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Nathália Lipovetsky e Silva

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Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Nathália Lipovetsky e Silva, Belo Horizonte / Brazil*

The Place of Philosophy of Law between Justice and Efficiency

Abstract: A discussion regarding the complex relationship that exists between the concepts of efficiency and justice goes a long way back and raises several relevant arguments. One of them, and it must be rejected in advance, is that justice is in the realm of public law, while efficiency in that of private law. Is it unacceptable that the balance between public and private law leads to the belief of a divided legal system; one system, one set of laws, one legal system. Legislators and judges are responsible for determining a balance and no theory can postulate that the balance will always be found with a simple cut between public and private law to distinguish when the criterion should be justice or when it should be efficiency. It is reductionist to confine the discussion to single goals of efficiency and justice, when human dignity and human rights should also be considered when one is discussing law. Moreover, a discussion limited to only the concepts of justice and efficiency, relies on a belief that the terms are mutually exclusive. Posner has said that the economic analysis of law has limits and philosophy of law plays an extremely important role in this discourse, which must be interdisciplinary. There can be no goal other than the realization of human rights and there can be no justice if not shared by all of mankind.
Keywords: Justice, Efficiency, Human Rights

I. Introduction

This paper aims to briefly discuss the relation between justice and efficiency and the role of philosophy of law in this relation. There are several arguments that could be brought up to the discussion and we set the bounds of this paper on the goals of law and the possibility of justice and efficiency coexisting in harmony. Before outlining our conclusions, we are going to discuss the notorious dichotomy that exists between private law and public law.

To set the tone of the work, we start by making the most important conceptualization to the development of the paper: an attempt to define justice and efficiency. The difficulty of the task is quite obvious, especially when talking about conceptualizing justice. For this reason the Classical Antiquity's concept of justice will be used as the basis for the discussion and to emerge with a contemporary understanding of justice capable of fulfilling the goals of law and of the State, as a *maximum ethicum*.

* Master student in Philosophy of Law at Universidade Federal de Minas Gerais – UFMG/Brazil.

II. Starter concepts

1. Justice

Justice in Classical Antiquity is an *areté*, a capacity, an excellence, a virtue, whose place is in the soul. The *areté* for justice is, in ancient Greek, a *dikaiosýne*. The notion of "justice" in the archaic age had already been originally set, under the meaning of the word *díke*. In the scope of the archaic thought, *díke* was one of the former notions towards the change from pre-State juridical form to the political ground and, later, to ontological and cosmological grounds. This concept of *díke*, and the posterior ethical-juridical concept that was absorbed by the western tradition, are the ones that relate to our contemporary experiences.[1]

In Plato's work justice plays a central role, as the virtue that agrees to everyone, as a good in itself, as something desirable in itself. Speaking through Socrates mouth, Plato defines justice as "the duty imposed to each one to do not play more than a role in society but the one to which nature gave him more capability". Hence, justice to Plato is harmony: between the warring parts of the person (reason, spirit and desire) and of the city (temperance of the merchants, courage of the soldiers and wisdom of the governors – the philosophers). Justice aims unit in the multiplicity.[2]

To Aristotle, justice "is the most perfect virtue and contains all the other virtues within it". One cannot forget that the idea of virtue to Aristotle is exactly the balance and moderation between a deficiency and an excess of a behavior. Justice is the balance in itself; it either *is* or *is not*. He distinguishes two particular types of justice in his *Nicomachean Ethics*: distributive and commutative justice.

> "One type of justice, and of what is just in that same sense, is that found in distributions of honour or money or the other things that have to be shared among members of the political community (since here one person can have a share equal or unequal to another's).
> Another type is that which plays a rectificatory role in transactions. This type divides into two, since some transactions are voluntary, others involuntary. The voluntary transactions are things like selling, buying, lending without interest, depositing, and letting (they are called voluntary because the first principle in these transactions is voluntary). The involuntary ones are either secret – such as theft, adultery, poisoning, procuring, enticing away slaves, treacherous murder, and false witness – or involve force, such as assault, imprisonment, murder, robbery, maiming, slander, and insult."[3]

The concept of justice as equality comes from the thought of Aristotle and it is the oldest and most traditional of the concepts of justice. It postulates equality as the goal of law both in the relations between individuals and individuals (commutative justice) and in the relations

