

**...AND JUSTICE FOR ALL.
LEGAL INTERPRETATION ON DEMOCRATIC VALUES**

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ABSTRACT: *The democratic ideal of justice for all is challenged in the contemporary world by the conflicting nature of the values that Law is called to defend. The accelerated rhythm of social change causes law to fall behind life, and over-regulation is not the solution to create a "living justice". It is the responsibility of judges to adapt Law to the changing needs of society, and in the continental legal tradition these judges apply the law, but do not create it.*

In this paper, we argue that this traditional view of the judge's role is outdated and that we must acknowledge the increasingly interpretative role of the courts. History has proven that laws can be unjust and even criminal, but the principles and values of the Law are perennial. When law contradicts Justice, it is the judge's duty to make use of his own moral sense and interpret law extensively in accordance with the situation and the idea of Justice.

Meanwhile, as a guardian of the "living justice", the judge has a huge social responsibility that goes far beyond mere legal (disciplinary, civil and criminal) liability. Consequently, it is imperative that we take additional precautionary measures in the appointment and the evaluation of judges. In our opinion, this is the kind of public matter we should debate, rather than the one regarding the magistrates' liability. After all, when we speak of liability, the malicious act has already been done. It is preferable to focus on preventing injustice and other social illnesses and to build a society that is healthy, adaptable and ready to face the challenges of the future.

This is the only way to continue to aspire to the ideal of justice for all, and manage to harmonize so many contradictory democratic values, such as freedom and responsibility, unity and diversity, citizens' liberties and public security. The coexistence of values can only be the result of a continuous interpretive effort that excludes any a priori suppression of some of the values in favour of others.

KEYWORDS: *justice; legal interpretation; democratic values; social change*

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1. COLIDING VALUES

Liberty and justice for all. An idea deeply embedded in the collective American mind. It is the final part of the so-called Pledge of Allegiance - the oath of faith to the American flag as a symbol of the republic it represents. The phrase is unchanged since the first

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version of the oath, from 1892¹, to the present days. As a genuine patriotic ritual, the oath is recited with the right hand on the heart, not just in situations such as the opening of Congress sessions, the acquisition of American citizenship or other formal circumstances, but also at the beginning of each school day or at various events of non-governmental organizations.

Through a suggestive paradox that has motivated us in choosing the title of this article, since 1954, the text of the oath refers to "one Nation under God". Today, this kind of reference may be considered discriminatory to the atheist Americans, those who are not monotheists or those who refuse to swear for religious reasons; this can be an implicit violation of the ideal of freedom and justice *for all*². In fact, the words "under God" continue to spark numerous controversies and legal debates³, although since 1943 the Supreme Court of the United States has decided that recitation of the Oath is not mandatory in school and students cannot be punished for their refusal to pledge. Regardless of their reasons, the citizen cannot be obliged to recite the oath, it is stated in the reasoning of the decision, since "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind".

Although there have been nearly three quarters of a century since this ruling of reference for the interpretation of the American democratic values, there are still violations of it, namely when children are forced to join the choir to recite the oath of faith. Very recently a first-grader was punished at the school he attended in the American state of Indiana because he refused to stand up and recite the oath, arguing that he thus understood to protest against the US government, which is "racist, greedy and does not care for people"⁴. The child's mother sued the school and, most likely, her complaint will be admitted.

The values that a democratic society assumes are multiple and contradictory, and their interpretation is - as we shall see below - performed in several stages, being the work of different interpreters. In this article, we will focus mainly on the concept of "rightness" or "justice" (Gorea, 2017, pp. 24-31)⁵, exemplifying its interpretation from the perspective of other values of democracy.

"Justice is the first virtue of social institutions, as truth is the first virtue of systems of thought," John Rawls said in his treaty on justice as equity (Rawls, 1987, p. 29). The idea expressed by this great American philosopher is not new; it is as such in the philosophical thinking of the ancient Greeks that placed Justice at the top of the social values hierarchy:

¹ www.ushistory.org/documents/pledge.htm

² The full text of the Pledge of Allegiance, in its current form, is: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." Source: www.law.cornell.edu/uscode/text/4/4 .

³ See, for example, a website dedicated to the pros and cons of controversial issues of American society, at: <https://undergod.procon.org/>.

⁴ The news is available on an American legal portal: <https://lawnewz.com/high-profile/first-grader-punished-for-refusing-to-say-pledge-of-allegiance-lawsuit-says/> .

