Journal of Law and Criminal Justice
June 2024, Volume 12, pp. 23-31
ISSN: 2374-2674(Print), 2374-2682(Online)

Published by The Brooklyn Research and Publishing Institute
DOI: 10.15640/jlcj.v12a3
URL: https://doi.org/10.15640/jlcj.v12a3

If Justice Wins: Theoretical-Legal Reflections on Rawls and the Current Situation

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Abstract

In the recent historical period we are witnessing manifestations of war and violence that trigger serious reflection on sovereignty, justice and freedom, themes that have always been present in philosophical debate. The debate therefore focuses on how society can be organised in such a way that each citizen can pursue his or her own inclinations and enjoy his or her own freedom without this conflicting with the corresponding rights of his or her neighbour. Obviously, the reflection must also be extended to the relationship between states. According to Rawls, a just society should not pursue the greatest possible welfare for the greatest number of people, at the risk of neglecting minorities, but should be founded on a legal-political vision based on the values of security and universal justice. A similarity can be found with the Dworkin's theory of elaborating the integrity postulate, which ensures a judicial decision is always consistent with the principles chosen by a social community and realizes the postulate of equal concern and respect, the core of the connection between law and morality at the legislative and judicial levels. Rawls' thought also has many references to Kant's theory of justice. It shows how important the concept of freedom is, and that the very idea of freedom means having regulations that allow there to be no prevarication. A clear example of this is guaranteeism. In the protection of citizens, it is essential that there is a guarantee of protection from those who go against the laws. In this regard, after a brief examination of the major theories of punishment and the situation applied in Italy, we focus on the particular situation of rights management during the pandemic period. It is a source of reflection that is still relevant today because a balancing of principles had to be carried out, which should always be a guide.

Keywords: Justice, Freedom, Balancing of principles, Social justice, Guaranteeism, Punitive power

1. The task of contemporary legal-political philosophy

The transformations of this end of the century raise complex and worrisome phenomena ranging from the globalization of the economy to multiculturalism, from the post-Cold War geopolitical settling to increasingly full-bodied and irrepressible migratory flows pushing toward the north and northwest of the planet (Trevor 2023). In this context, complicated recently by the severe pandemic crisis, conflict situations between various peoples of the world are becoming more bitter as well as the dispute between the West and Islam is becoming more extreme. To the pressing terrorist threats, and wars on various fronts of the globe, the most alarming in the European sphere at present is certainly the one that is taking place before our eyes, due to Russia's invasion of Ukraine on February 24, 2022. On another front, Hamas's October 7, 2023 attack on Israeli towns and villages marked a caesura in the Middle East conflict and initiated another bloody war. These are phenomena and dangerous events of war that pose to contemporary legal-political philosophy the pressing demand to extend the criteria of justice from the local to the global context, attempting to find a solution to what has been called the dilemma of extension.

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In such a difficult situation, for some time now the traditionally understood territorial States have been steadily and increasingly losing shares of sovereignty or their shares of sovereignty are increasingly subject to unpredictable events of informational and territorial overpowering in a global landscape and marketplace in which authority and power circulate in a way that can no longer be controlled (Sheppard 2023). This entails for contemporary legal-political philosophy the elaboration of theories of justice that no longer refer to a system with precise and well-defined boundaries, generally identifiable with the nation-State, but need to find credibility and consistency against the backdrop of increasingly complex global changes that affect the very frames of reference in which the concept of the State had until now found its most appropriate sense.

2. Justice, security and freedom in the Social Union of social unions

Under present conditions, legal-political philosophy is pressed by an increasingly difficult planetary scenario, one might say at times convulsive in the articulated interdependence or unstable self-sufficiency of its parts. There is therefore the challenge of extending globally the principles of justice linked with those of freedom and security aimed at envisioning equitable distributions of costs and benefits similar to those operating within individual States[3]. Indeed, the basic belief is that, despite the erosion of the nation-State, justice cannot but collimate, even at the global level, with the virtuous order of human relations related to the institutional treatment of conduct that adheres to what is prescribed by law through timely Codes that classify permissible and impermissible behavior within a state context. This requires the use of ad hoc adjudicative structures, through courts that implement legislative dictates with the application of sanctions to violators, sanctions that are made explicit as legal effects or consequential court actions.

