

REPRESENTATION OF JUSTICE IN EUROPE

**Deconstructing “justice” and
reconstructing “fairness” in a convergent
European justice system: an Aristotelian
approach to the question of
representation of justice in Europe.**

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ABSTRACT

‘Justice’ is spoken of in two ways: the *lawful* and the *fair*. The *law* is a human construct that is devoted to the advantage of all, or to the advantage of the best, or to the advantage of those in power or to the advantage of those representing it – let it be the politician, the media, the TV presenter, the filmmaker. Thus, the law serves the production or the preservation of happiness within politics and business. The law commands us to act according to the mean. A well-written law follows the mean well and a poorly written law does not. On the other hand, *fairness* is a principle sometimes materialised through the law and the given justice system. *Fairness* is the ultimate value pursued by both the common law and civil law traditions. However, its distribution through the *law* and the representation of this delivery varies. Does this mean that a different kind of *justice* is distributed? Through the teachings of Aristotle, this essay aims to deconstruct the notion of justice, by breaking down its two ingredients, the *lawful* and the *fair*, and by analysing the effect of their representation in modern European society. The relativity attached to the notion of justice is not a modern phenomenon, but a philosophical matter that can be analysed and indeed explained through the teachings of Aristotle and its contemporary students. The analysis will be developed in the context of convergent Europe, focusing on the role of the media and courts especially in relation to criminal justice.

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INTRODUCTION

In our quest to understand the modern version of the notion of justice, we become acquainted with a feeling that has always accompanied us, but was never easy to pin down. That is the feeling of mistrust and scepticism about the way justice is represented in modern society. John Stuart Mill said that mankind are always predisposed to believe that any subjective feeling, not other accounted for, is a revelation of some objective reality. Our task will be to determine whether the reality, to which the feeling of justice corresponds, is one which needs any such special revelation. For the purpose of this inquiry, “it is practically important to consider whether the feeling itself, of justice and injustice, is *sui generis* like our sensations of colour and taste, or a derivative feeling, formed by a combination of others”¹.

In other words, if we were to test objectively the image of justice as this is portrayed in modern society, how satisfactory would the outcome be? But what is justice, and how is this deconstructed in contemporary terms? More importantly, against what criteria is this system of representation compared, and what ultimate values are we aiming to attain? It becomes apparent that before we embark on criticising any system of representation of justice, we need to ascertain what the distinguishing character of justice, or of injustice, is. To find the common attributes of a variety of objects, it is vital that we survey the objects themselves in the concrete.

Our analysis of justice’s norm will need to avoid looking through the tinted glasses of popular culture such as the media, crime fictions, caricatures and films. We need to advert to the various modes of action, and arrangement of human affairs, which are classed by universal or widely spread opinion, as just. This approach will help us go back to basics, breaking free from the ‘macdonalised’ version of justice. Therefore, our first objective will be to deconstruct the notion of justice using objective tools and principles that are founded in human nature. The founder of Natural Law theory, Aristotle, will be consulted. The teachings of his students Jeremy Bentham and John Stuart Mill will also be discussed.

The second objective will be to use this untainted understanding to compare the norm of justice with its modern representation system. Ultimately, this will allow the identification of any gaps between values

1 Mill S John, *Utilitarianism, On Liberty, Considerations on Representative Government*, London: Everyman, 1993, pp 43-44.

of justice and delivery of fairness through its servants: judges, courts, lawyers, the media, policymakers and politicians, government and administrators. Due to the limited space provided for this paper, only the media and the courts will be investigated, using the territory of criminal justice.

The third and final objective will be to drill down to the identified gaps between justice's normative understanding and modern representation system. The distinction between common law and civilian traditions will be examined, testing whether Europe's harmonising legal systems provides the answer that could bridge the gaps that the system of justice's representation allows. This discussion will be developed in the context of a convergent Europe of 25 European Union partners and 46 Council of Europe allies. The trend of a unified, homogenous justice system will be subjected to criticism as equity² and various aspects of normative justice are delivered and represented in common law and civilian legal systems.

JUSTICE AND FAIRNESS: THE NORM AND THE REAL

Methodology & ground rules

The individual man is essentially a member of society, or as Aristotle put it, a 'social animal', whose identity is determined, but not limited, to its membership of different social groups³. Our world and realities are often defined by our surroundings, and for those rare thinkers whose views do not conform to what is 'common sense', things become complex, as we tend to ostracize or label them as 'abnormal'. But justice is hardly a subjective notion. It is made of ingredients that are pure and

2 The word 'equity' is used in the Aristotelian sense, meaning the correction of the law according to the principles of universal justice in situations for which the law is too abstract or generalised. For Aristotle, equity and justice are closely related. While not absolutely identical, they belong to the same genus and are both morally good. What is equitable is just, in one sense, but in another sense it is higher than what is just since equity is the principle applied to correct justice when it errs.

