'THE BEST IN THE WEST'

Educator, Jurist, Arbitrator

Liber Amicorum in Honour of Professor William Butler

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AEQUITAS AS REAL LAW: SOURCES OF THE EUROPEAN LEGAL TRADITION

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> A principle of law ... is merely the direct expression of justness: I confirm my freedom as a right insofar as I acknowledge the freedom of others as their right.
>
> Vladimir Solov'ev, Оправдание добра [Justification of the Good]

JUS AND LEX

In social consciousness law coincides with the forms of its fixation and expression – positive law (*lex*). This view puts into place the objectively existing historically conditioned form of social relations determining the equality of participants and the value of each from the conflicting interests, official-authoritative procedure for the settlement of disputes, and determination of the rules of behavior which hold back from a genuine concept of law only the general, which is equal for all (principle of formal equality).

The reduction of the concept of law (*jus*) to its official form (*lex*) is justified because positive law represents the result of the efforts of all of society for a precise expression and consolidation in a receptive form of the understanding of law achieved – both in the general sense and with regard to individual situations and conflicts of interests. This fixation is becoming the point of departure for further considerations on law, the basis or judicial decisions, the source of a quest for legal principles and new, previously unknown, situations – which form the legal tradition of a people, a special professionally-oriented discourse, conceptual context enabling the work of past generations of thinkers to be taken into account and to contribute something new to what is already known, supporting a succession of conceptions and a unity of thought contributed to particular concepts. A norm of positive law represents a generalization of experience, a key to a general system of conceptions achieved about law, and simultaneously, a unit of actually operating law, a rule of behavior in a particular individual instance. This is one of the phenomena of social culture, a quantum of social memory, a historical and present wealth of the people and the experience and potential thereof.

Positive law exists in diverse forms. Most significant and noteworthy among them is *lex* (закон). *Lex* is a norm socially elaborated for a particular

type of instance and adopted in accordance with an established procedure, targeted towards the fullest recording of the opinion of the people and existing practice of the regulation of instances of the particular type. A *lex* is distinctive for its official character, extensive sphere of operation, level of generalization and procedure of adoption which are called upon to ensure the conformity of expectations and requirements of society to the level achieved of the comprehension of law as a whole and the situation being regulated in particular. A *lex* expresses (to the extent reached) the conformity to social requirements of the social readiness to comply with the correlation (compromise, procedure for agreeing, and settlement of a conflict) of interests identified.

Other forms of fixing prevailing norms of law exist together with *lex* and enjoy public recognition and defense, such as various subordinate acts, legal custom, judicial precedent, and others. These forms of positive law such as *lex* are subjected to official and unofficial (doctrinal) interpretation. Interpretation acts as a procedure in which fixed and publicly significant texts are translated into prevailing cultural codes (translated into the current language) and concretized with regard to concrete instances. A significant part of modern jurists identify law (*jus*) not with *lex*, but with the results of interpretation. It is easily observed, however, that the differences of principle between official forms of positive law and the interpretation thereof do not exist: one or the other is relegated to the external, cognitive aspect of law, the procedure for its fixation and perception, but not to the essence of the prevailing norm. Special laws assign (or recognize) particular public agencies as official interpreters of laws, thereby eliminating any conceptual distinction between the law officially in force and law as a result of interpretation.

Positive law and law established by interpretation equally act merely as forms of fixation, recognition, and perception of norms of law which exist objectively, irrespective of official recognition, and are a genuine regulator of social relations. In a rule-of-law society rights enjoy defense based on these objective norms, whereas deviations from them, inevitable in the course of publicly significant fixation, are ignored and suppressed. In a despotic society there is no place for the said distinction of norms of *jus* and norms of *lex* (positive law) because in such societies a norm of law is considered to be only that which received public recognition as law. Here the official is elevated to a degree of the objective (existing). The entire meaning and content of the struggle for *jus* consists of approximating official law to objective, in ensuring order, under which the divergence between them will be resolved in favor of objective law (perhaps not expressed), whereas deviations from the naturally formed order of social relations will be regarded as a misunderstanding, as the costs of the legislative process or interpretation, and accordingly rejected by courts and law enforcement agencies.

A norm of positive law – *lex* or judicial precedent – objectively cannot fully correspond to the entire sphere of regulation. An abstract norm of general operation (*lex*) or settlement of a conflict of interests, to become a model for the resolution of conflicts in similar instances (precedent) cannot fail to take into account the possible diversity of situations which arise or significant details of other possible instances. The task which confronts the court is to identify genuine law resolving a conflict according to the principle of equality for every specific instance. If a norm of legislation (or precedent) can be applied directly (which is rare), the task does not require additional efforts, but if (which often happens) interpretation is required or a genuine norm is found addressing a particular instance, the court needs a guiding principle, a special norm, which would guide the quest for law and act as a criterion of a legal character for the solution found.

