

THEMIS AND DIKÉ: THE TRANSVERSAL RELATIONSHIP BETWEEN JUSTICE AND REVENGE IN THE CASE OF FEDERAL CONGRESSMAN PAULO SALIM MALUF*

THEMIS E DIKÉ: A RELAÇÃO TRANSVERSAL ENTRE JUSTIÇA E VINGANÇA NO CASO DO DEPUTADO FEDERAL PAULO SALIM MALUF

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ABSTRACT

The purpose of this article is to analyze whether there is a transverse relationship between the structures of revenge and justice, especially in the current law, based on the analysis of the case of Congressman Paulo Maluf, where there is a clear polarity on the possibility of granting custody due to his weakened health status. Initially, it points to the difficult conceptualization of justice and then to investigate the Greek mythological foundations that fall on the goddesses Themis and Diké, as a proposal to discover the birth of justice. Subsequently, it analyzes the structures of justice and revenge, comparing them. In the end, for the analysis not to be restricted to theory, it investigates the practical case related to the arrest of Congressman Paulo Salim Maluf to demonstrate that there

* It is important to note that the elaboration of this article took place in the context of the authors PhD at the Pontifical Catholic University of São Paulo, based on the ideas discussed in the core classes of Philosophy of Law, notably in the subject of Justice and Revenge, delivered by Professor Tércio Sampaio Ferraz Junior. Thus, the arguments and conclusions presented here are the result of both Professor's lectures and the healthy discussions among classmates, whom I thank for the contribution.

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is a transversal (and not diametrically opposed) relationship between the structures of justice and revenge.

Keywords: Greek mythology; Themis; Diké; Justice; Revenge.

RESUMO

Este artigo tem por objetivo analisar se há uma relação transversal entre as estruturas da vingança e da justiça, mormente no direito atual, a partir da análise do caso do Deputado Federal Paulo Salim Maluf, em que se verifica nítida polaridade sobre a possibilidade de concessão de prisão domiciliar em função do seu estado de saúde fragilizado. Inicialmente, aponta para a difícil conceituação da justiça para, em seguida, investigar as bases mitológicas gregas que recaem sobre as deusas Themis e Diké, como proposta de descobrimento do nascedouro da justiça. Posteriormente, analisa as estruturas da justiça e da vingança, comparando-as. Ao final, para que a análise não se restrinja à teoria, investiga o caso prático relacionado à prisão do Deputado Federal Paulo Maluf para demonstrar que há uma relação transversal (e não diametralmente oposta) entre as estruturas da justiça e da vingança.

Palavras-chave: Mitologia grega; Themis; Diké. Justiça; Vingança.

INTRODUCTION

Law, as the applied social science that it clearly is, is directly related and linked to the very concept of society. In this sense, the evolution of modern legal systems has happened indistinctly to the evolution of society itself, as a way of adapting to the new social realities that have arisen and, consequently, regulating human conduct in its current (postmodern) contours.

But it is not reduced to that. In this evolutionary path, especially due to the great tragedies that plagued the world – the 2 Great Wars and so many other world and regional conflicts –, Law is increasingly concerned with the guarantee of fundamental human rights, in a kind of search for human solidarity that must be extended to all, which, as it must be noted, have been translated into the principle of the dignity of the human person.

This new perspective of worldwide human solidarity, as it is, rejects the possibility that the law contains in its normative body any elements of revenge, which, even if went through common sense of society or under the view of the “interpreters” of law, would be something contrary to the structure of law itself and unacceptable in any conception of justice.

Revenge, as it is said, was only applicable under the Hammurabi Code, the Talion Law, or under the perspective witnessed until the early eighteenth century, in which cruel and tortuous punishment constituted a kind of collective revenge

(which, however, it was fought and overcome through the humanitarian vision brought by Cesare Beccaria in his “Of Crimes and Punishments”). It is as if revenge and justice appear as the composing elements of water and oil, structures that cannot touch each other or blend together.

However, this does not seem to be the most accurate analysis of the subject. This is because Professor Tércio Sampaio Ferraz Júnior, one of the biggest names in the current philosophy of law scenario in Brazil, has undertaken several studies to demonstrate that, in fact, it is not a simple task to clearly distinguish “how far justice goes and how far goes revenge”. And to refute the traditional view (of a split between justice and revenge), the aforementioned author defends the absorption of each other, which points, in our view, to a transverse relationship, in which can be noted the constant “touch” between justice and revenge, into one another.

With the objective of humbly following the conclusions of Professor Tércio Sampaio, this article intends to analyze if there is a transversal relationship between Justice and Revenge in the current Brazilian law structure and if in the context of the arrest of Congressman Paulo Salim Maluf, due to his weakened health status, it is possible to confirm the absorption of one structure by the other.

