ТЕОРИЯ ПРАВА И ГОСУДАРСТВА

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WHY PROCEDURAL JUSTICE DOES NOT EXIST**

Since the middle of the last century the interest in the naturally-legal research has been restored, and then intensified. At that time, there appeared new concepts advocating for the existence of different types of justice (corporate, solidarity, organisational, international, etc.) including procedural justice. The best-known advocates of the concepts of the existence of procedural justice were J. Rawls and O. Höffe, and later L. Fuller, H. Hart, R. Dworkin, P. Koller, M. Van den Bos and others.

However, the aim of this work is not to support the idea of the existence of procedural justice suggested by the above writers, but rather to challenge it. This will be shown by referring to the obvious: justice is synonymous with truth, and not with rightness, on which the above writers develop the concept of procedural justice. Truthfulness is related to what exists, and rightness to the proper and accurate performance of appropriate procedures. Otherwise, founding of procedural justice in truthfulness would be a kind of contradictio in adjecto arising from the confusion between justice and procedurality.

The two terms are related but not similar, therefore truthfulness and rightness do not coincide, and nor do justice and law. Something that is truthful need not be righteous. And vice versa, something that is righteous need not be truthful. Apparently, it has to do with the relationship between the objective (truthfulness, justice and fairness) and the means (rightness, correctness, accuracy, reliability, etc., in a word, solidity). This relationship between truthfulness and rightness depicts rightness , first of all, as the means of the proper application of law, and only after that as the means of possible achievement of fairness in law. Of justice therein can be no mention. The aforesaid relationship shows another thing: only substantive legal rules can be just, while this cannot be the case with procedural rules.

The consideration of the relationship of truthfulness and rightness in the example of the actually existing justice and the actually non-existent procedural justice, raises yet another important question: the relationship between material (substantive) and formal (procedural) legal rules. As it is rendered impossible to clearly and fully delineate them, thus are substantive rules relating to procedures declared the procedural, and all that only to acquire for procedural rules and positive law the aureole of justice. This cannot be accepted as correct because, for example, the principle of impartiality or the principle of fairness, which are wrongly considered procedural, indeed belong to substantive law.

In still a deeper shade lies the question of the relationship between natural law and positive law. It seems that the insistence on the existence of procedural justice can be regarded as the belated response of the members of positivist jurisprudence. Strange enough, that the existence of procedural justice is advocated by the writers who originally belonged to the direction of naturally-legal jurisprudence. It seems that both the former and the latter aim at showing positive law as just. Only in this case, it is not a construct but a simulacrum. It must be hard to believe in any authority as truth instead in truth as the only authority.

Between the truthfulness of justice and the rightness of procedure lies fairness as the place of occasional meeting of justice and procedure. Therefore, procedural justice does not exist, but justice exists, though it is not procedural, and nor is fairness. Procedure is the only righteous means of law, but law is not the only righteous means of justice.

Key words: justice, fairness, truthfulness, rightness, procedural law, procedural justice.

1. JUSTICE IN BRIEF

Justice (iustitia) is the ultimate social and legal value. It has value because it is a kind of proportionality and harmony, all the way up to the achievement of harmony, which is another name for absolute justice. Apart from this absolute, divine or natural justice, there exists social

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justice, with its derived types (moral, religious, legal), which is relative viewed in human proportions [1; 2].

A special type is legal justice. It is an important type of social justice because it is considered synonymous either with the proportionate or with the equal. It is determined pursuant to two formal legal models, because of which we speak about two types of legal justice. The first is distributive justice (justitia distributiva: "proportional allocation among all"), which is original, position-based and prescribes that "the unequal be treated unequally". The second is the commutative (justitia commutativa: "equal allocation among all"), which relates to the exchange and prescribes that "the equal be treated equally". In its narrowest meaning, legal justice denotes adapting to law (legal justice /justitia legali/). We can also speak about court justice (and not only about fairness) as a special type of the manifestation of justice where court judgments are the sources of the law. However, the question what substantive justice is comprised of cannot be answered with any of the like models, but with the oldest, the antique one, that it is just to serve the common good [3, p. 122]. For example, the most recent attempts to determine solidarity justice, according to which more of the common goods should be allocated to the weak and poor and less to the strong and rich (the justice of Robin Hood), are not models of substantive justice as they are presented, but of the Aristotle's distributive justice. And it is formal.