In some legal systems of the modern world (countries of the "civilian" or continental law: Europe, Latin America, Japan, Northern Africa, and other civilized countries independent of European States) where logically systematized and codification legislation exists, special norms determining the general legal criteria and the procedure for interpretation have been included in a single block of legislation. In Common Law countries, where there is no logically organized system of norms (and codification), the quest for law is governed by general principles (often fixed in the form of judicial precedents) which orientate the judge towards the identification and most adequate qualification of the situation being considered with a view to the reconciliation and resolution of a conflict of interests. In any system continental (more inert, closed) or Common Law (more unfettered, open) – the task of finding law is placed on the court. Law in the objective sense turns out to be a norm regulating a specific instance found in an established procedure in the course of a judicial dispute. This law becomes generally-known in the course of (official) publication, but cannot be elevated to a *lex* or a precedent binding for application in similar instances because each instance is unrepeatable and requires its own special decision, perhaps subject to the general norm. Thus, a divergence objectively exists between *jus* (as a natural form of social relations, principle of formal equality) and positive law as a system of expressed and generally-recognized norms. Whereas legal science understands by law a genuine and objectively existing law – a norm governing a specific instance, then social consciousness (and often legislative and law enforcement agencies) – an officially recognized norm (*lex*, custom, precedent, international convention).

Hence the need for legal science (jurisprudence) to have a special concept expressing the idea of a genuine law, law proper, in opposition to an official positive law (which may not be rule-of-law, but a genuine law cannot fail to be in any event – applicable to any concrete matter). Since time immemorial "justness" (equity) has acted as such a concept.

CONCEPT OF JUSTNESS

Today the concept of justness in common parlance is associated with "social justness", with a distorted notion of support of the weak and powerless, State social programs, compensatory restoration of equivalence ("violated justness"), equal "starting" opportunities, material or consumer equality (equalizing), in other words – all those social forms which are targeted towards reducing the chasm between the wealthy and the poor, the healthy and the sick, the successful and the hapless, the informal equalization of various social groups or individuals materially below some standard of consumption or diminished in their human dignity. These ideas, although remote from law, reflect but also distort the principle of equality. Justness (natural law) as a benefit equal for all or an approach equal for all (different justness does not exist for individual or groups, but only one for all) assumes an equal retribution for the equal and unequal so as to consistently implement the principle of equality. But such equality will be formal equality: an equal relation for all (except for unprivileged groups or persons), a general norm for all (which therefore becomes a norm that is universal), a single scale of approach to all members of society (or people in general – as members of a single mankind).

An equal scale does not assume material equality, but achieves formal equality irrespective of the material position of the persons being discussed. Equality (formal) overcomes existing differences (material), transforming different people into equal persons, establishing uniform rules for all, *irrespective* of real possibilities. An exceptional measure (or scale) is applied to the hapless (and only in special relations) because they from a formal point of view deserve (preliminary, exceeding the result sought) compensation targeted towards ensuring a formally equal status with the majority. Thus legal privileges arise (justified by the aim of formal equality) – exclusive rights of certain social groups. These exceptions are just (unlike unjustified, unequal privileges) because they are subjected to a principle of equality uniform for all.

In legal theory "justness" is a synonym of law, a concept indicating a genuine (natural) law objectively existing in social relations, despite possible arbitrariness of the legislator and inevitable costs of an official fixation of such a genuine law. Justness is a concept expressing the essence of law in force (actually existing in the forms of legislation and procedure), an immoveable constant, a law ideal for a particular society and for a particular matter.

ON NATURAL LAW DOCTRINES

The juxtaposition of law to justness (genuine, divine, natural law) has from ancient times permeated the most perspicacious doctrines on law and act as one of the definitions of law. These doctrines seek to build a

model of ideal law as guidance for an honorable person in his relations with other people. According to these doctrines, which are called "natural law" doctrines, man stands in the center of the legal order, endowed from birth with certain rights, natural and inalienable, and all social and public institutes are derivative from these primary rights and are in the service thereof. Being natural or divine, natural rights determine morality and the virtue of a person and the perfection of his thoughts and feelings. Law forms man and society as perfected in all relations. In the majority of natural-law doctrines this ideal receives an ethical assessment: in speaking about the subject of an ideal law, they talk about a morally perfected person. Because law as the embodiment of a moral *lex* does not depend upon the discretion of human beings, it proves to be a source of laws in force. It is required of the legislator to reproduce *jus* in a *lex*, to subordinate *lex* to the natural characteristics of *jus*. A *lex* is merely a *lex* which is consistent with natural *jus*. The State and laws exist so as to ensure and defend the innate rights of man.