⁵ We have referred to liberty or freedom - the other pillar of democracy mentioned in the Pledge of Allegiance - in previous works, such as Brîndușa Gorea, *Freedom of Speech and Lawyer's Responsibility*, în Iulian Boldea, Cornel Sigmirean (Editors), *Debating Globalization. Identity, Nation and Dialogue*. Section: Social Sciences, Arhipelag XXI Press, Tîrgu Mureș, 2017, e-ISBN: 978-606-8624-01-3, pp. 24-31. Available online: <http://www.upm.ro/gidni/GIDNI-04/GIDNI%2004%20-%20Social.pdf>

Justice is the supreme social value of the Practical Life, just as Truth is the supreme value of the Theoretical Life, Good - the Moral Life and the Beauty - of the Aesthetic Life.

Without intending to go into an in-depth interpretation of the values of Rightness and Justice⁶, we will only say that such an interpretation is mandatory and implicit for the democratic exercise, which - with a certain historical periodicity - requires re-interpretations and re-evaluations.

2. LEGAL INTERPRETATION OF VALUES

Freedom and responsibility, unity and diversity, citizens' rights and public security are just a few examples of democratic values that are both friends and enemies. A democratic legislation, headed by its Constitution, cannot absolutely choose a value to the detriment of another; it can at best offer a general "recipe" on how to proceed when democratic values are in conflict, choosing one of them in a motivated and conditioned manner. "Legislation is the result of the decision-making process of the representatives elected by the majority within a community, who have been given this prerogative based on the belief that they will act in accordance with the common goals of that community. [...] While the law has to be sufficiently general and abstract, in order to encompass as many possible situations, it must also avoid interfering with other rights." (Fodor, 2017, p. 107)

So how do we manage our values, especially when they risk colliding? What kind of interpretation of democratic values do we choose? Who, when, and in what way should take on the social role of "axiological arbiter"? Not only the American society plows between contradictory values, but any democratic society, including the Romanian democracy that we are striving to build.

The Romanian Constitution guarantees the right of private property, but recognizes that there may be "causes of public utility", that is, public, general values that would justify expropriation (a violation of individual property rights). How does our Supreme Law balance the need to guarantee private property and the need to achieve public utility goals? By admitting the violation of private property, but only conditional on: (1) the determination of the public utility cause under the law and (2) the "right and prior" compensation granted to the expropriated owner.⁷ The "legal guidelines" also offers a solution for the situation that the expropriating State and the expropriated citizen give a different interpretation to the concept of "justice": if there is "divergence" in the "right" amount of compensation to the owner and it cannot be agreed upon, a judge will make this decision⁸.

We chose the above example not to discuss the right of public and private property in Romania but to illustrate a paradigmatic mechanism for the way in which democracies interpret their own values:

1. The law recognizes (guarantees, protects, etc.) a social value (in our example, the right of citizens to own private property), but acknowledges (explicitly or implicitly) the

⁶ For more details on the meaning of the concepts of "rightness" and "justice", see Brîndușa Gorea, Elena Puha (2009), *Filosofie, Justiție și Drept – ediția a II-a, revizuită și adăugită*, Târgu-Mureș: Editura „Zethus”.

⁷ According to art. 44, par. 3 of the Constitution of Romania, "No one can be expropriated except for a cause of public utility, established according to the law, with just and prior compensation."

⁸ Paragraph 6 of the same Article 44 of the Supreme Law states: "The compensation provided for in paragraphs 3 and 5 shall be determined by agreement with the owner or, in the event of a dispute, by the courts."

relative character of that value, conditions it of not infringing another values (in the case under consideration, the need to carry out works of general interest⁹). In other words, *legislation admits the contradictory character of the values that it itself legitimizes and, implicitly, the fact that these values will at one point collide with each other.*

2. Legislation decides what happens (how to proceed) in the case of collision between values. Just as, according to classical political theory, in the democracy, political power is held by every citizen in part, but exercised according to the majority's decision, the ethical architecture of democracy engages a multitude of values. Nevertheless, in the eyes of the legislator some of them take precedence over others. In the example we choose, the law decides in favor of works of public interest, to the detriment of the right of private property. Things could have been different (and indeed they were different in the communist era, for example) if the Romanian legislative had decided that the expropriation could be done without the "right" compensation of the owner, or with subsequent compensation, or that it could not take place without the consent of the owner (expropriation is simply forbidden, irrespective of the existence of a superior, general interest). Concluding, at this stage of the process of legal interpretation on democratic values, *the legislator opts for one of the conflicting values, but also establishes "damage control" measures, to safeguard the "most" part of the sacrificed legislative value* (in our case, the precaution regarding the determination of the cause of public utility by law and the condition of fairness and prior compensation).