[1] Armando Poratti, *Diké*, la justicia antes de la justicia, in: Márgenes de la Justicia, ed. Grupo Editor Altamira, 2000, 31.
[2] Marcel Deschoux, Platon ou le jeu philosophique, 1980, 215-251.
[3] Aristotle, Nicomachean Ethics, 1131a.

between individuals and State (distributive justice). According to this theory, the order brought in by law has to respect equality to be fair and to achieve justice.[4]

On the discussion between justice and efficiency, distributive justice is more frequently the type of justice in question, specifically referring to the just distribution of income, which is an issue currently plaguing humanity. However, according to Mathis, it is important to examine how both commutative and distributive justice relate to efficiency, as the efficiency criterion for economic analysis of law is applied primarily to non-contractual liability law, contract law and criminal law.[5]

2. Efficiency

The usual definition of efficiency puts it as a synonym of productivity, or the performance of the economy, which, in a comparative figure over time, is the rate of economic growth. In Polinsky's words: "efficiency corresponds to the 'size of the pie', while equity has to do with how it is sliced".[6]

The most used concepts of efficiency are the Pareto Efficiency and the Kaldor-Hicks Criterion. The concept of efficiency developed by Vilfredo Pareto is based on three main principles: (1) consumer sovereignty – respect for the autonomous preferences of individuals, once there are no good or bad preferences; (2) non-paternalism – the utility of individuals is what matters to society and no additional considerations are ends in themselves required by the State; (3) unanimity – changes of allocation require the consent of all. The Pareto superior means that "any change that puts one member of society in a better position without making somebody else worse off is a Pareto improvement" and "a change that violates the Pareto criterion is termed Pareto inferior". Also, Pareto optimum is the state in which a person's position cannot be improved any further without making another person worse off, which means Pareto superior changes are no longer possible.[7]

The Pareto Superiority Principle appears to be morally uncontroversial because of an apparently simple finding: if we move from a Pareto Inferior to a Pareto Superior state, how could anyone complain about it? But the Paretian principles are morally uncontroversial only if they are treated as principles for *prima facie* evaluation of social states, subject to the possibility of countervailing moral evaluations. Still, the decision of how much weight is to be

[4] Norberto Bobbio, Diritto e stato nel pensiero di Immanuel Kant, 1984, 72-3.
[5] Klaus Mathis, Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law, 2009, 187.
[6] See Mathis (note 5), 190.
[7] See Mathis (note 5), 33.

given to each particular social arrangement, satisfying or not the efficiency criterion, is not a morally neutral decision.[8]

The Pareto Efficiency does not apply to law and the coerciveness within law because it is based on the assumption of the free market model, in which every participant is free to choose whether or not to engage in market transactions. That is why Nicholas Kaldor and John R. Hicks, considering that legal decisions often have to be taken by weighing up competing interests, proposed a collective decision-making rule to be applied to non-Pareto-superior decisions, called the Kaldor-Hicks Criterion. So, "a change is an improvement by the Kaldor-Hicks criterion if the gainers value their gains more highly than the losers their losses" and "every new allocation of property rights is acceptable as long as the gainers' benefits outweigh the losers' disadvantages".[9]

The Kaldor-Hicks criterion "is not confined to options which leave nobody worse off, but also permits those which make some people better off at other people's expense. If someone demands actual compensation, what this means is that the Pareto principle must in fact be satisfied. So the Kaldor-Hicks test does not indicate actual Pareto improvements, only potential Pareto improvements."[10]

III. The dichotomy private law x public law

The classic dichotomy between private law and public law appears to be very inconsistent, as a result of the limitations private law might find in public law when the collective or public interest is set above private interest.