The coinciding of law with morality is one of the major weaknesses of natural-law doctrines. Under this approach, identifying law with justness relegates to justness a place among ethical, but not legal, phenomena, such that the justified juxtaposition of *jus* (as a primary natural phenomenon) and *lex* (as a secondary, artificial creation of humans) is accompanied by the logical subordination of law to the requirements of morality or other non-law (as distinct from law) criteria – which is contrary to the thesis of the primary and objective (natural, divine) character of law itself. Similarly, the consistent juxtaposition of legal and political phenomena, relegating to the State and other social institutes an official position in the legal system of society draws the real society into the sphere of earthly, ordinary, profane, whereas law comes down to some ideal (or unreal) phenomenon, an unachievable testament. The principle of law proves to be not an integrating principle for all social phenomena defining and identifying the divine essence of *lex* in force and real society, but merely one of the phenomena of an ideal not capable of being fully embodied in reality.

HISTORICAL DATA ON JUSTNESS

Historical data concerning the development of law demonstrate a more targeted, integrative picture of the subordination of social institutes to the legal system and ideology of a single principle which proves to be a genuinely operative principle, a definition of all social life embodied in the genuine diversity of all aspects thereof.

In the legal doctrines of the New Era, the concept of justness (in its correlation and traditional juxtaposition with positive law) have come down as several maxims, the most authoritative of which have been taken from decrees of Constantine the Great (early fourth century):

C. 3, 1, 8 (314 r.): *It is decided that in all matters considerations of justness should be higher than law proper.*[1]

Other generalizations have come down in fragments of Julius Paul, a great jurist of the early third century:

D. 50, 17, 85, 2 (Paul., 6 quaest.): *Each time when a natural principle or ambiguity of law prevents justness, the situation should be rectified by just decisions.*

D. 50, 17, 90 (Paul., 15 quaest.): *In all matters, especially in law, one should take into account justness.*[2]

It is usually believed that these texts are independent of Imperial legislation of the fourth century because with Constantine the juxtaposition of justness to law – as a new ideology echoing Christianity gradually received official status – was confirmed in the science of Roman law, and through it occupied a stable place in the theories of many European thinkers of later centuries.

This view, on the whole a reliable one, assumes a certain rethinking of the concept of *aequitas* from the times of classical Roman jurisprudence. In other words, having become a topic of European legal thought, the concept of justness had its own pre-history: it acquired its genuine meaning within the framework of classical Roman law (first to third centuries). The subsequent mastery of the Roman legal legacy by Byzantine, Western European, and all world culture occurred under other conditions, in another cultural context, within the framework of an understanding of law different from that which was peculiar to the creators of legal science. Identifying the place and significance of *aequitas* in the structure of Roman classical law is essential in order to scientifically elucidate this category.

Roman jurists of the classical era perceived an abstract concept of justness among the philosophers, especially Cicero (first century B.C.) and Aristotle (fourth century B.C.), whom Cicero himself followed. For jurists,

[1] C. 3, 1, 8: Const. et Licin. AA. ad Dionysium.
Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem. <a 314 d. Id. Mai. Volusiano et Anniano conss.>.This and other such decrees in reality belong to the Emperor Licinius. See also C. 7, 22, 3: Const. et Licin. AA. litt. ad Dionysium vice praef. *Solam temporis longinquitatem, etiamsi sexaginta annorum curricula excesserint, libertatis iura minime mutilare oportere congruit aequitati.* <a 314 d. III K. Mai. Volusiano et Anniano conss.> C. 1, 14, 1: Const. A. Septimio Basso PU.
Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere. <a 316 d. III Non. Dec. Sabino et Rufino conss.>

[2] D. 50, 17, 85, 2 (Paul., 6 quaest.): *Quotiens aequitatem desiderii naturalis ratio aut dubitatio iuris moratur, iustis decretis res temperanda est.*
D. 50, 17, 90 (Paul., 15 quaest.): *In omnibus quidem, maxime tamen in iure aequitas spectanda est.* These observations drawn by the compilers of the Digest of Justinian from the initial context, even without special "corrections" have a new meaning, which the classics did not have.

the idea of justness coincided with *jus* because its separation out from a single (syncretic) concept of the ought and the correct (*aequum*) occurred under the influence of philosophical doctrines. The analytical isolation of "justness" in the doctrines of professional jurists became possible because, on one hand, the concept *aequitas* fully corresponded to the legal views which had formed and to legal terminology and was readily embedded into the language of the developed Roman jurisprudence and, on the other, in the doctrines of the great philosophers the idea of justness was already subject to the principle of legal equality and commensurateness, which jurists perceived as a genuinely legal concept.