Legal justice, being a type of social justice is not perfect. But nor is the law. As a result, between the imperfect legal justice and the even more imperfect law, there always exists a higher or lower tension [4, pp. 675-679]. Justice is easier to feel than to determine or achieve, because law can never become justice itself. For this reason, any law is unjust to a certain extent. But it must not become perverted to achieve injustice. Bearing this in mind, Cicero determined the purpose of law as the skill of the right measure in the distribution of the goods among citizens (Sit ergo in jure civilians hic finis legitimae atque usitatae in rebus causisque civium aequabilitatis conservatio). In such a way he refreshed the older Plato and Aristotle's idea of achieving the common good as the greatest accomplishment of substantive justice. This means that "normal law" must contain at least "minimum of justice", which, through general legal principles, flows into law (as proposed by R. Dworkin). However, this justice is not procedural either.

2. RAWLS'S AND HÖFFE'S UNDERSTANDING OF PROCEDURAL JUSTICE

When as of the middle of the last century, the interest in naturally-legal research restored, and then intensified, even more have grown the contemplations on the types of justice: international, political, corporate, solidarity, organisational, transactional, compensational, etc. [5–9], differing from traditional forms of religious, moral and legal justice. Moreover, increasingly has grown the support for the existence of procedural justice envisaged as considerably broader than legal and court justice.

Such support was accepted with certain relief in the positivist-oriented jurisprudence in the West. It can be considered a belated response to the revival of naturally-legal teachings in the second half of the 20th century. It is odd that procedural justice is also advocated for by the writers belonging to the opposite orientation. Such support can be regarded as an exaggerated response by the members of the naturally-legal jurisprudence. But the relief of the former and the support of the latter are neither appropriate nor useful because procedural justice is non-existent. They are just the thought constructs and experiments in legal philosophy and theory.

The most famous advocates of the teachings of the existence of procedural justice are John Rawls and Otfried Höffe. In addition to these, other writers, mostly the Anglo-Saxon (L. Fuller, H. Hart, R. Dworkin, F. Hayek or M. Van den Bos) argue in favour of this like teaching.

As for John Rawls' teaching of procedural justice, "the principle of the openness of position", set forth in his famous work "A Theory of Justice" [10, p. 91], contains the idea of the ideal initial social condition or social position, as well as the belief that "all positions" of individuals in society are not "open" (while some are though). The latter belief of Rawls shows that individuals are not even equal when it comes to the access to opportunities. After all, it is well-known, that social competition has never been impartial and just, because it is rigged before its very start. Not even in Rousseau's idealised description of the natural state of man "without competition" is there such a completely "fair" equality between the "noble savages" – people are different and therefore unequal. This fact, which Jean-Jacques Rousseau had already pointed out, Rawls accepted as evident, but in spite of it, he still considered as decisive his idealised vision of the necessary impartiality with regard to the "equality of opportunity", and thus the necessary rightness of individuals in society. It is only normal that such impartiality and rightness in individuals with self-awareness can produce but the sense of personal frustration and injustice [10, p. 93].

Such "openness of position", which Rawls departs from when he speaks about procedural justice, relates and is further transmitted to all purely procedural situations in which individuals can find themselves (starting from the type and the way of using procedural rules in the determination of the original position of an individual in a society or an employee in an enterprise, all the way up to the position of an accused or a witness in a proceeding before judicial authorities). Moreover, the absence of the necessary impartiality in social and legal sense, as well as the resulting rightness as to social behaviour and the application of legal rules [10, p. 92] (words which Rawls uses as a kind of mantra) not only deprive individuals of the results of their exertions, but take away from them the opportunity to undergo personal "experience of self-realisation" which is one of the few "basic forms of human good" in general. This way Rawls confirms, perhaps unconsciously, the general theodicean tragedy of the human being, because all that

he claims is in favour of the conclusion opposite to his original premises. This world is really changing due to the impact of stimulating and acceptable ideas, but for this world the ideas and conceptions alone are not enough.

In considering Rawls's conception of procedural justice, it can be perceived that the major flaw in his teaching consists in that social and legal rules through which we determine the criteria and measurements for establishing the concept of procedural justice, are declared to be procedural in advance although they are not. These are, first and foremost, the rules through which we determine "the principle of the openness of position", as well as the rules which establish the way of the impartial and righteous execution of procedural norms, whereas they are substantive although referring to the way of the conduct of the procedure. This fact already shows that Rawls' main premise, contained in his "principle of the openness of position", is virtual and fictional, as well as Kelsen's "pranorm". This premise is non-existent and cannot be used as the starting point for determining procedural justice. As has been mentioned, the reason is evident: "the principle of the openness of position" and "the principle of fair equality of opportunity" (as a means to achieve) "equality", is substantive and not procedural in its nature. It is related to substantive rules which determine the way in which purely procedural social and legal rules will be executed.