> "The public/private law dichotomy is a formalistic distinction which belies the fact that there are overlaps in private and public law and that all law is in fact guided by considerations of public policy. It evidences a philosophy which has been criticized for good reasons. However, it is not inappropriate or contradictory to acknowledge the importance of public policy considerations which attach to the relationship between a statutory authority and an individual as opposed to an individual and another individual. (…) However, the benefits of acknowledging that the dichotomy is fictional and that focusing on the relationship between the parties at the duty and standard stage will allow for the incorporation of relevant public policy considerations applicable to the special relationship between the state and individual must be recognized. They will lead to an approach unfettered by vapid theories which will misdirect the development of the law."[11]

Posner, however, proposed that the efficiency principle should be the guidance of the civil courts and that the public sector should be in charge of distributive justice. "Private law would

[8] Allen Buchanan, Ethics, Efficiency, and the Market, 1985, 10-11.
[9] See Mathis (note 5), 39.
[10] See Mathis (note 5), 40.
[11] Anne Deegan, The Public/Private Law Dichotomy And Its Relationship With The Policy/Operational Factors Distinction In Tort Law, in: QUT Law and Justice Journal, 2001, 265.

have to prioritize the efficiency criterion, and public law would have to prioritize the principle of justice."[12]

> "The judge whose business is enforcing tort, contract, and property law lacks effective tools for bringing about an equitable distribution of wealth, even if he thinks he knows what such a distribution would be. He would be further handicapped in such an endeavor by the absence of consensus in our society on the nature of a just distribution, an absence that undermines the social acceptability of attempts to use the judicial office to achieve distributive goals. A sensible division of labor has the judge making rules and deciding cases in the areas regulated by the common law in such a way as to maximize the size of the social pie, and the legislature attending to the sizes of the slices."[13]

Mathis agrees that social policy goals can be more effectively fulfilled with a tax and transfer system rather than through private law, although he also affirms that the idea of dividing the sectors in order to achieve goals of justice and efficiency separately remains unconvincing because:

> "(1) Allocation and distribution are indivisibly linked to one another. It is not possible to have efficient production on the one hand and just distribution on the other. *Taxes and transfers also have an influence on work incentives and the use of production factors*. Hence, redistribution via the state administrative apparatus is not necessarily always more efficient than redistribution through regulation of the private sector.
> (2) On the contrary, it is more than likely that low-cost and effective redistribution can be carried out *equally well, specifically by means of private law*. As the example of rent law shows, redistribution by fine-tuning legislation under private law can indeed work well. In principle, there is absolutely no reason not to use private law – as a complement to tax law and social law – as an instrument of redistribution in certain cases.
> (3) *In specific instances it could lead to very absurd outcomes* if private law were focused solely on efficiency. Particularly in civil litigation, the parties are intent upon a ruling which is in tune with their conceptions of justice. They are unlikely to be satisfied with the reasoning that, although the ruling is not just, it encourages economic efficiency instead."[14]

It is important to remind, here, that economics ethics is usually divided into three areas of concern: the division of output – deals with questions of distributive justice; the question of commodification – pertains to the property of using market rules in noneconomic matters, such as permitting a market for human organs; and the ethical basis of economic thought and analysis – relates to the anthropological premises of economic modeling and their impact in changing actual economic behavior.[15]

In this scenario, the question is how is it possible to try to place such discussion, for example, as a private or a public law matter of concern exclusively? These are ethical issues discussed with practical purposes, with questions that are being asked in courts and in the public sector on a daily basis. The whole legal system is involved in dealing regularly with

[12] See Mathis (note 5), 198.
[13] Richard Posner, The problems of Jurisprudence, 1994, 388.
[14] See Mathis (note 5), 201.
[15] Albino Barrera, Globalization and Economic Ethics: Distributive justice in the knowledge economy, 2007, 5.

those issues and in finding a way to achieve justice, what will only happen with the aid of efficiency, due to the way a system works: interconnected and as an organized whole.

Most importantly, it cannot be forgotten that the legal system is an unity and its divisions might be made with didactic or gnoseological purposes. This, however, does not alter the conclusion that there is only one legal system, with one single goal, for which efficiency represents a component.

IV. The goals of law

Norberto Bobbio, analyzing the history of the western thought, comes out with a synthesis of three answers to what would be the goals of law:

(1) Justice as order – with the goal of law being social peace: the legal system is created so men can leave nature's state of anarchy and war and establish social peace, in the name of the right to life; (2) Justice as equality – it comes from the thought of Aristotle and, as said above, puts equality as the goal of law both in the individual-individual and State-individual relations, and the legal system has to be based on the respect to equality to be fair; (3) Justice as liberty – it says that men reunite in society and constitute the State so they can guarantee the maximum expression of their personalities, of their individual liberties, which can only be possible under a legal system that assures to each individual a sphere of liberty that cannot be violated by others.[16]

