

## ЭТИЧЕСКАЯ ТЕОРИЯ

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### **Hobbesian Impartiality in Constitutional Law: Claims of Justice and Claims for Justice\***

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Starting from Hobbes's silver rule of impartiality "quod tibi fieri non vis, alteri ne feceris" the paper discusses the constitutional tensions between *claims of justice*, which ground their impartiality on the equality between men, regarding their dependence on basic needs; and *claims for justice*, which are also made in the name of impartiality, but are grounded on liberty and responsibility, resulting out of the common capability of men to pursue their interest as rational planners. Their difference, in terms of impartiality, is that the former present redistribution, for purposes of guaranteeing equal opportunities for all, as a matter of *procedural impartiality*, while the latter take distribution to be a matter of personal responsibility, falling primarily within the ambit of *proportional equality and distributive justice*. The paper discusses the corresponding constitutional forms and sociopolitical implications, depending on the prevailing conception of impartiality. Each notion of impartiality has its proper power structure, for the realization of the respective constitutional ends: the focus of the former is on legislation providing for social rights; the focus of the latter is on individual rights and judicial review. But the interplay between claims of justice and claims for justice cannot be settled once and forever. Constitutional democracy, to overcome their friction and tension without undermining political liberalism, has to disprove Hobbes's pessimism on rhetoric and public deliberation; for this to happen, however, it is necessary to recognize that impartiality is more than a matter of prudence; rather it is a virtue associated with civility.

**Keywords:** Hobbes, constitutional law, politics, silver or golden rule of impartiality, impartiality, liberty, equality, justice, needs, prudence, social rights, liberal state, welfare stat

### **Introduction**

Impartiality is usually associated with procedural fairness. Procedural impartiality entails *natural justice*, which includes maxims such as *nemo iudex in causa sua*, or *audi alteram partem*<sup>1</sup> (e. g. entrenched in the concept of fair trial, art. 6 of the European Convention of Human Rights). As Gert notes, "Briefly, a person is impartial with regard to a group in a given respect if he does not favor one mem-

\* My special thanks to Christel Fricke as many parts of this paper have been presented in stimulating workshops organized by her in Oslo's Centre for the Study of Mind in Nature.

<sup>1</sup> *Wade W. Administrative Law*. Oxford, 1989. P. 465, 466, 472.

ber of the group over any other member in that respect”<sup>2</sup>. To accept the legitimacy of the process and to recognize the result as binding and authoritative, the parties must enjoy and have recognized equal status. As Hobbes writes, “Also if a man be trusted to judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them. For without that, the Controversies of men cannot be determined but by Warre”<sup>3</sup>. Hobbes is not considered to be a theorist of impartiality. Yet the silver rule of impartiality “quod tibi fieri non vis, alteri ne feceris” plays an important role in his Natural Law theory of reciprocity<sup>4</sup>. The silver rule, with its negative formulation, is prudential in nature and quite distinct from the golden one (“love your neighbor as yourself”)<sup>5</sup>.

Procedural impartiality becomes the natural, so to speak, condition for any resolution of a conflict engaging the disputing parties in the process, and having them to cooperate and to accept as legitimate its results. Procedural impartiality concerns the rules of the game, setting the abstract framework of absolute or arithmetic equality ( $1=1$ ), within which concrete questions of proportional equality are played out, resulting to different distribution of benefits or goods between parties of equal status, according to fair criteria of justice<sup>6</sup>.

The distinction between questions *of* justice, i. e. of procedural and arithmetic equality, and questions *for* justice, i. e. distribution according to merit and worth, is due to the fact that justice is associated with proportional equality<sup>7</sup>. The importance of proportional equality is that it justifies, indeed it entails, numerical inequality, on grounds of justice. Therefore proportional equality quite likely implies wider numerical inequality in the name of justice. Grading exams (e. g. on a scale of 1 to 20) is an obvious illustration of this situation.

This paper discusses different claims of impartiality in constitutional law, on grounds of equality with regard to basic needs, as opposed to liberty in the exercise of practical reason and agency. For the former, equality in the satisfaction of needs is primarily a matter of *procedural impartiality*, while the proponents of liberty take it to be rather a matter of personal responsibility, falling primarily within the ambit of *proportional equality and distributive justice*. The interplay between claims of justice as opposed to claims for justice corresponds to different constitutional power structures and conceptions of separation of powers, involving the minimal or active and interventionist role of the state. Accordingly, the priorities set between equality and liberty are associated with monist and pluralist conceptions of popular sovereignty, respectively, which differ in their populist emphasis on the people as opposed to the citizens of an

<sup>2</sup> Gert B. *Morality: Its Nature and Justification*. Oxford, 2005. P. 131–132.

<sup>3</sup> *Hobbes Th. Leviathan*. Part I. Of Man. Ch. 15. P. 119. URL. <http://oll.libertyfund.org/titles/hobbes-leviathan-1909-ed> (accessed on 30.04.2018).

<sup>4</sup> Lloyd Sh.A. *Morality in the Philosophy of Thomas Hobbes*. Cambridge, 2009. P. 211.

<sup>5</sup> Parfit D. *On What Matters*. Oxford, 2011. Vol. 1. P. 321: “We ought to treat others as we would want others to treat us. This rule expresses what may be the most widely accepted fundamental moral idea, which was independently discovered in at last three of the world’s earliest civilizations”. On the tension between loving our neighbors as ourselves and Kantian duty, see: Frankfurt H. *The Reasons of Love*. Princeton, 2000. P. 77–78. In light of legal positivism’s view of law as a command, the assimilation of the golden rule with the divine injunction is suitable.

<sup>6</sup> Mill J.S. *Utilitarianism*. London, 1901. P. 92: “[I]mpartiality is an obligation of justice [...] as being a necessary condition of the fulfillment of the other obligations of justice”.