The same can be said of Rawls' "independent criteria", i.e. measurements or standards that should establish procedural justice [10, p. 93]. Nor are they procedural, but substantive in their character. They can even be just, but not as the ingredient of procedural justice. It should be pointed out that such clear measurements and standards are non-existent – for which reason they are not clearly determined in Rawls' teaching either, nor is there a feasible procedure that inevitably leads to the righteous outcome, i.e. to procedural justice. But all this did not prevent Rawls from arguing that the impartial procedure "transfers" its impartiality to the righteous, i.e. fair "outcome". Therefore, again it is related to his belief that procedural justice can be achieved.

Rawls also claims that it is not necessary any more to take account of the infinitely varying circumstances and constant changes of the relative positions of certain persons, as was once done in civil naturally-legal theories of the Social Contract, because it is sufficient for the system (that is referring to the state, and especially to the legal one) to be righteously set up ("structured"). As if the system could do what nature fails. On that occasion, he also ignored that Jean-Jacques Rousseau and John Locke derived the establishment of the state and legal system from the natural and social state, and not the natural and social state from the one and same state and legal system. As has been mentioned above, neither in this construct or simulacrum of the original state, as well as in the subsequent social status, are individuals equal [10, p. 119]. Instead of this road map, Rawls arranges conditions (which he himself lays down in advance) into the artificially created virtual concept of the "original position" [11]. By claiming that it is wrong to focus attention on the varying relative positions of individuals and by expecting that any such change is just per se, Rawls himself challenges his own initial premise and admits that it is fictional, that it is also related to the construct and the simulacrum. Similar problems at the time made Ronald Dworkin develop his political theory of law that came after his legal theory (which could not answer the ultimate legal questions, which was the task he set upon himself) [12; 13]. Neither in the latter, the political, did Dworkin succeed in finding the criteria and standards for the flow of natural law into positive law. Instead, he only managed to set forth the guidelines, and similarly did Rawls when he spoke of procedural justice.

Rawls's teaching of the "principle of the openness of position" and the existence of the "independent criteria", is obviously the matter of his personal belief. However, this is the case with Rawls's conception of perfect and imperfect procedural justice, too. In other words, it is not possible to determine a procedure which provides a desired result with certainty in the sense of the achievement of procedural justice, especially not automatically. This is acknowledged by Rawls himself, who is right when he says that perfect procedural justice does not exist, but is wrong when he claims the opposite of imperfect procedural justice, because procedural justice does not exist at all [10, p. 90–95]. Both of them are chimaeras. Justice is not a chimaera, and nor is it procedural.

When it comes to the teaching of Otfried Höffe, which is set forth in his book Justice: Philosophical Introduction [14], first it should be noted that Höffe begins his presentation of procedural justice with the statement that for the legally binding decisions "defined procedures are necessary". This is not under dispute, but something else is open to dispute though: his claim that these procedures are "based on the principles of justice" (e.g. What does the procedure of tax payment by citizens have to do with the principles of justice? One who claims it, has to concede that any state which levies taxes on its citizens is just or at least based on the principles of justice) [14, p. 47].

Open to dispute is also the following Höffe's statement. He says that when it has to do with the procedure, it is not directly related to the contents or the results, but to the jurisdictions, terms and forms, which are not the purpose in themselves but produce that general readiness for the acceptance of the decisions of the legislator that are not yet determined in terms of the content (here Hцffe confuses readiness of the citizens to have the legislator with their readiness to accept the legislator's "pig in a poke", in the form of any future law whose content cannot be acquainted with in advance). Also, proceeds Hцffe, procedures must be open to the needs and interests of those whom they concern (this only in case that the respective subjects are telepaths

when it has to do with future laws – subsequent acquaintance with such laws, which have already been adopted, is harmful for citizens and dangerous). In addition, adds Нцffe, the procedures themselves must be such that they can be learned (why and who from?), and, besides, they must rely on the previous givens which are, on their part, also fair – which, at least, are not inconsistent with substantive justice [14, p. 47].

In addition, Höffe distinguishes three types of procedural justice, unlike Rawls who contents himself with its two types. It is related to "pure", "imperfect" and "perfect" procedural justice. Only "pure" procedural justice is something more than "mere subsidiary legitimacy", which Höffe links with "imperfect justice ... which prevails in the law and the state". He has failed to observe that "imperfect justice" is of the "wooden iron" type. One way or the other, not even Höffe's imperfect justice (for which he himself admits that it is prevailing in the law and the state) can be deprived of the righteously executed procedure, impartiality, etc. [14, p. 48]. Otherwise, the following saying of Ulpian would hold true: Quod principles placuit, legis habet vigorem.