ARISTOTELIAN VIEWS ON JUSTNESS

In objecting to the Sophists (leading thinkers of the preceding era), who had juxtaposed law and morality, allocating to justness a place among ethical concepts, Aristotle showed the substantive unity of law and justness, having proposed the formal, abstract, and universal significance of this concept. Aristotle (Arist., NE., 1234b19 sqq) distinguishes natural law, the same everywhere and not dependent upon recognition or nonrecognition thereof, and conditional (conventional) law, which is determined by the agreement of people. The concept of justness was unified and immutable only with respect to the Gods, whereas truly existing law, human law, is changeable, just as the conditions of life are changeable: distinctions are determined by the diversity of real relations and historical conditions of the fixation of the rules of community life (1135a). Diversity does not contradict the unity of the essence because all rules are subordinate to the general rule common for all, that they act according to law.

Justness is a proportion, Aristotle teaches in Book 5, "Nicomachean Ethics" (§7). The essence of justness in the application of an equal scale to equal and unequal to unequals (distributive justness) and in equal retribution compensating losses (punishment, contributory compensation) or determining equivalence under an exchange (equalizing justness). It is just that deviations are excluded from equality and violations of commensurateness and equivalence are compensated: under a voluntary exchange, equality ensures the commensurateness of notions, and under a loss as a consequence of theft or damaging of property (involuntary exchange) – equal contributory compensation enables harmony to be restored, and that unlawfully taken to be returned or the losses to the victim compensated.

In explaining the general operation of the legal principle (*omnis ratio iuris*), Cicero reproduces the doctrine on a single equal scale and the theory of contributory compensation in Roman terms (Cic. Part. Or. 130):

> Law is divided at first into two pairs: nature and *lex*, and the significance of each type falls into divine and human law, and

justness is peculiar to one of them (*aequitas*) and, to the other, piety religion). The significance of justness is dual: one is orientated towards the true and lawful, and, it is said, rests on the principle of commensurateness and the good (*aequi et boni ratio*), whereas the other relates to an interchange of retributions which with respect to good deeds are called gratitude and with respect to injustice – revenge. They also are common for nature and *lex*, but peculiar to *lex* which are written and which are supported without being written, or universal law, or by the customs of ancestors.[3]

The unity of law in principle distinguishes it from diverse legislation and is regarded as the regulatory basis of society as an objective and universal law.[4] Law is, in and of itself, the highest principle (de leg., 3, 37; 3, 48),[5] which does not accept utilitarian approaches (from the standpoints

[3] Cic. Part. or. 130: *Quod dividitur in duas partes primas, naturam atque legem, et utriusque generis vis in divinum et humanum ius est distributa, quorum aequitatis est unum, alterum religionis. Aequitatis autem vis est duplex, cuius altera directa et veri et iusti et ut dicitur aequi et boni ratione defenditur, altera ad vicissitudinem referendae gratiae pertinet, quod in beneficio gratia, in iniuria ultio nominatur. Atque haec communia sunt naturae atque legis, sed propria legis et ea quae scripta sunt et ea quae sine litteris aut gentium iure aut maiorum more retinentur.*

[4] Cic., de leg., 3, 18-19: *Igitur doctissimis uiris proficisci placuit a lege, haud scio an recte, si modo, ut idem definiunt, lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria. Eadem ratio, cum est in hominis mente confirmata et <per>fecta, lex est.* (19) *Itaque arbitrantur prudentiam esse legem, cuius ea uis sit, ut recte facere iubeat, uetet delinquere, eamque rem illi Graeco putant nomine* νομον *<a> suum cuique tribuendo appellatam, ego nostro a legendo. Nam ut illi aequitatis, sic nos delectus nim in lege ponimus, et proprium tamen utrumque legis est. Quod si ita recte dicitur, ut mihi quidem plerumque uideri solet, a lege ducendum est iuris exordium. Ea est enim naturae uis, ea mens ratioque prudentis, ea iuris atque iniuriae regula. Sed quoniam in populari ratione omnis nostra uersatur oratio, populariter interdum loqui necesse erit, et appellare eam legem, quae scripta sancit quod uult aut iubendo <aut prohibendo>, ut uulgus appellare <solet>. Constituendi uero iuris ab illa summa lege capiamus exordium, quae, saeclis <communis> omnibus, ante nata est quam scripta lex ulla aut quam omnino ciuitas constituta.*

