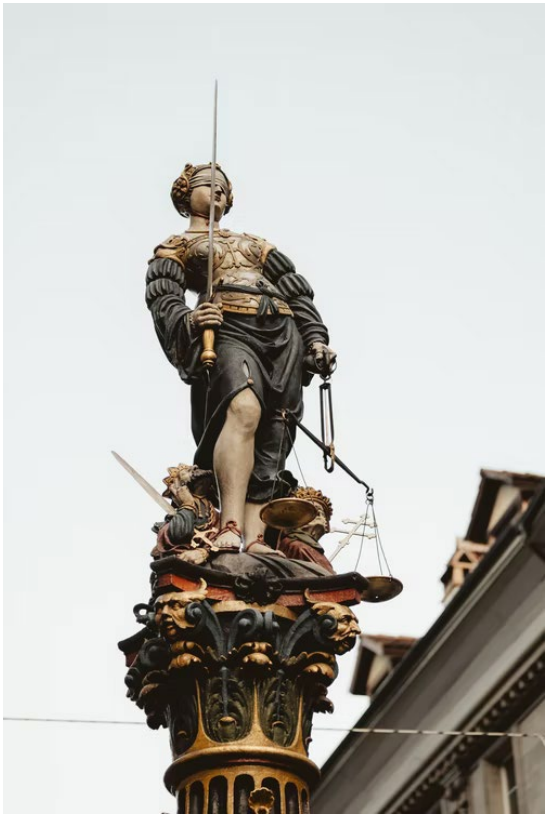
culprit does not pay to make good the wrong. He pays to feel the pain of the law biting him. And also, to show an example to others: an example of the order that the law represents. Opposed to this logic is that of **restorative justice**. **Restorative** justice does not find it useful to punish for the sake of punishment. It seeks compensation for the victim, or for the community that was wronged by the crime.



The West African palava (in Krio, from the English palaver) is an assembly, where the elders' role is to mediate between the parties and to represent the unwritten "law", i.e. the community's accepted moral system. This justice is neither abstract, nor universal. The circumstances and the identity of the claimants count, so every case is different and each one might end with a different decision. Order is important but it cannot be re-established without fairness as without fairness consensus cannot be reached, and without consensus, the peace is in danger. In case of an obvious wrongdoing, peace is achieved not so much by punishment as by the compensation of the victim.

The co-existence of different justice principles sometimes leads to intercultural conflicts and social tensions. Especially when one principle is imposed from the top to the detriment of another, which is considered more important by the members of the society in question. After the civil war in Sierra Leone, the international community established a special tribunal to prosecute those "with the greatest responsibility for crimes against humanity". The Special Court, the running of which cost millions of US dollars, finally indicted only 13 individuals - and the most prominent figures of the fighting factions were not amongst them. The public recognised the deterring value of the indictments but lamented the cost of the tribunal. For them it did not make sense to spend so much money to punish the culprits when the same amount could have been spent on compensating the victims. If Sierra Leoneans could have chosen, they

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would have preferred restorative justice to retributive justice – the obsession of the tribunal. Sierra Leoneans also considered the tribunal's quest for one single truth as a derisory illusion. Their messy civil war taught them if anything that a criminal can also be a victim and a victim can become a criminal.

In many aspects, the Sierra Leonean palava resembles the East European Romani Kris (Bódis 2004), the traditional court of the Vlach Roma presided by 4-5 clan leaders. The Romani Cris is also less concerned about the truth - as each person can have their own truth – than about the balance or harmony of the group. Its ultimate aim is to re-establish mutual respect between the parties. Fines are also paid during the Romani Cris, sometimes to the plaintiff, sometimes distributed in the community.

The Western tribunal, the Wayana chief, the African palava, the Romani Kris discuss conflicts between individuals or cases where individuals act against society. But what happens if society wrongs individuals? Can a society be unjust? Well, most of us think that certain societies are more just than others. Rawls (1971), one of the most well-known 20th century theorists of justice, thinks that everybody would prefer to live in a just society if only for a second they would forget who they are. In a thought experiment he proved that if people could choose a social system for themselves, without being predestined to certain advantages or disadvantages by their social status, they would prefer to live in a society where even the worst off person is somewhat protected. He claims that such a hypothetical society would be optimally just, in that it would keep inequality and freedom in balance: inequality would be tolerated only to the point where it would still make even the worst off person better off than he would be in a completely egalitarian society. In this vision, which is very close (at least in theory) to economically developed liberal democracies, justice does not mean total equality, but it does mean the curbing of inequalities. Freedom is protected by rights, while inequality is fought against by the redistribution of resources. The concept of justice that Rawls defends here is that of **social justice**, which is about the fair distribution of resources. Social justice is necessarily distributive. **Distributive justice** means that society as a whole provides for those who cannot provide for themselves: the children, the old, the very poor or the very sick. No society would survive without some form of redistribution, although for radical libertarian thinkers, such as

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Hayek (1976), social justice is an oxymoron, because the function of justice is to ensure the freedom of the individual (and the market).

