

Susan Petrilli*

Justice, fairness and juridical perfectibility

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Abstract: Aristotle had already underlined the importance of the relationship between justice and equity (a term I interpret as synonymous to fairness), which he analysed in great detail. Equity is the term which in the English translation of Aristotle's works corresponds to *epieikes* (Greek). A starting point for my paper will be Aristotle's considerations on the relationship between equity and justice. In English we have "equity," "impartiality," "fairness," "equitableness". Do we distinguish between these terms? is there any difference? In what follows I discuss equity, or better the relation between equity and justice, treating equity and fairness as the same thing. According to Aristotle equity and justice are neither completely the same nor generically different. If they are different either the just or the equitable is not good; or, if they are both good, they are the same (Aristotle, *Nicomachean Ethics*, Bk. V, Ch. 9, 10, p. 1019). Briefly, we could make the claim that equity (fairness) corrects the tendency that characterizes justice towards abstraction, impartiality and indifference, which in fact constitute the condition of possibility for justice to obtain. Equity opens to singularity, to unreplaceability, to uniqueness, shifting justice from the relation of indifference to the other, to the relation of unindifference to the other, to each and every other considered in his or her absolute unrepeatability.

Keywords: firstness, equity, justice, mercy, otherness, responsibility, semioethics

This essay is dedicated to my life-time mentor and good friend, Augusto Ponzio

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less". "The question is," said Alice, "whether you can make words mean so many different things". "The question is," said Humpty Dumpty, "which is to be master — that's all".

(Lewis Carroll, *Through the Looking Glass*, 1871)

*Corresponding author: Susan Petrilli, The University of Bari "Aldo Moro," Bari, Italy,
E-mail: susan.petrilli@gmail.com

1 Introduction

What most justifies opening legal discourse, indeed the discipline of jurisprudence (whether a question of special juridical issues or problems of a general order, as is the problem of justice and equity or impartiality) to the general science of signs and language is the latter's irrepressible vocation for otherness. In fact, such disciplines as semiotics and philosophy of language are characterised by a high degree of availability towards the other – and let us recall here the work of esteemed semioticians and philosophers of the order of Charles Peirce, Victoria Welby, Mikhail Bakhtin, Charles Morris, Thomas A. Sebeok. We are alluding here to the disposition to listen to others in their otherness, their “absolute otherness” (by contrast to “relative otherness”), to the capacity for opening to others not only in quantitative terms (think of the omnicomprehensive character of Sebeok's *global semiotics*), but also in the qualitative (see Petrilli 2015a, 2015b; Ponzio 2008a).

In such a perspective semiotic analysis is committed to relating to the other dialogically. The sign sciences as we conceive them and are now referring to them know that they cannot ignore the dialogic relation to the other, that indeed interpretive processes are oriented by the other, by otherness logic which is appropriately described as “dia-logic” (see Ponzio 2006). Dialogism is a fundamental condition for an approach to signs and language which as much as it may be oriented globally does not aim to englobe and enclose the other, but rather privileges the particular and the singular, the unique, which means to say the other in its otherness. This approach is guided by the principle of *detotalisation* rather than of *totalisation*, to evoke terminology as introduced by the Italian semiotician and philosopher of language, Ferruccio Rossi-Landi (1975, 1978, 1985; see also Petrilli 2016: 133, 192).

As above all Emmanuel Levinas has shown, otherness obliges the totality to reorganise itself ever anew in a process related to what he calls “infinity” (Levinas 1991). The latter is a concept that may also be related to that of “infinite semiosis” as elaborated by Charles S. Peirce, the father of pragmatism. The relation to infinity is not limited to the cognitive dimension: beyond the established order, beyond the symbolic order, beyond convention and habit, it implies a relationship of involvement and responsibility with that which is most refractory to the totality. Our allusion here is to the otherness of the other, precisely, that is to say, to the other not in the sense of another, to another person, another self, another *alter ego*, to an I belonging to the *same community*, but rather in the sense of the other in its extraneity, strangeness, difference – whether the other external to the self, the other from self, or the other of self, the other in the heart of identity. Indifference towards the other

thus described is impossible. And this is so in spite of all the efforts made by the self to the contrary, by the identity of the I, and in spite of the illusory guarantees that the I, that identity logic may offer.

Such an orientation in semiotics is not connected to any particular ideological vision of the world, of social reproduction (see Ponzio 1993). Semiotics as we understand it has a special focus on the relationship between human behaviour and awareness of the radical responsibility pertaining to humankind, to the human being understood as a “semiotic animal,” that is to say, of our responsibility towards life. The “semiotic animal” is a properly responsible actor, capable of *signs of signs*, of mediation, reflection, awareness in relation to semiosis over the whole planet (see Deely, Ponzio, Petrilli 2005).

From this point of view, what Sebeok (see 2001) baptized as his *global semiotics* must be adequately founded in *cognitive semiotics*. But we will now add that it must also open to a third dimension beyond the quantitative and the theoretical, which is the ethical dimension of existence. Given that this third dimension concerns the ends we have elected as worthy of our striving for, we have proposed that it be described as the “semioethical” dimension of semiosis, that is, of our signifying behaviour. The semioethical dimension is the immediate object of analysis of a special orientation in semiotic studies designated as “semioethics” (an expression which gives the title to another monograph, this time myself with Augusto Ponzio, published in 2003, *Semioetica*. See also Petrilli and Ponzio 2010, and for the history of this term as we are proposing it, see Petrilli 2012; and again Petrilli 2010 and 2014b, ed.).