3 However, as various libertarians would argue, although our membership to different groups (e.g. ethnic, religious, national) is influential, our identity cannot be reduced to membership of a single group. Each one of us is defined by a unique combination of characteristics that make up our personality.

easy to identify in nature. It is the theories that have been developed to explain these ingredients that are human constructs and hence subjective.

I have presented elsewhere⁴ a schema that breaks down the ‘world of theories’ into three levels. The schema can be illustrated with three circles, the smaller fitting inside the bigger. The larger circle is broad enough to include theories with distinctive accounts of Ethics (how we should lead our lives) and Political Morality (relationship of the individual with the aggregation). According to Aristotle, Ethics is concerned with “things which are for the most part so ... things which are capable of being otherwise”⁵. The perfect opposite is mathematics, which is a science that deals with “things that are of necessity”⁶. Examples of theories fitting in the first circle are the philosophies of liberalism, utilitarianism, communitarianism, republicanism or feminism.

Moving on to the second circle, we find theories for justice systems. These are theories that deal with the justice system in its entirety, and are able to address issues deriving from all stages of the justice process. In other words, theories that belong to the second circle are broad enough to address any justice issues. However, they are not as broad as the theories of the first circle, which can take on board issues relating not only to justice, but also to ethics and political morality. Examples include Hart’s theory of justice⁷.

Finally, there is the third circle, the smallest one, which includes theories that deal with specific problematic issues of various disciplines, such as criminal justice. Theories that belong to the third circle cannot deal with all problematic issues of justice (like theories of the second circle), and are certainly not interested in questions of ethics or political morality (which are issues that are addressed by the theories of the first circle). Examples include ‘just deserts’ theories (retributivism) and rehabilitation paradigms.

The delineation of the three levels of theories is important for at least three reasons. Firstly, if we are to analyse the normative concept of justice and compare it with the product of today’s system of its representation, then we need to be able to locate ourselves within a certain School of Thought. Our arguments will be relative and will

4 Gavrielides Theo, “Some Meta-theoretical Questions for Restorative Justice” *Ratio Juris* Vol 18 No 1, 2005, pp. 84-106.

5 Aristotle, *Nicomachean Ethics*, II-27.

6 *Ibid.*

7 See Hart LA, *The concept of law*, Oxford: Oxford University Press, 1961.

appeal to the followers of that School, but questioned by their opponents. Secondly, in our analysis, we will need to identify the circle within which we will be working, and if it is narrower than the others, then we should avoid making invalid arguments that are too big to fit within our chosen world of theories. Finally, if we are to talk about common law and civilian law systems, then again we will need to move within a certain sphere.

In particular, for the deconstruction of the notion of justice, I will be moving within the first, larger circle, using Aristotle's Natural Law theory and Mill's and Bentham's utilitarian perspectives. This will allow me to paint a picture of justice that is broader than any particular justice system and is detached from modern, limited images of justice as these are represented in today's society. The product will be a normative capture of justice's image which will then be compared to what we witness today as justice. This will allow conclusions to be drawn about the system of representation of justice in modern society. For the comparison between common law and civil law traditions and the way justice is interpreted by these systems, I will be moving within the third circle using a specific area of justice, criminal justice⁸, as this is where the differences between the two traditions are more apparent.

The normative concept of justice

Arguably, each legal system is based on the accepted notion of justice by society which then entrusts its application and enforcement to legal practitioners such as judges and lawyers. This statement, by definition, leads us to assume two things; first, that there are different legal systems and second that there are different types of justice depending on a local community's understanding. Although this might be true – and will indeed constitute one of this paper's themes of investigation – what is undeniable is that justice has a normative concept that is *universal truth*. Before we move on to any further analysis, this norm has to be deconstructed and revealed. The chosen School of Thought that will be used is Aristotle's Natural Law theory.

The starting point for Aristotle's analysis of justice is the individual as opposed to a state of affairs. Put another way, justice has been thought to be, primarily, the morally right assignment of good and bad things (such as punishment, reward, respect, wealth etc). For Aristotle, it is primarily the virtue of a person who expresses or acts for that right

⁸ As opposed to other areas of law such as tort, contract law, commercial law etc.

assignment. In fact, justice is placed at the top of the values' pyramid, since though other ethical standards (e.g. mercy, compassion, generosity, benevolence) may be valuable, they are supererogatory rather than required. The man who is not just is the man who takes more than his share of the things which are good in themselves, but not always good for a particular person i.e. external goods such as wealth and honour (particular justice).