The sense of justice can only be based on the conception of a well-ordered society that Rawls calls a "social union of social unions," which applies even; indeed one might say especially, in the periods of greatest crisis such as the one went through under the Covid19 (Hirvonen 2022). Justice, "is the constant and perpetual will, translated into action, to recognize to each person what is due to him; this is the office, deontological and inviolable, that magistrates invested with their high office enact in the places appointed to tribute justice: the courts. Justice, which is always embodied as the will of the people, is also repressive action, the legitimate power to protect the rights of all, hence the power to grant, in the recognized circumstances, to grant justice to each person, hearing requests for it and in its name, that is, granting what is just when it is due and to whom it is due."(Rawls 1971)

3. Extensible justice in moral virtue

The idea that follows from this is that a well-ordered democratic society can represent a far more comprehensive good for each citizen, nationally and internationally, than specific goods that individuals may enjoy should they rely on their own resources or limit themselves to lesser associations. It could be argued, then, that the good of social union, and participation in this broader good governed by justice, greatly enlarges and intensifies the specific good of each individual. Certainly such a perspective would be fully and beneficially realized if all individuals on our planet participated in it, involved both emotionally and rationally in its purpose. Unfortunately, however, not all, indeed only relatively few are those who are able to fulfill the conditions dictated by justice in an accomplished way. (Rawls 1994, 62)

Yet, beyond institutionalized judicial action, which operates with a prescriptive, authoritarian and codified justice, there is a more extensible sense of justice, sometimes called natural in that it is considered innate, which should urge each individual to use fair criteria of judgment toward his fellow human beings, in ordinary or extraordinary situations, and to behave accordingly, in the sense of honesty, fairness and non-injury to one's neighbor. In fact, justice should be understood in the same way as a moral virtue, as the ancient philosophers considered it, that is, not codified, imperative, external and institutionalized, but private, internal and of strong axiological impact (Schmidtz, Thrasher 2014). According to such a concept of justice, behavioral rules referring to self and others, both in terms of duties and expectations of each, should be observed with great moral thoughtfulness.[4]

[3]The most relevant theories of justice in recent years are liberal theory in the version of J. Rawls, libertarian theory in the version of R. Nozick, the theories of C. Beitz, T.W. Pogge, and communitarianism, which, "while retaining a direct link to conceptions of citizenship, can envisage different answers to the thus- humanity defined dilemma of extension."

[4] Cf. G. Solari, in EnciclopediaItaliana (G. Treccani), which cites various bibliography including Benedetto Croce. 1908. *Philosophy of practice*, Bari: Laterza.

4. Rational choice as maximin in the original position

John Rawls' two best-known works, *A Theory of Justice* and *Political Liberalism*, focus on the traditional political view of obligation concerning justice within the national community.[5] A just society, according to Rawls, in contrast to the social contract theory whose utilitarianism he dislikes, should not pursue the greatest possible welfare for the greatest number of people, at the risk of neglecting minorities, but should be founded on a legal-political vision based on the values of security and universal justice.[6] He hypothesizes that the free and rational individuals who make up a society would jointly adopt a concept of justice in a primordial situation in which everyone is churned out of information about his or her personal identity (gender, generation of belonging, natural endowments, social position). In such a condition, to which Rawls gives, as noted above, the name "veil of ignorance," choice would fall on a social structure such as to maximize the advantages of the least favored subjects (Gaus, Thrasher 2015).