The trichotomy *global semiotics*, *cognitive semiotics* and *semioethics* is of fundamental importance for our understanding of semiosis, indeed is decisive not only on a theoretical level, but also in special spheres or dominions as is the legal. And it is in relation to such spheres as the legal that semiotics can and must continuously refine its auditory and critical functions, its capacity for listening and criticism.

What follows is a reflection on the relationship between justice and equity in terms already dealt with by Aristotle in his *Nicomachean Ethics* (see Aristotle 1957, 2000, 2011). In fact, in Aristotele the relationship between justice and equity is described in terms that focus on the particular, the singular as the very condition of justice, as the condition of possibility of justice, of a just interpretation and application of the law. We could say that Aristotle outlines the problem of the relationship between justice and equity in such a way as to evidence the need for listening to the other – where “listening” is understood in a medical sense as well, as practiced in the sphere of symptomatology, medical semeiotics. And, in fact, from semeiotics or symptomatology semioethics aims to recover the ancient and original vocation of semiotics for listening, precisely.

2 Justice, fairness, equity

In *Nicomachean Ethics* (Bk. V, 1137a, 31 – 1138a, 2) Aristotle underlines the importance of the relationship between *justice* and *equity*. We interpret the term “equity” here as synonymous to *fairness*. In the English translation of Aristotle’s works “equity” corresponds to the Greek *epieikēia*. English makes such terms available as “justice,” “equity,” “impartiality,” “fairness,” “equitableness”... Do we distinguish among them? Are there any differences? In this paper I wish to speak about equity or, better, about the relation between *equity* and *justice*, treating *equity* and *fairness* as the same thing.

Ancient Greek distinguishes between *dike* and *dikaiosune* (justice; in Italian *giustizia*) and the relative adjective *dikaios* (just; in Italian *giusto*). *Dike* is justice in a strong sense, that is, hard cold justice, abstract justice. This is the justice of the Gods. Think of Agamenon who sacrifices his daughter Ephigenia, his wife Clitennestra who takes revenge for her daughter’s death by killing Agamenon together with his concubine Cassandra and then Oreste who takes revenge for his father’s death by killing his mother and her own lover, and so it would have continued had not the court intervened and released Oreste from his guilt.

The Greek language also has *axios* which is connected to the verb *axiōō*, to think it right.

Of some interest is how the “work” carried out by the same word can vary from one historical-natural language [in French *langue*; in Italian *lingua*] to another, whether in the same language [*langue/lingua*] or in a different language [*langue/lingua*]. For example, in English there are significant variations in the usage of each of the words “justice,” “fairness,” “equity” (It. *giustizia* fiscal; Eng. *tax equity*).

In Italian the word “*giusto*” carries out multiple tasks (to evoke Humpty Dumpty in *Through the Looking Glass* by Lewis Carroll). Instead, in English these tasks are distributed among different adjectives: *impartial*, *right*, *fair*, *correct*, *exact*, *happy*:

guerra *giusta*: just war; uomo *giusto*: just man; causa *giusta*: just cause;
 but: arbitro *giusto*: fair referee; prezzo *giusto*: fair price;
 età *giusta*: right age; altezza *giusta*: right height; momento *giusto*: right moment;
 risposta *giusta*: correct answer;
 traduzione *giusta*: exact translation;
giusto desiderio: legitimate aspiration;
giusta rivendicazione: lawful claim;
giusto mezzo: happy medium;
 quel che è *giusto* è *giusto*: fair’s fair.

En passant, from a semiotical point of view it is interesting to observe that a word cannot “work” in isolation (even if paid well, contrary to what Humpty Dumpty boasts on the conviction that he is master, as he says in the epigraph above). The word does its work in cooperation with other words, words with which its capacities are compatible or incompatible, and in discursive contexts, whether real or hypothetical.

Taking Aristotle’s text as our starting point, we will address the conference theme, *Communication and Fairness in Legal Settings*, distinguishing *fairness* (equity) from *justice*. Following Aristotle, therefore, we distinguish between *epieikeia* and the relative adjective *epieikes* (convenient, appropriate, equitable, moderate) and *dikaosune* (justice, *giustizia*, the sense of justice, *il senso della giustizia*, justice of the just man, *la giustizia dell’uomo giusto*) with its relative adjective, *dikaios*, just. And to repeat, in Greek we also have *dike* for *justice* which in addition to “justice” as we are describing it, is also charged with the meanings of “rule” [“regola”], “norm” [“norma”], “right,” “law” [“diritto”], “trial” [“processo”].

As asserted by Aristotle (Bk. V, 1137a, 31 ff.):

Our next subject is equity [*epieikeia*, fairness, *equità*] and the equitable (*to epieikés*) [*fair, even, rightful, equal, appropriate, balanced, convenient, moderate*], and their respective relations to justice [*dikaosune*] and the just [*dikaios*]. [...]

[...]; for the equitable [*fair, equo*] though it is better than one kind of justice, yet is just, and it is not as being a different class of thing that it is better than the just. [10] The same thing, then, is just [*giusto*] and equitable [*equo*], and while both are good, *the equitable is superior* [my italics]. What creates the problem is that the *equitable* [*fair, equo, fair*] is just, but not the legally just [*that is, just according to the law*], but a correction of legal justice [my italics]. The reason is that all law is universal, but about some things [*alcuni casi singoli*] it is not possible to make a universal statement that is correct. [my italics] [...]. Hence the equitable is just, and better than one kind of justice [25] – not better than absolute justice, but better than the error that arises from the absoluteness of the statement. *And this is the nature of the equitable* [*fair, equo*], *a correction of law, where it is defective owing to its universality* [my italics]. [...]