3. Legislation recognizes its (organic and functional) inability to regulate at the level of detail (or particular case) the final balance between values, delegating this operation of finesse to the judiciary courts. In the example under consideration, if the amount of damages due to the expropriated person cannot be established "by mutual agreement", it will be determined by a judge. This stage in the interpretation of democratic values may, of course, be lacking if consensus on compensation is achieved, but it becomes essential in case of divergence. Only a judge can determine the amount of compensation to be considered fair, and only in a concrete case, subjected to judgment (or to a "cause pending before a court" to use the esoteric language of law). As it is natural, the law is too general to take into account the details of each individual situation, but a court of justice will address the actual case, will analyze, for example, the characteristics of that property, and will decide what the level of compensation is for its expropriation. In other words, *the final and most important stage of the interpretation on democratic values is, in case of divergence, the judicial interpretation, whereby the judge decides on the concrete way of prioritizing the values.*

This example of Romanian expropriation for a cause of public utility, although somewhat schematic, may prove useful in identifying an implicit and subtle pattern of managing values in a democratic society. This pattern can be found, for example, in the protection of the right to life versus the (conditional) admitting of abortion - to refer to our country, but also to the legitimate defense or euthanasia (which in some states is permitted even in the case of minors¹⁰).

⁹ There are other social values that restrict aswell the free exercise of private property rights, such as the need to protect the environment or ensure "good neighborliness"; see in this respect paragraph 7 of Article 44 of the Constitution.

¹⁰ In February 2014, the Belgian Parliament adopted a law authorizing the euthanasia of children diagnosed with incurable illnesses that accuse unbearable pains and are at the terminal stage and there is no treatment to alleviate

Managing values also means interpreting them, and interpretation possesses not only the logical sense of explanation, clarification of obscure meaning, restoring meanings, but also the hermeneutical meaning, the reconstruction of an attitude that establishes meanings and attributes meaning¹¹ (Gorea, 2016, pp. 7-11). Therefore, interpreting values from a legal perspective means drawing and redrawing the outlines of social life.

3. #FREETOCHOOSE

Recently, the Romanian public space has witnessed a passionate debate on the issue of compulsory vaccination. Vaxxers and anti-vaxxers have brought arguments, counter-arguments and pseudo-arguments, public pro-vaccination information campaigns and online anti-vaccination petitions have been launched, there were street protests¹², and the Government has proposed a draft law on vaccination of the population, which is currently awaiting adoption by Parliament. The public debate on the vaccination law is illustrative of our argumentation as it raises the issue of a conflict between values: the right to private life, the freedom of conscience or even the right to physical and mental integrity¹³, on the one hand, and the right to health, which according to the Constitution of Romania also involves the state's obligation to take measures to ensure public health¹⁴. Partisans of mandatory vaccinations invoke the "traditional" arguments on disease prevention, especially transmissible, while vaccine opponents are warning us about the experimental nature of vaccines, long-term risks to children's health, their side effects and even respecting the democratic right to choice.

The most interesting aspect in the debate on compulsory vaccination is that both sides actually invoke the right to health, that is, the same fundamental value but differently interpreted: the right to live in a healthy environment, protected from the epidemic risk, on one hand, and the right to decide for oneself what is and what is not healthier or (more) unhealthy. The particularity is that vaccination refers especially to children, so that the constitutional right of the person to dispose of oneself¹⁵, here materialized in the patient's right to make informed medical decisions, is actually exercised by the parents on behalf of the child. At least by tradition, all decisions related to the life of a child are taken by parents / parent / legal guardian, and the views of this decision-maker are also subject to social change.

It is hard to tell today whether or not vaccines are dangerous to health, are useful or unnecessary, are a scientific conquest for humanity or just a profitable business for the global pharmaceutical industry. Most likely, only the future will confirm or disperse the

their suffering. According to the law, the child may request that this procedure be applied, regardless of age. In September 2016, a minor whose age was not disclosed was euthanised at his request in Belgium. See: www.bbc.com/news/world-europe-26181615 și www1.agerpres.ro/sanatate/2016/09/18/belgia-primaeutanasiere-a-unui-minor-presa--00-04-47.