<sup>7</sup> Aristotle. *Nicomachean Ethics / Trans. by H. Rackham*. Cambridge (MA), 1982. P. 288; Weinrib E. *Aristotle’s Forms of Justice // Ratio Juris*. 1989. No. 2. Iss. 2. P. 211.

open and democratic society; on majoritarian predilection, favoring the legislature, as opposed to checks and balances, particularly judicial review guaranteeing the rule of law, etc. The paper argues that in the long run the problem of reconsidering the claims of impartiality in constitutional law is perennial, to the extent that the balance between liberty and equality does not accept final settlement, once and forever, because sooner or later justified inequalities, in the name of economic liberty, upset the equality of opportunities, giving stronger voice to the claims of justice as opposed to claims for justice, and vice versa<sup>8</sup>. Given this situation, it is submitted that constitutional democracy depends on its ability to disprove Hobbes's pessimism<sup>9</sup> on the futile and pernicious nature of rhetoric and deliberation in assemblies<sup>10</sup>. This however requires acknowledging that impartiality is not merely a matter of prudence, as presented in Hobbes's silver rule, but a *virtue* associated with fidelity to the Constitution and with a predisposition to civility, which takes into account the legitimate interests and concerns of the others.

### The Silver Rule of Hobbesian Impartiality

Impartiality in the negative version, as a counterpoint to extreme partiality and an admonition to avoid doing to others what you would not want others to do to you, is prudential in nature. Its complementing part, and actually the catalyst for the development of impartiality out of extreme partiality, is the experience of retaliation, of revenge, which may be regarded as a law of proportionate and equivalent human reaction: "eye for eye, tooth for tooth, hand for hand, foot for foot". By leveling up the nature and the seriousness of the threats one may know that one potentially runs the risk of being hurt in a similar manner. Retaliation energizes and mobilizes practical reason to try to avoid the most serious forms of threats and of conflicts<sup>11</sup>, to act prudently and to try to look for mediation, negotiation, avoidance of outright conflict and war. In Hobbes's prudential universe, causes are being turned into reasons, in the same way that the prediction of a causal reaction may lead to deterrence, to an assessment of the concomitant risks and the potential consequences of a certain course of action. This ultimately leads to the formulation of a general rule of prudence, valid presumably for all cases falling within its ambit. According to Hobbes<sup>12</sup>, "As Prudence is a Praesumption of the Future, contracted from the Experience of time Past: So there is a Presumption of things Past taken from other things (not future but) past also".

The prudential nature does not mean that the silver rule of impartiality is alien to morality. Summarizing the Laws of Nature, Hobbes remarks that "[t]hey have been contracted into one easie sum, intelligible, even to the meanest capacity; and

<sup>8</sup> *Rosanvallon P.* La société des égaux. Paris, 2011. P. 309.

<sup>9</sup> *Skinner Q.* Reason and Rhetoric in the Philosophy of Hobbes. Cambridge, 1996. P. 265–266.

<sup>10</sup> *Ibid.* P. 349.

<sup>11</sup> *Apressyan R.* Talion and the Golden Rule – A Critical Analysis of Associated Contexts // Russian Studies in Philosophy. 2002. Vol. 41. P. 46, 48, 52 ("Talion assumes a responsive or reactive action, that is, it indicates how to act in relations established by others"; "Talion, reinterpreted in the spirit of initiatory action, is transformed into a negative formula of the Golden Rule"). *Del Vecchio G.* On Justice / Transl. by I. Polygenis. Athens, 1961. P. 121 ("le talion est une illusion causée par la passion de la justice, mais aveugle"). *Vlastos H.* Socrates: Ironist and Moral Philosopher. Cambridge, 1991. P. 179 (ch. 7 "Socrates' rejection of retaliation" discussing talion from the point of view of justice).

<sup>12</sup> *Hobbes T.* Leviathan. P. 22.

that is, Do not that to another, which thou wouldest not have done to thy selfe; which sheweth him, that he has no more to do in learning the Lawes of Nature, but, when weighing the actions of other men with his own, they seem too heavy, to put them into the other part of the ballance, and his own into their place, that his own passions, and self-love, may adde nothing to the weight; and then there is none of these Lawes of Nature that will not appear unto him very reasonable”<sup>13</sup>. The golden rule is compatible, and indeed is better suited, to a conception of morality, and more particularly of impartiality, associated with moral duties and with the universalizability of moral judgments. On the contrary, the silver rule operates as a *limitation* of partiality. Its aim is not to totally overcome partiality but to arrive at a balanced, reasonable, judgment, *taking, however, into consideration the legitimate interests of others*.

Rephrasing the negative mode in the formula “do unto others as they do unto you” Gregory Kavka termed it “the Copper Rule”<sup>14</sup>, suggesting that this is the gist of Hobbes’s Natural law. But it seems that there is a real and important difference between the *golden* rule, “love your neighbor as yourself”, “do to others as you would have them do to you” (Matthew 7:12, Luke 6:31), the (negative) *silver* one, and the (consequential, based on retaliation) *copper* version. The first (i. e. the positive version) is a dictate of morality to love our neighbor as ourselves, in which case it may be attributed to the divine will, i. e. the legislator of the universe. Even independent of the divine command, it requires the existence of the sovereign, the legislator, from whose will emanates the normativity of law. The silver rule, however, does not state a positive duty. It counsels *abstention*; to stay away, or, if neutrality is not available, to avoid certain forms of behavior out of prudential practical rationality. It is the negative condition in the state of nature, related to the instability and the precarious character of victory over the enemy, which induces men to give up their liberty. The interesting element here is that, in reality, it is not out of love for the neighbor that one assumes the obligations of the covenant, creating the artificial person of the state, but out of the negative impact, the *unpleasant encounter* with the other<sup>15</sup>. The others impose themselves on us and we find ourselves involved into disputes, disagreements and conflicts with them. This contentious situation is a permanent state of affairs, something that one may not realistically hope to overcome, because it shall not somehow wither away. This characteristic of the silver rule makes necessary the invention and the establishment of an authoritative process to resolve disagreements<sup>16</sup>; first, disagreements about what is right and wrong, which is the duty of the legislator, and second, disagreements about specific cases and controversies.