The notion that men are free and cannot be considered means, but always and end in itself, prepares the construction of a new conception of social justice, having human dignity as a start and always bearing in mind the merit of being a person each one has.[17]

According to Salgado, law is the vector of western's intelligibility and, hence, the point of arrival of western's culture – a *maximum ethicum*[18]. His idea of justice in the contemporary world

> "is understood as the historical processuality of law's intelligibility, the result of the accumulation of this processuality in the historical present of our time, and expresses itself through the effectiveness of law in the just social order with universal signification, meaning that it effects the legitimacy of power by the democratic procedurality, whilst this power has its origins in popular will and organizes itself in the separation of powers, aiming its core (the declaration of rights) and axiological content, as a process historically revealed, constituted of the culture's fundamental values, consciously formalized in the declaration of fundamental rights, in the constitution, to its full effectiveness."[19]

[16] See Bobbio (note 4), 72.
[17] Joaquim Carlos Salgado, A idéia de justiça no mundo contemporâneo: fundamentação e aplicação do direito como *maximum* ético, 1995, 333-334.
[18] See Salgado (note 17), 267. SALGADO, of course, affirms that law and State cannot be thought as separate realities or separate concepts, which would lead to an abstraction that would jeopardize the comprehension of the totality of the reality.
[19] See Salgado (note 17), 257.

According to this concept, a society is considered just, meaning justice exists within the society, when all factors are taken into account, with a consideration for the society on a universal scope; examining the international relations of the society in question. If the societies of Germany, France, Italy, USA etc. are considered as immersed in the totality of humanity (meaning as partners with places like Namibia, Congo or Brazilian slums/*favelas*) one cannot say they are just societies.[20]

The goal of law, thereby, is justice, to provide justice to the society, allowing every and each one, by the merit of being a person – a dignified human being – to have one's fundamental rights implemented. In other words, the goal of law is to assure fundamental rights to every human being, not only the ones under a certain legal system, but to all of them. Law does not have to be restricted to the specific legal system of a State, it has to be viewed and accomplished as a human institution created to make human life better.

V. Is it possible for justice and efficiency to coexist?

According to Mathis, justice and efficiency are two different goals and their relation can stand in three possible bases:

(1) Harmony, in which the pursuit of one goal would be beneficial for the other goal; (2) Neutrality, in which the pursuit of one goal has no effect on the achievement of the other; (3) Conflict, in which justice and efficiency are considered replaceable up to a certain point and the interchangeability relation is named trade-off.[21]

This third position is the most common between economists and the trade-off could be on the production level or on the values level: "The values trade-off expresses how much justice a person or a society is *prepared to sacrifice* in order to achieve more efficiency (or vice versa). With a production trade-off, on the other hand, the question is: how much justice *must be sacrificed* in order to achieve a certain level of efficiency (or vice versa). And whereas the values trade-off is dependent upon individual values, the production trade-off is determined by empirical facts."[22]

Under distributive justice, inequality is possible if the same standard runs all distribution. In this regards, Perelman presents six different distribution criteria[23]:

(1) To all in equal measure – meaning all people should be treated the same way, with equality of income or opportunities; (2) To all according to their convictions – focusing on

[20] See Salgado (note 17), 258.
[21] See Mathis (note 5), 185.
[22] See Mathis (note 5), 186.
[23] See Mathis (note 5), 187-9.

people's inner attitudes and values; (3) To all according to their rank – in an aristocratic way of treating people according to their social status; (4) To all according to their legal entitlement – respecting what the law says to be the rightful due to render to each one (justice in the Roman *suum cuique*); (5) To all according to their needs – distribution based on the needs of each one, in an attempt to define a minimum substance income for people; (6) To all according to their merit – creating incentives for certain forms of work, depending on the circumstances.

