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The Systematization of Legal Values around Justice²

1. Introduction

On the premise that the term “value” means an idea of justice, in dealing with the study of the higher values of any legal system and, therefore, of the process to which the legal norms comprising it are subjected from its very beginning, it is necessary to understand the meaning of the state in which they are framed, without losing sight of the historical perspective.³ Consequently, the political formula of the state that is used comes together with the existence of the higher values of the legal system, which are the ones that constitute its legal expression.

However, the situation is complex for two reasons:

- 1) Firstly, because within any given type of state there are different positions. By way of illustration, most contemporary liberals do not advocate a total freedom of the market, with Bruce Ackerman noting the various limitations to its operation, which are classifiable into four types. The first limitation is that real-world markets do not conform to the ideal models of perfect competition, which thus drives the state to protect the environment and consumers, while also leading to the provision of old age pensions and health insurance. The second calls into question the right of high earners to transmit financial gains to their children, without this opportunity existing for the children of poor parents. The third deals with the great significance that education has in preparing each citizen for making sensible choices. And the fourth is focused on the ensuring of more or less equal political resources for all citizens, even while they may have different uses.⁴

In another facet of the analysis, there are differences between the liberal, protective and republican models of freedom in relation to fundamental rights. Indeed,

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³ L. Henschling, *État de droit – Rechtsstaat – Rule of Law*, Paris 2002, p. 30ff; A.E. Pérez Luño, *Derechos humanos, Estado de Derecho y Constitución* [Eng. *Human Rights, Rule of Law and Constitution*], Madrid 2005, p. 214ff; D. Zolo, *Teoria e critica dello stato* [Eng. *Theory and Critique of the State*], in: P. Costa, D. Zolo (eds.), *Lo stato di diritto. Storia, teoria, critica* [Eng. *The Rule of Law. History, Theory, Criticism*], Milan 2003, p. 17ff.

⁴ R. de Asís Roig, *Sobre el concepto y el fundamento de los derechos: Una aproximación dualista* [Eng. *On the Concept and Foundation of Rights: A Dualistic Approach*], Madrid 2001, p. 85; M. Atienza, *Introducción al Derecho* [Eng. *Introduction to Law*], Barcelona 1994, pp. 151–152.

the most liberal conception of autonomy is presented by Immanuel Kant, for whom the problem of the law is, as in all morality, its general conceivability with freedom being the primary reality of both. And we find the most republican orientation in Jean-Jacques Rousseau, who sets out from the principle of the constitution of civic autonomy and establishes an internal connection between popular sovereignty and human rights.⁵

- 2) Secondly, because in social and democratic states governed by the rule of law, freedom needs to be recognized and protected by the state, and equality ensures an equal formal efficacy of the law, proscribes any type of discrimination between individuals and groups and provides a certain minimum guarantee of material security. The mediation between freedom and equality, between the social and democratic state, shows that the state has to provide freedom by legally intervening in the proportion that is necessary to enforce respect for fundamental rights. Therefore, the task of organization must serve to remove the obstacles that oppose social mobility or the deployment of the full range of individual economic, social and cultural possibilities.⁶

Now, taking into account the considerations listed above, we can show that justice represents the axiological criterion that must inspire any normative system, and it is formally manifested through legal security, and materially through freedom and equality (without disregarding values such as social peace, pluralism or solidarity, which will not be examined in this article).⁷ Within this systemic organization chart analysed from the perspective of critical positivism, security plays an informative and conclusive role of freedom and equality, which in the rule of law is a presupposition of legality emanating from fundamental rights and fulfils the function that ensures the attainment of freedoms. Security is objectively regulated by the structural and functional regularity of the legal system, which produces certain subjective perception effects of calm and tranquillity in people and in the conscience of society in knowing what rules to adhere to.

Antonio Enrique Pérez Luño understands it as an addition of certainty and legality, hierarchy and normative publicity, non-retroactivity of what is unfavourable and non-arbitrariness; linking up today with the basic legal rights whose assurance is deemed socially and politically necessary. Accordingly, justice is losing its ideal and abstract dimension in order to be incorporated into the claims that inform its content in the social and democratic rule of law as established in the constitution in question.⁸

In addition to the above, we will analyse various theories that will allow us to conclude the centrality of justice when it is understood as an over-informing value that globalizes and systematizes all the other values.

⁵ I. Kant, *The Metaphysics of Morals*, New York 2017, First Part, IV, and Second Part, III; J.J. Rousseau, *The Social Contract or Principles of Political Right*, London 2007, II, VI.

⁶ E.L. Lutz, H. Hannum, K.J. Burke (eds.), *New Directions in Human Rights*, Philadelphia 1989.

⁷ G. Peces-Barba, *Curso de derechos fundamentales. Teoría general* [Eng. *Course on Fundamental Rights. General Theory*], Madrid 1999, pp. 207–294.

⁸ F. Arcos, *La seguridad jurídica. Una teoría formal* [Eng. *Legal Security. A Formal Theory*], Madrid 2000, p. 409; A.E. Pérez Luño, *La seguridad jurídica* [Eng. *The Legal Security*], Barcelona 1991, p. 30ff; A.E. Pérez Luño, *Teoría del Derecho. Una concepción de la experiencia jurídica* [Eng. *Theory of Law. A Conception of Legal Experience*], Madrid 2020, pp. 220–221.