The article is structurally divided into three topics. In the first one, it analyzes the problematic of the conceptualization of justice in function of the plurality of philosophical perspectives regarding its definition and configuration, to sequentially investigate the foundations of Greek mythology that fall onto the goddesses Themis and Diké. In the second, it deals with the relationship between justice and revenge and asks about the possibility of a cross-sectional relationship between its structures, in the third and final topic, to verify that absorption relationship in the practical case involving the possibility of house arrest of Federal Congressman Paulo Salim Maluf.

To develop the intended approach, the dialectical method is used as research methodology, coming from the normative-historical analysis of the concepts of Justice and Revenge and the existing conflicts and positions on the theme – thesis and antithesis –, and, if possible, to come to interpretations as to arrive at a new understanding of reality (synthesis).

THE PROBLEM OF THE CONCEPT OF JUSTICE: AN ANALYSIS FROM THE MYTHOLOGICAL BASIS OF THE GREEK CONCEPT OF JUSTICE – THEMIS AND DIKÉ

Ab initio, one should warn about the difficulty in conceptualizing what is meant by justice, whether due to the multiplicity of concepts, or even the

philosophical perspectives¹ brought by different historical contours². In this sense, accordingly, follows the comprehension of Tércio Sampaio Ferraz Júnior on the subject, by adding that:

The concept of justice is, perhaps, the most disputed one in the literature of Philosophy of Law, of all time. It concentrates, from the dawn of thought, the most heated legal controversies. Defining it is an inexhaustible endeavor, but always renewed. In different paths, sometimes thrown into the ideal dimensions of an ethical target to pursue, sometimes entangled in existence itself as a constantly performed task, sometimes pointed out as logical data in the legal axiomatic, the notion of justice is a subject of which, dogmatically, critically or skeptically, one cannot derive away from³.

In spite of this conceptual difficulty, the literature on Philosophy of Law usually traces the conceptualization of justice from very peculiar perspectives, among which this work will give special emphasis to the one based on the Greek mythology, whose analysis will try to approach the structures of justice and revenge.

But why seeking the conceptualization of justice parting from a myth? Because, as pointed out by Husserl in the Twentieth century⁴, in order to be able to discover something philosophically one has to go back to research on “the very things themselves”, not only on scientific premises. And, “to go back to the very things themselves means the return of what appears to us as something experienced, lived, known, but not given as existing in the world (...)”⁵⁻⁶.

¹ In terms of contemporary lines of thought in normative political philosophy, and more specifically in terms of identifying a just, free or good society, the main conceptions of justice are centered on the following theories: (i) utilitarianism; (ii) communitarianism; (iii) liberal equality; (iv) libertarianism; (v) Marxism; and (vi) feminism (KYMLICKA, Will. *Filosofia política contemporânea: uma introdução*. Tradução de Luís Carlos Borges. Revisão da tradução de Marylene Pinto Michael. São Paulo: Martins Fontes, 2006).

² About the conception of justice, one cannot forget about Aristotle’s contributions about what is just and the quality of the “virtue of justice”, whose analysis is made in different works on the topic, such as: (i) FERRAZ JÚNIOR, Tércio Sampaio. *Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito*. 3 ed. São Paulo: Atlas, 2009; (ii) MASCARO, Alysson Leandro. *Filosofia do direito*. 4 ed. São Paulo: Atlas, 2014; e (iii) GUNDIM, Wagner Wilson Deiró; VALVERDE, Thiago Pellegrini. Justiça aristotélica e as onze ilhas do Supremo Tribunal Federal: a possibilidade de justiça no caso concreto. *Revista da AGU*, Brasília, v. 16, n. 4, out.-dez. 2017.

³ FERRAZ JÚNIOR, Tércio Sampaio. Do discurso sobre a justiça. *Revista da Faculdade de Direito da Universidade de São Paulo*, v. 74, 1979. p. 153.

⁴ HUSSERL, Edmund. *A crise da humanidade europeia e a filosofia*. Introdução e tradução de Urbano Zilles. Porto Alegre: Edpucrs, 1996 (Col. Filosofia; 41).

⁵ SILVA, Maria de Lourdes. A intencionalidade da consciência em Husserl. *Argumentos*, ano 1, n. 1, 2009. p. 47.

⁶ The importance of Heidegger and Gadamer in the field of phenomenology is also unquestionable and corroborates the point made by Husserl, especially when considering the question

In other words, “to go back to the very things themselves” means reaching the birthing state of something, and for that, it is necessary to unveil what is hidden in the intimacy or into the manifestations of a given people. It is in this context that, in the words of Tércio Sampaio Ferraz Júnior:

Understanding law and justice requires a return to the apocryphal (from APO: emanation, and KRYPHOS, the secret). Hence the importance of art to reach the immanent of things themselves. And the role of literature, onto this dramatic account: to look deep into the soul to get a better look at the surface of what appears. That is, to go from the unique, intimate and incommunicable obscurity of the secrets of the human heart to the transparency of the rules seen by legal common sense⁷.