Höffe claims that "pure" justice "lies in the procedure itself, while of the criterion for the just result, which would be independent from the procedure, can be no mention" [14, p. 48]. He thus derives the concept of justice from procedural norms and claims that procedural justice can be derived from itself alone, from its own measurements, which cannot in advance provide a just result (which is his original "uroboros"). This way he relativises justice, as does Michael Walzer, and allows for the just to be considered also that what is unjust [15, p. 16]. It is only that Walzer derives justice from the changeability of social conditions and the respective cultural milieu of a society, while Höffe does it directly from procedural rules that need not provide a just result in the form of legal or court justice or fairness. Besides, Höffe fails to explain why procedural rules are just at all, except that he considers them such. If the belief is an argument in philosophy, this is not the case in science.

Two other types of procedural justice are achieved "through the procedure". In so-called "perfect" procedural justice there is a kind of an independent measurement for a fair result, as well as a procedure through which this result is achieved with approximate certainty. Thereafter Höffe gives an example of the equal division of the pie, which refers to commutative and not to the procedural justice. He failed to note that it is important for (commutative, not procedural) justice, that the parts are equal, and not the way in which and by which means is the cake cut into equal parts (which, presumably, should apply to a non-existent procedural justice) [14, p. 16]. Also, Höffe claims, when it comes to "imperfect procedural justice" then, too, "for the just result there exists an independent criterion". Höffe illustrates it by the example taken from criminal law and claims that criminal procedural justice is achieved when all real culprits, but only they, are punished in proportion to their guilt. But such an independent criterion does not exist. And nor does the legal system which faultlessly punishes only the culprits. By this example Höffe challenges his own self: firstly, because he confuses substantive rules with the procedural, and secondly, because he confuses a just outcome (that only the culprits are punished) with a righteously conducted procedure (which renders possible, or impossible, the achievement of such just objective in the form of court fairness). This is realized by Höffe himself, when he admits that it is obvious that there is no procedure which excludes judicial misconceptions and which prevents the punishment of the innocent, as well as the non-punishment of the culprits, too severe or too mild. It is clear that such relative justice is neither legal nor procedural.

Attention should also be drawn to the fact that Нцffe does not make a clear distinction between procedural justice [14, p. 49] (which does not exist) and the right to a fair trial (which exists) [16]. He, indeed, states quotations "Listen to the other side" (Audiatur et altera pars), and "No one should be a judge in his own cause" (Nemo ex judex in causa sui), but ignores the fact that the right to a fair trial is the collective designation of a set of substantive rules and recommendations referring to the conduct of investigation and judicial procedure, and not a set of formal procedural rules that are classified under procedural justice. Also, he ignores that the right to a fair trial refers to the protection of rights of people in all stages of the proceedings before the court or other state authorities, as well as that it is concerned with substantive rather than the procedural rules. This is confirmed by the most important international documents in which it is clearly set forth that this right is the fundamental human right and that it is one of the generally applicable principles. As such, it cannot be only procedural in its nature. For example, the right to a fair trial is enshrined in The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The UN General Assembly, The European Convention on Human Rights and other similar international treaties, and even in the norms of the customary international law. All the documents, especially in Article 6 of The European Convention on Human Rights, determine international standards referring to a fair trial. Their determination and development are based on the idea that when human rights are not respected in a police station, interrogation room, in detention, court or prison cell, then the authorities obviously do not perform their duties. Apparently, these rules are inspired by justice, and perhaps they are even just, but they are not procedural.

Finally, Höffe concludes that one should take account of the fair and equal treatment of the parties, that one should keep in mind the objective and subjective independence of judges, the publicity of proceedings, legal remedies, the prescribed time frame of proceedings, etc. for without legal security, which

they serve, there is no real justice either. But not even then is it about procedural justice, but about rules that should ensure a fair trial [16, p. 34–65; 17, p. 534]. Their primary objective is not justice, but legal security.

3. TRUTHFULNESS AND RIGHTNESS

As has been mentioned earlier, the aim of this work is not to support the idea of the existence of procedural justice, upheld by John Rawls, Otfried Höffe and other writers, but to challenge it. This will be shown by referring to the obvious: that justice is synonymous with truth, and not with impartiality and rightness on which the authors wrongly based their notion of procedural justice.

That justice should be derived from nature, i.e. truthfulness, is confirmed by numerous writers who derive the concept of justice from nature itself, from the ancient to the contemporary ones. This applies to Serbs, too, for whom justice has always been derived from that what "is", what is natural and truthful. Justice is the "foundation of everything" (St. Sava). It is the truth because "just is only that what is truthful" (Dositej Obradović). Otherwise, it must be hard to believe in any authority as truth, instead in truth as the only authority.

Such traditional metaphysical point of view is not shared by all writers. For example, according to Peter Koller justice is the most important part of morality, because its standards do not express only what is good or evil but also what is right and wrong in our relationships with other people. This means that the concept of justice, which is traditionally derived from truthfulness, is expanded by Koller through the introduction of the concept of rightness in the ethical and not in the positivist sense [18, p. 8, 11]. Other writers, especially in the field of social sciences, take it "for granted" that procedural justice exists and multiply that construct to make up different simulacra, i.e. different types of procedural justice, which are also non-existent (for example, criminal procedural justice, and why not civil procedural justice, too, administrative procedural justice, etc.).