The most intelligent men have deemed it necessary to proceed from the concept of *lex* and they are, indeed, right, provided that *lex* as they define it is the highest reason embodied in nature, directing us to perform that which should be performed and prohibiting the opposite. This same reason, when it is consolidated in human thoughts and improved, also is *lex* (19). Therefore, it is considered that wisdom is *lex*, the sense of which is that it commends to act properly and prohibits to commit crimes. They suggest that the Greek name "*nomos*", since a *lex* "behests" to each that which is provided, and our word "*lex*", in my view, emanate from the word "*legere*". Therefore, if the Greeks contribution to the concept of *lex* the concept of justness (*aequitas*), then we contribute the concept of choice; but something else is peculiar to *lex*. If these reflections are correct (and I am personally inclined to think this is, in general, true), the origin of law should be derived from the concept of *lex*. Because *lex* is a force of nature, it is the mind and consciousness of a wise person, it is a measure of *jus* and non-law. But because our law is based on the notions of the people, and from time to time we say that what the people say is called law (as do the common people), those provisions which determine in written form that is found to be necessary, either order this or prohibit this. When substantiating law one proceeds from the highest *lex*, which being common for all centuries, arise earlier than written law and indeed earlier than before any State was founded.

[5] See "On Duties" (Cic., de off., 3, 30): Justness illuminates in and of itself (*Aequitas luceat*

law is justice established (*aequitas constituta*) for members of a single *civitas* aimed at ensuring the affiliation of all proper (their) things".[10]

CONCEPTS OF JUSTICE AND LAW

In these definitions Cicero was true to his intention to extract the concept of justness from philosophy, and not from law (de leg., 17); however, in turning to the real phenomena of justness, he constantly cited legal cases and, in attempting to fill up the concept of "the good and the just" (*bonum et aequum*) with specific content, resorted directly to the work by the greatest jurist of the first century B.C., Quintus Mucius Scaevola Pontifax (d. 82 B.C.) (Cic., de off., 3, 17, 69-70).

Court suits targeted towards the establishment of the extent and content of mutual notions of the parties in the view of the judge (*boni et aequi iudicia*) proved to be the embodiment of justness in civil cases as realized justness.

The concept of *bonum et aequum* had from times ancient described the Roman legal order. The expression *aequum ius, aequum est* (= *ius est*), *bonum et aequum* are found in the very earliest texts,[11] as demonstrated by epigraphs (original inscriptions on stone and bronze) and often in legislative acts to indicate lawfulness and legal force. *Aequum* likewise was attributed to people and to the Gods (by the first Roman playwright, Titus Maccius Plautus, 154-154 B.C.),[12] who sketched the sphere of the lawful, ought, normative. In this meaning the term *aequum* is found throughout the entire textual tradition of Roman law. In its technical sense *bonum et aequum* points to the outcome of the activity of judicial magistrates (Cic., de leg. Agr., II, 102: *ius in iudiciis ac aequitate magistratum*), judges, and jurisconsults and is placed in the same category as laws (although distinct from them: Plautus Men., IV, 2, 5: *quil neque legels neque aequo/m bonum usqua/m colunt*; Cic., top., 28: *si quis ius civile dicat id esse quod in legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat*; 31: *si quis ius in legem, morem, aequitatem dividat*; Cic., in Verr., 2.3.42: *qui ab aequitate, ab lege, ab institutis non recesserunt*). *Aequitas* is relegated to that special sphere of law which acts as the criterion of lawfulness of a judicial decision (Cic., in Verr., 2.2.109) or the adequacy of an interpretation of a law (Cic., part. Or., 136), or a partial expression of will (Cic., Brut., 145; 198; de orat., I, 242 sq; pro Caec., 57; 61; 65; 77; 80-81; 104; pro Mur., 27).

Whereas in the era of the Republic jurists spoke of *aequum*, equating it in meaning with *ius*, by the end of the first century A.D. they begin to resort

[10] Cic. Top. 3. 9: *Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas...*

[11] See, for example, the speech of Marcus Porcius Cato (234-149 B.C.) To the Rhodians (Gell., 6, 3, 36-42).

[12] Pseudol., I, 3, 35: *Deos quidem, quos maxume aequom est metuere, eos minum facit*

to the abstract category *aequitas* (literally: that this is capable and actually acts as *aequum*, is just and commensurate). The term *aequitas* is used by jurists of the first and second centuries merely in individual instances (to be sure, the content thereof has survived in a smaller number of fragments) which were widely disseminated at the end of the second century. The greatest component of the Digest of Civil Law of the Digest of Justinian (sixth century) is the official collection of fragments of Roman jurists and our principal source for law of the classical era; it contains dozens of texts of jurists from the end of the second and early third centuries in which *aequitas* acts as a consolidated concept expressing the idea of a genuine law, legal justness as a leading principle governing a legal *civitas*, and as an imbedded composition of interests, a means of settling conflicts, a highest value comprising the purpose and essence of the activity of a jurist.