2. The theory of justice

2.1. Diversity in the understanding of justice

Although in the previous section we have attempted to provide an orderly view of what justice is and what it entails, many ideas have been supported by the doctrine of justice. One example is that of Ulpiano, who defined justice as “the constant and perpetual will to give each person his or her right”.⁹ The law has justice as its aim, and makes reference to its projection in real and practical life that, by establishing a certain equality between men, seeks to achieve the common good.¹⁰ A jurist does not lack parameters to discern the just from the unjust, the lawful from the unlawful: *Iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, limitum ab illicito discernentes*.¹¹

Notable within classical realism are Aristotle, Thomas Aquinas and their followers, for whom justice resides in the natural order as occurs with the classical natural law. The first-named held that justice is “the provision by virtue of which men practice what is just, act justly and want what is just,” which is a formula equivalent to that of Ulpiano.¹² Meanwhile, Thomas Aquinas spoke of the “virtuous habit of the will by which we are firmly and steadily inclined to give each one his right”.¹³ Will here means the voluntary act or, rather, the firm and constant disposition in the will to give what is fair.

In relation to the position supported by legal positivism, a great number of authors, such as Hans Kelsen, identify positivism with the thesis that there are no principles of morality and justice which are universally valid or, at least, knowable by rational means. With this view, Kelsen sets out from the assumption that the only judgments from which we can preach truth or falsehood are empirical statements. Value judgments are subjective and relative.¹⁴ Therefore, according to him, justice is nothing more than an irrational ideal. Now, legal positivism does not entail accepting the thesis of the non-cognitivism of values, meaning that John Austin,¹⁵ setting out from utilitarian theories, believes in the possibility of building an objective morality, and Herbert L.A. Hart accepts to be the minimal content of natural law.¹⁶ This position could be complemented by John Rawls’ assertions in his attempt to rescue ethical-political reflection from scepticism and relativism that prevailed in the practical philosophy of the first part of the 20th century. In this sense, the author gives priority to justice and argues that it must be prioritized over coordination, efficiency and stability.¹⁷

In short, the belief that there are universally valid and rationally justifiable moral and just principles is perfectly compatible with the positivist conception of the law.

⁹ *Digesta Iustiniani*, 1. 1. 10. 1.

¹⁰ J. Iglesias, *Derecho romano* [Eng. *Roman Law*], Barcelona 2010, p. 93.

¹¹ *Digesta* ..., 1, 1, 1, 1.

¹² Aristotle, *Nicomachean Ethics*, New York 2009, V, 9, 1.137 a.

¹³ T. Aquinas, *Summa Theologiae*, New York 2016, II-II, q. 58 a 1. Cf. M.T. Cicero, *Treatise on Rhetorical Invention and Treatise on Topics*, 2009, I, 2, c 53. On the subject see: B. Barry, *Theories of Justice: A Treatise on Social Justice*, Vol. 1, Berkeley–Los Angeles 1989.

¹⁴ H. Kelsen, *Pure Theory of Law*, Clark (New Jersey) 2009, p. 79ff.

¹⁵ J. Austin, *Lectures on Jurisprudence: Or The Philosophy of Positive Law*, Vol. 1, Clark (New Jersey) 2005, pp. 218, 268–269.

¹⁶ H.L.A. Hart, *The Concept of Law*, Oxford 2012, p. 239ff.

¹⁷ J. Rawls, *A Theory of Justice*, Cambridge 2000. On this subject see: F. Arcos, in: V. Zapatero, M.I. Garrido, F. Arcos, *El Derecho como proceso normativo* [Eng. *The Law as Normative Process. Lessons of Theory of Law*], Alcalá de Henares 2010, p. 237.

But of all the positions, the one that understands justice as a global, all-encompassing and fundamental value is the one that we believe is most correct. The problem, says Giuseppe Lumia,¹⁸ has to be approached with reference to the general problem of value, especially as a result of the notable impulse given by Max Scheler. This path is advantageous as it allows us to give the idea an objective basis without eliminating the position that it considers it to be a virtue or permanent frame of mind, emphasizing its objective aspect defined as an evaluation criterion.¹⁹

2.2. Justice and legal values of freedom, equality and security

As is evident from what has been mentioned so far, the problem of justice does not differ from that of values in general, because what is sought is the criterion by which a behaviour can be valued as fair or unfair and the standard by which it is inspired.²⁰ The legal values in which the projection of the value of the law unfolds are structured through the problems related to justice, order, security, social development, collective welfare, etc.

They constitute ideal objects with a validity analogous to that of other ideas, but they also have the vocation of realization. It is true that the validity of a value does not entail its necessary realization; in this regard it can be said that the value realized configures the quality that has the virtue of comparing an object with the ideal value.²¹ From this point of view, it can be affirmed that legal values rationally base the validity and regulatory meaning of each of the regulations of the legal system insofar as they are beneficial to the freedom of each individual and the freedom of social existence in all its dimensions.

Thus, the law is never neutral when it comes to defending some or other values. All legality is supported by a system of legitimacy, while it is possible to appreciate that values are not absolute and change due to circumstances.²²

2.2.1. Freedom

One of the characteristics of the law is that it sets out the sphere of freedom of its citizens, so one of the moral evaluations made of it refers to the justification of the greater or lesser scope of autonomy that is left in the hands of each citizen, and the greater or lesser space for intervention that is reserved for power. The structural path followed is combined with that of freedom and equality of humans whose social life affects all individuals and finds the capacity to aspire to the highest level of dignity.²³

This needs to be completed with the idea that emerged in the 19th century, i.e., that the fight for freedom shone a light on a new ideal: the citizen was no longer the mere holder of civil rights that came with citizenship, but this also meant they had a set of political rights among which the right to elect and remove rulers stood out. However, it was in the 20th century that a new step was taken and citizenship came to be understood

¹⁸ C.S. Nino, *Introducción al análisis del Derecho* [Eng. *Introduction to the Analysis of Law*], Barcelona 2013, p. 32.

¹⁹ G. Lumia, *Principios de Teoría e ideología del Derecho* [Eng. *Principles of Legal Theory and Ideology*], Madrid 1993, p. 113ff.

²⁰ G. Bueno, *El universo axiológico* [Eng. *The Axiological Universe*], "Dianoia" 1981/27, p. 233ff.