Rawls' theory of rational choice as maximin hypothesizes, along the lines of what Dworkin outlines under the same conditions with his alleged judicial auction, a pre-social situation where each individual, called upon to determine the principles of justice that are to govern his society, is in an "original position" in which self-interested personal interests and preferences are silenced. It should be noted that the "original position" does not correspond to the "state of nature" of modern contractualism, imagined as a hypothetical historical period prior to the social covenant. Rawls differs from this expedient in that he does not "historicize" the situation of individuals outside of society, but operates a process of "abstraction" vis-à-vis the present society, "stripping" each individual of his or her economic-social identity. Rawls' contract theory is also not a theory of bargaining; in the "original position," in fact, appeals to strategic rationalities to determine justice outcomes are to be ruled out.

A similarity can be found with the central role of Dworkin's theory of elaborating the integrity postulate, which ensures a judicial decision is always consistent with the principles chosen by a social community and realizes the postulate of equal concern and respect, the core of the connection between law and morality at the legislative and judicial levels. The compulsoriness of norms and obedience to them can be legitimized only if the requirement of integrity is in force within a social community and if its members agree to "be governed by common principles, and not merely by rules derived from political compromises," on the basis of reciprocity of rights and duties and on a consistent line of fairness and justice. (Dworkin 1989, 199ff)[7]

5. The darkness of fate and the basic institutions of a well-governed society

Rawls believes that individuals in the original position choose principles that insure against risk and the worst outcomes of the natural and social lottery by introducing an analogy with the "maximin" rule of choice: individuals choose the maximum of the minimums. In the dark about one's social lot, that is, not being able to know in advance what characteristics in terms of ability, wealth, race, gender, health, one will be endowed with, it is natural for each individual to choose that distribution in which the condition of those who are worse off is safeguarded and made better off. A just society is one that tends to prioritize improving the relative positions of disadvantaged groups in the distribution of primary social goods, so contractualism, as a theory of justice, is presented as a proposed normative political theory centered on egalitarianism. (Rawls 2001)

The principle of maximin, which requires the maximum to be achieved in the minimum conditions, allows, according to Rawls, for society to be ensured a stable and efficient arrangement: stable, because basic goods, such as freedom of speech and income, are distributed egalitarianically; efficient, because positions at the top of the social ladder are accessible to all (Magen, Morlino 2008).

[5] Rawls, an American philosopher and theorist of neo-contractualism, earned his emeritus professorship at Harvard University, and with his work A Theory of Justice (1971) he implemented a reformulation of social contract theory in which he made a firm critique of utilitarianism, the predominant direction of thought in Anglo-Saxon political and moral philosophy.

[6] In fact, for Rawls, the utilitarian position tends to sacrifice the interests of the minority, while the social contract model, handed down from the thought of Locke, Rousseau and Kant, seems to be the most suitable to define the concept of justice.

[7] The illustration of principles as foundational values of law constitutes the central thesis of Dworkinian thought. For an in-depth discussion of this treatment see also R.M. Hare, *The Langauge of Morals*. 1952, Oxford: Oxford University Press, in which the author subjects prescriptive language to a careful analysis in order to highlight the difference of the logic of imperatives from the logic of indicatives, transl. it. *The Language of Morals*, 1968; L.L. Fuller, *The Morality of Law*. 1986, esp. 130-239; N. MacCormick, *Law, morality and legal positivism*, now in N. MacCormick and O. Weinberger. 1986. *Law as an institution*, italian translation 1990, edited by M. La Torre, 157-179.

More, the maximin principle will subdue subversive and revolutionary sentiments: "the theory of the functioning of democratic institutions must agree with Locke that people are capable of a certain natural political virtue and that they will not engage in resistance and revolution unless their social position in the fundamental structure is grossly unjust and this condition is protracted for a certain period of time and does not seem to be able to be eliminated by other means. Therefore, the fundamental institutions of a moderately well-governed democratic society are not so fragile or unstable as to be brought down by mere subversive peroration." (Rawls 1994, 89)[8]

6. Freedom and security as not conflicting values

If all major social goods are to be distributed equally, Rawls also envisions unequal distribution to benefit the most disadvantaged, thus opposing the theory of equality of opportunity. Income inequalities, if related to the skill of each individual, in fact, are not objectionable; but there are undeserved inequalities, as Dworkin himself argues, such as being born rich or poor, smart or disabled, lucky or not, which, being random inequalities, are therefore undeserved. So, Rawls criticizes equal opportunity theory, which, by failing to take undeserved inequalities into account, overlooks the fairness of a distributive justice that creates a system where the least advantaged can get the most possible.