In this context, understanding the “birthing state” of the concept of justice by analyzing the mythological foundations of the Greek concept of the goddesses Themis and Diké, which give rise to all further understanding and interpretation of the characters of justice, is an essential task for identifying, within the scope of secret, how the relationship between justice and revenge takes place. In this case, therefore, the way to identify “the very things” will be through the analysis of the “myth”.

Generally, common sense about the personification of justice is summarized in the following elements: a woman who holds a scale in one hand, a sword in the other, and who usually has her eyes closed⁸. This personification would initially represent the elements that make up the image of the goddess Themis⁹, daughter of Uranus, God of Heaven, and of Gaia, Goddess of Earth, whose name

of the concept of tradition (ver: GADAMER, Hans George. *Verdade e Método método II*. Rio de Janeiro: Vozes, 2002). “Following the same path, according to Gadamer, “every encounter with tradition that takes place within historical consciousness involves the experience of the tension between text and the present” (KUSCH, M. *Linguagem como cálculo versus linguagem como meio universal*. São Leopoldo: Unisinos, 2001. p. 260).

⁷ FERRAZ JÚNIOR. Tércio Sampaio. *Michael Kohlhaas: justiça e vingança*. No prelo: 2018. p. 9.

⁸ In the words of Juscelino Silva, paraphrasing Pierre Grimal, this image would correspond to the goddess Themis, so that “The scale serves to weigh the balance of the cosmos; the sword, the power to punish those who are out of place, and the blindfold symbolizes the impartiality of the decision” (SILVA, Juscelino. *Themis e Diké a interpretação do mito articulado aos direitos da mulher ocidental*. *Revista Jurídica*, v. 3, n. 1, 2012. p. 2).

⁹ It is important to note that Adorno and Horkheimer confirm the image of Themis as a blindfolded goddess, because for them “covering the eyes of justice not only means that one should not interfere with the law, but that one was not born from freedom” (ADORNO, Theodor; HORKHEIMER, Max. *Dialética do esclarecimento: fragmentos filosóficos*. Rio de Janeiro: Jorge Zahar, 1985). However, some authors, such as Damásio de Jesus, point out that Themis was represented carrying a scale in her right hand and a cornucopia on her left hand and that she had no blindfold, an attribute that was invented by the 16th century Germans, who, ironically, deprived her from her eyesight (JESUS, Damásio Evangelista de. *Os olhos abertos de Themis, a deusa da justiça*. *Jornal Síntese*, São Paulo: IOB, abr. 2002).

comes from “the Greek *Thémis*, from the verb *tithénai*, to establish as a norm, from what can be concluded, it is ought to be established as a rule, as the divine or moral law, the justice, the law, the rights, as opposed to *nomos*, the human law and *dike*”¹⁰. It is important to note here that Themis is the goddess of eternal laws, applicable in a kind of transcendent justice, originating in the world of the gods¹¹ and acting as divine balance¹², whose mundane application is essentially effective in the context of this familiar world.

However, the personification of Justice does not only include the aforementioned goddess, especially since one can perceive, within the context of the myth, the existence of other figures with different characteristics, namely: *Diké*, in the Greek mythological context, and *Iustitia*, figure from Roman mythology¹³.

Diké, in another turn, the daughter of *Themis* with Zeus, represents an important advance in the development of the Greek spirit of liberation from individual forces, as their concern will be to guarantee equality for all citizens, both large and small, starting to correspond to an idea of retribution, that is, to give each one what is due to him¹⁴. As a consequence, *Diké* will imply an overcoming of *Themis*, because while the latter is related to the authority, legality and validity of law, the former seeks to promote the fulfillment of justice as a cry against the authoritarian law and to guarantee, in a broader sense, the sense of equality¹⁵. As such, as reported by Sophocles in the Greek tragedies *Antigone* and *King Oedipus*, *Themis* and *Diké* oppose themselves in the Greek world from tensions between divine justice and the justice of the gods¹⁶.

¹⁰ SICILIANI, Bruna Casimiro. Bases mitológicas e literárias do conceito grego de justiça. *Direito & Justiça*, v. 37, n. 1, jan.-jun. 2011. p. 64.

¹¹ SICILIANI, Bruna Casimiro. Bases mitológicas e literárias do conceito grego de justiça. *Direito & Justiça*, v. 37, n. 1, jan.-jun. 2011. p. 64.