²¹ C. Grzegorzcyk, *Théorie générale des valeurs et le droit* [Eng. *General Theory of Values and Law*], Paris 1982, p. 40ff.

²² A.E. Pérez Luño, *Lecciones de Filosofía del Derecho* [Eng. *Lessons of Philosophy of Law*], Seville 2006, pp. 124–125.

²³ D.D. Raphael, *Justice and Liberty*, London 1980, p. 28ff.

as a guarantee of economic and social rights, entailing an innovative development for the new generation of human rights.²⁴

Delving deeper, we can argue that social freedom involves three kinds of relationships: exchange between equals, organization of the individual within the community and belonging to the community. These are relationships of coordination, participation and integration, corresponding to the species of commutative, distributive and general justice.²⁵ As Brian Z. Tamanaha says, there are three basic principles of the rule of law: the government being limited by the law; legality consisting of a broadly legitimized normative system of a general and coercive nature; and the rule of law that implies that legal rules are premised on rationality, so that there is an appeal to reason in acting.²⁶

In another facet of the analysis and in relation to rights, there are differences between the liberal, protective and republican models of freedom. Indeed, if the most liberal conception of autonomy is presented by Kant, the most republican orientation we would find in Rousseau who sets out from the principle of the constitution of civic autonomy and establishes an internal connection between popular sovereignty and human rights. He considers that through the social contract life is given to the political body and popular sovereignty can be expressed exclusively by the universal and abstract language of laws, since there is no general will regarding any particular object.²⁷ According to Rousseau, the exercise of political autonomy cannot be conditional on the existence of innate rights, but the opposite occurs, the normative content that contains the idea of human rights is extracted in the form of realization of popular sovereignty.²⁸

The liberal and protective archetypes refer to the creation of a freedom-defining scope of non-interference, with the difference lying in the attitude that the state must maintain. In the first, political power is attributed the role of policing and arbitrating so it can act in the cases in which some interference, labelled as illegitimate, takes place. However, the protective model takes into account the fact that the effective enjoyment of the aforementioned sphere must be made possible, therefore, the public authorities must establish the necessary conditions to make it possible.

Finally, in the case of republican freedom, the concept that is defended is that of non-domination, the reason why the right to participation is in a special place, with the rights being institutions or constituting an ordering of value.²⁹ The republican ideal considers that the formation of political will and opinion in the public sphere and in parliament is due to the structure of a public communication aimed at mutual understanding.³⁰

²⁴ A.E. Pérez Luño, *La tercera generación de derechos humanos* [Eng. *The Third Generation of Human Rights*], Cizur Menor 2006; M.E. Rodríguez Palop, *La nueva generación de derechos humanos. Origen y justificación* [Eng. *The New Generation of Human Rights. Origin and Justification*], Madrid 2002.

²⁵ L. Legaz, *Filosofía del Derecho* [Eng. *Philosophy of Law*], Barcelona 1979.

²⁶ B. Tamanaha, *On the Rule of Law, History, Politics, Theory*, Cambridge 2010.

²⁷ J.J. Rousseau, *The Social Contract...*, II, VI.

²⁸ See: J. Habermas, *Derechos humanos y soberanía popular: Las concepciones liberal y republicana* [Eng. *Human Rights and Popular Sovereignty: The Liberal and Republican Concepts*], "Derechos y Libertades" 1994/3, p. 225ff.

²⁹ M.C. Barranco, *El concepto republicano de libertad y el modelo constitucional de derechos fundamentales* [Eng. *The Republican Concept of Freedom and the Constitutional Model of Fundamental Rights*], "Anuario de Filosofía del Derecho" 2001/XVIII, pp. 209–210; J.F. Laporta, *Sobre el uso del término 'libertad' en el lenguaje político* [Eng. *On the Use of the Term "Freedom" in Political Language*], "Sistema" 1985/67, pp. 23–43.

³⁰ J. Habermas, *Derechos humanos...*, pp. 225–229.

2.2.2. Equality

However, these conceptions of freedom must be complemented by the value of equality. In this regard, when we give a judgment based on equality, it is impossible to avoid carrying out a relational operation, making it clear that an evaluative judgment is consummated in which certain inherent facts and inferences are valued. Equal treatment will be achieved when A and B are treated equally by C, if C gives the same benefit or specific burden to A and B. Whether A and B receive an equal distribution will depend on the rule that is applied.³¹ The principle is broken down into the obligation of the legal system to prevent any form of negative discrimination from being regarded as positive *a priori*, and in the implementation of positive discrimination in cases that have traditionally involved situations of inequality.

Within this approach, the differentiating legal treatment can be derived from the comparison or interpretation of various normative orders to obtain from this comparison the appearance of a constitutionally reprehensible inequality and a situation that is *de facto* not directly attributable to the rule, even when it is in relation to the performance of the interpretation and application of regulations. In addition, the origin of the differentiating legal treatment must be derived from the law in a clear, precise and direct way, which prevents its inclusion in the prohibited area of the treatments that diverge and derive from the normative succession and the change in the comparable treatment of situations.³²

In this sense, the question is what duties are imposed in most constitutions? To answer this, it is necessary to address the issue that the pending task is to make constitutional equality known as a value, principle and right, embodied in the dimensions of democratic and social freedom. In its liberal dimension, the connection is established with the prohibition of arbitration at the time of creating the rule that includes the difference and at the time of its application. In a democratic structure, it is not permitted that certain minorities or disadvantaged social groups isolate themselves and, in social terms, equality legitimizes an unequal right to guarantee equal opportunities to disadvantaged individuals and groups, dimensions that are based on human dignity such as the basis of the political order and social peace.³³

However, if it is true that equality has an older historical background as a principle, it is also true that it is understood as the right of citizens to equal treatment by legal rules, without any kind of privilege. This normative content obliges and, at the same time, limits the public authorities who must respect it. Consequently, the legal consequences of the same facts must be treated identically, so that, in order to differentiate, there must be a sufficiently strong and reasonable justification, in accordance with generally accepted criteria and value judgements, with consequences that would not be disproportionate.³⁴

³¹ F.E. Oppenheim, *Igualdad* [Eng. *Equality*], in: N. Bobbio, N. Matteucci (eds.), *Diccionario de Política* [Eng. *Policy Dictionary*], Vol. 1, Madrid 1982, p. 803.