It is perhaps for this reason that it is the right moment to set forth a number of observations about the relationship between truthfulness and rightness in general (that exists), and about the relationship between justice and procedural justice (which does not exist).

First of all, procedural legal rules can provide only rightness in the sense of properness, predictability and reliability (for example, in accordance with the application of substantive rules of impartiality and fairness /fair play), but cannot provide truthfulness and justice. Rightness is proper administering. Something is done righteously because it has been administered in a proper, systematic and expert way, and not because it is true or just. Herein truthfulness appears only as a possible objective or a desirable result, rather than the ingredient of the respective procedure which is but the means of a possible achievement of that desired objective [19, p. 17–18]. Rightness is particularly significant for the law, which is righteous when it is suitable for work, i.e. unrighteous when it is not suitable for work. But, it is the servant of truthfulness for procedural justice that can be nothing more than "applicable rightness". Such rightness is useful because it can serve as a "reliable measure" and a "guiding principle" [20, p. 57]. But it has nothing to do with justice whatsoever, which has its own purpose ("supra purpose"), especially when it is inspired by mercy.

The same relationship can be considered in a different and more modern way, from the perspective of natural sciences, which do not determine truthfulness any more as the absolute but the relative notion. Today, many natural philosophers and theoreticians of probability believe that instead of the terms "truthfulness" and "justice" one should use the terms "probability" and "concreteness". According to them, we can speak only of the "degrees of truthfulness". They incline towards "different degrees of probability" which tend to finally become the complete, absolute truth. This means that the debates about truth in a traditional and absolute sense should be replaced by the debates in a modern and relative sense about the "degrees of truthfulness", the "degrees of rational belief" or the "degrees of probability" (J. M. Keynes) [21, pp. 71–78]. In line with this, truth is not considered only the relative, but also the unachievable value, except for one case in which it is indeed attainable. This is the case when truth is realised (established and confirmed, no matter what exactly it means). Until then we can speak only about the "degrees of truthfulness" (H. Reichenbach, H. Jefferies, K. Popper) [22, 23, 24] expressed in the form of "scaled certainty" that something is true. At the opposite end of the same scale there is "wrongness". Therefore, when we claim that something is true, the afore-mentioned writers believe, then we only say that we personally assume that something is true. And we can never claim that something is really absolutely true, except for the abovesaid exception. For this reason these writers suggest "suitability for work" as the basic researcher's guiding principle, and not truthfulness of the obtained evidence which in the long run belongs to our referential system (L. Wittgenstein) [25].

The briefly presented beliefs about truth and justice in natural sciences are added with new descriptive approaches of the scientists from different social areas. They, too, focus more on the individual perception of truth and justice, therefore, on that what individuals regard as just, and less on the definitive or truthful abstract metatheoretical determination of justice. For example, some writers direct their study to the research of justice and rightness in the areas of social exchange, contracting, purchasing, etc. that is, in business relations in general (J. Greenberg) while others deal with justice from the standpoint of the possession of wealth and social power (R. Nozick), education opportunities, availability of medical care (F. d'Agostino). There are also works on the nature of organisational justice, the process of fair judgment in organisations (R. Korpanzano, B. Ambrose)

or the forms of control in the organisation (R. Shapiro, E. Brett). Further are examined the effects of justice as to the consequences of righteous or unrighteous treatment in the workplace (M. Van den Bos, G. Conlon). Finally, the issues of the determination of justice in international relations are revived (R. J. Bies). What a quantity of the accumulated maculatura. It seems that this quantity and not its quality has in natural and social sciences given impetus to the authors in legal sciences to ever more often and with an increasing persistence advocate for the existence of procedural justice (for example, in the case of "norms and procedures of the allocation of goods") [26, p. 169–176].

Be that as it may, what applies to truth, should also be applied to justice. Yet, the claim about justice as the unachievable value, as well as the claim about truth as the unattainable value is not acceptable, because truth is nonetheless bound to be found out and justice flows into positive law, i.e. it is occasionally embodied in it in the form of fairness. This renders possible to conclude that justice nonetheless exists (as does truth, and not only in the perfective, as something that is achieved or reached), therefore, not only in the way as proposed by contemporary writers. Moreover, one cannot consider truthful the claim that justice is relative in the sense of scaling. Here it is rather related to the degree of the realisation of efforts (successfulness) to achieve justice. Besides, it is arguable whether relative justice can be just at all. If nothing else, it is for certain that there exists an immutable conception of justice which motivates man to achieve it, in which he succeeds now and then, despite being so "fortunately shaped that there is no accurate measurement of truthfulness", but on account of this he has "more exquisite measurements of inaccuracy". Man is not only a rational, but also an intuitive being. Thus can be explained why there are so many misconceptions about truth, justice and its types [27, p. 72]. Justice is a glorious idea which consists of divine ingredients in us.