But justice, for Aristotle, is not only a value. Justice also means obedience to law. In fact, he thinks that the law should control the whole range of human life. He proceeds to say that if a particular State⁹ does this only partially that is because it is only a rough and ready adumbration of what law should be. In his work *Nicomachean Ethics*, he concludes: "by 'just' we may mean (i) what is lawful or (ii) what is fair and equal; these are 'universal' and 'particular' justice respectively"¹⁰. It is interesting to note that the Greek equivalent of the word just (from the Latin word 'jus') is δίκαιος, which meant "observant of custom or rule"¹¹. In Attic law, ἀδικεῖν (to do injustice) was the word used to express any breach of law. Aristotle says: "As the defendant in a civil suit is charged with wronging an individual, the prisoner in a criminal case is thought of as wronging the city"¹².

From the above analysis, it becomes apparent that there are two types of justice. One that is attached to the concept of the law and one that defines what is fair and equal – we will call it fairness. Although both should be valued-based, the former is more easily exposed to arbitrariness and human fault. The latter is closer to the ideal, but is abstract.

In our journey to understand the way justice is represented in today's society, we went back to basics looking at what justice is as a normative concept that is detached from reality. To do that we chose Aristotle's teachings, which define justice as part of Natural Law. This School of Thought involves a system of consequences which naturally derives from any action or choice. On this account, justice is a universal and absolute concept, while human constructs such as religions, principles and theories are merely attempts to codify that concept, sometimes with results that entirely contradict the true nature of justice. This analysis is

9 In ancient Greece (Hellas), each city was a separate state (city-state) with its own sovereignty, army and governance system (see for example Athens vs Sparta).

10 1129 & 3-1130

11 Cf. *Hom. Od.* 3, 52.

12 *Loc cit supra* note 5.

not abstract as it acknowledges the caveat between the normative side of justice and its real dimension which is expressed in the law.

This analysis leads to the question of whether the system of representation refers to justice (the law) or fairness. We would be obtuse to expect from any judge or lawyer to represent the normative concept of justice (fairness). Their job description stops where justice (the law) is done. It is therefore on this type of justice (the law) that we need to focus our analysis, keeping in mind that fairness, being part of nature, always looms to warm up the often cold court rooms and law offices.

MIND THE GAP BETWEEN JUSTICE'S NORM AND REPRESENTATION SYSTEM

This part of the paper will aim to address our second objective using the normative understanding we have developed in the previous section. A comparison between justice's norm and representation system will help us test the objectivity of modern legal systems. However, before we move onto this analysis, there is a caveat that needs to be addressed.

This paper has already accepted that although justice is hardly subjective, the various methods of its interpretation are human constructs and hence subjective to fault and relativism. Natural Law theory is no exception; hence our interpretation would have been different, depending on the School of Thought of our choice.

For example, for the advocates of divine command theory, justice is the authoritative command of God. The Pythagoreans had defined justice as reciprocity i.e. that A shall have done to him what he has done to B, or as the Old Testament put it "An eye for an eye, and a tooth for a tooth" (*Lex Talionis*). Others, such as Plato, have argued that justice is the interest of the strong i.e. a name for whatever the powerful or cunning ruler has managed to impose on the people¹³. For Nietzsche, justice is part of the slave-morality of the weak many, rooted in their resentment of the strong few, and intended to keep the noble man down¹⁴. Thomas Hobbes sees justice as a collection of enforceable, authoritative rules created by the public and hence injustice is whatever

13 See Plato's Republic, esp. Thrasymachus.

14 Nietzsche said: "Justice (fairness) originates among those who are approximately equally powerful", Nietzsche F, Human, *All Too Human*, Cambridge: CUP, 1986.

those rules forbid, regardless of their relation to morality¹⁵. Thinkers belonging to the social contract tradition would argue that justice is derived from the mutual agreement of everyone concerned or from what they would agree to under hypothetical conditions. These examples are only meant to be illustrative of the variations of interpretations of the norm of justice, which we have accepted to be objective, using Natural Law theory.

Justice's modern representation and delivery system

To test the objectivity of justice's modern system of representation, we first need to identify the means of its delivery. These can be classified into two general categories. We will refer to the first one as the informal delivery system of justice, encompassing our day-to-day treatment and interaction with others. We have accepted that justice is first and foremost a value that informs our code of interaction and behaviour towards ourselves and others. This is where justice is delivered informally by each one of us in our daily activities. The second system of justice, the formal one, encompasses the justice system that has been constructed to deliver justice through the law and its institutions. For the reasons explained, we will focus on the formal system of justice's delivery though references to the informal one are unavoidable.

To understand the formal delivery system of justice, we only need to follow a law's journey from its conception to its delivery. To deliver justice (the law) formally, first there needs to be an injustice done to society. This needs to be identified and publicly condemned. It also needs to be backed up by a pattern of unjust behaviour. Through this, the need for regulation arises. This requires a mixture of skills and professions including politics, the media, academia, market research, economics, campaigners and so on. Once a law has been produced to regulate this pattern of injustice, then a further series of actors come into play to represent and deliver justice, including lawyers, courts, judges, administrators, the media, film makers, authors, politicians, campaigners and different types of institutions. Once this law is delivered, then a further chain of maintenance and publicity activity is observed encompassing educational institutions, the media, campaigners, politicians etc.