³² M. Rodríguez-Piñero, M.F. Fernández López, *Igualdad y discriminación* [Eng. *Equality and Discrimination*], Madrid 1986, p. 41ff.

³³ J.M. Bilbao Ubillos, F. Rey Martínez, *El principio constitucional de igualdad en la jurisprudencia española* [Eng. *The Constitutional Principle of Equality in Spanish Jurisprudence*], in: M. Carbonell (ed.), *El principio constitucional de igualdad. Lecturas de introducción* [Eng. *The Constitutional Principle of Equality. Introductory Readings*], City of Mexico 2003, p. 106.

³⁴ On the subject of equality see: M.I. Garrido, *La igualdad en el contenido y en la aplicación de la ley* [Eng. *Equality in the Law and in the Application of Law*], Madrid 2009, pp. 19–183.

2.3. Special consideration of justice and legal security

Security has been understood theoretically as subordinate to justice by some authors, although in concrete situations they make security prevail over justice. From this point of view, it is true that, at times, it is deemed that order and peace are superior, but the evaluation that is then carried out is the embodiment of the normative in intrinsic terms. This is the case of Saint Augustine,³⁵ for whom justice is the path that leads to peace. However, subsequently it is common to see references to security, order and peace based around external social relations such as conflict resolution and the balancing of interests. Thomas Hobbes and Hans Kelsen,³⁶ for example, understand peace as the ultimate purpose of law. Going one step further, justice will be understood in various ways, agreeing to seek the general interest, the result of attending to the needs and aspirations of people who are individuals and who simultaneously form part of society.

The concepts of *security* and *certainty* are integrated into a single criterion and are combined to the point of being confused in common language. In the sphere which we are now contemplating, the reasoning is as follows: recognizing that the legal postulate of social conservation is directed towards the achievement of peace, peace is to be defined as the principle that argues for a society's pursuit of its own maintenance, made explicit in both a subjective and an objective dimension.³⁷ Thus, it is common to distinguish between security as a synonym for certainty and absence of doubt, and security as a synonym for absence of fear, as the awareness that things are safe and that the requirements considered fundamental by man are protected. Others differentiate between security as protection that produces order and certainty (if we look at it from an objective perspective); and as the absence of doubt and fear (if we look at it from a subjective point of view).³⁸

With this vision and with reference to legal certainty, law constitutes an organizing framework for activities, clarifying the position of each one of them and thus setting the scope of their activity based on the protection assured to each individual and to the rights vested in them. The legal system must consistently take into account the set of physical, psychological and socioeconomic considerations, and must create a series of duly ordered directorates when it is necessary to establish a legislative policy that favours its objectives.

Thus, the law needs to change continually in line with new social needs. Thus, if the aim is to create a true and secure system, there is a given margin of uncertainty and insecurity so that it is possible to make progress with a closer approach to the values one is trying to achieve.³⁹ The idea of legal security arises as a result of an awareness of the importance of the law itself having a secure extent, as a means of avoiding harm to freedom, equality and, in short, the dignity of the subjects of the law. In this way, the elements of legal security are legal certainty, legal effectiveness, and the absence of arbitrariness.⁴⁰ In line with the above, a law which is disobeyed does not generate

³⁵ Saint Augustine says: "*Ordo est parium disparium quererum sua cuique loca tribuens dispositivo*", Saint Augustine, *The City of God*, Peabody (Mass.) 2009, XIX, XIII, 1.

³⁶ T. Hobbes, *The Elements of Law, Natural and Politic*, New York 2009; H. Kelsen, *What is justice?*, Oxford 2013.

³⁷ J. Guasp, *Derecho* [Eng. *Law*], Madrid 1971, p. 315ff; F. Arcos, *La seguridad jurídica...*, p. 35ff; A.E. Pérez Luño, *La seguridad...*, p. 30ff.

³⁸ E. Díaz, *Sociología y Filosofía del Derecho* [Eng. *Sociology and Legal Philosophy*], Madrid 1993, p. 44.

³⁹ R. García Manrique, *El valor de la seguridad jurídica* [Eng. *The Value of Legal Security*], Madrid 2012, p. 50ff.

⁴⁰ R. García Manrique, *El valor...*, p. 20ff.

certainty of order, nor does it provide citizens with data from which to foresee the conduct of the normative powers or that of other individuals.⁴¹

Furthermore, if normative certainty makes possible the predictability of the law and the certainty of the action, effectiveness is necessary so that there is confidence in the legal system that makes reference to the force it contains.⁴² On the other hand, the security of the law requires that the public powers carry out acts of production and application of legal norms in a non-arbitrary manner. The certainty and effectiveness of the law refer to different aspects of the formal structure, the duration and the empirical existence of the rules; but they also do so in the form of the acts by means of which those rules are created or applied.⁴³

According to what has been argued, the dimensions of justice are different depending on whether it regards one class or another. By way of illustration, commutative dimension refers to freedom of work, property, hiring, inheritance, etc. The distributive dimension refers to the rights of political participation (to elect and be elected), to be obeyed when you have power and to be served when you are a mere citizen. And the general dimension refers to the rights of education, protection of families and disadvantaged groups, access to culture and all the freedoms related to the exercise of spiritual, ethical, aesthetic, and religious faculties.