Perhaps pointing out that truthfulness and rightness do not coincide, although they are determined in absolute or relative sense, is more important than considering the relationship between truthfulness and rightness. Something that is truthful need not be righteous from the procedural point of view (for example, when the court establishes substantive truth, but on account of the unrighteous conduct of the rules of procedure must acquit the culprit). And conversely, what is righteous need not be truthful (for example, when the rules of procedure are conducted righteously but the result is not truthful on account of erroneously established substantive truth). Obviously, it is related to the relationship between the objective (truthfulness, justice or fairness) and the means (rightness, properness, predictability, correctness, i.e. solidity of the conducted procedure). This relationship shows that rightness is primarily the means of impartial application of the law, and only then and in the second-class the means of the possible achievement of fairness in the law. Also, the above-mentioned relationship shows that only the substantive legal rules can be just, while this cannot be the case with the procedural rules (for example, the rule that the procedural rules are to be impartially and fairly applied belong to substantive law and only this rule in this example can be regarded as just, while the procedural rules themselves cannot be regarded as such because for them it is enough only to be righteously conducted, and that in compliance with the aforementioned substantive rule).

The consideration of the relationship of truthfulness and rightness in the example of actually existing justice and actually non-existent procedural justice gives rise to yet another important question, and that is the question of the relationship between material (substantive) law and formal (procedural) law [17]. The former relates to the general legal norms that are classified according to their content, and the latter to the general legal norms that are classified according to their form. But this division, too, is "to a large extent artificial, as are the previous divisions, because it is not always easy to determine whether a certain norm belongs to substantive law or formal law" [17, p. 220]. That it indeed relates to artificial and unreliable division is shown by the set forth teachings of Rawls and Höffe, but also that of Koller, in which the rules of substantive law relating to the application of purely procedural rules, are classified under procedural rules. In other words, because it is rendered impossible to clearly and fully delineate between one and another, the proponents of procedural justice declare substantive rules relating to procedure the procedural, and all that only to construct the concept of procedural justice. Neither of this can be accepted because, for instance, the rule of impartiality and the rule of fairness require that only procedural rules are righteously applied. These rules, and others, too, determine the way of conduct of purely procedural rules. It is not the same to relate to something and to be something. For this reason, they belong to substantive law.

Be that as it may, the relationship between substantive law and formal law shows that rightness, and hence so-called procedural justice, is but the means of the application of the law. Moreover, it shows that only substantive legal rules can be just, while it cannot be the case with procedural rules. This allows for concluding something else: truthfulness is the synonym for justice, and rightness is the synonym for the procedures which per se are not or do not have to be righteous, and even less truthful in the sense of justice. Therefore, rightness cannot be the synonym for justice and so-called procedural justice.

In yet a deeper shade lies the question of the relationship between natural law and positive law. It seems that insistence on the existence of procedural justice can be regarded as the belated response of the members of positivist jurisprudence. Strange enough, that the existence of procedural justice is also advocated by the writers who have originally belonged to the direction of naturally-legal jurisprudence. Particularly, the proponents of positivist legal beliefs insist on the differentiation between positive law and natural law and between justice as truthfulness and rightness as properness. Such an approach could be called scientific,

and not philosophical. It requires from the jurists realists-positivists to take an objective, value-based and ethically neutral attitude with respect to the law, as the norm, particularly procedural, need not be linked with any one system of social and legal values (for example, the achievement of common good, the realisation of justice, the protection of human liberties, etc.). The fact that they have deviated from such value-based and ethical neutrality shows also that the same jurists-positivists ever more often consider that the measurement of justice is the fact that the norm has been righteously applied, exactly according to the established procedure, as well as that only this is enough for positive law to be regarded as just. Such claim cannot be accepted if one bears in mind that positivists derive the law in a "bottom-up" manner (as has recently often been the case with the members of the Anglo-Saxon jurisprudence direction), as well as that it is based only on the world of physical reality, instead of the world of metaphysical reality, because the law is simultaneously the realistic and the idealistic phenomenon. They wrongly identify the world of physical reality with the world of legal reality (which is a kind of "surreality", metareality), while the purely legal world of ideas (the world of the meta-metalegal reality) is excluded from their consideration. Despite these decisive flaws, they still, because of the alleged justice of procedural rules, readily regard positive law itself as just. And it is exactly this legal metaworld and the meta-metalegal world (or "world 2" and "world 3" as they are called by K. Popper), which jurists-positivists dispute and reject, that show that within the law as the metaworld there exist two separate worlds, i.e. it has two special models: the legal world of rules (the metaworld of the substantive rules) and the legal world of the meta-metarules (the world of the procedural rules). The former regulates the content of legal communication, and the latter establishes the order of righteous conduct of legal rules and human behavior under them. If only the righteous conduct of a procedure could secure the characteristic of justice to positive law, legal anarchy would begin shortly. Moreover, any order could be designated as just because of the righteous application of the law. This also means that the legal order in which the law is not always applied righteously could be considered legitimate. Obviously, rightness is the necessary condition for the application and normal realisation of the law, but it is not the basis of its justice.