¹² Among the actions of *Themis* as a promoter of harmony in the universe, Carlos Eduardo de Souza Lima Gomes points out that: “Among the most exemplary actions of this goddess as a promoter of harmony in the universe, we can mention the attribution of the idea of the Trojan war to her, in order to reduce the standards of population density of the Earth. It is in her facet of personification of justice and eternal law that we find her advising Zeus, in the fight against the giants, to cover his shield – which is now called the aegis – with the skin of the Amalthea goat. These are just some of the actions that corroborate this role of divinity of good proportion, of equanimity” (GOMES, Carlos Eduardo de Souza Lima. *Themis e Diké em Hesíodo: afirmação de uma ideologia camponesa ante os reis “comedores-de-presentes” na Grécia Arcaica (século VII a.C.)*. Dissertação (Mestrado em História) – Universidade Federal Fluminense, Instituto de Ciências Humanas e Filosofia. 2007. p. 55).

¹³ FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013.

¹⁴ JAEGER, Werner Wilhelm. *Paideia: a formação do homem grego*. 3. ed. São Paulo: Martins Fontes, 1994.

¹⁵ JAEGER, Werner Wilhelm. *Paideia: a formação do homem grego*. 3. ed. São Paulo: Martins Fontes, 1994.

¹⁶ For more information, read: SÓFOCLES, *Édipo Rei/Antígona*. Tradução de Jean Melville. São Paulo: Martin Claret, 2008 (Coleção obra-prima de cada autor, v. 99).

In dealing with the personification of Diké, Tércio Sampaio Ferraz Júnior asserts that:

Thus, the Greeks placed this scale, with both plates, but without the pole in the middle, in the left hand of the goddess Diké, daughter of Zeus and Themis, in whose right hand was a sword and who, standing and having eyes wide open, would say (solemnly declare) that the just was there when the plates were in equilibrium (íson, hence the word isonomy). Because of that, for the vulgar language of the Greeks, the just (the right) means what was seen as equal (equality)¹⁷.

It should be noted that unlike Themis, who has figuratively blindfolded (or wide-eyed, but blind), Diké is wide-eyed¹⁸, which denotes the goddess's intention to seek the truth, and hence promote equality to all. The existence of an egalitarian right, therefore, was the objectified goal for ancient times, as it sought a "just measure" for the attribution of the right. And, according to Werner Wilhelm Jaeger, it was "in the demand for equality, implicit in Diké's concept, that this measure was found"¹⁹.

Finally, within Roman mythology, there is the general representation of justice by the goddess *Iustitia*:

(...) which distributed justice through the scale (with the two plates and the balance pole right in the middle) which she held with both hands. She would stand up and blindfolded, and say (declare) the right (jus) when the pole was completely vertical: right (rectum) = perfectly straight, straight from down under (de + rectum)²⁰.

Unlike the goddesses *Themis* and *Diké*, both holding a sword in one hand, *Iustitia* did not combine knowing the right to the force to execute it, but rather rested its preoccupation with the exercise of *jus-dicere* by firm activity. This is the result of holding the scale with both hands, ensuring the direction of the jurist's activity in a single action, but in a forceful way²¹. The fold in the eyes of

¹⁷ FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013. p. 10.

¹⁸ In the words of Tércio Sampaio Ferraz Júnior, "the Greek goddess, with her eyes opened, points to a more abstract, speculative and generalizing conception that preceded, in importance, practical knowledge" (FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013. p. 11).

¹⁹ JAEGER, Werner Wilhelm. *Paideia: a formação do homem grego*. 3. ed. São Paulo: Martins Fontes, 1994. p. 136.

²⁰ FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013. p. 10.

²¹ FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013. p. 10.

Iustitia, in turn, shows the importance attributed by the Romans to the act of listening, and, consequently, to the exercise of speaking and the use of words in the discussion of retribution/compensation²²⁻²³.

It is noteworthy that, although the conceptions of the goddesses of Justice present different visions and personifications, it will be possible, through the myth, notably the Greek, to present a sketch about the structures of justice and revenge, bringing them closer, to demonstrate, in the following sections, that the existing relation is not one of exclusion or overcoming of each other, but of absorption, in a true transversal relation.

JUSTICE AND REVENGE: OPPOSITE OR TRANSVERSAL RELATIONS?

As already pointed out in the beginning of this article, one has the impression that the general consensus around the themes of justice and revenge is that there is a complete distinction, overcoming and even incompatibility, which, according to the most accurate doctrine is a mistake.

In this sense, in an article entitled *Justice v. Vengeance on law and the satisfaction of emotion*, Robert C. Solomon argues that it is not possible to eliminate the relevance of revenge from considerations of justice and the law, and that justice itself, in part, represents a matter of emotion and that the desire for revenge is basic to its concerns. Later on, in dealing specifically with revenge and the usual view of the adjectives that accompany it, the author points out that:

(...) Vengeance is thought to be especially dangerous and socially disruptive, typically violent, utterly unreasonable, and by its very nature opposed to law and its constraints. I would like to suggest, to the contrary, that vengeance need not be dangerous or disruptive, need not be violent, need not be unreasonable, and need not be opposed to law and constraint. According to this opposition view, one might say that the point of law is to make the passions more coherent, more consistent, more articulate, more perspicacious, more reasonable, more subject to scrutiny, more civilized. The law, like culture, shapes as well as expresses emotions. We should beware of the tendency to reinforce the opposition between reason and emotion by rendering emotion as primitive

²² FERRAZ JÚNIOR, Tércio Sampaio. *Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito*. 3. ed. São Paulo: Atlas, 2009.