It is plain, then, what the equitable is, and that it is just and is better than one kind of justice. It is evident also from this who the equitable man is; [35] the man who chooses and does such acts, and [1138a] is no stickler for his rights in a bad sense, but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity [*equità*], *which is a sort of justice and not a different state of character* [my italics].

Equity and justice clearly belong to the same class and yet equity which is a “kind of justice,” as Aristotle says, is better than justice. The relation between equity and justice according to Aristotle is like the relation between two human beings (and not between a human being and a horse for example), two human beings who in fact belong to the same class, though a healthy human being is better than a sick one.

3 Justice as complete virtue, which is virtue towards others. Justice as fairness

In relation to our topic, we will now evidence another aspect which Aristotle examines in a preceding passage in the text we are analysing, *Nicomachean Ethics*, and precisely the following [1129b, 30 ff.]. Unlike other virtues, justice

... is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbour also; for many men can exercise virtue in their own affairs, but not in their relations to their neighbours [...]. For this same reason justice, alone of the virtues, is thought to be “another’s good,” because it is related to our neighbour; [1130a, 5] for it does what is advantageous to another [...].

Hence we could make the claim that justice is “complete virtue” because it is performed in relation to others, it is oriented towards others. Justice is the only virtue that keeps account of the other, that is formulated for the sake of the other. To clarify this, think of virtues that are juxtaposed to sins like lust or gluttony. For example, think of virginity as a virtue and it is soon obvious that this is a virtue which as such in fact concerns my relationship to myself and not to the other.

Aristotle underlines the fact that to exercise virtue in relation to what concerns us directly, when a question of one’s own affairs is easy, whereas when a question of exercising virtue in those things that concern others, one’s neighbours, to exercise virtue is difficult. So virtue thus understood, that is, the complete virtue that is justice is not part of virtue, but rather *is virtue itself*. And to this concept Aristotele adds the consideration that consequently, injustice its opposite, is not part of the vice, but *is the vice itself* (cf. 1130a, 6–10).

Naturally we are speaking of justice corrected by equity, by fairness. In fact, equity / fairness corrects the tendency characteristic of justice, manifest in justice towards abstractness, impartiality, universality, and here we will also add the tendency towards *indifference*. In fact, a possible clarification of the meaning of “equity” could sound something like this: do things in such a way that the law does not commit injustice.

4 Justice, uniqueness and responsibility

Fairness is the very condition of possibility for justice. In other words, fairness is what makes justice possible.

On exercising justice in the relation with others, equity opens to singularity, unreplaceability, uniqueness. This means to shift justice from the relation of

impartiality, of indifference towards the other, in the opposite direction of the relation of unindifference towards the other, to each and every other considered in one's absolute singularity, one's unrepeatability.

Under this aspect we could add a few considerations on the relation between "equity and responsibility" to Aristotle's reflections on the obvious relation between "injustice and responsibility". In fact, responsibility does not only concern the voluntariness, the willfulness of an action, its intentional nature. Even if, of course, an act can only be defined as just or unjust on the basis of voluntariness: killing someone involuntarily in a car accident, for example, does not make a murderer of you. In the words of Aristotle (1135, 20 ff.):

[...], a man acts unjustly or justly whenever he does such acts voluntarily; [...]. Whether an act is or is not one of injustice (or of justice) is determined by its voluntariness or involuntariness; for when it is voluntary it is blamed, and at the same time is then an act of injustice; so that there will be things that are unjust, but not yet acts of injustice, if voluntariness be not present as well (Bk. V, Ch. 7, 1135, 15ff).

Equity opens to the other considered in terms of absolute unrepeatability, of singularity, unreplaceability, uniqueness. Equity presupposes a relationship with the other which is one of inalienable responsibility towards that other. Responsibility is the condition for orienting the self in the sense of singularity, uniqueness. The kind of responsibility alluded to here is different from responsibility that is associated with the self understood as the individual of a class, genus, genre or group of some sort. Unlimited and inalienable responsibility for others, absolute responsibility, is experienced in the face-to-face relation and is connected with the very possibility itself for uniqueness of the one and only, beyond the specificity of the individual understood as a member of a group, or class of some sort.

Singularisation, to become singular, unique, is not a property of the subject in itself. On the contrary, singularity ensues from, is the consequence of the subject's responsibility in his or her otherness towards the other who is also considered in his or her own otherness, absolute otherness. This type of responsibility which is *unlimited responsibility*, *absolute responsibility* cannot be delegated. It is the other who renders me unique and the burden is heavy. Protest as he may, Moses from the Book of Exodus in the Bible story could not escape God's calling. It was he and no other that God had elected to represent himself and his law. And even when Moses protested that he was not an eloquent speaker, God did not free him of his vocation, but confirmed that Moses was the chosen one, providing him with support from his brother Aaron who became his spokesman. In a love relationship I cannot send somebody else in my place to meet my suitor or my beloved. For the person in love I am not replaceable

with anybody else. The relationship bonding us is a relationship among singularities in their uniqueness and unreplaceability and not one of indifference, that is, where the parties can be indiscriminately substituted.