¹¹ On the valences and ambivalences of legal interpretation, see Brîndușa Gorea (2016), *Logical Landmarks of Legal Interpretation*, Bucharest: Romanian Academy Publishing House, pp. 7-11.

¹² Where the slogan in the subtitle was launched, alongside "where there is a risk, there must be personal choice", "our children are not your testing animals", "pharmageddon" and others.

¹³ Guaranteed by art. 26, art. 29 and Art. 22 of the Romanian Constitution.

¹⁴ Article 34, paragraph 1 and 2 of the Romanian Constitution.

¹⁵ Guaranteed by art. 26, par. 2 of the Constitution, provided that it does not violate the rights and freedoms of others, public order or good morals.

fears of a new generation of parents who refuse vaccination, convinced of their health risks for children. Whether or not they are the victims of mass disinformation characteristic of the post-truth era in which we are said to have stepped in¹⁶, these parents cannot be accused of not loving their children or taking risks for them and confronting the "public odium", for reasons other than caring for their health and well-being. Similarly, a multitude of people - specialists or non-specialists in medicine, epidemiology or vaccination, who cannot be suspected of obscure interests, act in full good faith when advocating vaccination; misinformation or, more precisely, concealment of key information, also specific to the post-truth era, could work against the latter.

„Le monde change, il devient le théâtre de nos émotions, au détriment des actions collectives anticipées, concertées, programmées, organisées”, according to Professor Jean Luc Penot. „Les réseaux sociaux et quelques fois les rumeurs prennent le pas sur les organisations historiques, démocratiques, collectives. *L'innovation et l'action publique ne semblent plus être portées par l'Etat qui se désengage faute de moyens budgétaires et de vision à long terme.* Les décisions sont souvent improvisées en réaction à des situations de crise et d'émotion amplifiées par les flux continus d'information. Le principal obstacle à la sortie de crise est la difficulté de créer et de partager un sens et des objectifs communs afin d'offrir une vision à long terme et restaurer la confiance. *Tenant compte de ces changements et de l'incertitude sur l'avenir, le débat sur les valeurs conduit à s'interroger sur la finalité et l'efficacité de nos organisations.*” (Penot, 2017, p. 19)

In the overwhelming flow of contradictory information that drowns us, the right to make informed decisions becomes terribly difficult to exercise. Especially in situations like the one described above, it is a huge responsibility to decide as a parent whether or not to vaccinate your baby. This is the moment and context in which Romania is preparing to adopt a vaccination law¹⁷.

In other words, the legislator will intervene - it remains to be seen to what extent – in a decision traditionally made by the family, regarding the rights and obligations of the parent to the child. Why this legislative intervention, which we can interpret as an option for one democratic value at the expense of others? The answer to such a question may be a legal one (see the obligation of the state to take measures to ensure public health in the context of the recent epidemics in Romania), an emotional one (because "it is necessary to do so!", in order not to let us go back to the Middle Ages or to enter the "civilized countries", for example), or an emotional-legal one, such as the one offered by the current Minister of Health: "We have over 95,000 normative acts in this country, but we do not have a law to deal with a vital area: protecting the health of children and the entire population of Romania. Annually, through vaccination against preventable diseases, we can save thousands of lives and prevent unnecessary suffering. We can offer our children a happy childhood that is not marked by illness or painful memories." ¹⁸

We also brought into question the emotional component of the legislative decision (the first stage of the legal interpretation of democratic values, as described above), since in

¹⁶ For a point of view in this regard, see : <https://republica.ro/vaccinurile-care-provoaca-autism-sau-medicina-in-epoca-post-adevarului>.

¹⁷ The draft law can be consulted on www.ms.ro/wp-content/uploads/2017/04/LEGEA-VACCINARII-10.04.2017-002.pdf.

¹⁸ www.ms.ro/2017/08/11/mesajul-ministrului-sanatatii-referitor-la-adoptarea-proiectului-de-lege-privind-activitatea-de-vaccinare/.

the contemporary world (post-truth or not), Law must entail *acceptability*, an attribute not only of the rational component. Especially in a democratic society, and among the educated and informed citizens, the governors can no longer decide discretionarily, arbitrarily, i.e. they can no longer take legislative decisions beyond a certain increasing social acceptability threshold. A proof of this phenomenon is the Romanian public protests in the winter of 2016/2017. The acceptability of law implies, of course, a rational understanding of the legislation, but also a psychological factor, which may be associated with the rational (for example, the opposition to an unfair or wicked law, civic attitude), but also with the irrational (as in the case of the much-blamed phenomenon of undocumented takeover and propagation of information, especially from the virtual space, that is, that "intellectual laziness" which is said to allow the reign of the post-truth¹⁹).