²³ Also, according to Tércio Sampaio Ferraz Júnior, *Iustitia's* also being blindfolded shows that the conception of law for the Romans "was rather referred to a know-how, a prudentia, a balance between abstraction and the concrete" (FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. 7. ed. São Paulo: Atlas, 2013. p. 11).

as possible – choosing the most irrational, destructive examples and then glorifying reason in an uncritical way (Aristotle’s “spark of the divine”, for instance)²⁴.

It is important to note that it is not possible to treat revenge as something outside of law and the very concept of justice, since the relationship between its structures is very close and, in some situations, they absorb each other in a kind of transversal relationship. Especially because, notably, revenge is not as limitless as it seems, mostly due to it being a cultural fact, and as such, it remains surrounded by values and rituals, which, in some situations, eventually limit its performance.

Proportionality, that there is also a demonstration of the relationship between the structures of justice and revenge. To retribute, therefore, may mean giving one thing for another – in an Aristotelian sense of justice and proportionality – as repaying one evil for another evil – which would denote a certain relationship with revenge²⁵.

The approximation of justice and revenge can also be presented from the perspective of a philological survey about the meaning of the words retribution, punishment and revenge from the Greek language, whose expressions point to the terms *poine*, *timoria*, *kolasis* and *zemia*²⁶. In this sense, Tércio Sampaio Ferraz Júnior clarifies such concepts by stating that:

(...) *poine* had only the meaning of negotiated reparation as compensation for damage. (...) The rescue (*apoína*) was thus a strengthening of the *poine*, a monetary compensation (...). The word *zemia*, in its turn,

²⁴ “Revenge is believed to be especially dangerous and socially disturbing, typically violent, utterly irrational, and by its very nature versus law and its limitations. On the contrary, I would like to suggest that revenge need not be dangerous or disturbing, need not be violent, need not be irrational, and need not be contrary to the law and its obstacles. According to this opposition, it can be said that the purpose of the law is to make passions more coherent, more consistent, more articulate, more insightful, more reasonable, more subject to supervision, more civilized. Law, like culture, shapes and expresses emotions. We must beware of the tendency to reinforce the opposition between reason and emotion, making emotion as primitive as possible – choosing the most irrational and destructive examples and then glorifying reason in an uncritical way (Aristotle’s ‘divine spark’, for example)” (SOLOMON, Robert C. Justice v. Vengeance on law and the satisfaction of emotion. In: BANDES, Susan A. *The passions of law*. New York: New York University Press, 1999. p. 129).

²⁵ In the words of Tércio Sampaio Ferraz Júnior, “retribution has nonetheless, even in the pursuit of proportionality in terms of relation between such aspects, a connotation of revenge, retaliation, which gives the penalty, for example, a permanent ambiguity, from which one can cautiously use, as just, the death penalty or even renounce it, in terms of justice” (FERRAZ JÚNIOR, Tércio Sampaio. Tércio Sampaio. *Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito*. 3. ed. São Paulo: Atlas, 2009. p. 232).

²⁶ FERRAZ JÚNIOR, Tércio Sampaio. *Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito*. 3. ed. São Paulo: Atlas, 2009.

is a dialectal form of *demia* (*demos*, people), understood as the socialized sanction, that which belongs to the people. In this context revenge and punishment converge: *timoros*, the avenger; *timoria*, revenge or punishment; *Timoreo*, I punish, I avenge. (...) In the same direction is the word *kolasis*. Literally, *kolasein* means *pruning*, “keeping it short”, which is practiced with the use of the sickle. Technically, the expression has a less emotional connotation than *timoreo* (I punish, I avenge). *Kolasis* is, for example, pruning, in a field of wheat, an ear that rises above the others, as symbolically appears in Herodotus, concerning the treatment Thrasybulus gives to an envoy of tyrant Periandros²⁷.

That is, any retribution/repairment, from the subjective point of view, is not simply a pecuniary benefit, or even the application of a sanction or penalty, because there is also present a subjective interest of revenge, of something else. Thus, the structures of justice and revenge are intertwined in the current legal framework, whether under public or private law. And the performance of justice, in this sense, serves as a kind of limitation of revenge, as occurs for example in the use of *apoiné* (rescue) of moral damage, in a monetary way, as to resolve any situation in which a person’s honor has been vilified.