15 See, Hobbes Thomas, *The Elements of Law, Natural and Politics*, 1889, ed. F. Tönnies, including "Short Tract on First Principles", 1889 (written 1630-36).

These agents – whether the media, politicians, judges, lawyers, campaigners, educational institutions – are engaged to contribute to the formal system of justice’s delivery and representation. This paper will focus only on a selection of case studies (the media and courts) to test how objective the representation of justice by these agents is.

Representation of justice by the media: Case study no 1

Arguably, the media is one of the most powerful agents in the representation system of justice nowadays. It has a general appeal to the public and can reach almost everyone in their homes, work, schools etc. It is generally accepted that – with exceptions – journalists and media agents in general are committed to a code of ethics that reflects their societies’ accepted values. However, on various occasions, the media can misrepresent justice (the law), often creating confusion and hostility that is unjustifiable and unfair (value). To test this claim, we will use human rights legislation and the UK’s Human Rights Act in particular as a case study.

Human rights are generally understood as individual entitlements that derive from someone’s humanity. They set minimum standards to be respected by States, providing individuals with a mechanism to protect, but also demand, acknowledgment of their basic freedoms and natural rights. In 1998, the British Government passed the Human Rights Act (HRA), incorporating the rights and freedoms protected in the European Convention on Human Rights (ECHR), a regional treaty introduced by the Council of Europe and implemented by the European Court of Human Rights in Strasbourg. It is not within this paper’s remit to elaborate on human rights or the ECHR; therefore no critical analysis will be attempted¹⁶.

As with most common law countries (e.g. Australia, Canada, the USA, South Africa) that have introduced similar Acts, someone would expect that the British public would embrace such major legislation. However, there is evidence to suggest that there is misunderstanding and even hostility towards the HRA and human rights. Unpublished research by the Department for Constitutional Affairs has indicated that this is

16 Further on the concept of human rights in Gavrielides Theo, “Human Rights vs. Political Reality: The case of Europe’s harmonising criminal justice systems” *International Journal of Comparative Criminology* Vol 5 No 2, 2005, pp. 60-84 and in Gavrielides Theo, “Human Rights and customer satisfaction with public services: a relationship discovered” *International Journal of Human Rights* Vol 13 No 1, 2009.

mainly due to misleading media coverage particularly by the tabloid press and television.

Some evidence to support this claim can be found in the findings of a 2004 study by the Institute of Public Policy Research (IPPR). Their research was carried out with a sample from the UK's voluntary sector: "Some sections of the Press have characterised the HRA as a 'criminal charter' and the last refuge for unmeritorious defences"¹⁷. However, research by the Human Rights Act Research Unit has indicated that the impact of the Act on jurisprudence is minimal, while there is no evidence to suggest that it allows loopholes to be used by criminals¹⁸.

In 2000, Francesca Klug in "Target of the Tabloids" went further in analysing the impact of a negative press portrayal of the HRA: "If the government promote the Act, they risk unleashing 'Eurochaos' scare stories which Ministers fear will provide officials with excuses for not exercising powers that are commonplace in other States which have incorporated the ECHR into local law"¹⁹. A study carried out by the Telephone Helplines Association supported Klug's comments: "A large proportion of the general public in the UK is deeply suspicious of anything coming from Europe. It is a shame that useful Directives are rarely shown to come from Europe, whereas anything coming from there which can be described as 'bureaucracy run mad' is splashed all over the red tops"²⁰.

Misunderstanding and hostility in relation to the HRA can also be ascribed to campaigning by various political parties. For example, the Conservative Party has recently announced the establishment of a commission to investigate the workings of the Act with a view to reforming or repealing it. The shadow Home Secretary said: "The HRA has given rise to too many spurious rights. It has fuelled a compensation culture out of all sense of proportion and it is our aim to rebalance the rights culture"²¹. In similar vein, the Spectator wrote: "considerations of people's supposed rights often paralyse sensible action [and] preclude kindness and common sense...they drive out considerations of...decency, tolerance [and] mutual obligations" (The Spectator 24.4.04).

17 Institute of Public Policy Research (IPPR), Butler, Frances, *Human Rights: Who needs them? Using Human Rights in the Voluntary Sector*, IPPR: London, 2004.

18 <http://www.doughtystreet.co.uk/hrarp/summary/index.cfm>

19 Klug, Francesca, "The Human Rights Act Research Unit. Target of the tabloids", The Guardian 14.7.2000

20 Telephone Helplines Association, THA Bulletin: October, 2003.

21 Davis David, "Victim Nation" The Spectator August 2004, 2005.

However, the media's attack does not only concern human rights legislation, but also the meaning and significance of human rights more generally as opposed to the HRA itself. Various studies have suggested that due to bad media coverage, human rights:

- are often conceived by the public to be used only for either extreme cases of torture and inhumane treatment²² - or as a hindrance in the war against terrorism;
- tend to be seen as luxury entitlements used by celebrities, travellers or even convicted criminals who want to avoid punishment or claim compensation for trivial reasons;
- are often associated with political correctness;
- conceived in narrow legalistic terms and largely of interest to lawyers.