The intuitive argument for the theory of justice as fairness aims to model a just distribution of resources after ensuring the ascription of equal fundamental freedoms to each person. Freedom, security and equality are not conflicting values, at the point when distributive equity aims to make equal the unequal value of equal freedoms (Roe 2008). For Rawls, the principle of efficiency is to be replaced with the principle of difference, which specifies the principle of equality and expresses a "democratic fraternity" based on an idea of reciprocity or solidarity of citizenship. Rousseau, too, in his Second Discourse speaks of "the order of economic and social inequalities," defining it as a principle of difference: that is, each advantage or primary social good of citizenship must be distributed equally, unless some inequality in its distribution benefits those who are more disadvantaged.

6.1. Just Social Union as cooperation and security stable over time

Only against the background of institutions shaped by the principle of freedom and the principle of difference is it possible for there to be a just society, that is, a society that passes the test of ethical justification by making possible a life to be lived with others in a pattern of cooperation and security that is stable over time (Tyler,Jackson 2014).[9]

"To illustrate the idea of Social Union consider a group of musicians, all of whom were equally naturally gifted, and who therefore could have learned to play every instrument in the orchestra equally well. Through long training and practice they became very proficient in playing their adopted instrument, and recognized that human limitations make such practice necessary; they can never become sufficiently proficient with many instruments, much less play them all at once. Therefore in this particular case where each person's natural talent is equal to each other's, the group realizes the same shade of latent ability in everyone through peer coordination of activity. But even when the natural musical talent is not equal in all but differs from person to person such a result can still be achieved, provided those talents are properly complementary and properly coordinated. In any case, people need each other, for it is only in active cooperation with others that the individual's talents can be realized, and in good part through the effort of all. The individual can be complete only in the activities of a social union." (Rawls 1994, 63)

7. The political legitimacy of the State and the duty to abide by its laws

Everyone's success in life depends, according to Dworkin, on possessing equal initial chances and responsibility for his personal choices, but also, and to a large extent, on the fairness of the political decisions made by the community to which he belongs, as Rawls argues. The liberal community has a duty to identify those aspects of the good life that are made possible or cultivated only in a just State (Chan, Bradford, Stott 2023). To the extent that a citizen behaves unjustly, whatever the causes, his life and the lives of other citizens with whom he coexists are inevitably immiserated. Accepting in toto the strong conception advocated by Plato," Dworkin observes, "no one in fact will ever profit from injustice. "Perhaps the great lives of some artists would not have been possible in a perfectly just society, [...] but a person inevitably suffers harm when his or her community fails in the task of providing security and justice, and this is so even if she, for her part, has done everything possible to

[8] See J. Locke. *Second Treatise of Government*, 223-230, Ital. transl. 1984. *Trattatosulgoverno*, Rome: EditoriRiuniti, 212- 216.

[9] So, the theory of justice as fairness seeks to accord the two great terms of the democratic or liberal-democratic tradition, namely liberty and equality, trying to arrive at, as they say, the best trade off, the best balance between what is required by equality and what is required by liberty, without neglecting the problem of security.

contribute to the community's success. Each of us shares this strong reason in wanting our community to be a safe and just community. A safe and just society is a prerequisite for a life that respects all the ideals of humanity none of which should be abandoned." (Dworkin 2002, 256-258)

With the work *The Law of Peoples*, the core of Rawlsian theory of justice seems to move from the individual political units at the national level, namely States, to place itself in the international arena. In particular, Rawls analyzes the conditions that make possible a "world society of free peoples," which is only possible if it is formed by peoples who respect the "law of peoples". (Rawls 2001, IX)

In *Law of Peoples*, in fact, it is intended to apply a particular conception of justice and security not only to the principles and norms of the law of a specific State, but also to extend it to the multifaceted international custom. The moment a law-abiding Society of Peoples is realized, international relations can be based on a kind of "realistic utopia" (Rawls 2001, XII-XVI), a highly desirable and exciting prospect although the term utopia casts more than a shadow over it and implicitly entails an underlying pessimism about the real chances that the foretold conditions can really be realized in a given time and place.