As Emmanuel Levinas says: “On the famous problem: ‘Is man individuated by matter, or individuated by form?’ I support individuation by responsibility for the other. I am responsible for every man, my neighbour, and no one can substitute me. In this sense I am chosen” (“Philosophy, Justice, and Love,” in *Id.* 1998: 108; see also Levinas 1983b). The other ordains me says Levinas. In other words, I am ordained the absolutely other by the other.

Under this aspect let me signal an important interview by Augusto Ponzio with Levinas, published in the French original in Ponzio’s 1996 monograph, *Sujet et altérité* (see also Ponzio 1998, 2004, 2008b). The title of the interview is “Responsabilité et substitution” (first published in Italian in 1989). Ponzio interrogates Levinas on the relationship between responsibility and justice, precisely; whether responsibility towards the other depends on the organisation of society as a State, so that the State comes first and responsibility arises from the state; or, vice versa, whether institutions and juridical procedure are not only founded on responsibility towards the other, but somehow limit it, so that responsibility is an original and open, even overwhelming condition in the relation with the other, which comes before the state, and which the state then models and limits (see also Chomsky and Foucault 1974; Diamantides 2007; J. Ponzio 2007). Levinas responds like this:

An anonymity is necessarily installed in social reality, hence interrupting responsibility between the self and the other and reconducting the singularity of self and of the other to the individuality of the individual [...].

The exceptional position of the self, insofar as this self alone can respond to the other, is thus understood beginning from the generality of the laws of the Code, which are applied to everybody.

In fact, in social multiplicity we are not two with our neighbour, that the self is called to account for, but we are with the third and the fourth, etc. Every self is an other! The exclusive relation of the *self* with one’s neighbour is modified.

So the problem is how to account for everybody? Who is the first for me? [...]. Judgment and comparison are necessary. To consent to comparing the uncomparable is necessary, the selves all unique [...] The State is necessary, general laws are necessary, institutions to formulate judgements are needed. All the work of politics and justice is required. [...]

This conception contrasts with Hobbes who maintains that man is a wolf for the other man, and the State means to limit natural cruelty.

On the contrary, for us [...] the State can always review its laws and its justice.

Is not, in fact, this concern to reconsider – improve – the law the essence of democracy and of the liberal State, signs of mercy and charity that breathe in it?

Endeavour with a view to a law that is always better! Improvement and renewal that are not obtained through a mere logical deduction of doctrine that becomes ever more precise, but that demand a moral effort by the human.

When the state appeals to a form of justice that is invariable and logically deduced, we must suspect Stalinism or fascism (Eng. trans. by myself)

And Levinas continues like this:

You shall not be partial in judgment; you shall hear the small and the great alike; “you shall not be afraid of the face of man,” as announced in the *Deuteronomy* 1, 17. Which in Hebrew sounds like this: “To judge you shall not acknowledge faces”. But the Bible also says: “The Lord lift up his countenance upon you” (*Numbers* 6, 26). A contradiction between these two assertions? — a question the Talmud asks itself and responds to immediately like this: “the first before the verdict, the other after. (Eng. trans. by myself)

Fairness, equity is the expression of the original relationship of the self to the other, which is a relationship of involvement, participation, unindifference. The original relationship to the other is the face-to-face relationship, one in which individuals do not exist as identities, classified according to roles, genres, genera, ideological positions. Instead, in the original face-to-face relationship, selves, subjectivities exist in themselves, are valued in themselves, in their reciprocal absolute (non-relative), irreducible, otherness.

5 Responsibility as a bad conscience

As Levinas has contributed to evidencing throughout all his writings, in the face of the other the self is called to answer without alibis. This is the perspective from which that self must speak standing outside the parts it plays in one's role as the “same,” the “identical,” as demanded by the official communication order, which today is the “global communication order,” that is, a communication order oriented by the functional and the productive (Petrilli 2012, 2014, 2016).

The immediate relation with the “alien” is one of involvement. Responsibility is involvement, exposition, proximity of one-for the other.

Reading Levinas we can distinguish, in the relation of the I, of the self to the other, between a “bad conscience” (“dirty conscience”) and a “good conscience” (“clean conscience”) (see Levinas 1983a, 1994).

The first, that is a “bad conscience” (a “dirty conscience”), consists in feeling responsible, therefore uncomfortable, at fault, even guilty in the face of the other. In fact, the relationship here between the self and the other is one of discrepancy, lack of equality between the advantageous situation of the self and

the disadvantageous situation of the other. The relation to the other is always more or less asymmetrical, unequal to a lesser or greater degree.

But then “a good conscience” (a “clean conscience”) soon follows. For example, in the case of one’s attitude towards the migrant, the refugee: so what do you want? This is my country, my territory, my home, my job, my neighbour whom I must care for; this is my life which I have created with great sacrifice; I’m a citizen in this country, I’m born here; you, instead, are a stranger, a foreigner, an intruder, an illegal, a clandestine...; we don’t need you, we already have an unemployment problem here.

In the first place, as Levinas says, conscious awareness calls for recognition of one’s own “bad conscience”. As much as it may succeed in finding shelter in a good conscience and its alibis, the I is originally consciousness of being put into crisis. The truly human is the place of renewal and regeneration of a “bad conscience,” the possibility of fearing to commit injustice, more than fearing death or, as Socrates in Plato’s *Gorgia* claims, the truly human is the possibility of choosing to suffer injustice rather than committing injustice, rather than inflicting injustice upon somebody else.