What is also noteworthy is the way in which the public space has been disseminating the information that vaccination becomes mandatory through this new bill. A more thorough examination of the draft law reveals that the situation is more nuanced: art. 4 introduces routine vaccinations, "mandatory according to the national vaccination schedule", but art. 7, par. 2 says that the parent or legal guardian may refuse vaccination in writing (otherwise, consent being presumed). In legal terms, it is a simple relative presumption of consent to vaccination (welcome, in the case of absent or negligent parents), not a legal obligation. The emotional factor, and probably the lack of legal culture, however, has determined a large part of the media to announce the introduction of mandatory vaccination.

It is certain that, when carefully considered, any decision of any legislator is an axiological option and, at the same time, a hermeneutical template for the interpretation of social values. This can be observed even in the European Convention on Human Rights, which proclaims the right to respect private life, but allows the interference of public authorities in the exercise of this right if this is "a necessary measure in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"²⁰.

4. DEMOCRACY AND SOCIAL CHANGE

The situation becomes more complicated when there is no median phase in the "logical scheme" of the value balancing operation, i.e. the legislator's choice for one of the values to the detriment of another. In such a situation, the judge will have to resolve the dispute without having a legislative template to rely on. For example, if the Romanian legislator had guaranteed private ownership, but it would have allowed expropriation, without specifying the conditions we have discussed above, the task (we could even say the burden) of the judge's interpretation would have been much more difficult. And yet,

¹⁹ An affirmation such as "Vaccine does not cause autism, because no one knows what causes autism" can make us smile, like an authentic paralogism, but it has spread to virtual space as a true scientific reasoning.

²⁰ Article 8, paragraph 1 and 2 of the European Convention on Human Rights (available online at [www.echr.coe.int/Documents/ Convention_ROM.pdf](http://www.echr.coe.int/Documents/Convention_ROM.pdf)). Similarly, art. Article 9 of the Convention permits the restriction of freedom of thought, conscience and religion, if they are "necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

the solution is not - in our opinion - excess regulation but, on the contrary, simpler legislation, as general and detached as possible, with the consequence of widening the limits of interpretation given to judges.

The main reason for such a shift in the gravity center of legal interpretation on democratic values is related to a reality that we all perceive, but whose consequences may go unnoticed: the accelerated pace of social change.

The Oxford Dictionary defines social change as a change in the customs, institutions or culture of a society, especially due to ideological or technological factors²¹. The social changes we are witnessing today go beyond ideology and technology. The phenomenon of migration or new terrorism (the hackers or the "lone wolf" attackers) forces us to make new decisions, which we do not have time to filter through long, thoughtful, and structured debates. Sometimes we do not even have time to precede them by legislative measures (if we knew how to regulate social phenomena that exceed our predictability). Under these circumstances, the only weapon available to democratic societies is Justice, which must jump directly to the third stage of the legal interpretation of democratic values, because the Law simply fails to keep pace with the rhythm of social change.

The paradox is that democracy, beyond its various connotations and interpretations, is understood as a "political space of all", in which every citizen is guaranteed the protection of rights and freedoms and no one can be discriminated, and it becomes overwhelmed by the multitude of values it has to manage²² (Toffler, 1973, pp. 287-289). Social life evolves, therefore democratic values also evolve, but "in a sense, evolution does not solve problems, but it creates them"²³ (Gafton & Gafton, 2017, p. 10). In the nowadays "war against terror", for instance, „the real victims are the standards, ethics, values and rights whereupon current democracies are intended to be based”. (Chilea, 2016, p. 83)

An eloquent example is the constitution and enlargement of the European Union, a paramount democratic project, in which not only citizens are expected to live in "liberty and justice", but the constituent countries themselves have the status of "citizens" with rights and obligations / duties. Supranational judicial interpretations, such as the European Convention for Human Rights, are faced with situations that are slightly different from those with which they were "used to" and have to make decisions that are inevitably political (in the Aristotelian sense of practical art of government). The Strasbourg Court has already decided, in the case of France (in 2014) and, more recently, Belgium (in July 2017), that the decision of these states to ban the burka (the Islamic veil covering the face) in public is justified and "necessary in a democratic society", because it seeks to guarantee "protection of human rights and freedoms". In a paradox similar to that of the American

²¹ See: https://en.oxforddictionaries.com/definition/social_change.