The silver rule leads to the introduction of obligatory processes, i. e. of rules of the game, for the peaceful resolution of conflicts. The concept of the rules of the game corresponds to equal treatment (rule-like) for the same category of cases, and is juxtaposed to *ad hoc* judgments, and the corresponding casuistry. While, the copper rule is focused on the consequences of aggression, i.e. retaliation, legitimizing preemptive action to avert aggression<sup>17</sup>, to be placed at an advantageous position by

<sup>13</sup> Hobbes T. Leviathan. P. 121.

<sup>14</sup> Kavka G. Hobbesian Moral and Political Theory. Princeton (NJ), 1986. P. 347.

<sup>15</sup> Fuller L. The Morality of Law. New Haven, 1964. P. 20, 23 (“The bond of reciprocity unites men, not simply in spite of their differences, but because of their differences”).

<sup>16</sup> Hampshire S. Justice is Conflict. Princeton (NJ), 2000. P. 53–55.

<sup>17</sup> Walzer M. Just and Unjust Wars: a Moral Argument with Historical Illustrations. N. Y., 2015. P. 75, 80.

striking first, creating a *fait accompli*, the silver rule's guidance is to make procedural fairness the necessary, natural condition of persons who cannot prevail over one another, and who have come to acknowledge how miserable is life without having peace of mind. Hobbes in this regard seems to be in good company with Montesquieu<sup>18</sup> who defined political liberty as "cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa sûreté". We should note here that the golden rule states a substantive command, or a primary rule, of a specific content (show to the other as much love as you have for yourself), while the silver rule directs you to a *venue*, to seek an established authoritative procedure and to have the dispute resolved by a binding decision. Were it possible for men to obey the golden rule, and to follow the divine command of overcoming their partiality, then, presumably, the necessity of an established process for the resolution of conflicts would not be so important and indispensable. However, the copper rule is by definition contrary to the logic of procedural impartiality, because it builds on aggression, on the acceptance of retaliation, while, the purpose of procedural impartiality is precisely to avoid reaching the point of having to retaliate for an arbitrary act of aggression. As Lloyd writes, "Hobbes is thus not espousing Kavka's 'Copper Rule'<sup>19</sup> that one treat others as they treat oneself, but rather the more robust rule that one refrain from actions one would disapprove in others".

The negative aspect of the silver rule should be combined with the notorious unreliability of practical reason in Hobbes, who expressly disavows the definition of the will as rational appetite<sup>20</sup>, while "Good and Evil, are names that signifie our Appetites and Aversions"<sup>21</sup>.

The result of this subjectivity and unreliability of deliberative processes between men, where rhetoric funnels discord and undercuts the possibility of normative practical reason is that Hobbes's prudential solution, in the form of a contract<sup>22</sup>, takes the form of *translatio*, of irrevocable alienation of power to the sovereign, the *pactum subjectionis*, which turns a free man into a subject of the sovereign, instead of a *concession* (delegation)<sup>23</sup>, under specific terms and purposes. This is a simultaneous, a common, act through which the individuals leave the state of nature and enter into civil society, by binding each other in an agreement to alienate their right to judgment and to authorize the Sovereign to will in their place:

"I Authorise and give up I my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner"<sup>24</sup>.

The negative aspect of the silver rule, combined with the unreliability of practical reason in Hobbes, has, among others, the following consequences: 1) emphasizing consensus and authorization for the achievement and the preservation of political unity; 2) providing a rational and peaceful way out when substantive agreement

<sup>18</sup> *Montesquieu*. De l'esprit des lois. Paris, 1995. Vol. 1. P. 327.

<sup>19</sup> *Lloyd Sh.A.* Morality. P. 32.

<sup>20</sup> *Hobbes Th.* Leviathan. P. 47.

<sup>21</sup> *Ibid.* P. 122.

<sup>22</sup> *Ibid.* P. 102.

<sup>23</sup> *Ellerman D.* Translatio v. Concessio: Retrieving the Debate about Contracts of Alienation with an application to today's employment contract // *Politics and Society*. 2005. Vol. 33. P. 449–480, 460.

<sup>24</sup> *Hobbes Th.* Leviathan. P. 132.

through deliberation on the main issue is unavailable. The importance of consensus is that it sidesteps substantive disagreement and discord. In that respect, at the social level, where civil war may erupt, Hobbes clearly introduces a solution which is crucial for political liberalism: the foundational agreement about how to resolve peacefully disagreements. If the sovereign is composed of a collegial body, then the majority rule applies: “because the major part hath by consenting voices declared a Sovereigne; he that dissented must now consent with the rest”<sup>25</sup>.

Hobbes’s constitutionalism provides the most realistic account of the impartiality of the rules of the game between political enemies who employ strategies against each other in quest of political power. The rules of the game offer constitutional legitimacy. They empower the rulers, offering the basis of their authority, and they motivate them against their infringement, so as not to undermine their own legitimacy. As a consequence, free, unrigged elections are synonymous with political democracy.

What has not been adopted, of course, is Hobbesian mistrust for rhetoric; his radical identification of rhetoric, not with the republican humanist tradition and with the fruitful Aristotelian ambivalence over the epistemological status of rhetoric, between sophistry and dialectic<sup>26</sup>, but with the demagoguery which deviates from truth and justice. As a result, our political universe is pluralist and based on public deliberation, exemplified in our choice between rival political parties, who compete on the basis of their programs, which they try to legitimize on the basis of the common good. But this difference should not conceal the fundamental common aspects between contemporary constitutionalism and Hobbes’s constitutionalism, which is grounded on empowering rules of the game<sup>27</sup>, ultimately supported by the authority of government.