It is very interesting that Aristotle should have recovered this conception of committing or suffering injustice from Socrates (through Plato of course). After having observed that obviously both phenomena, committing injustice and suffering injustice, are wrong, bad, he then goes on to add that nevertheless worst of all is to commit injustice. This is illegal, unjust and in full contrast with virtue; while on the contrary to suffer injustice does not imply all this. Therefore, we could make the claim that in principle to suffer injustice is the lesser evil. But Aristotle adds that (and this is typical of him by comparison to Plato’s Socrates) nothing prevents suffering injustice from becoming the greater evil in certain circumstances. To give an example, by analogy, to sprain one’s ankle could be considered, in principle, the lesser evil by comparison with pleuritis, but this does not exclude the possibility that in given circumstances, for example while running to escape serious danger, for dear life, it should become the greater evil (cf. 1138a, 28 – 1138b, 1).

What Levinas calls “bad conscience” is inevitable involvement in the relationship with the other.

Our example concerning the *migrant* is not only topical today, but it tells of the inevitable involvement of the “communitarian” in the face of a mass phenomenon now in today’s world become enormous, uncontrollable. The migrant is the expression of a condition that is distinct from the traditional figure of the *emigrant*. Unlike the migrant, the emigrant / immigrant appears to be acceptable by a given society simply because he or she can be transformed into labour-force, into merchandise. Instead, in the present day and age the migrant across the e

globe is forced and bound ever more to the condition of *refugee*. This is also a consequence of the disasters provoked by co-called humanitarian (military) interventions, so-called “humanitarian wars,” wars passed off as “just and necessary” (the first war thus denominated goes back to 1991). And all this of course is performed in the sign of a “good conscience” and of “profit”.

In globalisation today, the relation to somebody who is “distant” is in fact a relation of “proximity”: the person who was distant from me in the past (and not such a remote past) is now close to me, and ever closer.

For the “good conscience,” this person is a *neighbour* in the sense of spatial distance; for the “bad conscience” he or she is a *neighbour* in the sense that we are responsible for him or her. As Emmanuel Levinas (1972) says this is effectively the true meaning of the expression “my neighbour,” “he for whom and in the face of whom I am responsible”.

Our relationship with those who are “distant,” and not only with neighbours in a spatial sense, now takes place within a situation of *exposition*, that is, *of being exposed necessarily, inevitably, of being subject to the outside, without shelter* (see Levinas 1993, 2000).

To live and operate in the illusion of isolation is not a possibility, that is, not in real life, but the illusion is of course.

Proximity of the other is *my responsibility* for the other. Proximity implies my – in my uniqueness, singularity, as a unique human being – my non delegable responsibility for the other, my responsibility that cannot be delegated, deferred to somebody else, proximity implies my subjection to the other, under the crushing charge of alterity.

Levinas speaks of involvement with the other as the experience of “bad conscience” and “preventive peace” (Ponzio 2009a, 2009b). This latter concept can be juxtaposed to the concept of “preventive war” which has been passed off as “just and necessary” and still today most sadly finds consensus and participation in the global communication-production world, in the presentday situation of global communication (see Levinas 1994).

According to Levinas a “bad conscience” is the origin of human signification.

The individual act of freedom even, which the order of impersonal reason institutes, is not itself based on impersonal reason. On the contrary, it is based in the relationship with the other, it is the other who renders me free.

Impersonal discourse presupposes discourse in the face-to-face relationship, which is a relationship of command without tyranny. And as Levinas explains, this is not yet obedience to an impersonal law. However, *it is* the indispensable condition for the institution of such a law (Levinas, “Freedom and Command,” in *Id.* 1987); see also J. Ponzio 2007.

Subsequently, this bad conscience attempts to justify itself, to appease itself, to make itself comfortable as regards questions raised by the other simply by being present.

In this way, a “bad conscience” reconciles itself as a “good conscience,” which of course is only an illusion.

6 Fairness as a correction on justice and condition of its perfectibility

To return to Aristotle, he maintained that equity, fairness is a *correction* on justice, on the universality and abstraction of the law. Justice understood as equity is a “complete virtue” because it is performed in the relationship with others, it is directed towards others, oriented by others. Equity, fairness is a correction on justice in the sense that it returns to others, it recovers the relation to others considered in their singularity, unreplaceability, uniqueness, and not as an abstraction.

If this is the case, then we can now add that this means to recover the original relationship with the other as our neighbour. And this means, in turn, to recover the primordial relationship at the origin of justice itself, the relationship with the other as other, *autrui*, the other who regards me, *me regarde*, as Levinas says (*regarder* as “to look at” and “to concern”). This is the other who looks at me (from whose gaze I cannot escape) and who concerns me (for whom I cannot escape responsibility).

This is the face-to-face relationship in which another one, *autrui*, *this* other, puts the I into the accusative, summoning me, questioning me, calling me back to the condition of absolute responsibility, apart from any initiative I might choose to take.

The normal, institutional, asymmetrical relationship between he who judges and he who is judged is overturned: without identity, without the protective mask of responsibility delimiting itself in the mirror of the self, without titles, stripped bare of all attributes, consciousness of self returns from the nominative case to the accusative. And this means to recover the sense of a bad conscience that a good conscience had sedated, anaesthetised.

Justice is founded on non-indifference, or unindifference, on charity and love for the other.

Without equity, without fairness not only can justice not be just, good, or true, but it may even become indifference and cruelty.

The self's responsibility in its singularity, in the face-to-face relationship constitutes the reference to which justice and the work of the State must be reconducted, towards which the *perfectibility of justice* must tend.