These distribution criteria are based on a static concept of distributive justice, while most of the contemporary theories of distributive justice are dynamic, meaning they postulate neither a specific just distribution nor an ideal distribution, but, instead, they "advocate institutional structures which enable individuals to do certain things or to realize life plans regardless of the exact result of the ultimate income distribution".[24]

To Lalaguna, sometimes social wealth combines with justice, according to the economic analysis of law, in a way that little sacrifices on each side could bring benefits to both. But it requires a political decision-making process that would choose between personal and collective interests. If wealth does not have priority, it has to be placed as an element to be valued in conjunction with the others, as a component of value. That would be the case of lining up the difference between means and ends, in which wealth would be only a means to the achievement of an end, that would be justice in the measure that as wealth, inevitably, favors respect to the individuals of a society, it would favor justice as well.[25]

Continuing the discussion about the relation between means and ends in the economic analysis of law, Lalaguna says:

> "The economic analysis of law proposes an economic interpretation of goods and responsibility. This means that economic benefit, its maintenance and its progress set the value that gives life to the whole institution. Under this perspective, the rising of wealth is automatically a value, since it provides an increase of benefits and hence an improvement in economic compensations. It presumes that wealth is understood as a component of value by excellence, that has a value in itself – in the measure that it satisfies the exigencies of the *homo economicus* – and, thus, the capability of promoting other values – that could result as consequence of the acting of the 'invisible hand' –.
> The delimitation, in the sense, of wealth in the economic analysis of law is not clearly presented. From this one can say that not always wealth is a synonym of justice. (…)
> It is confirmed once again that the economic benefit is only one part of social and personal welfare; thus, the reductionism proposed by the economic analysis of law, far from reflecting reality, misrepresents it, losing its true sense by forgetting the existing relation between means and ends."[26]

[24] See Mathis (note 5), 189.
[25] Paloma Durán y Lalaguna, Una aproximación al análisis económica del derecho, 1992, 194.
[26] See Lalaguna (note 25), 195.

To Dworkin the economic analysis of law has a descriptive and a normative limb, which is discussed in his work *A matter of principle*, affirming that the flaws of the normative limb are so huge that they throw doubts on its descriptive intentions. To the author, there is a bad comprehension of what is wealth maximization and he does not identify it with Pareto Efficiency.[27]

> "It is unclear *why* social wealth is a worthy goal. Who would think that a society that has more wealth (…) is either better off than a society that has less, except someone who made the mistake of personifying society, and therefore thought that a society is better off with more wealth in just the way any individual is. Why should anyone who has not made this mistake think that social wealth maximizing is a worthy goal?"[28]

According to Lalaguna, it is wrong and reductionist to want efficiency to have a protagonist role in the legal system, grounding society under the "protection" of wealth assumed as the goal of juridical norms. Both justice and efficiency affect the wealth distribution and one cannot forget that respecting the principle of equality is not necessarily actualizing justice, a reason why it is important and necessary that efficiency is comprehended as a component of justice.[29] Justice and efficiency not only can coexist, as they do and have to, precisely because efficiency is a key component of justice.

VI. Conclusion

Posner did abandon his initial position that wealth, and, therefore, efficiency, was a social goal in itself. Efficiency is, thus, only an instrument to achieve other social goals. Criticizing wealth maximization does not necessarily mean that efficiency has no justification, since justice and efficiency are not mutually exclusive. On the contrary, they have a complex and intrinsic relation. Even though justice sublates efficiency, inefficiency can cause a decrease in resource production, which results in affecting the effectuation of justice: economic growth generates resources to the public purse through taxes, which shall be converted in a better performance of State's functions: promoting education, health care, social security etc. Social justice needs economic growth to be assured by the State. On the other hand, if injustice affects negatively the will to work and the productivity of people, it means efficiency also depends on justice.[30]

The relation between justice and efficiency is an issue that needs to be seen through the perspective of the philosophy of law and not only through that of economics. The role of the

[27] Ronald Dworkin, A matter of principle, 1985, 237.
[28] See Dworkin (note 27), 240.
[29] See Lalaguna (note 25), 196.
[30] See Mathis (note 5), 203.

philosophy of law is exactly not to allow the thought that efficiency and wealth, typical concepts of economics, to seductively overlap the goal of law: justice. Economics can profitably be applied to law, but not in a way that wealth maximization overwhelms justice, because productivity is a goal of economics, but the goal of law is justice and that cannot be compromised. When law implements justice, efficiency is accomplished as well, sublated by justice and effectuated within it, as one of its many necessary elements.

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Adress: Nathália Lipovetsky e Silva, Belo Horizonte / Brazil.

Av. João Pinheiro, 100/sala 1506 – Centro – BH/MG, CEP: 30130-180