### **Impartiality, Liberty and Equality, in Constitutional Perspective**

Hobbes discusses dignity, which is a common public standard, the public worth of man according to Hobbes’s definition<sup>28</sup>, as opposed to merit and worthiness, which vary from man to man<sup>29</sup>. We all have the same status as persons and we are entitled to the same rights, because of our common human dignity, but of course we do not have the same worthiness, or merit. Talent, hard work, education, opportunities are some important factors which account for the different skills we develop and our unequal fitness regarding them.

Impartiality is the background, the baseline of distributive or meritorious justice, which leads to particular judgments of proportional equality, as opposed to mere arithmetic equality. In this context, numerically unequal treatment may be just, while egalitarianism may be unjust. This depends on the substantive criteria of justice. Justice and impartiality are intertwined. The demise of either one is bound to bring the fall of the other. Wherever we expect justice to prevail, we establish and we try

<sup>25</sup> *Hobbes T.* Leviathan. P. 135.

<sup>26</sup> *Garsten B.* Saving Persuasion. Cambridge (MA), 2006. P. 118.

<sup>27</sup> *Gavison R.* Legislatures and the Phases and Components of Constitutionalism // *Bauman R.W.* Tsvi Kahana. *The Least Examined Branch: The Role of Legislatures in the Constitutional State.* Cambridge, 2006. P. 198, 205.

<sup>28</sup> *Hobbes Th.* Leviathan. P. 69.

<sup>29</sup> *Ibid.* P. 74.

to sustain impartial institutions. Impartial procedures fulfill the task of passing over from generation to generation the basic grammar and language of justice, which is necessary to publicly articulate in a common world what it means and what it takes to develop agency and to become a person within society.

The antinomy of absolute and proportional equality, of claims of justice as opposed to claims for justice, acquires practical importance from the constant renewal of humanity, which makes imperative that, as entailed by the maxim that all men are created equal, sharing the common status of human dignity, everyone should be given at least a fairly equal chance to play personally the game of justice, fulfilling her or his potential. However, this requires equal fundamental liberties and fairly equal opportunities. In this paper, due to space limitations, the focus is on basic needs as an aspect of real equal opportunities. This ebb and flow of some sort of equality of opportunity and some level of inequality entailed by justice, as a result of proportional equality, i. e. the interplay of claims of justice and claims for justice, both in the name of impartiality, accounts for the perennial character of the problem of justice, as one generation succeeds another (not to mention institutional factors which aggravate the problem, e. g. the law of inheritance, primogeniture privileges, gender inequality etc.).

We are now ready to discuss the relation of equality to impartiality. There is an overlapping analytical framework of equality and impartiality, respectively, in their arithmetic-procedural and proportional-distributive aspects. It may be useful to distinguish in this regard, claims of justice, which are in essence the claims of arithmetic equality and procedural impartiality, from claims for justice, which are the claims of proportional equality and impartiality according to substantive criteria of fair distribution. The assumption of justice is that the question of proportional equality has been raised, discussed, and answered impartially, both procedurally and in terms of fair and impartial substantive criteria of distribution. Accordingly Peter Westen wrote in his essay on "The Empty Idea of Equality": "So there it is; equality is entirely circular. It tells us to treat like people alike; but when we ask who "like people" are, we are told "they are people who should be treated alike". Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know"<sup>30</sup>. In a similar vein, Bernard Gert<sup>31</sup> writes: "A person is sometimes described as impartial as if that characterization were a complete one. But it is not. Understanding what is meant by saying that a person is impartial requires knowing both toward which group the person is impartial and in what respect the person is impartial with regard to this group [...] A is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced by which members of G benefit or are harmed by these actions. Briefly, a person is impartial with regard to a group in a given respect if he does not favor one member of the group over any other member in that respect".

Constitutionally speaking, claims to equal treatment and legal equality in the satisfaction of basic needs (usually covered by social rights) are coupled with (economic) liberty and responsibility for one's actions, in the name of free agency and

<sup>30</sup> Harvard Law Review. 1982. Vol. 95. No. 3. P. 537, 547.

<sup>31</sup> Gert B. Morality. P. 131-132.

autonomy. The corresponding claims of impartiality are those which have their source in the following distinct features, which any two newly born humans, with a projected normal development, share and have in common: they will be more or less equally dependent on the same basic needs; and they will be more or less equally capable of practical judgments in their every-day life. Hence, the basic dichotomy regarding claims *of* justice and claims *for* justice is between *equality* in the satisfaction of basic needs, versus *liberty* and responsibility in the exercise of practical reason. Their crucial difference, in terms of impartiality, is that equality in the satisfaction of needs presents redistribution, for purposes of guaranteeing equal opportunities for all, as a matter of *procedural impartiality*, while the proponents of liberty take distribution to be rather a matter of personal responsibility, falling primarily within the ambit of *proportional equality and distributive justice*, which, as already emphasized in non-egalitarian.

It should be noted that *economic liberalism* offers a specific account of the diversity between people, in terms of merit, which is addressed and examined for purposes of proportional equality, i. e. of justified inequality. Underpinning this view are assumptions involving agency: liberty, choice, responsibility and accountability<sup>32</sup>. Agents are taken to be equal, not merely on the ground that they are alike regarding their dependence on the natural and anthropogenic environment, to fulfill their basic needs, but in addition because their mental and psychic makeup is for practical purposes similar, making them in principle equally accountable in managing their affairs as rational planners. At the same time, however, liberalism has also a *political* component, because every individual is legally entitled to develop a plan of life according to his or her personal values and ideas, regarding the meaning of life. As a result of autonomy, every person has the legal right to develop a plan of life, but obviously no two of them are identical one another.