4. FAIRNESS AS THE MEETING PLACE OF TRUTHFULNESS AND RIGHTNESS

Between justice and procedure resides fairness as the meeting place and the coinciding of justice as truthfulness and rightness as properness (reliability, and correctness, i.e. solidity). This is also indirectly acknowledged by writers who advocate for procedural justice, especially those who are trying to find some kind of support for procedural justice in the rules of substantive law. Because of this, they consciously confuse substantive norms with procedural norms. However, procedural justice is non-existent, while justice exists, though it is not procedural, and neo is fairness, which can be considered the operative and applicable form of justice.

The fact that fairness is the place where truthfulness and rightness meet and cross one another is shown by the connection of natural law and positive law which enables the rules of natural justice to flow into the rules of positive law. This link renders possible the determination of fairness in naturally-legal and positively-legal sense. Fairness "in the naturally-legal sense' exists when a law directly refers to natural law in cases related to legal gaps (when there are no legal provisions referring to particular cases whose provisions are not envisaged by law or the judge could not appeal to them as they do not fall under any one of general norms). On the other hand, fairness in positively-legal sense has at its disposal its legal (substantive) and judicial (formal) forms. Legal fairness in the positively-legal sense renders possible for the legal norm to be applied in such a way that all the characteristics of a case are going to be taken into account. Such norms fall under justice in the law (which requires that petty theft, embezzlement, fraud out of need, etc. are not punishable) in contrast to rigid law which does not allow for taking into account such characteristics. Judicial fairness in the positively-legal sense exists when concrete cases, which are embraced by law, are decided in the spirit of law, i.e. its idea, substance, and not in keeping with the letter of the law. This usually happens when law does not embrace all the characteristics of a concrete case (legal gap case). It is then that judicial fairness enables the judge to decide the concrete case according to the rule he himself determines." It follows that the law only through fairness can serve the realisation of the idea of justice (Aristotle), and not through procedural justice (Rawls, Höffe and others). A similar thought is found in Radbruch's Philosophy of Law: the law is reality which has its meaning in the fact that it serves the idea of justice.

Open to dispute is also the place of procedural justice when compared to legal and court justice. If procedural justice were really to exist, legal and court justice would become its types. However, the scope of procedural justice would not have been exhausted because it would also have to relate to all other procedural rules adopted by other social subjects. This shows that procedural justice is in this sense also ambiguously conceived and determined, which is not the case with procedural rules that have to be increasingly more determined and clearer for their righteous application.

5. CONCLUSION

To claim that procedural justice exists means to incline towards what is modish in jurisprudence. Jurists-positivists can gain satisfaction in it, for, after all, positive law is also just, even if only in the procedural sense. On the other hand, jurists of naturally-legal orientation, exaggerating the broadening of the concept of justice, also make disservice to both themselves and jurists-positivists. They have started advocating for the existence of procedural justice, so that at least through which the

positive law becomes just. They have neglected that procedural justice is non-existent while justice exists, as well as that justice is not procedural, and nor is fairness.

The fact that procedural justice does not exist can be shown by the following statements:

– Justice is synonymous with truthfulness, and not with rightness upon which the aforementioned writers build the concept of procedural justice.

– Truthfulness refers to what exists, whereas rightness relates to proper and accurate conduct of appropriate procedures.

– Truthfulness and rightness do not coincide, and nor do justice and law. Something that is truthful need not be righteous. And vice versa, something that is righteous need not be truthful.

– The link between truthfulness and rightness shows that it is connected with the relationship between the objective (truthfulness, justice and fairness) and the means (rightness, correctness, accuracy, reliability, etc. in a word, solidity).

– Procedural justice is often wrongly derived from the substantive rules referring to procedures that are thereafter declared procedural (for example, the principle of impartiality or the principle of fairness requires that procedural rules are applied righteously and fairly: they belong to the substantive law and not to the procedural law because they determine the way of conduct of the purely procedural rules). To relate to something and to be something are different things.