It seems that only few people immediately associate human rights with their everyday encounters with public services, while only on rare occasions are civil rights perceived to be about the individual rather than the community²³.

Human rights are also believed to encourage a 'compensation culture', "a name, blame, shame and claim culture, the American Model that we all wish to avoid"²⁴. The 2004 IPPR study concluded that when people are asked "what human rights mean to them... the typical response is: disappearances and torture overseas or protecting the rights of terrorists or people like Myra Hindley. It seems that they have never had anyone raise human rights in any other contexts". Their report also

22 In a live discussion on Radio 5, Late Night Live, 2.10.02, an Asian man who fled to Britain 30 years ago phoned in to tell to the radio audience: "I came here because Britain is a free country. We don't need a Bill of Rights".

23 In 2002, in a series of letters to the Lord Chancellor, the Prince of Wales wrote: "human rights legislation is only about the rights of individuals" (Telegraph, 26/09/2002). However, according to the latest report of Mr. Alvaro Gil-Robles, the Council of Europe's Commissioner for Human Rights, the Council was concerned with the frequency with which calls for the need to rebalance rights protection were heard. These calls, the Commissioner said, argue that human rights have shifted too far in favour of the individual to the detriment of the community. However, the Commission said: "...It is perhaps worth emphasising that human rights are not a pick and mix assortment of luxury entitlements, but the very foundation of democratic societies. As such, their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us" in Council of Europe, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights on his visit to the United Kingdom 4th-12th November 2004*, Council of Europe: Strasbourg, 2005.

24 HRH The Prince of Wales to the Lord Chancellor, quoted by the Daily Telegraph 2002.

said: “Celebrities like Naomi Campbell and Catherine Zeta Jones have used human rights arguments to help protect themselves from unwanted media intrusion. Their well-publicised court cases have encouraged a sense that human rights seem to be principally of interest to expensive lawyers”.

Francesca Klug argued that: “Given the absence, to date, of human rights education in schools, most people glean their understandings of bills of rights from American movies and news reports that gun control cannot be introduced into the US as a result of this albatross. There is confusion between human rights, bills of rights and international or regional human rights treaties. This general lack of clarity tends to result in one of two repeated misconceptions. First, that all bills of rights are presumed to be in the image of the liberal, American model with its Supreme Court that can overturn all legislation. Second, that every time the European Court of Human Rights makes an adverse judgement against the UK, it is assumed that this is part of a plot hatched in Brussels to undermine British sovereignty. In fact, of course, the ECHR has nothing whatsoever to do with the European Union...”²⁵.

To sum up, we have used human rights and human rights legislation as a case study to shed some light on the media’s contribution to justice’s representation system. It becomes apparent that human rights law is not adequately represented by the majority of the media, which in fact have created confusion, misunderstanding and hostility which is not backed up with evidence.

Representation of justice by the courts: case study no 2

For most lay people, courts are often synonymous with justice (the law). It is interesting to notice that most first year law students are convinced that justice, especially criminal justice, is delivered only in courts. Of course, this is far from true with the majority of cases been resolved at the plea bargaining/ negotiations stage²⁶.

For those cases that do end up in court, it is generally accepted that justice (the law) is delivered in a manner that all the participants regard as fair. However, there have been occasions where miscarriages of

25 Francesca Klug, *Values for a godless age*, London: Penguin Books, 2000, p. 13.

26 According to the Lord Chancellor’s Department (now Department for Constitutional Affairs), at least 98% of the criminal cases are resolved in Magistrates’ court, 82% plea guilty and never go to court while only 2% of cases end up in proper Crown Court trials (see for example LCD 1997 pp. 64, 90 and Home Office 1995 p.31).

justice have occurred. Despite their considerable small number, their impact on public confidence is severe, particularly where criminal law cases are involved, as this is where the accused's most basic rights and liberties are at stake. For this reason, we will focus our analysis on criminal justice.