It is in the name of responsibility for the other, in the name of mercy that the harshness of the *dura lex* can be mitigated and that justice can be improved, and become juster, more human.

7 Justice and mercy in Shakespeare's *The Merchant of Venice*

"Though justice be thy plea, consider this, / That, in the course of justice, none of us / Should see salvation". These are the words uttered by Portia disguised as Baldassarre, a young lawyer whose mission it was to defend Antonio, the merchant, in William Shakespeare's *The Merchant of Venice* (Shakespeare 1999 and 2008: Act IV, Sc. I, ll. 197–198). And the argument is continued as follows: "we do pray for mercy [in Italian, *clemenza, misericordia*]; / And that same prayer doth teach us all to render / The deeds of mercy" (Act IV, Sc. I, ll. 198–200).

This would seem to be an argument, but in effect apart from responding to the adage "do not do to others what you would not like done to yourself," it belongs to a "rather strange type of logic" (cf. Ponzio 2009c). We realize this immediately with the conclusion that Portia draws from Antonio's admission to the debt, from his recognition of the contractual obligation, of *the bond*: "Do you confess the bond?," "I do". And the conclusion: "Then must the Jew be merciful" (Act IV, Sc. I, ll. 180). In fact, the argument maintained by Portia / Baldassarre recites that given that Antonio admits to *the bond*, Shylock must be merciful.

What we are dealing with here is argumentation in the form of an enthymeme (Aristotle; from *enthumeomai*, to reflect, to deduce), that is to say an argument where one of the two premises from which is drawn the conclusion is implied.

Shylock responds: "On what compulsion must I? tell me that" (Act IV, Sc. I, ll. 181).

Portia explains that the nature, the quality of mercy consists in its not being forced, compelled. In Portia's inference there is no obligation to accept the conclusion once the premise has been accepted. The need to be clement can be explained, it could be argued, though not merely as the result of a syllogism of the inductive or deductive type. On the contrary, the situation to be explained is rather exceptional, something that cannot be discussed solely in the light of a pre-established law, of obligation and constriction. Unlike hatred which inspires Shylock's own actions and unlike revenge, neither of which can be explained or

justified if not in terms of reaction, that is, of reactive behavior, thereby reducing human behaviour to the mere immediate effect of a cause, mercy instead can be motivated with reasons, it can be justified: it is twice blest (Shakespeare's verb "to bless," or "to blest" contains simultaneously, together, meanings that in Italian are distributed among a variety of expressions including "to benedict," "to consecrate," "to give," "to favour," "to make happy"; "(God) bless you!"). Mercy is superior to justice, as much as it is part of justice, emerging as the latter's completion and crowning. Mercy saves us, and from this point of view mercy is different from the mere application of the law, from raw justice. Each and every one of us calls for mercy and the fact of invoking mercy, this very appeal to mercy teaches us to be merciful in turn:

The quality of mercy is not strained, / It dropped as the gentle rain from heaven / Upon the place beneath: it is twice blest; / It blesseth him that gives and him that takes: / 'Tis mightiest in the mightiest: it becomes / The throned monarch better than his crown; / His sceptre shows the force of temporal power, / The attribute to awe and majesty, / Wherein doth sit the dread and fear of kings; / But mercy is above this scepter'd sway; / It is enthroned in the hearts of kings, / It is an attribute to God himself; / And earthly power doth then show likest God's / When mercy seasons justice. (Act IV, Sc. I, ll. 182–195)

8 Justice, mercy and forgiveness

"Mercy" is also the keyword that is now circulating through the current Holy Year, baptised as the "Jubilee of mercy". Mercy is an attribute of God himself as asserted in the title of a recent book by Pope Francis, *Il nome di Dio è misericordia* [The Name of God Is Mercy] (2016). And reference to certain considerations made in this very book, precisely, can help us specify the meaning of the word "mercy" more closely, explain it and its relationship to *justice* and *fairness*.

On this account let me also add that we diverge from the interpretation of mercy as formulated by Augusto Ponzio in his essay cited above, "La scelta degli scrigni nel Mercante di Venezia di Shakespeare" ("Choosing between the Caskets in *The Merchant of Venice* by Shakespeare") (2009c). In this particular context in fact Ponzio uses the term "mercy" indiscriminately, that is, both in the sense of *clemency* and of *forgiveness*.

From this point of view, interesting to observe is that the word "mercy" in Shakespeare's *The Merchant of Venice* has been translated into Italian not only with the word *clemency*, but also with the word *misericordia* itself, which would seem to be the more appropriate translation (P. Joietti translates "mercy" with

“*misericordia*” in Shakespeare 1990). As a consequence “merciful” has been rendered with *misericordioso*.

However, to understand the word “mercy” in the sense discussed in *The Merchant of Venice*, that is, as a word that can be replaced indifferently with “forgiveness,” is to lose the possibility of relating this word “mercy” to “justice” and to “fairness” evidencing the difference between these two concepts. This is to say that to interpret mercy as forgiveness obstacles the distinction between justice and fairness, which, instead, the word mercy is able to explain.

As clearly emerges in the book by Pope Francis cited above, *Il nome di Dio è misericordia*, mercy (*misericordia*) is not forgiveness, mercy does not converge with forgiveness, so that to be merciful (*misericordioso*) does not mean to forgive. Pope Francis Bergoglio explains this (2016: 11–13) in his comment to a passage in the eighth chapter of the Gospel by St. John, which revolves around the episode of Jesus and the adulteress. Adultery was considered a serious offence against the law of Moses, so extreme as to be punished with the death penalty. As we all know, some characters in the Bible story interrogated Jesus as to what they were to do with a woman who had been accused of adultery.