Therefore, as a result of the opposition formulated between security and justice, an adequate conception needs to maintain that neither of them forms a watertight compartment, nor do they constitute opposing doctrinal positions, but rather that justice formally enshrines security.⁴⁴

3. Validity and justice of legal rules. A key to understanding the systematization of legal values around justice

As Norberto Bobbio⁴⁵ points out, the law has to be viewed from different points of view based on validity, justice and efficacy, which, in turn, belong to different disciplines and research methods that cannot be confused with each other or ignored. These are related to and coincide with, respectively, science, philosophy of law and legal sociology. A rule is valid if it has been promulgated by the competent bodies and in line with the ordered procedures; if it is fully in force, without having yet been subject to an express or presumed derogation from other regulations, a validity that is not incompatible with the lack of normative effectiveness; and if there is an absence of contradiction with the hierarchically superior rule and other preferential legal norms. The last of these requirements is of a material nature and the first two are of a formal nature.⁴⁶

⁴¹ L. Lombardi Vallauri, *Saggio sul diritto giurisprudenziale* [Eng. *Essay on Jurisprudential Law*], Milan 1975, p. 575.

⁴² T. Geiger, *Estudios preliminares de Sociología del Derecho* [Eng. *Preliminary Studies of Sociology of Law*], Granada 2001, pp. 89–90.

⁴³ See: Judgments of the Spanish Constitutional Court: of 20 July 1981 (27/1981), and of 30 November 1982 (71/1982). In the same line see Judgments of the Spanish Constitutional Court: of 7 May 2012 (94/2012), and of 11 December 2015 (296/2015). V. Zapatero, M.I. Garrido, F. Arcos, *El Derecho como proceso...*, p. 212ff.

⁴⁴ G. Peces-Barba, *Los valores superiores* [Eng. *The Higher Values*], Madrid 1984, p. 100ff.

⁴⁵ N. Bobbio, *Justicia, validez y eficacia* [Eng. *Justice, Validity and Effectiveness*], in: N. Bobbio, *Teoría general del Derecho* [Eng. *General Theory of Law*], Madrid 1993, pp. 33–51.

⁴⁶ E. Díaz, *Sociología y Filosofía del Derecho* [Eng. *Sociology and Philosophy of Law*], Madrid 1971, p. 67ff. See also: F. Ost, *Essai de définition et de caractérisation de la validité juridique* [Eng. *Test of Definition and Characterization of Legal Validity*], in: *Droit et pouvoir* [Eng. *Law and Power*], Vol. 1, Brussels 1987, p. 115, reflect the legal system through three interrelated circles pertaining to legality, effectiveness, and legitimacy respectively.

For positivism, the problem of validity is related to its origin, since its first externalizations would arise within the historical school, which appealed as a validating structure to the conditioning force of the historically individualized social process, from which the purposes that give meaning to the ordering arise. But it was necessary to find a rationale that followed stricter formal reasons. This is the case with Austin's thinking,⁴⁷ which focused on the dependence of validity on the strength of political power, i.e., the rules are valid because they have been imposed by the politically legitimized assumptions for this purpose, with this being the criterion of effectiveness. According to this doctrine, the existence of sovereign power would legitimize the validity of the positive law as a whole, and the positive-formal structure of the legal organization would be the validating proof of each rule. For this reason, the concept of validity already appears here as strictly formal.

Kelsen's⁴⁸ formalist thought went a step further and assumed that legal validity is, according to his concept of legal norm, a concept of a logical-hypothetical nature. Effectiveness refers to actual compliance with the law. Basically, it consists in the conformity or adequacy of the recipients' conduct with what the rule prescribes. It is interpreted in the sense of the heteronomy of the law with respect to society, as it is imposed by public order, or in that of its autonomy with respect to society. Although, in fact, the concept that interests us in the formalist perspective is the meaning that such observance acquires by being relevant as a legal matter.⁴⁹

However, as has been seen, validity only instructs that the legal norm meets the requirement of external legality. This theory does not resolve, without further details, whether observance is owed to such a rule, so that the issue of legality-legitimacy arises, now turned into a problem since new legal-political structures are imposed in which the studied notions have to find an application. Specifically, the Congress of Vienna (1814–1815) which, together with Talleyrand's contribution, were those to which we owe the principle of legitimacy as the title justifying the monarchical restoration.⁵⁰

The law is configured as a system of legality because the unity of an order is based on a fundamental rule – or rule of recognition according to the terminology used by Hart – from which all the others emanate. The simple belief in legality is a translation of the positivist belief in the immanent rationality of the legal order, which has been imposing a formalistic legalism. Thus, it would only be correct to speak of legitimacy and legality as antithetical terms when expressing the opposition between natural law and positivism.

Legitimacy can be critical, alluding to the conditions of a rational morality, which must or should comply with the positive law, so a just legal order will be so from the perspective of some conception of political morality. Legitimacy can also be positive, when it refers to a system of values that are in the law in alignment with those that are in force throughout the bulk of society. And also to the formal legitimacy that refers

⁴⁷ M.J. Falcón, *Concepto y fundamento de la validez del Derecho* [Eng. *Concept and Foundation of the Validity of Law*], Madrid 1993, p. 29ff. With respect to Austin see: J. Austin, *The Province of Jurisprudence Determined*, Cambridge 2009, p. 144ff.

⁴⁸ See the critic to Kelsen in M. van de Kerchove, *Les deux versions de la théorie kelsénienne des conditions de la validité d'une norme juridique* [Eng. *Two Versions of the Kelsenian Theory about the Conditions for the Validity of a Legal Norm*], Leuven 1970, p. 73ff.

⁴⁹ As Falcón says: legal effectiveness refers to the ontological or realistic basis of validity as effectiveness or obedience to the law. M.J. Falcón, *Concepto y fundamento...*, pp. 43ff.