A fundamental principle in the law of evidence is that its rules and procedures should always be weighted towards acquitting the guilty rather than convicting the innocent. "Better to let 100 guilty men go free than to wrongly convict one innocent man". Yet in spite of this, there are no guarantees that innocent people are never convicted. Even the appeal system can often fail, leaving serious question marks about the integrity of the justice process. One example is the 1975 'Birmingham six case', where six men were convicted for their involvement in two serious terrorist bombings in Birmingham, UK. The primary evidence against them were their confessions and forensic evidence. However, they claimed that they were tortured by the police to confess and that they were innocent. Their appeal was dismissed, but in the mid 1980s after a television documentary that covered their case, doubts were created about their guilt. After an MP published a book in which he claimed he had tracked down and interviewed the real bombers, the Home Secretary referred the case back to the Court of Appeal. The appeal was for the second time dismissed. However, in 1990, the case was again referred to the Court of Appeal and on this occasion the appeal was allowed and the defendants' convictions were quashed on the grounds that both the confessions and the scientific evidence were suspect.

The Birmingham six case is only but one example of a number of miscarriages of justice that came to light. Some other examples include: Guildford four 1975-1989, Maguire family 1976-1991, Judith Ward 1974-1992, Cardiff three 1990-1992, Taylor sisters 1992-1993, Bridgewater three 1979-1997. These are examples taken only from one legal system. Things become even more serious if we use jurisdictions that allow capital punishment. For example, in November 2005, Ruben Cantu who in 1984 was found guilty of manslaughter and was sentenced to death being only 17, was finally found innocent after the only eye witness said: "You've got a 17-year old who went to his grave for something he did not do. Texas murdered an innocent person".

Finally, miscarriages of justice are also considered by the media to constitute 'juicy stories'. Although, in principle, media coverage is desirable, the way these cases are emphasised often creates further confusion and mistrust in justice (the law). This is a classic example of two justice agents misrepresenting justice (the law) in modern society.

Representation of justice by the courts & media: case study no 3

The last case study will elaborate on one of the most apparent failures of both courts and the media to represent justice. This refers to the sexual offending cases that occurred within the Catholic Church and the way both the courts and the media have dealt with them, most of the time misrepresenting justice (the law) so badly that the cost for the victims, their families and society is too considerable to bear.

It all started in the beginning of 2002 in Boston, USA when the Boston Globe acquired documents showing that John Geoghan suspended from priestly ministry in 1994 had been moved from one assignment to another even though it was alleged that he had molested nearly 200 children for more than thirty years. This revelation was followed by an avalanche of hundreds of other similar cases that eventually crashed into court rooms and law offices. I have presented elsewhere a chorology and a detailed analysis of these cases; therefore, I will not elaborate on them further²⁷.

The media's criticism does not refer to their whistle blowing; on the contrary, this allowed these cases to come to light and for justice to be sought. In fact, this constitutes an example of the significant role the media can play in representing and assisting justice in bringing balance and restoration to communities and individuals. The criticism refers to the way the trials were covered. The stories that were written, presented in television shows or discussed on radio, in chat rooms, the internet and other sources were primarily interested in the gossipy side of these grievous injustices. As a result, they painted a picture of justice that was far from reality but none the less rather "attractive" i.e. it sold.

For example, there was tendency for exaggeration including false accusations. One of these cases is the late Cardinal Bernardin of Chicago who was accused by the CNN for sexual offences against a minor. This was based on a single testimony which was later withdrawn by the accuser who admitted that his recovered memory was faulty and that the Cardinal was indeed innocent. In their straggle to collect evidence on cases that took places forty or fifty years ago, the media often performed the role of the judge and the jury, the police and the

²⁷ Gavrielides Theo and Coker Dale, "Restoring Faith: Resolving the Catholic Church's sexual scandals through restorative justice: working paper I", *Contemporary Justice Review Vol 8 No 4*, 2005, pp. 345-365.

prosecutor, most of the times playing a deaf ear to testimonies that were not that convenient or easy to sell. On the other hand, a number of victims and their families as well as a considerable proportion of society feel disappointed with the way the courts and the criminal justice system represented justice. We will focus on one case to understand the reasons behind this disappointment.

The first well-known American case in the 1980's was that of Louisiana-based Catholic priest Gilbert Gauthé. Church authorities transferred the priest from parish²⁸ to parish, where he sexually abused minors repeatedly despite hierarchs' awareness of his reprobate behaviour. Angry parents eventually brought Gauthé and the Church to trial and after tremendous pressure, the Diocese of Lafayette, Louisiana removed Gauthé from his ministry in 1983.

In 1985, local courts sentenced Gauthé to 20 years in prison, but he was released after 10 years. He was later arrested in Texas on charges of fondling a 3-year old boy and was finally re-released from prison again in 2000 (Paulson 6/12/2002). Catholic scholar William Jenkins writes: "The Gauthé case also established the precedent that such failure to intervene should result in financial penalties, payment for therapy for the victims and compensatory damages for their families. Following Gauthé's conviction in 1985, a group of concerned clergy and laity submitted a confidential report on abuse to the Catholic hierarchy. This document warned of the need to take urgent action in the face of such scandals, and suggested that legal liability payments could run into billions of dollars. It also warned that the Church could no longer rely on the friendship and sympathy of Catholic politicians, judges, and professionals within the criminal justice system..."²⁹.