The blueprint of liberal impartiality, as a constitutional ideal, is found in the American Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”. Impartiality is reflected in the idea of equal right to pursue happiness. This was truly a revolutionary breakthrough, transforming the pursuit of happiness from an ethical question to be answered by each human being in quest of Aristotelian eudemonia, of the good life, into a moral, political and, ultimately, legal entitlement, in the language of natural rights, attributed to humans by birth, and therefore equally distributed to all, for which government should be responsive and responsible.

The position held on the priorities between equality and liberty; between claims of justice, entailing the satisfaction of basic needs, as a matter of procedural impartiality; and claims for justice, justifying inequalities, in the name of treating individual agents impartially, according to proportional equality, forms the political spectrum from economic libertarianism to social democracy and beyond, towards communism<sup>33</sup>. Accordingly, to impartiality leading to some form of redistribution in the name of social rights; and to impartiality in treating individuals as responsible

<sup>32</sup> Ripstein A. *Equality, Responsibility and the Law*. Cambridge, 2001. P. 3, 9, 12, 15.

<sup>33</sup> Dunn J. *Setting the People Free: The Story of Democracy*. L., 2005. P. 123–153.

agents on the ground of their personal performance, correspond two different conceptions of separation of powers, regarding the relation between fundamental rights, and the role of the state – minimal in classical liberal night-watchman state, active and interventionist in the welfare state<sup>34</sup>, particularly in the first few decades following World War II. Each notion of impartiality has its proper power structure, for the realization of the respective constitutional ends: the focus of the former is on the legislature, i. e. the *institutional dimension* of the organized state and of democratic political authority, to enact legislation providing for social rights; the focus of the latter is on individual rights as the core of fundamental rights and the essence of *personalism*, and on judicial review of the constitutionality of the laws, as the pillar of the rule of law for their guarantee. Clearly, every mature and developed legal system combines both elements. Their harmony is sought by the application of the principle of proportionality, i. e. the reasonable balance between the conflicting interests arising out of the limitation on rights imposed by general and impartially applied laws of the state, in the name of the general interest.

Proportionality<sup>35</sup> has also a strong prudential element, to the extent that it checks means to ends, in the light of a balancing test between state interest and the infringement on rights. This process separates the element of reason from that of the will in the political decisions of the legislator, subjecting the rationality of the former to judicial review; if a democratically legitimate decision is found unreasonably partial, arbitrary and capricious, it is rendered unconstitutional. The Constitution offers the legal and political framework within which the connection of equality and liberty, i. e. of the criteria of impartiality, is organized and implemented.

But there is more in the connection between criteria of impartiality and constitutional power structures. I suggest that the prevailing constitutional criteria of impartiality condition fundamentally “a certain sentiment of solidarity, which [in M. Oakeshott’s words] the human components of a modern European state enjoy in common”. According to Oakeshott, “the sentiment of solidarity is that in virtue of which the members of a modern European state compose a specific collectivity”<sup>36</sup>. *Impartiality*, particularly formal equality before the law for a state’s nationals, and *solidarity*, on the basis of a blend of features usually associated with the organic nation<sup>37</sup> (e. g. common history, language, traditions, religion etc.), holding together the members of a political society, are related to *political unity* like symmetrical bricks and cement in modern constructions. Hence, political unity is enhanced by homogeneity, while undermined by heterogeneity.

A crucial aspect of political culture regards a constitution’s conception of political unity as reflected in the prevailing constitutional grounds of solidarity, based on the impartial distribution of fundamental rights, which is usually in some tension with ethnocentric or religious criteria, characterizing the socio-political majority of a nation-state. The impartial and neutral enforcement of fundamental rights (including social rights), which protect political dissent and social minorities, plays a crucial

<sup>34</sup> Bognetti G. *La divisione dei poteri*. 2<sup>nd</sup> ed. Milano, 2001. P. 15.

<sup>35</sup> Alexy R. *A Theory of Constitutional Rights*. Oxford, 2002. P. 397–414.

<sup>36</sup> Oakeshott M. *Lectures in the History of Political Thought* / Eds. T. Nardin, L. O’Sullivan. Exeter, 2006. P. 359.

<sup>37</sup> Fletcher G. *Our Secret Constitution: How Lincoln Redefined American Democracy*. N. Y., 2001. P. 62.

role in preventing the antagonism between homogeneity and heterogeneity from taking quite invidious constitutional forms, such as Schmitt's understanding of the political as the relation between friend and enemy<sup>38</sup>.

Currently, however, with the rise of populism in "fragile democracies"<sup>39</sup> constitutional impartiality risks to be superseded by a powerful trend towards political partiality, reviving nationalism. It is useful in this regard to distinguish two competing models of constitutional power-structures: one *monist*, majoritarian, centralized, extolling the energy of strong political voluntarism, taking as representative image of the collective subject, *the people*; the other *pluralist*, focused on checks and balances as guarantees of political liberalism, federalist, prudent in its quest for political rationality and reasonable judgment, taking as representative image of the collective subject, *the citizens of an open democratic society*<sup>40</sup>.

In the age of globalized financial markets, which erode state sovereignty and undermine the power of the nation state to play its redistributive role in covering basic needs through social rights (welfare state), the claims of justice and the nationalist revival in the form of monist popular sovereignty are mutually reinforced, and threaten to dismantle liberal democracy and international cooperation.

### Equality's Claims of Justice. Liberty's Claims for Justice

As discussed in the preceding paragraphs, man's dependence on the external world for subsistence, and man's common rationality and psychological makeup are often considered as two horns of a dilemma, regarding constitutional solidarity, homogeneity and heterogeneity. According to one approach claims of justice should take priority over claims for justice, because the latter depend on the former, and the precondition for the normative acceptance of the inequalities arising out of the claims for justice is the actual achievement of the claims of justice. As a result, in the real world, first of all matters the vindication of the claims of justice. It is useful to remember in this regard the distinction between desires and needs. As D. Wiggins has noted "unlike «desire» or «want» then, «need» is not evidently an intentional verb. What I need depends not on thought or the workings of my mind (or not only on these) but on the way the world is"<sup>41</sup>. Focusing on the concept of needs, we can discuss on a more concrete basis the questions of solidarity, homogeneity and heterogeneity, placing them into a political perspective.