If Jesus had responded that they should forgive her, they could have accused him of transgressing the Law. But to the wise words pronounced by Jesus, “Let him who is without sin cast the first stone,” the crowd responded by slowly leaving the adulteress alone, face-to-face with Jesus. The woman does not deny adultery and Jesus does not say that he forgives her, nor that adultery is not a sin. But rather like all the others who gave up lapidating her, he simply says that nor does he condemn her on the basis of reference to the Law. With his mercy, with his *misericordia*, Jesus, as Pope Francis observes, indeed does not say “I forgive you,” but “he goes beyond the Law that commanded lapidation. To the point that he says to the woman to go in peace”. Mercy does not cancel sins and does not enter into a relationship of contrast and contradiction with respect to the Law. Mercy mitigates the law, it adapts it to circumstances, it reconducts the law to the situation it originally arose from, that is, of non-indifference towards the other, defence of the single individual, the intention to produce and preserve, as Aristotle says (V, 1129, 18–19), the happiness of each and every one of us.

According to Aristotle as well – who maintains that equity, consideration of the single case, can mitigate justice, alleviate and relax it – somebody may commit adultery, fully aware of what he or she is doing, not as a result of premeditation, but of passion. In this case, there is no doubt that that person commits an injustice, but this does not mean that he or she is unjust. Think of stealing for example. A person is not necessarily a robber, even if he or she has stolen. In the same way, though a person may have committed adultery he or

she is not necessarily an adulterer or an adulteress, and so forth for any other action for which we may be “guilty” (cf. *Ibid.* 1134, 20–24).

9 The investigator and the judge. Similarity in abductive reasoning

As observed by A. Ponzio in his 2009 essay, Shylock is not at all able to understand the reason why it is necessary to be merciful towards Antonio if he has admitted to the bond and therefore fully recognizes his fault. Shylock is only ready to accept a conclusion as the result of a constriction, a necessity and obligation on the basis of the recognition of a law. In other words, the only conclusion he is willing to reach must be as the effect of a cause, or simply as the response to an impulse, or a question of obedience to an oath, a question of coherence, the effect of a habit, a custom, set behavior, even of a whim. All such givens, facts or circumstances must necessarily ensue in a pre-established attitude or standpoint and determine, condition the action to be performed.

When it seems to Shylock that Portia, disguised as a lawyer, is ready to favour his intentions, as when she declares that “there is no power in Venice / Can alter a decree established: / ’Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state: it cannot be” (IV, I, ll. 216–220), he applauds and declares that “A Daniel come to judgement! Yea, a Daniel!” (IV, I, l. 221).

Daniel is the young man who in the Sacred Scriptures unmasks the two lustful elders who falsely accuse the chaste Susanna. They threaten to declare that she was meeting a young man in the garden unless she agrees to have sex with them. But Susanna refuses to be blackmailed and when she was on the point of being executed for promiscuity, Daniel interrupts the proceedings and demands that the two old lecherous men be interrogated to prevent putting an innocent to death (Daniel, 13, 1–64). More than a judge, Daniel is like a “private detective,” similarly to Auguste Dupin, the character invented by Edgar Allan Poe (cf. Bonfantini 1987) and Sherlock Holmes’s forerunner (see Eco and Sebeok, eds., 1983). As the representative of justice corrected by equity, of “live justice,” the judge acts as a middle term, and in fact judges are called “mediators,” as Aristotele says in *Nicomachean Ethics* (V, 1132a), on the conviction that if a balance is reached, justice can be achieved.

Such mediation is also that which allows for argumentation, for judgement. The judiciary decision derives from mediation between the major premise (the norm) and minor premise (the case). In the sphere of logic and with specific reference to the syllogism, Aristotle calls the term that bridges the minor premise and the major premise the “middle term”.

It is precisely this mediation that Shylock in *The Merchant of Venice* refuses to understand.

Portia's reasoning is neither of the inductive nor of the deductive type. Rather, we could make the claim that it is of the *abductive* type (Peirce), as generally is the reasoning of whoever is called to judge according to the law, mediating between justice and fairness, justice and equity, justice and mercy. From this point of view the judge-mediator and the private detective resemble each other, and Shylock is right when, during the course of his lawsuit, he compares Portia to Daniel from the Bible story. Aristotle had already distinguished *abduction* (*apagoghé*) both from *induction* and from *deduction* recognizing that its demonstrative value was inferior insofar as it was characterized by probability. Abduction is based on that type of likeness, of resemblance that with Peirce we would call *iconic*. Differently from the type of similarity that forms concepts, similarity of the iconic type does not eliminate difference among the terms that it relates to each other. Instead, when iconic similarity prevails in the relation among signs, as in the case of the type of similarity in which metaphors are formed, it leaves the terms that it associates to each other in their mutual difference, in their mutual otherness.

As A. Ponzio observes in his essay dedicated to *The Merchant of Venice*, this likeness, this similarity or resemblance is not the same type of similarity that allows for assigning given individuals to the same class, category, group, or set, that is, the type of similarity that forms the concept, genus, species, genre, gender, the same identities. Recovering terminology introduced by Thomas A. Sebeok and Marcel Danesi in their book *The Forms of Meaning. Modeling Systems Theory and Semiotic Analysis* (2000) to refer to the classification of an individual in a genre, Ponzio explains that iconic similarity is not a question of similarity according to the *cohesive form*. Instead, similarity at the basis of abductive argumentation as much as of the metaphor avails itself of a *connective form*. This type of similarity can also be called *elective similarity*, *attractive similarity*, *similarity by affinity*, *similarity by elective affinity*.