There is a tension between freedom and equality. In a society where freedom is the ultimate value, it is difficult to coerce those who possess surplus to give to those less fortunate than themselves. Rawls and most defenders of social justice try to solve this problem by focusing on the **equality of chances** instead of equal distribution. In a society whose natural state is inequality, the chances of individuals to succeed can only be brought closer together if those at the biggest distance from the first ones receive a helping hand. Positive discrimination, affirmative action, unemployment allowance, paid sick leave and disability pension are some of the concrete forms of help. If minorities, sick persons, people with disabilities and the unemployed were treated like everybody else, their initial disadvantage could only grow. What they need to thrive therefore is not total **equality** (we speak here about equality of treatment not about equality of resources!), but something better: **equity.** Equity is differential treatment based on **need**, while equality does not care about need. However different, both principles represent a form of justice. What is more - as we saw - even those who defend inequalities speak in the name of justice, a concept of justice based on freedom. Sometimes in the eyes of those who do not benefit from preferential treatment, equity might appear as injustice. A staff of a human rights organisation tells this story:

"*One day an older lady came to the office. She didn't have an appointment, but I was available, so we sat down at the client table and she started to explain her problem. She told me that her neighbours were Roma (the lady is not a Roma herself) and one of them told her that she was a "bloody Hungarian". She said that she was discriminated against because of her Hungarian origin and that we should help her to take action against her Roma neighbours. I told her that we could not help because we can take action only for major violations and that in this particular case there was no violation. What I did not tell her is that we do not help the members of the majority against the minority. When she heard that she would not get legal help from us, she started to swear loudly that we were anti-Hungarian, she yelled this for 10 minutes and then stormed out of the office.*"

It is interesting that the human rights defender somehow does not dare to tell the client the real reason for his objection: "What I did not tell her is that we do not help the members of the majority against the minority". It is as if faced with the judgement of the other he would retreat,

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he fails to defend the principle of equity for which he works daily and in which he believes. He is not a cowardly person, this would be in conflict with his profession. It is rather that he finds suddenly that his commitment to equity enters in competition with his respect for equality. His own inconsistency probably disturbs him as much as the complainant yelling at him. If there is hardly any easy solution for this dilemma, the very fact of recognising its paradoxical nature might help this professional to be more self-conscious in his work.

Capitalism has an intriguing relationship with equality. Although in the self-definition of the modern Western world, the cradle of capitalism, the commitment to equality carries a lot of weight (think of the triad of the French Enlightenment program: "Liberty, Equality, Fraternity"), material inequalities tend to increase instead of fall. (https://ourworldindata.org/global-economic-inequality). It seems that these societies support abstract, legal and political equality but do not do a lot for economic equality. Calls for the latter indeed remain somehow suspicious, as the relation with the ideology of the late socialist regimes is too easy to make. In this way, the ancient moral value of fairness, supported by world religions, and its modern days corollary: equity, become subjects of contestation and of vehement political debates. This debate is about the kind of society in which people would like to live, but also about the kind of justice that they need to build this world.

If one considers injustice not as a divine curse on humanity, but rather as something produced and maintained by those mechanisms that promote inequality (economic but also racial, ethnic, gender and other group-based inequalities), the logical conclusion is that justice is a social cause which needs structural changes, beyond correcting individuals. In this view, not only is the American over-incarceration irrational, but it also perpetuates the racist inequalities, which prevail outside the prisons' walls. This example amongst other possible examples shows that the style of a legal system does not only reflect the nature of the political system, and the structure of the economy - what the society (and its members) think about economic justice – it also reflects the dominant ideas about the nature of man. In an individualistic society inequality is tolerated because a certain dose of selfishness is thought to be inevitably part of human nature. "The self is unjust in that it makes itself the centre of everything" says Pascal in *Pensées*.

Societies are however not fully coherent entities, they are traversed by conflicting value systems. Individuals sometimes get caught in those value conflicts without being able to clearly

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identify their deep causes. In the following case, several justice principles enter into collision, creating a lot of disappointment, frustration and dissatisfaction for the police officer who narrates it:

"A person caught in the act of stealing wood and detained was brought to court after 2 days in custody. The quantity of the stolen wood: it fit into a pram (baby carriage), its value was 400 Ft (a bit less than 1,5 euros. Both the judge and the attorney said.: "Why is the police dealing with this (affair)?" I understand the attorney, because as a defender that is his job. The judge, I tried to convince her that you can steal a whole forest with a pram. The judge however dismissed the case. We had a little argument and she won. The man (the suspect) on his way out of the courtroom told me that he expected worse and left smiling."