The Gauthé case put both Catholic clergy and the U.S. judicial system on alert, but the public had only captured a glimpse of the iceberg. News reports coupled with a television drama about Gauthé's molestation of children stirred further concern. But neither the Church ecclesiastical authorities nor the judicial system found an effective, efficient way to resolve the problem. Rather, both moved Gauthé around although the victims' parents certainly favoured incarceration. Loss of faith in the church hierarchy and cynicism about the defrocked cleric's movement through the prison system beleaguered some parents.

28 An administrative part of a diocese that has its own church in Anglican, Roman Catholic, and some other churches.

29 Jenkins, P, "Clergy sexual abuse: The symbolic politics of a social problem". In J. Best (Ed.), *Images of issues: Typifying contemporary social problems*. New York: Aldine de Gruyter. 1989, pp. 105–130.

CONVERGENT EUROPEAN JUSTICE

It is not the intention of this paper to be dismissive of the media and the courts' role in the representation system of justice. The critical analysis that was attempted focused on a selection of negative cases simply because the working assumption is that the media and the courts as well as the other agents that have been referred to in this paper are overall good representatives of the notion of justice (the law). However, this does not change the fact that they sometimes fail to represent justice. This bears the question of what could be done to move them closer to the normative concept of justice (the law), if this is indeed possible at all. The analysis will focus on Europe and will use criminal justice as its point of reference.

The account is based on a claim that has recently dominated the comparative law literature. This involves the harmonizing trend that seems to exist in Europe's criminal justice systems. It has been a long-standing tradition to think in terms of "systems" when talking about criminal procedures. According to Davies and Croall, almost all criminal justice systems are divided into four key subsystems: the law enforcement officers, the machinery of the courts, the penal subsystem and the crime prevention machinery³⁰. All subsystems are meant to represent the notion of justice (the law) objectively and as close to its normative understanding (the value).

The structure of a criminal justice system is also a reflection of society's attitudes and preferred response to crime. Hence, criminal justice systems tend to vary from nation to nation. However, systems often follow basic principles that are shared by other systems and it is within this understanding that we classify them into legal models. In Europe, the two most prominent models are common law – or the adversarial system as it is otherwise known – and civil law – or inquisitorial system. The former is found in countries such as Ireland, Great Britain and former colonies, while the latter is principally found in the majority of European countries such as France, Germany and Italy.

Although these two systems share a number of similarities – thus it would be a mistake to oversimplify their distinction – they often tend to deliver justice (the law) in different ways. This involves all stages and

30 Davies, M and H Croall, *Criminal justice: an introduction to the criminal justice system in England and Wales*. 1998. London: Longman.

agents mentioned in the previous section of this paper. This bears the question of whether a different type of justice is delivered.

Over the last fifty years, and especially after the Second World War, Europe has consciously engaged in a regional activity to bring harmony and unity in the hope of avoiding a similar disaster. This also includes the way justice is delivered in the continent. The literature refers to these changes as “harmonising factors” and some of them are: EU law, Europol, the introduction of the European warrant, the International Criminal Court and the Rome Statute, a number of multilateral treaties (e.g. against organised crime, money laundering, drugs) and the creation of regional *fora*. One of these is the Council of Europe, comprising 46 member States. One of the Council’s most significant achievements is the European Convention on Human Rights (ECHR), which has already been mentioned. The ECHR states in its preamble that the aim of the Council is “the achievement of a greater unity between its members”. The Convention uses terms such as “fair trial”, “just society”, “democratic society”, “liberty”, “security” and “morals” to refer to the whole of Europe, or at least to its 46 signatories. More importantly, through the European Courts’ jurisprudence it interprets these abstract words in a concrete manner making them binding for all. This involves an interplay that is taking place between judicial, political and legislative powers and the agents that are set to serve and represent justice in modern society.

We will focus on one Article to test this harmonising trend. This concerns the right not to be tortured or subjected to degrading or inhumane treatment or punishment (Article 3). The terms of this right are absolute and hence where a breach occurs it is not possible to balance it with another individual’s or groups’ rights. It is interesting to notice how the regional court laid minimum standards to be respected by all signatory States that are bound by their ECHR obligations to represent justice in a uniform manner.

Article 3 has been invoked by member States following both the common law and civil law traditions. Some examples include cases relating to serious assaults in custody (e.g. *Tomasi v France* A/241-A (1992) 15 EHRR 1), the application of psychological interrogation techniques (e.g. *Ireland v UK* (1989) 11 EHRR 439), prison conditions (e.g. *McFelleys v UK* (1980) 20 DR 44), suspects in detention, rape while in prison (e.g. *Aksoy v Turkey* (1996) 23 EHRR 553), and extradition or expulsion where torture or ill treatment might be a consequence (e.g. *Cruz Varas v Sweden* (1992) 14 EHRR 1).