Similarity in this case does not concern that which presents itself as the same, as belonging to the same category, to the same genre or species, to the same universal. It does not concern that which presents itself as identical, but rather it concerns that which is different, refractory to cohesive form, that which gives itself as *other*, as singular, unique. The argumentative strategy involving this type of similarity is only present in the type of reasoning that allows for passing the test of the caskets. In other words, the strategy which suggests that choosing the lead casket is (similar to) choosing one's beloved; choose the one

and find the other. This strategy also characterizes some of the decisive arguments put forward by Portia. This is the type of similarity Portia appeals to in her attempt at inducing Shylock in the first instance to clemency.

This is what we are denominating “connective” similarity, or similarity according to “elective affinity” which, as anticipated, leaves the terms involved in the relation, the terms that it associates to each other, reciprocally *other*. And even the decision to help Antonio is based on this type of similarity, of likeness, or resemblance: the fact that Antonio is bonded to Bassanio by a profound friendship, “makes me think that this Antonio, / [...] / Must needs be like my lord”. Indeed if Antonio, whom Bassanio loves, resembles Bassanio, then it follows that he also resembles Portia, who loves Bassanio: Antonio is, in her own words, “the semblance of my soul” (Act III, Sc. IV, ll. 16–20).

The logic of such connective strategy is the logic of unconditional risk for the other, of movement in a one-way direction towards the other, without return, without profit in relation to the other; to evoke Levinas this is the logic of being one for the other, of “substitution”. In this case the terms of resemblance are not indifferent. Differences are not erased and eliminated as occurs instead in the situation of indifference characteristic of cohesive similarity, which identifies, homologates, matches, equalizes. By contrast, connective similarity enables the relationship of unindifference among terms to endure: this is *similarity (resemblance, likeness) on the basis of alterity, otherness*, in juxtaposition to *similarity on the basis of identity*. The latter, identity similarity, is the type of similarity that is present in avaricious, greedy, miserly exchange, and in justice without equity, fairness, without clemency, without mercy (“in the course of justice none of us / Should see salvation,” as Shakespeare has Portia say in *The Merchant of Venice* in the citation reported above, Act IV, Sc. I, ll. 197–198). This is the only kind of similarity that Shylock is aware of. Even when Shylock argues that in spite of being a Jew he is equal to all other men, his reasoning is based on the logic of cohesive resemblance, resemblance by identity, based on the logic of equal exchange, of exact exchange, which is *do ut des* logic. This is the logic of indifference, of blind justice, of reactive justice, the law of retaliation (which Aristotle rejects adamantly: cf. *Nicomachean Ethics*, V, 132b, 21 ff.), of revenge:

I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christians is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that.

10 As a conclusion: With Aristotle, but also well beyond him

I began with considerations made by Aristotle (from his reasoning with reasonableness) on the relationship between justice (*dikaiosune*) and equity, fairness (*epieikéia*) and the corresponding adjectives equal, fair (even, rightful, appropriate, balanced, convenient, moderate, etc.) (*epieikés*).

But the sense of the present text intends to go beyond Aristotle, as we hope is clear from what has been said so far.

When Aristotle says (V, 1129, 18–19) “we call those acts just that tend to produce and preserve happiness and its components for the political society” (a fine definition) and when he says that justice is complete, perfect virtue because it benefits others as well, he is referring to the community that belongs to the *polis* and to the others of the *polis*, who also belong to the *polis*.

So the limits of Aristotle’s conception of justice are the limits of his times. We should not forget that Aristotle took a stand against his disciple Alexander, Alexander the Great, against what he refers to as the latter’s “*philobarbaric* politics” and not only against his tyrannical absolutism.

Aristotle remains anchored to a typical conception of his times *à propos* the relationship between man and the *polis*, that is, between Greeks and non-Greeks. This is the limit of his conception of *dikaiosune*, justice, as much as it is considered correctable, a conception that can always be improved, perfected through the practice of *epieikéia*, equity, fairness.

And what about us? Are we still Aristotelians? Aristotelian concerning human issues, even though from Galileo Galilei onwards on the level of the natural sciences we are anti-Aristotelian? I believe that Aristotle’s considerations on the relation between justice and equity, justice and fairness are still valid today. His conception is still helpful *à propos* the problem of whether or not justice can be improved, the sense in which justice can be improved, the sense in which justice is perfectable.

In this paper we have attempted to push the concept of fairness beyond Aristotle and consider the problem of the perfectibility of the law keeping account of a world, our own, where the concept of the “other” has expanded. Events in the world today demand that we extend the meaning of the word “other,” the unique other, ever more. My neighbour once distant has now become ever closer, unbearably closer, inexorably closer.

Think of the implications, for example, in terms of extending citizenship to the migrants involved in what is no less than the greatest mass exodus of our times so far, now even a global phenomenon.

This other is the other that equity, fairness, must account for and must do so ever more today, mindful of the expanding meaning of proximity and with it of responsivity to the other, of responsibility towards the other. To evoke the message pronounced to the world by Pope Francis when he denounces the situation of global indifference (see Petrilli 2016: 164–165, 189–194), I would not hesitate to make an appeal today to the urgent need for sense of global responsibility.

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