This interpenetration between justice and revenge occurs mainly by the inability of the Positive Law to deal with the depth of feelings related to revenge, notably by not giving victims of crimes, as the example, the feeling of satisfaction, which brings up to the surface the boundaries of the uncertainty between the feeling of revenge and the call for justice²⁸. Hence it is compelling, as pointed out elsewhere by Robert C. Solomon, that law and also the perception of justice take into account the emotional issues present in revenge as a result of their confrontation and analysis²⁹.

Thus, while the structures of revenge and justice are essentially distinct – while justice seeks to resolve conflict through *kolasis*, that is, by cutting something to maintain the balance of the scale, in revenge the idea of retaliation is always stronger – it is possible to perceive the communication between them in current law, with much more incidence in the field of Criminal Law. This is because, even for the protection of the legal assets to which it lends itself, the field of Public Law is much more “vindictive” than Private Law, since in the civil sphere the idea of compensation for damage suffered, i.e., the replacement of an offense for the payment of compensation is far more acceptable than allowing the murderer the right, by paying a certain amount, to be free from the restriction of his liberty.

²⁷ FERRAZ JÚNIOR, Tércio Sampaio. *Estudos de filosofia do direito: reflexões sobre o poder, a liberdade, a justiça e o direito*. 3. ed. São Paulo: Atlas, 2009. p. 234-235.

²⁸ FERRAZ JÚNIOR, Tércio Sampaio. *Michael Kohlhaas: justiça e vingança*. No prelo: 2018.

²⁹ SOLOMON, Robert C. Justice v. Vengeance on law and the satisfaction of emotion. In: BANDES, Susan A. *The passions of law*. New York: New York University Press, 1999.

The coexistence of revenge and justice in current legal systems, however, is not only evidenced by the idea of compensation, but on the contrary, there are other important examples that highlight this communication relationship between their structures.

A first example to be cited is the systematic of Brazilian Criminal Law regarding the effects of the conviction that apply from the beginning of the judgment, but extend up to two years after its enforcement for criminal rehabilitation³⁰ in five, counting until such time as aggravating circumstance of the crime³¹. It is explained: as taught by Tércio Sampaio Ferraz Júnior, in the “game” of revenge, the idea of “stain” is very strong, as well as the idea of total annihilation of the other, that is, rather than a restitution, satisfaction of revenge requires a purification of the honor vilified³². And this is exactly what happens within the criminal system with those who, sentenced to a penalty provided for by law, are “stained” not only by the punishment that, as a rule, hinders their freedom; but also by the trademark that is bound in their names (the criminal record) within time limits bound by law. And this is where the link between justice and revenge is glimpsed, for as has been said before, it is in the field of justice that *kolasis* (a cut) is necessary, that is to say, while allowing revenge itself, law and justice limit it. In the case indicated, while allowing the convict to carry the “stain” (bearing the condition of being sentenced to criminal rehabilitation or being considered a repeat offender), the legal order itself makes a temporal cut (a *kolasis*) as a kind of limitation on this feeling of revenge – in this case, the “stain” will remain only for the deadlines set in the criminal legislation.

But it is not simply that. Imbued in this “expectation of total destruction of the other”, it is also possible to draw a parallel, at world level, of the imprisonment systems adopted by several countries worldwide, where prisoners need to wear the same clothes, adopt the same haircuts and, often they are no longer called by their names and are identified by numbers. That is, the “retribution/reparation” is not limited to “doing justice” by applying a penalty previously

³⁰ This rule finds shelter in article 94 of the Criminal Law, that provides: “Article 94 – Rehabilitation may be required after two (2) years from the day on which the penalty is repealed, or its completion is terminated, computing the trial period of suspension and conditional release, if not revoked, provided that the convicted (...)”.

³¹ In this sense, the provisions contained in articles 61, item I, and 64, item I, both from the Criminal Law: “Art. 61. These are circumstances that always aggravate the penalty when they do not constitute or qualify the crime: I – the recurrence (...)”.

Article 64. For the purpose of recurrence: (...) I – the previous conviction does not prevail, if between the date of the completion or revocation of the judgment and the subsequent infraction has elapsed a period of time superior to 5 (five) years, counting the period of suspension or conditional release, if no revocation occurs”.

³² FERRAZ JÚNIOR, Tércio Sampaio. *Michael Kohlhaas*: justiça e vingança. No prelo: 2018.

established by criminal law; it is necessary to erase the existence of the one who has committed an illicit act, to make him reflect on the harm done by removing his own identity.

Admittedly, although the concept of justice is not exclusively linked to law enforcement³³, it is clear that the current legal order often allows interpenetration and coexistence between structures that would belong to the ideals of both justice and revenge – at least, it is so under the conception of the analysis of the Greek mythology about the goddesses *Themis* and *Diké*.