> D. 1, 1, 11 (Paul.14 ad Sab.): "*Jus*" speaks in many meanings: in one, when *jus* is that which is always just and good (*aequum et bonum*), which is natural law. In another meaning, that which serves all or many in some *civitas*, which is civil law.[13]

> D.1, 1, 1 pr (Ulp. 1 inst.): In turning to the lessons on law, one should know when the name ius originates. It is from iustitia: Celsus defines it well: *jus* is the mastery of the good and the just (*boni et aequi*).[14]

The Roman jurist often criticizes *lex* or a provision which has formed in *jus* as "unjust" (*iniquum*).[15] In so doing the *lex* or legal provision as a whole were not repealed, and in this sense *jus* remains law: judgment is rendered in a specific case or in a particular respect, noting the inapplicability, or unjustness, of applying the general norm to it.

MEANINGS OF JUS AND JUSTNESS

The juxtaposition of justness to *jus* and the insistent appeal to *aequitas* in substantiation not only of major innovations, but of any interference in the stable traditional norms extends into the period of the Late Empire (from Constantine the Great). The Emperor justifies his presence in the legal domain by the fact that he is acting as the conduit of an embedded justness, the best, the most substantiated and adequate decision, advancing as grounds *aequitas* as some highest normative principle. Imperial discretion thereby is given a normative metric, and Imperial authority itself is an

[13] *Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile.*

[14] D. 1, 1, 1 pr (Ulp. 1 inst.): *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi.*

[15] See, for example, Gai., 3, 25; 3, 41: *iniquitas iuris*; Id., 1, 84-85: *iniquitas rei et inelegantia iuris*; Id. 3, 40; 4, 75; 4, 133: *iniquum est*).

agent of justness, a means of realization, and an actual source of the highest truth and harmony.

These propositions became the point of departure for a new understanding of the idea of justness in opposition to which for the concept of law is consolidated the meaning of a fixed, officially recognized law (positive law), an abstract norm insensitive to the specific nature of an individual case (norms of general operation, *lex generalis*). Such distinctive features of law as stability, certainty, and equal meaning for all lose attractiveness and to an observer circulate only as negative consequences: insertness, inflexibility, equalizing indifference, becoming some soulless and insuperable coercive power insensitive to individual weaknesses and misfortunes for a person not only by a confluence of circumstances but each person loses his individuality, being turned into a faceless unity of administration (deprived of creative potential). All the positive features of the equal operation of the same norms for all are concentrated in the concept of justness, as if a genuine law exists outside the really operating law and legal expectations could be realized somewhere outside the sphere of law. This ideology is convenient for justifying the arbitrariness of authorities, who appropriate to themselves the right at their discretion to decide what is just and what is not. The link of Imperial authority with substantiated (legal) notions of justness, of course, cannot be ensured by any special remedies beyond the control of society and its naturally formed orders, or by any ideological tenets liberated from the principle of equality, which can only ensure the freedom of each coordinated with the freedom of all, the freedom of all as a condition of the freedom of each.

Here we confront in principle different understandings of law and justness: one of them, a scholarly understanding, identifies justness with law (genuine law), acknowledging the impossibility (or unjustness) of another justness except as equal for all; the other is arbitrary (ultimately always power) and endows justness with a situational meaning and juxtaposes law to it as a soulless order, extracting a justification of the non-normative and incidental discretion of the authorities in a demeaning attitude towards law (legal nihilism). Whereas the first understanding is the banner of liberal doctrines and social movements upholding the freedom of the individual, the second requires deniers of rights by despotic forces. These objective vectors of development of a respective ideology exist irrespective of the well intentioned propositions of the thinkers or their adepts.

For Roman jurists the idea of their professional activity consists of seeking a specific law as the application of general principles of equality and commensurateness to each individual case, a quest for justness

(single scale) for a concrete situation,[16] in overcoming factual distinctions in a single formal relation, equal for all similar instances (or norm). The identification of law and justness and recognition of the legal nature of justness excludes from the conceptual vocabulary of Roman jurisprudence the idea of justness as non law juxtaposed to the law of the concept, makes inconceivable moving justness ahead of law peculiar to the Imperial decrees of later Rome.