With regard to the basic needs for subsistence (e. g. food, shelter, education, health) people are fundamentally alike, and this sameness answers in the most objective manner the question of homogeneity. In a way, the focus on heterogeneity distracts the, morally appropriate and politically imperative, concern for basic needs. Needs present the most important claims of justice.

Accordingly, from a normative standpoint, democratic solidarity requires more than the satisfaction of needs, through benefits and subsidies of the welfare state for those who are unlucky, or lose in the game of economic competition<sup>42</sup>. Democratic

<sup>38</sup> Schmitt K. The Concept of the Political / Trans. by A. Lavranou. Athens, 1988. P. 46, 49.

<sup>39</sup> Issacharoff S. Fragile Democracies // Harvard Law Review. 2007. Vol. 120. No. 6. P. 1407, 1442.

<sup>40</sup> See in detail: Tassopoulos I. Popular Sovereignty and the Challenge of Impartiality. Athens, 2014. P. 219 (In Greek).

<sup>41</sup> Wiggins D. Needs, Values, Truth. 3<sup>rd</sup> ed. Oxford, 1998. P. 6.

<sup>42</sup> Cohen G. On the Currency of Egalitarian Justice. Princeton (NJ), 2011. P. 147, 155, 163.

solidarity has a normative component of recognition of our mutual responsibility to cover each other's basic needs in the name of citizenship, as a condition of political unity, and not as a result of philanthropy for unfortunate social categories. Impartiality is concomitant to universality, in public law. Whenever we accept that a legal right (e. g. universal suffrage) or public service is universally recognized or provided, then, it is intertwined with impartiality. The cracks in the universal recognition of social rights, which follow citizenship, being an integral part of it<sup>43</sup>, reveal the deeper implications of the crisis of the welfare state. This conception of the claims of justice as claims of citizenship goes back to the venerable tradition of democracy as the regime of the poor, developed in Aristotle's *Politics* (1317b).

The constitutional implications for the organization of political power according to the notion of democratic solidarity which is based on needs and on the social element of democracy are quite familiar. Democratic culture depends on the consolidation of a system which assumes social responsibility for the basic needs of citizens. The underlying realistic, if not cynic, political assumption is that the most effective way to control and oppress people is by threatening them with massive unemployment, poverty etc., up to the complete deterioration of their conditions of life; and by imminent erosion of their dignity and self-esteem. Basic needs are causes of action, and their pressure does not call for debatable arguments, but for a strong and effective political will to exercise authority, in order to enact legislative measures necessary to cover the basic needs of the poor. The authority of the state and the principle of popular sovereignty provide the basic framework for the exercise of political power in a way that serves the people. As long as the fundamental requirements of equality have *not* been met, any further claims for justice are secondary and, from a democratic point of view, certainly, less vital.

The rise of neoliberalism and the increase of economic inequalities worldwide have induced the surge of populism. Jacobinism, i. e. a political culture, not only of the left but also of the right, favoring "immediate and collective political action committed to the realization of an egalitarian but abstract socio-political ideal of citizenship through strong and centralized state institutions"<sup>44</sup>, is inherently related with the monist conception of popular sovereignty, appealing to the people, as if they were one person, with a unified will, and not a mere majority of voters, within a divided social body. Political liberalism rejects the authoritarian tendencies of the monist conception of popular sovereignty, which undermines the right to dissent and the open character of a liberal and democratic society.

Political liberalism<sup>45</sup> focusing primarily on pluralism, challenges the main assumptions of egalitarian equality regarding the priority of basic needs and their elevation to the mark of sameness, the basis of solidarity and the aim of democratic culture. Pluralism is hardly compatible with the reduction of the idealist element of human nature to its empirical component. Human beings may be virtually common in their most vital and elementary forms of human dignity and subsistence, but at

<sup>43</sup> *Kildal N., Kuhnle S.* The Nordic Welfare Model and the Idea of Universalism // *Kildal N., Kuhnle S.* Normative Foundations of the Welfare State. L.; N. Y., 2005. P. 13.

<sup>44</sup> *Tassopoulos I.* On the Jacobin Dimension of Greek Constitutional Tradition // *The Greek Crisis and European Modernity. Identities and Modernities in Europe* / Eds. A. Triandafyllidou, R. Gropas, H. Kouki. L., 2013. P. 59.

<sup>45</sup> *Rawls J.* Political Liberalism. N. Y., 1993. P. xxviii, 131.

the same time they are unique in their assertive individuality<sup>46</sup>. There are too many people with restless mind, with daring and creative imagination. Only the blindest ideological dogmatism ignores this fact, refusing to accommodate the common knowledge that people develop diverse worldviews and form different frames of mind. The idea that one can achieve homogeneity in human mentalities, equivalent to that existing across men according to their common vulnerability to basic needs and to the conditions of the external world, is fundamentally misled and misleading; it truncates the intellectual dimension of man. *Anthropos* after all means the creature which is staring upward.

The ill-conceived attempt to expand homogeneity to the human mind leads to impoverished and sterile forms of life, typically reflected in Fascist or Socialist Realism's aesthetics. It undermines the creative, agile and innovative line-drawing of human imagination; it erodes the power of reflection, flattens empathy and deliberation, and imposes a linear straitjacket of conformist orthodoxy and political coercion. It usually ends up to tyranny.