The above examples, which, it should be noted, are merely illustrative, seem sufficient to assert that, unlike what is common sense, the structures of justice and revenge are not mutually nullable – and should not –, but on the contrary, they communicate and are grafted into current legal systems in a cross-sectional manner, although most of the time the idea of justice traces a limitation (*kolasis*) to contain the rush of anger usually found in the emotions that make up for revenge.

THE CASE OF CONGRESSMAN PAULO MALUF'S HOME IMPRISONMENT: THE TRANSVERSAL RELATIONSHIP BETWEEN JUSTICE AND REVENGE

Although the above arguments seem to be sufficient to demonstrate the cross-sectional relationship between Justice and Revenge, so that the present work does not have a merely theoretical character, it will be sought, next, to verify if it is possible to identify the relationship proposed in the emblematic following case.

On December 20, 2017, Congressman Paulo Salim Maluf, 86 years old at the time and “bearer of serious and verified diseases”³⁴, surrendered before the Federal Police in advance of the enforcement of the arrest warrant issued in a monocratic decision, proffered by the Federal Supreme Court Minister, Edson Fachin, in the case of Criminal Action No. 863, which ordered the immediate enforcement of the judgment. The Congressman had been convicted by the 1st Panel of Ministers in May 2017, for the crime of money laundering, from 1997 to 2006, to the penalty of 7 years, 9 months and 10 days of imprisonment, initially

³³ For Aristotle, however, “The just is therefore the law-abiding and the righteous, and the unrighteous is the lawless man and is unwise” (ARISTÓTELES. *Ética a Nicômaco*; Poética. Seleção de textos de José Américo Motta Pessanha. 4. ed. São Paulo: Nova Cultural, 1991. p. 96).

³⁴ KAKAY, Antônio Carlos de Almeida Castro; FREIRIA, Marcelo Turbay; GABRIEL, Liliane de Carvalho. Crueldade estatal: Paulo Maluf é vítima do arbítrio que um dia representou, dizem seus advogados. *Revista Consultor Jurídico*, 2017. Disponível em: <https://www.conjur.com.br/2017-dez-30/maluf-vitima-arbitrio-dia-representou-dizem-advogados>. Acesso em: 10 jun. 2018.

in closed conditions, and to the payment of 248 fine-days, in addition to the loss of his mandate, to be declared by the Congress³⁵.

Against the monocratic decision issued by the said Minister, Rapporteur on this case, the *Habeas Corpus* No. 152,707 was filed, with an injunction, which was drawn to Minister Dias Toffoli, through which in summary he alleged a misconception of the decision from the Rapporteur Edson Fachin to dismiss the opposing infringement embargoes from the attorneys, which in Toffoli's comprehension would be perfectly appropriate in the case. In order to substantiate the *periculum in mora* for granting the preliminary injunction, the attorneys of the Congressman also argued that the withdrawal to the imprisonment system, in closed regime, of a person who is 86 years old and diagnosed with severe health problems would violate the principle of human dignity. It thus endorsed the granting of the injunction to assure the Congressman his freedom, or, alternatively, the granting of humanitarian house arrest, as provided for in article 117 of Law 7,210, of 11 July 1984 (Criminal Enforcement Law, of acronym LEP).

As the *habeas corpus* was drawn, Minister Dias Toffoli issued a decision on March 28, 2018 granting the preliminary injunction to allow the Congressman the right to serve his sentence at home. In summary, the conclusions drawn by the Minister were that:

- (i) even in the case of jail time, in his analysis, the Congressman could be framed in the legal permission provided for in article 117 of the LEP, due to his weakened health status, even if subjected to closed regime; and
- (ii) the 86-year-old patient has serious health problems that have been properly proven, and that there was information about the complications of his clinical condition, which would allow the measure to be accepted.

Then, on April 19, 2018, after the Federal Supreme Court decided in plenary not to uphold any embargoes on the judgment imposed on the Congressman, Minister Edson Fachin informed colleagues that he had officially and monocratically granted house arrest, due to the weakened health status of the Congressman, which has settled the discussion about the appropriateness of *habeas corpus*, whose preliminary ruling was previously granted by Minister Dias Toffoli.

From the considerations on this specific case in question, it remains to be asked about whether it is possible to verify the communication (or the absence of it) of the justice structures with those of revenge.

³⁵ If the reader is interested in deepening its knowledge on the foundations of the condemnatory judgment, we refer to the follow-up of said Criminal Action on the website of the Supreme Court, which can be done through the following link: <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4504330>. Acesso em: 10 jun. 2018.

It should be noted, firstly, that the arrest of Congressman Paulo Salim Maluf has caused some polarization in society, which has split between the defense of his arrest, even in closed regime, on the grounds that this would present itself as an issue of “justice” and, on the opposite side, those who have a more humanitarian view, are in favor of granting Maluf house arrest due to the weakened health status currently experienced by him³⁶.