8. Freedom in the Law

Rawls' theory of justice postulates that justice is the main requirement of social institutions. This premise places public constraints on the freedom of individuals based on norms that are to be established. Rawlsian theory also denies that the possibility of someone's loss of freedom is justified by a greater good shared by others. Rawls himself points out that the basis of his theory is taken from the theory of Kant, whom he considers the author who made the greatest contribution to contractualist thought[10].He states that "The original position can be seen as a procedural interpretation of Kant's conception of autonomy and the categorical imperative" (Rawls 1971). The concept of autonomy, in the Rawlsian and kantian sense, is obedience to a law that one prescribes to oneself, and which is chosen in the original position.

Kant argued in his theory of justice that justice itself is based on the idea of individual freedom and that the rules of justice are seen as the means to protect this freedom. (Kant 1976)

In fact, Kant observes that when a system of laws is lacking - either because it has not yet been formed historically, or because it has collapsed under the blows of upheavals such as a revolution - there will only be unbridled and unrestrained freedom and a state of war similar to that imagined by Hobbes in the state of nature before the birth of Leviathan. For this reason such a state will always be considered unjust. Not so much because of the injustice of individuals' actions but because of the absence of a formal system to protect their freedom. In fact also because, as Hobbes predicted, there would be a prevarication of one over the other. What guarantees each is precisely the presence of a system of laws. Freedom is a fundamental right, and every legal system should strive to guarantee it to all individuals. (Bobbio 1965)

The origin and protection of fundamental rights are subjects of study and debate in legal philosophy. An ever-present topic for the philosophy of law is the guaranteeing of freedom, which must contend with the requirements of the criminal justice system that provides for remedies that afflict freedom.

In fact, freedom can only be appreciated and lived in systems where there is security protection. However, the protection of safety is also achieved by ensuring that compliance with the law is enforced.

It therefore turns out to be fundamental that in every civil society there should be an institutional arrangement and set of laws capable of guaranteeing the coexistence of individual rights and freedoms and of allowing them to be expressed to the fullest extent; as the same argues this is justice. The concept, however, remains indeterminate, because, as is easy to understand, there is no single system of norms capable of ensuring such compatibility, but an indeterminate multiplicity, precisely.

8.1. Guaranteeism as the application of freedom in the law

One thinks of the importance of guaranteeism, a term of reference for legal practitioners and a protection technique for the fundamental rights of individuals. The importance of this juridical model can be found above all in the field of criminal law, with the aim of protecting the weakest subjects who find themselves on the margins of

[10] Regarding Kant's theory, here is what Rawls writes in his work A Theory of Justice: "The desire to act justly, when properly understood, derives in part from the desire to express more fully what we are or can be, namely, free and equal rational beings endowed with the freedom to choose. [...] Those who regard Kant's moral doctrine as a doctrine of rule and sanction seriously misunderstand it. Kant's main purpose is to deepen and justify Rousseau's idea that freedom is to act in accordance with the law we give ourselves. And this leads not so much to a morality of austere command, but to an ethics of mutual respect and self-esteem".

society: a suspect or defendant who loses his procedural and penal guarantees, a prisoner who suffers violence and blackmail in detention facilities, a demonstrator who opposes a power he considers illegitimate. By defending people who are in a condition of weakness, on the one hand, the idea of a classist criminal justice, based on inequality, is removed, and on the other, the formation of a community based on principles, those fundamental norms contained in the sources of law, is recalled.