Here some additional information on the identity of the actors is needed to understand better what made the narrator so angry. He is a man in his 50s, all his life he has been serving the police in a minor countryside town. He knows the suspect: he is an elderly Roma man who lives with his whole family (wife and 4 children) in a nearby village, in a house without heating (the events took place in December). The officer already suspected him of stealing wood from the forest several times but he never had the necessary evidence to arrest him. This time the man was caught red handed and although the value of the offense was small, the fact of stealing was incontestable. The judge was a young woman "sent" from the capital, who apparently did not share the officer's assessment about the importance of the case. As a middle-aged man, the officer probably felt humiliated and vulnerable by a younger woman who in this case was his superior and contested his professional injudiciousness. In fact, the judge's decision was that the man had enough punishment already with the 2 days custody that according to strict procedural rules was by no means necessary.

Not only was he humiliated by a woman, the officer also felt ridiculed by his old adversary whom he was chasing for a long time before he could finally corner him- to no avail. Positionalities, personal histories and individual emotions, such as pride, shame, frustration, anger, disappointment, and desire for revenge seemed to govern the course of events. However, once we leave behind the level of individual actions and reactions, we can discover another layer of the conflict: it is made of a whole series of disagreements over justice principles. The officer seems to be a firm supporter of the penal system and he believes unconditionally in the value of retributive justice. He probably does not think either that the material value of the theft

and the punishment (that he hoped for) are proportional – that is why he mentions meticulously and honestly all these small details in his account. But he does think that order must be maintained by all means, even against the principle of fairness. In fact, his job is exactly that: it is about maintaining the order, so the case, the wood-thief and the incomprehensive judge all threaten his professional identity. In these circumstances, fairness does not even enter into consideration for him. He does not believe that social justice has got anything to do with the police's work. He thinks about example setting and deterrence. The fact that the man used the stolen wood to heat a house in wintertime does not move him. If the law is blind, it should not look at the motives of the wrongdoing, it should only look at the consequences. A theft is a theft; there is no place for extenuating circumstances.

Interestingly, his most serious disagreement is not with the suspect but with the judge who is supposed to work for the same penal system that he represents. He experiences her open disavowal as a betrayal. Paradoxically, the very same hierarchical structure of the penal system that put the Roma man in the hands of the police officer makes the police officer vulnerable to the decision of the judge. What is more, the police officer who does not believe that considerations of fairness have a place in the courtroom comes finally to contest the fairness of the judgement. Order and fairness, penal justice and social justice, retributive justice and distributive justice, equality and equity, natural law and positive law are the real protagonists of this story and they are in a loud quarrel behind the back of the human actors.

- In the Western philosophical tradition, Plato, Aristotle and Aquinas were some of the proponents of natural law, the idea that our moral judgements reflect a transcendental, universal, timeless order. Louis Dumont, an anthropologist who theorised and documented the historical development of Western individualism (1986) posits a strong correlation between the worldview supposing a bounded, reasonable individual, separated from society, the idea of natural law, and universalism, i.e. individualists' tendency to consider their moral order as universal. This belief is all the more peculiar as the uncompromising individualism characterising Western societies is rather the exception than the rule amongst the world's countless cultures. The liberal idea of justice is that my individual rights should only be limited by the right of another person to be protected from the harm that I might cause to them. Individualism cannot be considered particularly efficient in protecting human societies against themselves. The 21st century arrived with a series of global crises, several financial crises, the

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crisis of work, the crisis of care, the crisis of democracy, the ecological crisis, even the idea of truth is in crisis in what some call the post-fact society. Justice based solely on individual freedom protected by individual rights meets its limits.

- More and more social movements demand rights for collectives and communities, for the future generations and for nature itself. The rights of nature are enshrined in the Ecuadorian and in the Indian constitutions. Rights of nature are recognised in some form, sometimes together with indigenous rights in New Zealand, Colombia, and Bangladesh in Australia and in the United States. African philosophers (Onazi 2020) oppose the Western individualist tradition with a conception of justice based on obligation rather than on rights. They believe that people in a just society have obligations *vis a vis* each other, obligations of solidarity, protection and care: a generalised obligation of fairness, extended, beyond the fellow human individual, towards the whole community and towards the non-human world. Principles of justice still evolve, mutate and hybridise. It is not excluded that societies, structures, and legal systems that consider themselves just today will appear glaringly unjust many centuries from now. Probably by then, another sense of justice will prevail. Still, this new form of justice will only draw on the many forms of justice with which humanity has experimented so far, all founded on the idea that despite the complications there is a fundamental difference between what is right and wrong.

Amongst the sensitive zones, justice is maybe the most vulnerable to culture chocks. It is because man is essentially a moral being and consequently, any challenge to our sense of justice profoundly perturbs the very core of our identity. The trainer therefore cannot have the role of questioning moral judgements in the room, let alone imposing his or her own moral sense. What she or he can do is to elucidate - bringing real examples - the complexity of the moral question and thereby open up the participants to the somewhat scary, somewhat liberating possibility of recognising in another person with a different moral sensitivity an equal fellow human being.

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