⁵⁰ R. Alexy, *El concepto y la validez del Derecho* [Eng. *Concept and Validity of Law*], Barcelona 2004, p. 45ff.

to the minimum level of justice that the legal order provides because it is an order and it is summarized in the idea of legal security.⁵¹

In summary, in this order of ideas, one of the first problems that arises is that of the conditions that a rule must meet so that we can say that it is valid, being at this point where it is convenient to distinguish between validity as belonging and validity as existence. The first implies that a rule is valid or, in other words, that it belongs to a normative system if it meets the conditions already known as created by a competent authority, having observed certain procedures established in advance, not having been repealed subsequently and not being contradicted by any other higher rule.

Now, thus presented validity, that is, as synonymous with belonging to a system, the problem that arises is that it does not explain the status of some rules that actually exist in all legal systems, such as Kelsen's basic founding norm or Hart's rule recognition. Nor does this concept include what could be called pathologies, i.e., unconstitutional rules, the unconstitutionality of which has not been declared by the constitutional courts or final judgments that represent a flagrant violation of the above criteria. Neither do they meet the aforementioned requirements nor are they valid in this sense of belonging to a system, but they do exist.⁵²

A second concept of validity assumes that a rule is valid when, in fact or by force of fact, it is applied or is applicable. This is what López Calera⁵³ calls the true validity of rules, with Prieto Sanchís extracting the following problem:

this shows us that the two concepts of validity or existence are completely different. The first is based on a normative judgment and, in principle, does not require that the valid rule be observed by the citizens or applied by the legal operators, especially by the judges; it is, if it can be said, an ideal or potential existence. The second, on the other hand, is based on a judgment of fact or empirical existence: it can then be said that it is generally obeyed and that those who do not obey it suffer some undesirable consequence.⁵⁴

It is therefore not enough to consider the validity of the rules; a second evaluation criterion is that of their effectiveness. This problem is whether or not a rule is obeyed by its recipients and whether, in the event of disobedience, the coercive measures provided to enforce compliance are applied – on this typology one has to go back to American legal realism.⁵⁵ Effectiveness is thus understood as the correspondence between the normatively anticipated behaviour model and the actual behaviour of the recipients. It is up to the theory of law to answer the question, which is keenly disputed, of who are the recipients; and to the sociology of law to answer the question of why some rules are obeyed more or less.⁵⁶

Last but not least, a third criterion is that of the justice of the rules, or what Calera names moral validity, concerning the reasons why those rules are worthy of being obeyed. An illustrative example is Gustav Radbruch's two-part formula: the intolerance and denial formulas. With regard to the first, it is said that positive laws lose their legal

⁵¹ L. Prieto Sanchís, *Apuntes de Teoría del Derecho* [Eng. *Notes on the Theory of Law*], Madrid 2016, pp. 101–103.

⁵² H.L.A. Hart, *The Concept...*, p. 201ff; H. Kelsen, *Pure Theory...*, p. 201ff.

⁵³ N.M. López Calera, *Filosofía del Derecho* [Eng. *Philosophy of Law*], Granada 1997, p. 88; K. Tuori, *Critical Positivism and Modern Law*, London 2016, p. 123.

⁵⁴ L. Prieto, Sanchís, *Apuntes de Teoría...*, p. 17.

⁵⁵ N. Bobbio, *Justicia, validez...*, p. 35; J.H. Schlegel, *American Legal Realism and Empirical Social Science*, Chapel Hill 1995, pp. 20–25.

⁵⁶ P.E. Navarro, *La eficacia del Derecho* [Eng. *The Effectiveness of Law*], Madrid 1990.

validity when the contradiction with justice occurs and reaches an unbearable degree. With regard to the second, the legal nature of positive laws fails to be recognized if, in their construction, they seek to deny the equality of the core of justice.⁵⁷ To pose whether a rule is fair or not is to base the problem around the necessary adaptation of being to the duty to be, which is one of the most difficult to answer, to the extent that some will think that it is a task which is little short of impossible. But trying to find answers to this crucial question is an important part of the role of the philosophy of law.⁵⁸

4. Just law as an expression of the embodiment of legal values

It can be deduced from the foregoing considerations that the establishment of a law is synonymous with justice, thus raising the question of whether it is possible to achieve justice or injustice of the law in a rational way. The answers that have been given have varied greatly. From that point of view, the term “just law” comes from the work published by Rudolf von Stammler in 1902. For this author, just law is tantamount with positive law in historical terms, but not all positive law is made up of rules oriented towards the notion of pure community. What we see in justice is the ideal born to survive in reality and in the law, which proposes a good social order that is better than the others. There is really no just law in itself, its idea is the criterion that assesses positive legal systems.⁵⁹

Along these lines, the justice of law is equivalent to that of whether it is internally founded, or if its claim to be obeyed, or its claim of normative validity is objectively justified. But what Stammler⁶⁰ wanted was to find an intermediate way out between the idea of a natural law that is valid *per se*, regardless of time and space, and positivism. Considering that justice is in the interest of the law, which is an *ad alterum* adjustment, a certain equality and proportionality; the conclusion is reached that positive law configures a point of view on justice, this being a constitutive principle of the law which brings it to life and takes on its vital fulfilment.

The ways of understanding the justice-law connection are expressed in four best-known positions. Positivism defends a separatist thesis. Idealism opts for a formally equalizing thesis. Critical formalism describes a formally separating position. And, finally, natural law uses an equalizing criterion but moves away from idealism because it does not suppose that positive law loses its legal status to the extent that the idea of justice is not realized or, at least, insofar as it is opposed to it.⁶¹

Whatever the position, it is no less true that the question of knowledge of justice and its very consistency are conflicts that are far from having been resolved to the satisfaction of all. The law is fair because it contains justice while, for the same reasons, every law is unfair because it is always an *iustum imperfectum*, it is not only the discrepancy between the ideal and the realization that can create a reason for negative evaluation, but also, taking a step further, under the logical aspect of justice, latent injustice

⁵⁷ G. Radbruch, *Vorschule der Rechtsphilosophie* [Eng. *Introduction to the Philosophy of Law*], Heidelberg 1948.