Only within the framework of Justinian codification, where the judgments of the classics of Roman law on individual cases, appeared in the form of general norms, abstract provisions of the most extensive operation, did mentions of justness take on a dual meaning – as arbitrary and situational interference agreed with an Imperial provision in the law that had formed. The entire legacy of Roman jurisprudence may, in this context, be reviewed (and often is in the textbooks) as a subordinate idea of the review and transformation of the inert and obsolete positive law and necrotic traditional norms. The fact is, however, that the Roman law in force during the classical period was basically the creation of the Roman jurists themselves: their judgments with regard to specific cases comprised the principal mass of fixed (written) texts - positive law (D. 1, 2, 2, 12). The existence of such fixation somewhat weakened the flexibility of these concretized norms because they were easily changed, depending upon the peculiarities of each new case, each specific situation. The justness of Roman law in action was ensured by the creative character of its principal source – jurisprudence. The quest for justness as a method of Roman law (*ars boni et aequi*) preserved its significance also in that case when there was an official (public) law for the case being discussed. Justness (*aequitas*) was acknowledged to be the leading criterion for the interpretation of laws or other legal acts. The general stability and certainty of the legal system was secured by a unified – legal understanding of justness and law and common principles of volitional interaction shared by all of society. For the Roman jurists, justness was law (genuine law, found law, because injustice could not be law).

BY WAY OF CONCLUSION

A contrast of one text of Ulpian (c. 170-228) in the Digests of Justinian (D. 15, 1, 32 pr)[17] and a fragment of the same text which has survived in

[16] In this sense the definition of law by Celsus, as the "mastery of the good and the just" (*ars boni et aequi*).

[17] D. 15, 1, 32 pr (Ulp., 2 disp.): *Si ex duobus vel pluribus heredibus eius, qui manumisso servo vel libero esse iussus vel alienato vel mortuo intra annum convenire poterat, unus fuerit conventus, omnes heredes liberabuntur, quamvis non in maiorem quantitatem eius peculii, quod penes se habet qui convenitur, condemnetur, idque ita Iulianus scripsit. idemque est et si in alterius rem fuerit versum, sed et si plures sint fructuarii vel bonae fidei possessores, unus conventus ceteros liberat, quamvis non*

manuscript, the source of which is independent of the Justinian compilation (Strasb. Frg. I A),[18] provides assurance of this. The text contains one of the most suspicious expressions of *aequitas dictat* (justness requires) common in Imperial decrees of the fourth century and extremely rare in the Digests. In the literary works it is unknown before the fourth century.[19] The Strasburg fragment (greatly damaged, one can only read several words in all) proves the genuineness of this expression: the fragment contains the word "[*aequitas*] *dictat*", and also the name of the suit absent in the text of the Digest. The compilers of Justinian were not interested in the classical remedies and they omitted terms which seemed to them superfluous. Thus, the Strasburg fragment illuminates the manuscript of Ulpian which existed before the Digest of Civil Law. Nothing prevents us from believing that this was a manuscript of the original work by Ulpian[20] that, as is now clear, contained the expression "justness requires".

The greatest investigator of the textual tradition of Roman law during the second half of the twentieth century, Franz Wieacker,[21] recognizing that the words *aequitas dictat* had not been included in the text by the Justinian jurists, suggested that Ulpian's text was distorted in the fourth century. In his view, the ethical foundation of interference was required because at the time the specific classical process being discussed in the

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maioris peculii, quam penes se est, condemnari debeat. sed licet hoc iure contingat, tamen aequitas dictat <rescissoriuum> iudicium in eos dari, qui occasione iuris liberantur, ut magis eos perceptio quam intentio liberet: nam qui cum servo contrahit, universum peculium eius quod ubicumque est veluti patrimonium intuetur.

If a proceeding is instituted against one of two or more heirs of one who may be brought to court within a year after the release of a slave in freedom or declaring him to be free by will, or the alienation thereof, or death – all the remaining heirs shall be released, even though *peculium* is awarded against he who instituted the proceeding, but not more than written by Julian. It will be the same if the assets were transferred to the account of another heir. But if there are several fructuaries or good faith possessors, with the institution of a proceeding against one of them, the others shall be released, although *peculium* should have been awarded which he had, but not greater. But although this occurs according to law, justness requires to bring to court those who by legal coincidence evaded liability so that rather real performance is secured rather than the embodiment of the demand in a petition to sue: he who has concluded a transaction with a slave had in view as the property foundation of the transaction the whole of the *peculium* wherever it is found.

[18] Emil Seckel (1864-1924) and Bernhard Kübler (1859-1940), *Jurisprudentia anteiustiniana reliquias* (6th ed.; 1988), I, p. 496.