²² Even since 1970, futurologist Alvin Toffler has warned that the fluctuation of values is faster than ever, that the diversification of values leads to "bankruptcy of consensus," and new values that appear, regardless of their content, will be more ephemeral than the values of the past. In consequence, people of the future are forced to choose in a new way. See Alvin Toffler, *The Future Shock*, Political Publishing House, Bucharest, 1973, pp. 287-289.

²³ Alexandru Gafton & Emanuel Gafton, *Reality, Science, Method*, in "Debating Globalization. Identity, Nation and Dialogue ", p. 10, Section: Language and Discourse, footnote no. 8 (available online at www.upm.ro/gidni/GIDNI-04/GIDNI%2004%20-%20Language.pdf). The authors make a distinction between "adapting", which is continuous but not observable, and "solves small, sometimes temporary problems", and "evolution", which is a qualitative leap that leads to "the emergence of a stable attribute whose existence and functioning are likely to lead to changes of course. "

Pledge of Allegiance, freedom is protected by a ban, democracy is guaranteed by a violation of freedom, and public security is presented to us as the premise of liberty. Perhaps an extraterrestrial would find it hard to understand our conception of values, especially in its evolved and complex democratic version.²⁴

What is certain is that Justice is increasingly called upon to rule on dilemmatic issues about conflicts between values, and not just "high-level" - constitutional courts, supreme courts or supra-national courts. "The law is alive like the people and it is developing to such an extent that no lawmakers in the world can keep up with this continuous movement," says a young judge, who until recently presided in the Tîrgu-Mureş Court²⁵. The consequence is that the interpretive role of the judge is growing, not only in the Anglo-Saxon legal system, but also in the continental one.

5. WHEN LAW CONTRADICTS JUSTICE

Traditionally, the British or American judge is a true Law maker, in the sense that his / her judgment relies less on the letter of the law, and more on his own conscience. "Because of his prominent and privileged role in society, [he / she can] apply the rules according to his / her personal conception of morality, equity, social opportunity, etc., the application of law being translated as «feel of the law»".²⁶ The sense of justice or equity (nothing else but a profoundly good-sense) is essential in the realization of justice, that is, in the restoration of social peace.

The principles and values of the Law are perennial, but laws can also be unfair (del Vecchio, 1983, p. 92), even criminal. As the French Revolution laid the state legislation on a pedestal of holiness, the bitter lesson of Nazism and Communism taught us that legality does not always equate justice. After the Nuremberg Process, most law theorists (not just the traditional partisans of natural law) adopted an anti-positivist orientation, which assigns greater importance to the judicial interpretation of the law. The decision of justice must be not only legal, but also equitable, reasonable, acceptable. Moreover, if there is a conflict between the law - on the one hand, and justice (equity and fairness) - on the other hand, the second should prevail, just as European Union law prevails over national legislation, when there is a conflict between them.²⁷ Only then can we talk about Justice for All.

When laws contradict Justice, it is the judge's task to call on his own moral sense and to make an extensive interpretation of the law, adapted to the situation and in line with the idea of justice. In other words, we consider the traditional conception of the continental legal doctrine, according to which jurisprudence is not a source of law, and the judge's

²⁴ Nevertheless, the same alien might be confused with the "classical" values of Athenian democracy if he/she were to realize how small the proportion of citizens was with decision-making. It is said that the wise Socrates himself thanked the gods that he was born "a man, and not an animal, a Greek, and not a barbarian, a man, not a woman".

²⁵ www.clujjust.ro/judecator-roxana-dan-dreptul-este-viu-ca-oamenii/.

²⁶ *Idem*.

²⁷ The principle of the primacy of EU law has been established in a case-law by a decision of the European Court of Justice of 1964: Decision 6/64 Costa vs. ENEL, available online on https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0006-1964-200802145-05_00.pdf.

role must be confined to the application of the legal norm to a factual situation, to be obsolete.

On the other hand, the "classical" resolution of conflicts by entrusting them to the courts is not always the best solution, which most states have recognized by adopting regulations that encourage alternative dispute resolution, such as mediation (Chiriac & Blaj, 2016, p. 154). These methods, alternative to traditional courts of justice, have - among many other advantages - the merit of actively engaging the parties to the conflict in discovering that right and fair solution for them, in the specific case.