For example, in *Ireland v UK*, the Court defined the meaning of the terms of Article 3, establishing in this way minimum standards to be

respected by all members of the Council. After the decision, the UK government compensated the victims and ordered the discontinuance of the techniques used³¹. This was followed by a number of other member States who saw the decision as laying a principle that was applicable throughout the Council³².

Equally important is *Soering v UK*, which had an impact on how suspect terrorists are treated today. In this case the deportation of a prisoner was found to be in breach of Article 3, as it would lead to the so called “death row phenomenon”. With its judgement, the regional Court introduced an exception to a rule of public international law, whereby no State could be found responsible for the acts of third States. As noted by the Court, “this rule cannot exclude State responsibility under the ECHR with respect to events taking place outside their jurisdiction”. As it would be expected, this decision has a major impact not only on the accused State, but also on the criminal justice policies of all the Council’s members. For instance, the civil chamber of the Dutch Supreme Court held the surrender of an American soldier as long as the US government failed to give sufficient assurances that a death sentence imposed by a national court would not be carried out³³. The decision also affected member States’ asylum policies, because, as the Court noted, although States are free to expel foreigners, “the specific importance of preventing torture justified an exception to that freedom”³⁴.

Through the means of a regional treaty that lays standards based on human rights principles, the regional Court aspires to represent justice (the law) in a uniform way across Europe. It is important to note that before any case has reached the Court, it would have exhausted all domestic legal procedures. However, we would be overambitious to think that the referred harmonisation process, particularly the role of the ECHR and the Council, do not face serious obstacles. I have discussed these elsewhere³⁵, and it is not the intention of this paper to turn political. Nevertheless, it is important to remember that the referred trend is often overshadowed by political and other factors.

31 Resolution (78) 35 of the Committee of Ministers, acting under A5, adopted on 27 June 1978.

32 <http://www.echr.coe.int/Eng/EDocs/EffectsOfJudgements.html>

33 HR 30 March 1990 [1991] NJ 249.

34 *Farrell v UK* (1982) 30 DR 96.

35 Gavrielides Theo, “Human rights vs Political reality: The case of Europe’s harmonising criminal justice systems”, *International Journal of Comparative Criminology Vol 5 No 2*, 2005, pp. 60-84.

CONCLUDING REMARKS

It would be naïve to think that any domestic, regional, national or local justice system can bring uniformity to the way the norm of justice is represented in modern society. Moreover, we would be overambitious to expect justice's representation system to be a perfect reflection of its norm.

Through the teachings of Aristotle, this paper has deconstructed justice to show that although it is an objective concept, it is split up into the human construct of the *law* and the ethically-based *fairness*. This led us to conclude that any analysis of justice's representation system should focus on its former element and not the latter. The account also helped us to understand that though we can be more demanding in terms of the representation of justice (the law), we have to remain reasonable with our expectations from the agents attempting to represent justice (the value).

A selection of case studies focusing on the agents of the media and courts provided evidence that the system of justice's representation often fails to deliver, and this can have serious repercussions including doing injustice to individuals and the society at large. Criminal justice was selected as the context of our analysis principally because this is where the differences between common law and civil law traditions are set to be more apparent. Subsequently, the examples of the Council of Europe and ECHR were chosen to illustrate the effect of harmonising factors on the understanding and representation of justice at the transnational level. This led us to question whether this type of agents maybe more appropriate for a unified representation system of justice that can promote and indeed reconstruct a modern version of justice (fairness).

At the beginning of this paper we asked whether the division between civil law and common law traditions as well as the inconsistency of justice's representation system results in justice being distributed unfairly or unevenly. From the evidence presented, the answer should be negative though not definitive. The answer is negative for at least three reasons.

First, the representation system under investigation involves justice (the law), while justice (fairness) is to be found in all good human nature irrespective of the given justice system. We have reconstructed fairness which is primarily a value that is inherent in all individuals. On the other hand, justice (the law) is the object of justice systems which are set up to rectify injustices done to individuals and the society.

Second, when justice (the law) is distributed by the civil law and common law traditions and represented by their respective agents, fairness is always present, being part of nature and a *sine qua non* ingredient of justice (the law) irrespective of the given societal, cultural or political context. This explains why regional courts, such as the European Court of Human Rights, have a moral authority to impose legal standards and represent justice on behalf of national legal systems. The value of fairness is also present irrespective of the given legal procedures. The distinction between common law and equity is to a large extent derived from Aristotle's recognition of equity as a kind of justice superior to legal justice; it is "a correction of law where it is defective owing to its generality"³⁶. Hence, it is not unattainable and should be pursued.

Finally, although common law and civil law traditions follow different procedures, it would be a mistake to oversimplify their distinction, since most substantive and procedural differences are gradually becoming obsolete.

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36 Aristotle, *Nicomachean Ethics*, 15-1136

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