But, of course, the deep challenge of Hobbesian constitutionalism, regarding pessimism on reaching political unity through the exercise of practical reason, is still with us: how to avoid Hobbes's conclusions from the recognition that, in the words of Leo Strauss, "in all practical affairs, one man is, in principle, as wise as any other, bent of his perception of his interest, and as capable as perceiving that interest as any other. By nature all men are equally reasonable"<sup>47</sup>. According to Hobbes, the incongruity of practical reason leads to a political Babel, from which political society can escape only through Hobbes's Leviathan.

But the sovereign's monologue does not need to silence everyone else's practical reason<sup>48</sup>. Political representation<sup>49</sup> according to democratic culture does not require citizens to abandon their personal claim to practical reason and deliberation<sup>50</sup>.

### Impartiality and Reflection in Public Deliberation

The connection between justice and impartiality does not depend on an institutional third player, other than the parties of the dispute, like the judge; the role of the arbitrator is simply that of a structural institutional guarantee. Impartiality is not a triangular relationship, like the trial, but a dual and bipolar one<sup>51</sup>, involving the internal dialogue of a conscientious person, from a partial, subjective and self-interested point of view, to an impartial one<sup>52</sup>, which takes into account the legitimate interest of the others and considers how one looks objectively from their standpoint.

<sup>46</sup> *Tassopoulos I.* On the Jacobin Dimension. P. 71–72.

<sup>47</sup> *Strauss L.* The Political Philosophy of Hobbes. Chicago, 1963. P. 159.

<sup>48</sup> *Perelman Ch.* Logique juridique: Nouvelle rhétorique. 2<sup>nd</sup> ed. Paris, 1979. P. 113.

<sup>49</sup> *Urbinate N.* Representative Democracy; Principles and Genealogy. Chicago, 2006. P. 54, 224.

<sup>50</sup> *Cohen J.* Procedure and Substance in Deliberative Democracy // *Bohman J., Rehg W.* Deliberative Democracy. Cambridge (MA), 1997. P. 407, 416–424, 428.

<sup>51</sup> *Smith A.* The Theory of Moral Sentiments. Indianapolis, 1982. P. 113: "When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judged of".

<sup>52</sup> *Nagel Th.* The View from Nowhere. Oxford, 1986. P. 171–172.

The purpose of impartiality's internal dialogue is one of articulation and transparency, intimately related with rationality, because, as Shaftesbury noted, "[o]ur thoughts have generally such an obscure implicit language that it is the hardest thing in the world to make them speak out distinctly. For this reason, the right method is to give them voice and accent. And this, in our default, is what the moralists or philosophers endeavour to do, to our hand, when, as is usual, they hold us out a kind of *vocal* looking-glass, draw sound out of our breast and instruct us to personate ourselves in the plainest manner"<sup>53</sup>. As Gilbert Harman<sup>54</sup> has argued, Adam Smith's *Impartial Spectator* is "the conscientious agent himself in a recurring shift, back and forth, between partiality and impartiality". This involves a much broader notion of procedure, which is not thinly formalistic, or "technical", but rather open-ended, discursive and argumentative, having as many meanings and perspectives, as impartiality can take.

Aristotle writes that "a man is the origin of his actions, and that the province of deliberation is to discover actions within one's own power to perform"<sup>55</sup>. According to Aristotle, "We deliberate about things that are in our control and are attainable by action [...] for nature, necessity, and chance, with the addition of intelligence and human agency generally, exhaust the generally accepted list of causes"<sup>56</sup>. Therefore, it is pertinent to distinguish between causes of action and reasons for action<sup>57</sup>. According to Aristotle, reasons are certainly one cause of action, but they are not the only one.

Where basic needs are in question there is no much room for argument. But this does not mean that the realm of politics can be confined to basic needs, excluding from its boundaries deliberation. Deliberating people apply silently, or invoke expressly, basic standards and criteria of right deliberation, such as logic, truth, and justice.

When someone violates in his talk the rules of logic<sup>58</sup>, falling into contradictions, we call him irrational; when someone talks about reality, about the world, ignoring basic facts, or taking them wrong, we try to show his mistake by invoking the concept of truth, offering evidence; and finally when we try to resolve our conflicts and more generally to talk about our mutual relations, we invoke justice, arguing for what is reasonable. Logic, truth, and justice are criteria which regulate our speech, our relation with the world, and our relationship with one another<sup>59</sup>. Everyone can take recourse to them<sup>60</sup>. A crucial underpinning of procedural impartiality is that the judge can render impartial judgments on the basis of reasons, concerning questions of logic, truth, and justice, which, from the legal point of view, are primarily intellectual criteria.

To the extent that they are relatively objective and public<sup>61</sup>, the intellectual criteria are different from the basic needs which can hardly exist separated from their agent, from a subject who has the corresponding feeling of that need. Precisely for

<sup>53</sup> Shaftesbury A.A.C. *Characteristics of Men, Manners, Opinions, Times*. Cambridge, 1999. P. 78.

<sup>54</sup> Harman G. *Explaining Value and Other Essays in Moral Philosophy*. Oxford, 2000. P. 181, 193.

<sup>55</sup> Aristotle. *Nicomachean Ethics*. P. 139.

<sup>56</sup> *Ibid.* P. 135.

<sup>57</sup> Hurley S. *Natural Reasons*. Oxford, 1989. P. 97–98, 101.

<sup>58</sup> Garver E. *Aristotle's Rhetoric: An Art of Character*. Chicago, 1994. P. 91–92.

<sup>59</sup> *Ibid.* P. 62.

<sup>60</sup> Williams B. *Truth and Truthfulness*. Princeton (NJ), 2002. P. 207.