The idea of correction of legal justice also concerned Aristotle, who questioned the concept of "equity" as the equivalent of authentic justice. The thinker of Stagira noticed that the generality of the law can be a source of injustice by applying it to a particular case, in which case there is no equivalence between legality and equality. Equity is to seek equal justice, even if it involves the correction of legal justice. Equitable is not just by Law, but by correcting it. (Gorea & Puha, 2009, p. 54).

We are currently witnessing real tectonic movements, social changes that make our old conceptions and ideologies to slide; they can end up colliding and causing real social earthquakes. Change is inevitable and it is preferable that they find us prepared, so we can avoid the social and individual trauma that Alvin Toffler defined as "the future shock"²⁸ (Toffler, 1973). Law cannot remain either opaque or indifferent to social change; on the contrary, in our opinion, it needs to understand and assume its role of promoter and guardian of democratic values, principles and institutions.

6. THE LIVING LAW

Of course, Law begins with rules and statutes, but it is not limited and should not be limited to it. As we have seen above, the first recognition (and at the same time the first interpretation, the first judgment) of the values of a society is made by the legislator, regardless of the fact that it is very reserved and limits itself to some guiding legal principles - such as in the Anglo-Saxon legal system - or is hyperactive and tends to regulate excessively, as in the Romanian (and continental, in general) legal system. But when we talk about concrete issues, re-establishing social peace, restoring values, Law has to prove to be alive, anchored in reality, flexible and adaptable. The role of the judge begins here, and he must prove to possess not only knowledge of law, intelligence and integrity, but also moral sense, wisdom, courage and love for others. "If the love of men is doubled by the living feeling of self-responsibility and that of Justice, no clemency will ever slip into indulgent weakness that encourages law-breaking. If the sense of responsibility and rigorous justice is retouched and well assembled by a great love of people and by a subtle understanding of the human soul, the judge will never strike with too much harshness where reparation and healing is possible, never will he let triumphal wickedness or perfidy dressed in legal forms", said Eugene Sperantia. (Speranția, 1946, p. 467)

²⁸ The future shock is, in short, the shock of change or the suffering caused by the over-stimulation brought about by the avalanche of news, the inability to absorb an excessive volume of change. See Alvin Toffler, *The Future Shock*, Political Publishing House, Bucharest, 1973, pp. 306-307, p. 312 and *passim*.

The concept of the "living law" was used by jurist and sociologist Eugen Ehrlich to designate the customary unwritten law of Romanian archaic villages, opposed to legal, formal, written or positive law. Considered to be one of the founders of legal sociology, Ehrlich set up a "living law" seminar in 1913 at the University of Cernăuți. Ehrlich considered that the "living law" is spontaneous and diffuse, a collective and anonymous creation, which is related to the custom, to the social life, to the silent action of the communities. It "develops independently from state laws and from the official legal order, often conflicting with them". The Living law is a "social, spontaneous, pacifist and non-contentious" legal order, which the judge can only use "when the legal lacunae allow it". (Bădescu & Cucu-Oancea, 2011).

Perhaps the profound insight into the legal phenomenon that this Romanian from Bukovina (presented by the foreign encyclopedias as an Austrian) demonstrated a century ago can provide us with a way to reconsider contemporary social illnesses, from causes to cure. The "living" law can now be interpreted not as an archaic legal order, opposed to the official legal order, but as a beneficial synthesis between the legislative and the judiciary, between the normative interpretation and the jurisprudential interpretation, between the political governance and the life of the social body. Such reconciliation between the abstract normative and the concrete social can be the only solution not to snap in the face of the shock of the future, to keep our democratic ideals alive and to give social values more than declarative recognition. However, in order to attain such a result, it is imperative to endow the courts with a greater interpretative role, enabling them to immediately adapt the Law to the changing social context.

Undoubtedly, more freedom of consideration for the judge can worry us, and the idea of granting it can be opposed with many arguments.

Do we have to fear a "dictatorship of judges", if we give them too much power in our society, should we be worried that we thus break the fragile balance of powers in the state? The natural tendency of any of the powers in a state is to take control of the others anyway, which is why we have the constitutional system of checks and balances specific to the rule of law, which "ensures the system that none of these powers exceeds the others" (Drăganu, 1992, p. 9) *apud* (Chiriac, 2013, p. 22). Perhaps it would be more reasonable for us to entrust the judges in Romanian society with more power, to the detriment of the current generation of legislators and governors. After all, history does not record periods of judicial despotism, but abounds in examples of political dictatorship.