By its nature, the term process, already in use also in Roman law in the sense of progress or succession, still recalls the idea of proceeding towards a point or an objective. In fact, what all the authors agree on is that the criminal process, although regulated by multiple laws and composed of various phases, as a whole is directed to the implementation of criminal law in the concrete case. In this regard, to give further confirmation of the close link between the criminal process and the penalty, we can recall the opinion of Carnelutti who says that the criminal process consists of the complex of acts, in which the punishment of the offender is resolved. (Carnelutti 1949)

9. The protection of liberty through the guarantee of the prosecution of the offender

In fact, even if we want to proceed with the analysis of the very concept of punishment, understood as the theory of criminal sanction, it refers precisely to the aspects of criminal procedural law. The definition of punishment covers two distinct areas: that of substantive criminal law and that of procedural criminal law. The penalty, with reference to substantive criminal law, includes everything relating to its classification and discipline at the time of the threat and then the substantial repercussions of its execution, in the sense that a fact considered as a crime is punished with a sanction established in precise ways.

With reference to procedural criminal law, the concept of punishment includes both everything that concerns the means and forms for the imposition of the sentence, therefore all the principles that regulate the phases of the criminal process, and everything that concerns the proper phase of the execution of the sentence imposed. Therefore, the definition of punishment also includes in itself the elements proper to the criminal process; this is an element that further strengthens the link between criminal trial and punishment that also takes on a social value with implications for the rights of associates.

The threat of punishment works, as a counterthrust to criminal action, not so much because of the severity of the consequences, but because of the perceived effectiveness and promptness of the punitive response. An efficient system, where punishments, proportionate to the severity of the crime, do not remain on paper but are imposed when accountability is established, is the best deterrent to crime. (Binding 1885)

It is not necessarily a matter of providing for prison sentences, rather, with a modern and international vision, to ensure that there is a finding of guilt and then a sentence is imposed, providing alternatives to prison for short sentences.

In the interest of public safety, the certainty of punishment to be invoked is then not only that of prison, but also of its alternatives.

9.1. Theories of Punishment

From the examination of the various theories elaborated by scholars about the foundation, purpose and function of punishment it is possible to trace two general orientations: one that collects all the doctrines which, looking at the past, consider punishment a just imposition for an evil that has been committed; another that, looking to the future, considers the penalty as a tool to inhibit the commission of new crimes. In the thought of the German authors the distinction between the absolute theory and the relative theory is outlined. The first one conceives the penalty as an element for its own sake, which disregards any purpose to be pursued or any justification must be given of the penalty within the social order. The second one, on the other hand, include all those theories that provide a justification of the penalty on the basis of the individual purposes that from time to time can be attributed to it. In the thought of the authors of Anglo-Saxon matrix, on the other hand, the distinction between the retributive theory and the utilitarian theories is outlined. The theory of retributive considers punishment as a just punishment or counterstep for an evil committed; utilitarian theories are instead all those theories that, for various reasons, attribute to punishment a function of instrument of protection of society and therefore consider it as a social utility.

9.2. Preventive detention in Italy

The Italian legal system is taken as an example. The expression criminal process is used in the Italian legal system as a synonym for criminal proceedings, both in the writings of doctrine and in the terminology of the law. The fact that the criminal process is conceived and defined as a series of acts necessarily implies that all acts,

although preordained towards the same end, have different functions and value. In fact, if we think of the various phases in which the criminal proceedings are articulated, we identify different fundamental moments: with the criminal proceedings it is ascertained whether a crime has been committed, if the subject identified as the accused is really the author and, if so, what penalty should be applied to him. All these phases are subject to the regulation of the criminal procedural law. The criminal trial, regulated by criminal procedure, can be understood as a path of investigation, carried out according to precise rules, which serves to establish whether a given punitive claim is taken for granted or not, to identify the possible culprit and to apply the sanction. Everything must obviously take place in compliance with the laws that regulate the criminal process and in compliance with what is also established in the Constitution, which provides for guarantees for the fundamental rights of the individual.