<sup>61</sup> O'Neil O. *Constructions of Reason: Explorations of Kant's Practical Philosophy*. Cambridge, 1989. P. 28, 35.

this reason we can substitute our deliberative judgment with that of another. We can consent to follow for a certain period of time someone's practical judgment as authoritative, without silencing or bracketing during that time our own political judgment. We subject political authority to close scrutiny in case of overt violations of the standards of logic, truth, or justice. But these standards are interpreted and conceived from various angles and perspectives, according to Amartya Sen's notion of positional objectivity<sup>62</sup>; practical reason depends on contested interpretations of disputed and uncertain circumstances<sup>63</sup>. The crucial question is how to apply the criteria in different situations, given the variety of cultures, and the conflict of interests and values. For this reason, impartiality is not merely a matter of prudence, in the sense of Hobbes's silver rule, but more importantly a question of virtue<sup>64</sup>.

Concluding his discussion on how prudence and virtue are intertwined, Aristotle writes that "Virtue is not merely a disposition conforming to right principle, but one cooperating with right principle, and prudence is right principle on matters of conduct"<sup>65</sup>. Aristotle's prose has epigrammatic elegance and clarity. He writes that we have to take a small step further, because virtue is a disposition not *according to* (κατά) right reason, but *with* (μετά) right reason<sup>66</sup>. Virtue does not follow right reason as a distant ideal, but goes on with right reason, hand in hand. Aristotle's discussion of the relationship between prudence and virtue is relevant to the role of practical reason in choosing the ends, beyond using instrumentally the proper means to achieve given ends. The field of practical reason is deliberation and resolution of the course to follow, in uncertain situations. Aristotle's point, placed into a constitutional perspective, is that you cannot seek virtue, according to the values of the Constitution<sup>67</sup>, without acting virtuously; constitutional ideals do not justify unconstitutional means of action. Virtue becomes elusive, if not practiced consistently over time. In law and politics one cannot insist on being committed to an ideal or principle, without sustaining and consolidating it; without using the Constitution not only as an end, but also as a means<sup>68</sup>.

### Concluding Remarks

A rhetorician of the Roman times, Dionysius of Halicarnassus<sup>69</sup>, said in the context of rhetoric something similar with Aristotle's discussion on prudence and virtue: "As reason should prevail in the soul, so should prevail in discourse that supreme ethos, which comes from philosophy, taking priority over all other aspects of rhetoric". From that philosophical ethos one must distinguish the personal or rhetorical ethos, which is adapted to a specific audience: "The rhetorical ethos is divided in 7 kinds, according to nationality, origin, age, predilection, luck, and profession. Nationality

<sup>62</sup> Sen A. *The Idea of Justice*. Cambridge (MA), 2009. P. 156.

<sup>63</sup> Brodie S. *Ethics with Aristotle*. Oxford, 1991. P. 239.

<sup>64</sup> Hanley R.P. *Adam Smith and the Character of Virtue*. Cambridge, 2009. P. 90, 99.

<sup>65</sup> Aristotle. *Nicomachean Ethics*. P. 371.

<sup>66</sup> Hardie W.F.R. *Aristotle's Ethical Theory*. 2<sup>nd</sup> ed. Oxford, 1980. P. 236–238.

<sup>67</sup> Solum L. *The Aretaic Turn in Constitutional Theory // Brooklyn Law Review*. 2004. Vol. 70. Iss. 2. P. 475, 515.

<sup>68</sup> Powell J. *Constitutional Conscience: The Moral Dimension of Judicial Decision*. Chicago, 2008. P. 114.

<sup>69</sup> *Dionysius of Halicarnassus. Art of Rhetoric*. Athens, 2003. P. 237 (In Greek).

is counted double as it concerns both the common good and the individual good”<sup>70</sup>. “All these kinds of ethos must be brought together, integrated into one single ethos”<sup>71</sup>. The constitutional ethos of impartiality is a philosophical one of respect and civility towards the personal or rhetorical ethos of the others, towards their own idiom and expression. Impartiality requires one to show consideration for the concrete, vital interests and concerns of the others. Without such civility towards the voice of the others, constitutional democracy can hardly escape the Hobbesian omen.

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<sup>70</sup> Dionysius of Halicarnassus. *Art of Rhetoric*. P. 271.

<sup>71</sup> *Ibid.* P. 277.

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## **Гоббс, беспристрастность, конституционное право: требования справедливости и требования соответствия справедливости**

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Отталкиваясь от серебряного правила беспристрастности Гоббса “quod tibi fieri non vis, alteri ne feceris” («чего не хочешь себе, не делай другому»), автор рассматривает требования справедливости (claims of justice), беспристрастность которых основана на равенстве между людьми, насколько они зависят от своих базовых потребностей, и требований соответствия справедливости (claims for justice), которые также призваны обеспечивать беспристрастность, но основываются на свободе и ответственности, задаваемых общей способностью людей сознавать при планировании деятельности свои интересы и стремиться к их реализации. Разница между ними заключается в том, что первое отражает задачи перераспределения с целью обеспечения равных возможностей для всех, и это – процедурная беспристрастность; второе же предполагает, что распределение является предметом личной ответственности и относится прежде всего к пропорциональному равенству и распределительной справедливости. В рамках конституционного права между этими требованиями могут возникать противоречия. Автор рассматривает соответствующие конституционные формы, вытекающие из признания первостепенности идеи беспристрастности, и их социально-политическое значение. Каждое понятие беспристрастности имеет надлежащие практические структуры, благодаря которым реализуются соответствующие конституционные цели. Предмет первого – законы, гарантирующие социальные права, предмет второго – индивидуальные права и их юридические гарантии. Однако взаимодействие требований справедливости и требований осуществления справедливости не может быть обеспечено раз и навсегда. Чтобы не допустить напряжений и противоречий между ними, конституционная демократия должна отвергнуть пессимизм Гоббса относительно публичных дискуссий. Но для этого необходимо признать, что беспристрастность это проявление не столько благоразумия, сколько цивилизованности.

**Ключевые слова:** Гоббс, конституционное право, политика, серебряное или золотое правило беспристрастности, беспристрастность, свобода, равенство, справедливость, потребности, благоразумие, социальные права, либеральное государство, государство всеобщего благосостояния