If judges have too much power of interpretation, there is a risk of non-uniform application of the law. In our legal conception, the uniform application of the law is an important value of the judiciary system, a real desideratum of it, legislatively marked by the re-introduction of the "appeal in the interest of the law"²⁹ (Gheorghiu, 2006). Should we dare to question the beneficial character of society for this desideratum? Is it possible for justice decisions to be better, more righteous, more suited to the social context, if the law were to apply less uniformly, and more tailored to a specific local community, for

²⁹ About the historical trail of the institution in Romanian law, from the "appeal in the interest of the law", to the "request for correction", "appeal in supervision", "extraordinary appeal" and again "appeal in the interest of the law" - see Liana Gabriela Gheorghiu, *Appeal in the interest of the law - source of law. Application of interpretative judgments in time*, in the *Juridical Current*, Year IX, no. 3-4 (26-27) of 2006, pp. 1-3.

example? How much and in which ways do we afford diversity in the legal interpretation of democratic values?

How much freedom of interpretation do judges have and how much should they have, after all? The answer of the aforementioned judge is eloquent: "In my opinion, the judge has as much freedom as he commits to ..." ³⁰. Why shouldn't we recognize by law this power of interpretation that judges have, which in reality exceeds the mere application of the norm to the case.

For the Law to remain "alive", that is, anchored in the rapidly changing reality - socially, demographically, technologically, ideologically, psychologically, etc., we must trust the professional body of the judges as the wisest fellow citizens and the closest to our communities. We have to understand that democracy is not an end in itself, but a way to govern for all; when "all" changes, when we have a new "all," we need a new democracy. Just as human rights are not received as a gift but won through social battle, democracy is not inherited, it is being "made" continuously. (Chilea, 2016, p. 82)

Of course, understood as a guardian of the "living law", the judge has a huge social responsibility, which goes far beyond mere legal liability (disciplinary, civil and criminal) ³¹ (Chiriac, 2016, pp. 63-74). Consequently, it is imperative to take additional precautionary measures in the appointment of judges and in maintaining them in these positions. Maybe we have to rethink the relationship between the Law and Justice, the normative interpretation of the democratic values and the judiciary one. Maybe we need to reconsider the judge's social role or even the contemporary concept of "justice". We did not intend to solve these dilemmas in this paper, but we still point out that, in our opinion, this is the kind of public debate that should concern us, rather than that on magistrates' liability. After all, when we speak of liability, the malicious deed has already been done; it is preferable to focus on preventing social illnesses and building a healthy, adaptable society that is prepared to face the challenges of the future society.

7. ...AND JUSTICE FOR ALL

The coexistence of values can only be the result of a continuous interpretive effort that excludes *a priori* suppression of some of the values in favour of others. Those who are best placed to do justice, that is to interpret fairly the concrete situations in which the values collide (between themselves or with the legally established rule of law) are not the legislators, but the judges. The latter are closer to the changing social realities, they can feel the pulse of the social body and can correct the inequities in real time. Our conclusion: to select the judges intelligently, to invest them with more decision-making power and to trust that they will judge just, not only by law but also by their own conscience.

How to create a body of judges in which we can trust, which we can rely on, and which - if necessary - can be the last refuge of the values of democracy, remains an open question. We could choose them democratically and on a limited mandate, we could turn

³⁰ www.clujjust.ro/judecator-roxana-dan-dreptul-este-viu-ca-oamenii/ .

³¹ On the responsibility and legal liability of magistrates, see: Lucian Chiriac, *Quod erat demonstrandum. De la responsabilitate et de l'engagement juridique des magistrats*, în *Curentul juridic*, Anul XIX, nr. 2 (65) din 2016, pp. 63-74.

to the Anglo-Saxon system of courts with jury, we could give up courts consisting of only a single judge or we could test them for a longer period before become permanent magistrates. As there are risks in our proposed solution (judges' excess power as a systemic risk, abuse of power by individual judges, errors resulting from subjectivity or incompetence, the risk of fragmentation of justice, etc.), there are solutions, corrective and protection measures. It is important to recognize the judge as an archetype of the just person, a prototype of the wise citizen and a role model of the defender of our social goals.

This is the only way in which we can consistently reconcile day after day, contradictory democratic values, such as liberty and responsibility, unity and diversity, citizens' rights and public security, and can we continue to aspire to the ideal of justice for all.

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