10. The covid-19 pandemic and the effects on human dignity

With the advent of the infamous covid-19 pandemic, a series of court cases were recorded that lead one to reflect once again on the difficult topic of protecting human dignity in the criminal justice process. The legislature issued a series of emergency measures in the field of justice in order to achieve certain objectives, which can be briefly summarised here as the postponement of proceedings that were not strictly necessary, the consequent suspension of various types of deadlines, and finally, the carrying out of the remaining activities in a manner compatible with the danger of infection. (Herrer 2021)

The case at hand concerns the application of the extraordinary procedural rules that were introduced as a result of the Covid-19 emergency by the above-mentioned measures, in relation to criminal proceedings against a defendant subject to the measure of precautionary custody in prison, who was granted the interrogation of guarantee well beyond the peremptory terms provided for by the criminal law, without the expiry of the effectiveness of the precautionary measure. The order ordering the restrictive measure was appealed before the Court of Re-examination, with notification of the appeal at the beginning of March, prior to the adoption of the emergency measures.

The first concerns the parties' choices regarding the handling of the proceedings. It should be noted that in the dynamics traced by the governmental decrees, the "will of the parties concerned" to carry out or not to carry out activities plays a singular role.

In fact, in the context of a rightful inclination to limit the activities to be carried out in the courtrooms due to the pandemic and the consequent risk of contagion, it is accorded a high value in balancing the needs dictated by the emergency, of avoiding the celebration of hearings, with the protection of individual liberty, in the face of the suspension of precautionary terms connected with the postponement. In this regard, it cannot but create strong doubts, in the context of the debate on garantism, that the rules are organised in such a way as to favour those who request the holding of the proceedings, thus avoiding, among other consequences, a longer duration of the personal pre-trial measure, but at the same time accepting severe restrictions in the exercise of their right of defence and on the level of procedural guarantees, due to remote participation. (Wolf, Haddock, Manstead, Maio 2020)

The issue has been much debated throughout Europe, and there have been many who have questioned the legitimacy of measures restricting freedom. The lockdown, which many national authorities have imposed to counter the COVID19 pandemic, as well as travel restrictions and curfews from 10 p.m. until 6 a.m. have been assessed as entirely lawful. The ECHR came to these conclusions in its May 20 ruling at the end of the Terhes v. Romania case Appeal No. 49993/20.

As a result, many restrictive measures of personal liberty that were considered illegitimate were justified, and penalties for offenders were deemed lawful. (Wagner 2022)

The problem has been noted not only in the strictly legal field but also in the medical field. In that case, there was a need to balance the right to health and medical care with the right to free movement and the priority of infected persons. (Dos Santos, Stein Messetti, Adami, Bezerra, Maia, Tristan-Cheever, Abreu 2021)

11. Conclusions

To conclude the review, it should be noted that the question addressed on the issues of justice, and freedom and security, encompasses wide-ranging and highly articulated issues. These are issues that have long been the subject of philosophical debate and always come to the fore especially whenever freedom and autonomy are threatened or compressed for any reason. It seems interesting to note that the effect is similar whether the threat comes from a rupture of diplomatic balances, as in the case of the recent conflicts recalled, or an event beyond human control, as in the case of the COVID19 pandemic.

If justice wins, inevitably security is strengthened, and this need not be seen as a source of restricting freedom. That automatisms should remain at the margins of precautionary matters is not in dispute: the constitutional jurisprudence says so, which has also inspired the legislature. In any case, there must always be a balancing act between the conditions for guaranteeing fundamental rights. In the case of solitary confinement, during the period of the aforementioned pandemic, the balance to be struck was between the right to liberty and the right to health. Since the right to health is primary, because primary is the right to life, the use of the restrictive instrument was justified. For this reason, it is necessary to always keep in mind the freedom-justice pair. Justice would not be such if it favored all freedoms, especially when a limit must inevitably be placed on the actions of fellow citizens so that they continue to live together safely and harmoniously.

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