– Truthfulness and rightness, i.e. justice and procedure, occasionally coincide and then they emerge in the form of fairness.

If the claim that procedural justice exists were accepted, then Hitler's Nuremberg race laws could be considered just only on the account of their being adopted in a legally righteous way. Or, in a milder case, any righteous and fair conduct of the rules of procedure in general could be considered just, while the unrighteous conduct of the same procedural rules would be legally acceptable, though it could not be called just in the procedural sense. Obviously, it is related to the dangerous simulacrum which replaces the substance of the law with its form (procedure), truthfulness with rightness, and justice with arbitrariness.

Insistence on the existence of procedural justice can be considered the belated response of the members of positivist jurisprudence, as has already been mentioned. Strange enough, that the existence of procedural justice is also advocated by the writers who originally belonged to the direction of naturally-legal jurisprudence. Presumably, both the former and the latter have the same objective, only for different reason: to present positive law as just. However, it is not Rawls's or Höffe's construct any more but a simulacrum of procedural justice that is readily accepted by jurists-positivists and supported by jurists of the naturally-legal orientation.

To sum up: procedural justice does not exist, but justice can be reached through righteous procedures. And vice versa, justice exists, but it is not procedural, and nor is fairness. Procedure is the only righteous means of the law, but the law is not the only righteous means of justice.

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ПОЧЕМУ ПРОЦЕССУАЛЬНОГО ПРАВА НЕ СУЩЕСТВУЕТ**

С середины прошлого века интерес к естественно-правовым исследованиям был восстановлен, а затем активизирован. В то время появились новые концепции, пропагандирующие существование различных типов правосудия (корпоративное, солидарно ответственное, организационное, международное и т. д.), включая также и процессуальное право. Наиболее известными сторонниками концепций существования процессуальной справедливости были Дж. Роулз и О. Хёффе, а позднее Л. Фуллер, Г. Харт, Р. Дворкин, П. Коллер, М. Ван ден Бос и другие.

Однако целью этой статьи является не поддержать идею о существовании процессуального правосудия, предложенную вышеупомянутыми авторами, а скорее оспорить ее. Это будет показано со ссылкой на очевидное: справедливость является синонимом истины, а не с правильности, на которой вышеупомянутые авторы разрабатывают концепцию процессуальной справедливости. Истина связана с тем, что существует, и с правильностью надлежащего и точного выполнения соответствующих процедур. В противном случае создание процессуального правосудия на самом деле было бы своего рода противоречием в своей основе, возникающим из-за путаницы между правосудием и процедурой.

Эти два термина связаны, но не похожи друг на друга, поскольку справедливость и правильность не совпадают, равно как правосудие и закон. То, что правдиво, может не быть праведным. И наоборот, праведность может не быть правдивой. По-видимому, это связано с отношением между объективным (правдивость, справедливость) и средствами (правильность, точность, надежность и т. д. – одним словом, прочность). Эта взаимосвязь между правдивостью и правотой определяет правоту прежде всего как средство надлежащего применения закона и только после этого как средство возможного достижения справедливости в законодательстве. О справедливости при этом нельзя говорить. Вышеупомянутая взаимосвязь показывает другое: только материальные правовые нормы могут быть справедливыми, в то время как это может не иметь места в отношении процедурных правил.

Рассмотрение взаимосвязи правдивости и правильности на примере фактически существующего правосудия и фактически не существующего процессуального правосудия указывает еще на одну важную проблему: взаимосвязь между материальными и официальными (процессуальными) правовыми нормами. Поскольку невозможно их четко и полно разграничить, таким образом, являются существенными правила, касающиеся процедур, заявленных процессуальными, и всего того, что только приобретает позитивный ореол правосудия. Это не может считаться правильным, поскольку, например, принцип беспристрастности или принцип справедливости, которые ошибочно считаются процессуальными, в действительности относятся к материальному праву.

В еще более глубокой тени лежит вопрос о взаимосвязи между естественным и позитивным правом. Похоже, что отстаивание существования процессуального правосудия можно считать запоздалым ответом сторонников позитивистской юриспруденции. Достаточно странно, что существование процессуальной справедливости пропагандируется учеными, которые первоначально принадлежали к направлению естественно-правовой юриспруденции. Похоже, что и первые, и последние стремятся показать позитивный закон как справедливый. Только в этом случае это не конструкция, а симулякр. Трудно поверить в какую-либо власть как истину вместо истины как единственного авторитета.

Поэтому процессуального правосудия не существует, но само правосудие существует, хотя при этом оно не является процессуальным и справедливым. Процедура – единственное праведное средство права, но закон – не единственное справедливое средство правосудия.

Ключевые слова: справедливость, правдивость, правота, процессуальное право, процессуальное правосудие.

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