[19] In the text of the noted historian Ammanius Marcellinus (325/330 – after 391) justness is a course of inspiration for new legislation (Amm. Marc., 22, 6, 5: *unde aequitate ipsa dictante lex est promulgata*).

[20] Otto Lenel (1849-1935) (*SZ*, 24, 416) found the possibility of restoring in the text of the manuscript the reference to the citation from Salvio Juliano (a great jurist of the second century), concerning whom there is mention in the first lines of the fragment in the Digest. The suspicious expression turns out to be more deeply rooted in the classical era. See Pringsheim, *SZ*, 41, 252 ff.

[21] F. Wieacker, *Textstufen klassiker Juristen* (1960), pp. 385ff.

text had already disappeared.[22] In reality, the falling away of the formal problem which the classics indicated did not require any interference in the text. If law was set out therein applicable for the fourth century, there was no need to correct the text. If Ulpian spoke about a norm obsolete in the fourth century, the text might not be used in judicial practice, but possibly as a monument of legal thought confirmed for jurists of the fourth century as superior to the law in force. In any event, the procedural technique to which Ulpian resorted was in the fourth century already inapplicable, and possibly unnecessary, so that having "corrected" the text, the later jurists should have "liberated" it from superfluous details (in the spirit of Justinian compilers, whose interference our data refute), but not to supply additional argumentation.

In and of itself, the verb "to dictate" (*dictare*) (which aroused Wieacker's suspicions) is encountered in the classical texts of Roman law.[23] The preference of justness to blind law (which also acts as a basic reproach in the text) is singled out rhetorically in the text: "But although this originates according to law, all the same justness (*aequitas*) requires to file suit also against those who as a result of the blind operation of the law has been released from an obligation ...". This figure frequent in the latest Imperial decrees proves to be fully classical. Gaius in the *Institutes* (a text independent from the latest corrections) juxtaposes responsibility under law and the injustice of bringing to trial (Gai., 4, 116: *Saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari* (It often happens that someone although liable under civil law, is unjustly brought to trial)), and even more clearly, speaks about the evident casuistic lawfulness of the suit (*prima facie iusta*) unjust in substance (Gai., 4, 126; 127; 128; 134). This approach meets the general principle on the eliciting of law, specific justness in each individual case. The numerous classical texts are thereby rehabilitated which contain rhetorical differentiation of the old law and justness. The reference to the founders of one of the classical schools, Massurius Sabinus and Gaius Cassius Longinus (first century), in the text of Paul (D. 22, 1, 38, 7) is deserving of full confidence, having substantiated a new decision by a reference to *aequitas*. This does not deny the significance of traditional law, but is a creative quest called upon to ensure the adequate operation thereof.

[22] In the text the possibility of repeating the proceeding against another joint and several debtor is discussed: the problem of extinguishing the suit demand arose only in the classical proceeding; Ulpian suggests a just solution contrary to the blind operation of the law (*qui occasione iuris liberantur*) which would lead to freeing the debtor (*ipso jure*) from the obligation merely as a consequence of the formal instituting of the proceeding (*intentio liberet*).

[23] In the «History of Roman Law» ("Enchiridion") a jurist of the second century, Sextus Pomponius (D. 1, 2, 2, 11: *ipsibus rebus dictantibus*) and in one of the decrees of Diocletian (c. 245–311) in 294 (C. 4, 6, 8: *iuris disciplina dictat*).

At the end of the second and in the third centuries such a use of words becomes more widespread, but this does not mean that the classics juxtapose the right of justness in the spirit of the latest Emperial chancelleries or that these words were placed in classical texts in the course of preparing the Justinian compilations, for the compilers of the Digest of Civil Law had placed in the mouths of the classics a later understanding of justness in opposition to positive law (as the defenders of the classical purity of Roman law often believe). Whereas the use of words in legal works represented by extracts in the Digest of Civil Law reminds one of the language of the late Imperial decrees, there are no such expressions in the words which have come down to us except the Justinian compilation,[3] or in the fragment of the work of the classics of a more just decision being juxtaposed to the requirements of "strict law" (*ius strictum*), and law in the literal meaning rather means that the classical models have served as a model for jurists of the Imperial chancellery, which launched into usage the expressions of a new ideology.

[3] The greatest of such works, the Institutes of Gaius, a textbook, does not know the word "*aequitas*"; Gaius uses *iniquitas* to mean "intent" or "offense", or "unjust action" — Gai. 4. 178; far from the philosophical meaning, although in the fragments of other works by Gaius represented in the Digest of Justinian it is encountered three times.