This duality of positions reflects very well one of the distinctions there is regarding the structures of justice and revenge. This is because, while in the perspective of revenge the role of the victim assumes primary importance, in the view of justice the central concern is drawn to the offender. This is why Tércio Sampaio Ferraz Júnior states that:

It should be noted that, in this revenge, the offender does indeed occupy a so-called secondary role, with the primary role standing with the offended. It is the offended who, in this vengeful structure, gives the measure of reparation, satisfaction, as seen, for example, in a duel. In this structure, it does not matter, after all, what the offender did, in fact, who may even have a level of legitimacy to act in such a way. Revenge is not measured by the offender, but by the offended. The burden of revenge rests on what the offended perceives from it. That is to say, it is the perspective and burden of the feeling of the offended that provides the [un]measured reaction³⁷.

In this case, it is clear that those who demand the conviction of the Congressman, despite his health status and senile condition, do not do so as a matter of “justice”, as one might imagine, because their view is not targeted at the offender, but on the contrary, it takes place from the perspective of the offended (the entire population who had been a victim of the crimes allegedly perpetrated by the Congressman). On the contrary, those who defend the need for the Maluf to serve his sentence at home, analyze the issue from the perspective of the offender, and, consequently, are impelled by the perspective of justice.

But the real intersection between the structures of justice and revenge, in this case, can be identified especially when one looks at the almost wrathful desire that Congressman Paulo Maluf, regardless of his current health condition, should answer for his crimes. The central idea is that he “cannot get away with

³⁶ This polarization is even witnessed in the legal environment, as exemplified by the various comments written by readers in the aforementioned article published in Conjur (cf. KAKAY, Antônio Carlos de Almeida Castro; FREIRIA, Marcelo Turbay; GABRIEL, Liliane de Carvalho. Crueldade estatal: Paulo Maluf é vítima do arbítrio que um dia representou, dizem seus advogados. *Revista Consultor Jurídico*, 2017. Disponível em: <https://www.conjur.com.br/2017-dez-30/maluf-vitima-arbitrio-dia-representou-dizem-advogados>. Acesso em: 10 jun. 2018).

³⁷ FERRAZ JÚNIOR, Tércio Sampaio. *Michael Kohlhaas: justiça e vingança*. No prelo: 2018.

it”, even if it can aggravate his health condition and consequently end his life. This feeling, however, although limited by Law, is not avoided by it, because often, due to strict legality, deprivation of liberty and not granting benefits such as this are deferred, on the grounds that allowing one not to go to jail would immediately imply an “injustice”.

And society itself, in situations like this, seeking to satisfy this so-called “sense of justice”, actually ends up demonstrating a feeling of “revenge”, portrayed in the intention of total destruction/annihilation of the other, as seen by some positions shown in the case of Congressman Paulo Salim Maluf.

The point intended here is that the common sense that the structure of revenge would have been absorbed by Law and the structure of justice itself, disappearing into it, appears to us as a clear mistake, especially because in the area of retribution/reparation, and especially those of criminal nature, where the feelings and emotions that accompany revenge are present not only in the behavior of social actors – victims, lawyers, involved parties and even judges –, but also in the very normative framework that, allowing the exercise of revenge, concomitantly limits it.

CONCLUSION

The present article has as its central analysis the investigation of the existence of a transversal relationship between the structures of justice and revenge, especially in current law and to develop the arguments that would strengthen the conclusion that will be adopted, as a starting point, about the analysis of the definition and concept of justice from their mythological foundations.

All that to demonstrate in the following, that, unlike the current view of justice and revenge, these structures are not completely distinct or colliding, but rather coexist internally within the framework of current law and have a transverse relationship. This finding can be observed by the current structure of Brazilian Criminal Law, especially by some of its rules – such as criminal rehabilitation, which can only be requested two years after serving the sentence and considering the recurrence as an aggravating circumstance of the penalty up to five years after the condemnation judgment has been fulfilled – which shows the existence of components of the revenge structure especially in modern Public Law.

In the practical context, the existence of this cross-sectional relationship between the structures of justice and revenge also seems to be corroborated, as can be seen from the analysis of the polarization in society about the enforcement or not of the arrest of Congressman Paulo Salim Maluf, whom, despite his conviction for the crime of money laundering, is 86 years old and in weakened health status. That is, within the normative framework, it is clear that there is an

interesting game that continually mixes the elements that make up for justice, but also for revenge.

And in this, it seems to us that the purpose of this work has been concluded: to demonstrate that, unlike what common sense usually advocates and believes, modern law contains in its structure elements of both justice and revenge, which, again, cannot be considered as excluding, but imbued in a transverse relationship.

Lastly, it should be noted that the author's option is not to discuss whether Congressman Paulo Salim Maluf's home arrest or detention was a mistake, but to contribute to the debate of Philosophy of Law in academia and society at large about the presence of the revenge structure, in relation to communication with justice, even in current law; which, as pointed out, does not necessarily imply anything negative.

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