⁵⁸ N.M. López Calera, *Filosofía...*, p. 89. See: V. Zapatero, M. I. Garrido, F. Arcos, *El Derecho como proceso...*, p. 18ff.

⁵⁹ R. von Stammler, *Tratado de Filosofía del Derecho* [Eng. *Treatise on Philosophy of Law*], Madrid 1930, p. 210ff; L. Recaséns, *Panorama del pensamiento jurídico en el siglo XX* [Eng. *Overview of Legal Thinking in the 20th Century*], Vol. 1, City of México 1963, p. 62.

⁶⁰ R. von Stammler, *Tratado de Filosofía...*, p. 209.

⁶¹ B. Barry, *Theories...*, p. 20ff.

emerges.⁶² In this way, when we study the problem of justice of positive law, we will refer to the ontic problems (the law performs a certain social function) included in that word, and to another series of ontological aspects (the structure of the law), closely linked to the former because the result that society will obtain from the validity of the legal norms depends on its success.

Giuseppe Lumia claims that there is a double question, i.e., “What are fair actions or rules?” and “On what justification does the answer rest?”, with the answer depending on the position adopted when conceiving the law.⁶³ Given this approach, a new question arises, what does the recipient of an unfair legal rule have to do? In general, the binding nature of laws is highly conditioned by ideological issues and by the prevailing political regime. In this way, any disobedience to the legal norms emanating from the state is justified as long as such disobedience is guided by higher principles and values, provided that these do not appear clearly endowed with the highest possible security. In some cases, the strongest duty will be to seek to ensure the best functioning of the state system, obeying it, but there is occasionally a right to display disobedience to bad laws, when such evil is contrasted by comparison with neglected values, when these values should have been promoted by a properly organized state.⁶⁴

From this perspective, there are three main representations of the denial of legal duty:

Right of resistance. This is understood as a class of category and includes the forms of disobedience to the rules, or it is understood as disobedience that seeks a change in the political or governing system. This double externalization of the right of resistance is of little relevance. As a category, because the doctrine deals with current forms of resistance to the rules, civil disobedience, and conscientious objection; and as a species, because neither the doctrine nor the legal system usually accept this figure when situated outside the constitutional order.

At the contemporary time, majority of authors understand that in any case the right of resistance would be configured as a right-duty of constitutional protection. Therefore, the protected legal right is the constitutional order, and the function of this “right” would consist of a guarantee, with dimensions of a subsidiary and reactive nature, of the order and structural principles of the constitution and, mainly, of fundamental rights.

Civil disobedience. This is a form of common resistance, since it is used by minorities in defence of marginal social interests not protected by the legal system. It belongs to the group of direct action procedures, and its objective is to influence public opinion in order to carry out a regulatory modification or to illegally exercise power.

From this perspective, the one who carries out the protest is the citizen, in a public and peaceful manner. The offence in which civil disobedience consists can refer to the current regulations, and also to the non-existence of a legal norm, regulation or policy in a certain sense. It should also be noted that a distinction must be made between a direct civil disobedience and an indirect civil disobedience. The first consists in the infringement of a rule which is the object of protest, and the second in the disobedience of a rule other than the one against which one wishes to protest.

⁶² R. Alexy, *La pretensión de corrección del Derecho. La polémica sobre la relación entre Derecho y moral* [Eng. *The Claim of Correctness of Law. The Controversy about the Relationship between Law and Morality*], Bogotá 2001, p. 25ff; on the subject see: L. Legaz, *Filosofía...*, pp. 350–351.

⁶³ G. Lumia, *Principios...*, p. 117ff.

⁶⁴ N. Martínez Yáñez, *La obediencia al Derecho en la España democrática* [Eng. *Obedience to Law in the Democratic Spain*], Madrid 2000, p. 16ff.

Conscientious objection. Conscientious objection is conceptualized as a subjective right that aims to achieve dispensation from a legal duty, or exemption from liability, when the breach of duty has been consummated. Its meaning refers to the refusal to comply with orders or rules, or to perform acts or services on ethical or religious grounds. It therefore arises in relation to a personal performance.

This is incorporated into the legal systems of democratic systems. This is the case of the obligation to provide military service and cooperation in the media ideologically contrary to the objector, to which we can add the case of professional practice in decriminalized matters. In these cases, the law frames the objection within rational limits, under the pretence of preventing fraud in the law and false conscience without violating the consciences of individuals.

In short, in order to give a correct answer, it will be necessary to weigh the tolerance of certain evils in order to avoid a greater evil, or not to prevent it; the difficulty or impossibility of achieving a better and safer judgment than that of the parties who decide on the exercise of a relationship, or the secondary disposition of wealth or assets; and sustaining the fact that a reason of judicial economy indicates the inconvenience of being able to operate the declarative or coercive apparatus for minor disputes.⁶⁵

5. Final note

In order to make it possible to enshrine the legal values systematized within the legal systems, all legal operators must act in a complementary manner, in accordance with the exercise of their functions, thus making justice real and effective. In this way, complete justice will be achieved that takes into account the law as a social fact.⁶⁶ Establishing the relationship between *law* and *morality*, the position we may adopt in connection with iusnaturalism or positivism is fundamental. From our point of view, the relationships between morality and law are clear and similarities exist between the two normative orders. For example, this occurs in deontological analysis, prescriptions and judgments on duty, the notion and forms of normative conflicts, the reasons for action, or in some concepts such as *authority*, *duty*, *coercion*, *autonomy*, *consent* or *responsibility*. Together with what has been stated, positive law is developing a morality.⁶⁷

From this point of view, critical positivism may even be a good position, because in it the validity of rules can depend contingently on their moral validity. In cases where there are legal precepts that incorporate moral concepts or that require moral argumentation to be applied, the legal validity of some rules will be linked to morality and will depend on their adjustment to it. But, if there were no such legal precepts, legal

⁶⁵ M.J. Falcón, *La desobediencia civil* [Eng. *Civil Disobedience*], Madrid 2000, pp. 22, 40ff; E. Fernández, *La obediencia al Derecho* [Eng. *Obedience to Law*], Madrid 1987, p. 40ff; M. Gascón, *Obediencia al Derecho y objeción de conciencia* [Eng. *Obedience to Law and Conscientious Objection*], Madrid 1990, p. 78ff; J. Malem, *Concepto y justificación de la desobediencia civil* [Eng. *Concept and Justification of Civil Disobedience*], Barcelona 1990, p. 30 ff; F. Ovejero, *¿Derecho de resistencia o rebelión?* [Eng. *Right of Resistance or Rebellion?*], in: R. Gargarella (ed.), *El derecho a resistir el Derecho* [Eng. *The Right to Resist the Law*], Buenos Aires 2005, pp. 149–156; J.I. Ugartemendía, *El derecho de resistencia y su "constitucionalización"* [Eng. *The Right of Resistance and Its "Constitutionalisation"*], "Revista de Estudios Políticos" 1999/103, pp. 237–238.

⁶⁶ J. Carbonnier, *Sociología del Derecho* [Eng. *Sociology of Law*], Madrid 1982; R. Cotterrell, *Introducción a la Sociología del Derecho* [Eng. *Introduction to the Sociology of Law*], Barcelona 1991; R. Treves, *Sociología del Derecho. Orígenes, investigación, problemas* [Eng. *Sociology of Law. Origins, Research, Problems*], Barcelona 1988, pp. 5–6.

⁶⁷ S. Álvarez, *La relevancia de la filosofía moral para el Derecho* [Eng. *The Relevance of Moral Philosophy for Law*], "Anuario de Filosofía del Derecho" 2008–2009/XXV, p. 410.

validity would not depend on morality. Law must take into account *morality*, to the extent which respecting it is of importance to the general interest of society, he must choose the prescriptions that he wishes to sanction.⁶⁸

In relation to the truth-justice tandem, the latter is still the most fundamental and independent value of human subjectivity. We are directed towards the agreement reached according to the rules of the democratic game.⁶⁹ More particularly, with the aim of systematizing the legal values around justice from our position, it is important to keep in mind that the constitution is a space in which consensus is manifested and is understood as a point of reference for what is fair, the result of the discussion between the different conceptions of justice that concur in society, as a fundamental law that establishes a framework of material and procedural unity, overcoming the formal and hierarchical content.⁷⁰

In this view, the concepts of *security* and *certainty* become complementary. The notion of security is born in social and individual correlation to the sanctioning force of law. Therefore, legal security from a broad point of view serves as a complement and reinforcement of freedom as the core of fundamental rights, assuming a certainty that can be broken down into several sequences (about the validity and enforceability of the rule of law, about the duration in time of the rule, about the meaning of the rule, about the behaviour through which the power is exercised, about behaviour in the exercise of the law and of legal duty, and about the behaviour when fulfilling an obligation).⁷¹ And with regard to the complementarity stated in relation to equality, an illustrative example is shown by using Ferrajolian terminology in the reference made to the primary guarantees, prohibitions and obligations that correspond to subjective rights and, in parallel, to the relations between what is permitted and what is forbidden, and between what is allowed and what is not obligatory.⁷²

In short, it can be concluded that the values selected in this article are indivisible and interdependent, forming part of the foundation of legal systems, and that if any of them is missing or violated, justice will be affected to a greater or smaller extent.

The Systematization of Legal Values around Justice

Abstract: This article underlines the centrality of justice when understanding it as an overarching value that globalizes and systematizes all the others. In particular, it analyses what happens with legal security as a formal enshrinement of justice, and freedom and equality as one of its main material manifestations. From this point of view, it becomes clear that the resulting systematization depends on the type of state currently in force. This is joined the diverse ways of understanding justice and the evaluation of the validity-justice relationship depending on

⁶⁸ J.M. Vilajosana, *Identificación y justificación del Derecho* [Eng. *Identification and Justification of the Law*], Madrid 2017, p. 80.

⁶⁹ A. Pintore, *Law without Truth*, Liverpool 2000, p. 223ff.

⁷⁰ L. Prieto Sanchís, *Constitucionalismo y positivismo* [Eng. *Constitutionalism and Positivism*], City of Mexico 1999, p. 50.

⁷¹ F. López de Oñate, *La certeza del Derecho* [Eng. *Certainty of Law*], Buenos Aires 1953, pp. 73–74; G. Peces-Barba, *Curso de derechos...*, p. 246. On the statements of legal certainty, see literally E. Zuleta, *Función certificadora y equidad* [Eng. *Certifying Function and Equity*], in: M. Laclau, D. Cracogna (eds.), *Teoría general del Derecho. Sus problemas actuales, Estudios en homenaje a J.C. Cueto Rúa* [Eng. *General Theory of Law. His Current Problems, Studies in Homage to J. C. Cueto Rúa*], Buenos Aires 1986, pp. 258–259.

⁷² L. Ferrajoli, *Los derechos fundamentales en la teoría del Derecho* [Eng. *Fundamental Rights in the Theory of Law*], in: A. de Cabo, G. Pisarello (eds.), *Los fundamentos de los derechos fundamentales* [Eng. *The Foundations of Fundamental Rights*], Madrid 2013, p. 192.

the different ways of understanding it. Likewise, the ways of understanding the justice-law connection are linked to the concept of the law that we uphold. Finally, it is concluded that legal operators are called to administer justice in a complementary regime, with legal security serving to reinforce freedom, as is the case with regard to equality.

Keywords: systematization, legal values, justice, complementarity of values, legal operators.

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