

GULBENKIAN IDEAS

Let's talk about the Future of Justice

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In her Gulbenkian Idea “Let's Talk about the Future of Justice”, Susanne Baer highlights three trends relevant to the future of law, courts, and constitutionalism: facts, trust, and rights. As the current COVID controversies illustrate, we are confronted with fake facts, destroyed trust in institutions, and limited and radically absolutist or abusive notions of rights. For a future of justice including fundamental rights in democracies, she argues, we thus need to defend facts, justify trust, and use rights to protect diversity in respect, against the inequalities that matter.

The future of justice - is there any one person who could give us an idea, a vision, a recipe to create and shape it? I am sure only one is not enough. Here as elsewhere, we need conversations, as in the Gulbenkian Foundation series. Because the future is complicated. Also, for ages “justice” has moved philosophers and activists, politicians and thinkers, jurists and people with other expertise. Some ideas traveled widely and some even have been canonized, while others are still buried in ignorance. There is, I am sure, work by women, from the Global South, or by other persons “othered” by dominant mainstreams, thus still treasures to be found. In my remarks, I will focus on law, as one instrument to safeguard and achieve justice, and more specifically on constitutional law and courts, since constitutionalism is about the very basics of how we understand and organize justice in our worlds. Throughout, I will refer to the COVID controversies to illustrate the challenges around facts, trust, and rights.

Justice?

The meaning and means of “justice” differ, depending on context. These days, around the globe ideas of justice are on the table relating to topics from prison conditions to trade agreements, from pay schemes to rules for relationships, from identity concerns of individuals, groups or nations to abuse and violence. Not least, in the COVID pandemic “justice” informs controversies around the measures taken to fight it. There is a call for “vaccine justice”; “justice in hospitals” is at issue of triage emergency decisions to distribute scarce resources; “online justice” is important to anyone in home office and televised conference rooms; “educational justice” is a challenge where schools have been closed, to the detriment of children, strikingly unequal. Yet in addition, and often quite noisy, there are calls for “justice” in the version of “my fundamental right” to oppose vaccination, lockdowns of shops, restaurants, theaters or schools, or wearing a mask. As I will explain, it is the version of “justice” you endorse that matters.

The very notion of justice matters to our future because justice is always already aspirational. Note that it is not the issue when it works. Then, justice eventually contributes to happiness, prosperity and welfare, or even to some version of efficiency, but it is - beyond academic interest - a sleeping beauty. This changes quickly when things are deemed unjust. Then, “justice” is put on the agenda, as a calling, a need, a demand. Even in movies, “Justice” comes up when there is a problem, with law firms in thrillers (US series 2006), when judges are under stress (British series 2011) or for a “Justice League” (comic 1960, movie 2017), constantly fighting. Justice is a rallying cry. It is always about the future. So what do we aspire to? Which version of justice do you want – which version do we want?

At least, three trends are extremely relevant here, relating to facts, trust, and rights. Facts – because there is a “knowledge crisis” which has the potential to undermine what law can do for justice. Trust – because there is a trust crisis that affects the very institutions of democratic constitutionalism, including courts we need to back up justice. And rights – because there are versions out there that destroy the very foundations of the attempt to peacefully live together, equally free and in mutual respect. Facts, truth, rights – these are the aspects that almost paradigmatically are at stake in the COVID controversies.

Facts!?

Most troublesome, facts seem not to be facts anymore. For many reasons, there is uncertainty, volatility, manipulation, as well as constantly growing quantity, complexity, acceleration, and multiplicity. Science, data, expertise and knowledge are not only complex, but they are also contested in ways that shatter their very status and function. Facts are endangered, they became precarious. To be sure, this is not a critical questioning of authorities of knowledge which informs many critical enquiries. Despite attempts to guilt-trip postmodern theory, feminist or antiracist interventions, these are out to set the facts right, not to destroy them. The trend to decry facts is not

a move to enlighten us, in practices of critique that Kant or Arendt and many more have conceptualized, as constructive commitments. It is also not the “crisis of truth” one Pope saw in 1982, complaining about attacks on “faith, morality and mission”. Instead, the Catholic Church itself rejects, denounces and ignores accounts of abuse. But way beyond this organisation, there is a pandemic of quite deliberate attempts to reject, denounce and ignore or, more dangerously, replace science, data, expertise and knowledge with attributions of conspiracy, with sheer aura, with belief, or simply with lies.

And there is a lot of evidence for this. Fake facts, manipulated information as data, words or pictures, targeting selected audiences in bubbles, consistent and plausible in themselves, are used to create, as Paul Kahn said in this context, “anger, anxiety and fear”. This is not about arguments anymore, it is about rage. It is not deliberation, a debate in which we try to convince and persuade with arguments, but shere propaganda. In addition, it is, as Daniel Innerarity added, simplistic and thus tempting, but disastrous in the long run.

The COVID controversies are a case in point. In “the old days”, a pandemic spurred scientific questions and the quest for distributive justice, utilitarian or egalitarian, procedural or substantive, and the issue would have been the adequacy of means. For sure, the complexity of the very problem is a challenge for any state measure taken. But to solve the justice problems, constitutional law and courts have instruments to handle that. Details differ in and across legal systems, but certain elements allow courts to handle challenges to facts.

One such element is the right of anyone affected who disagrees with what the state thinks is “true” and “real” to access a court system to present their “truth” and “reality”. Another element is the requirement to reason, both when bringing a case and deciding it, which forces courts to take arguments into account, based on hearings and research, and allow for criticism, to eventually learn and revise. Also, constitutional courts take experts into account, often inviting them to contribute, and develop tests of whether the state measure is based on facts, like plausibility in degrees or the obligation to update data and eventually modify measures. Not least, the concept of separated powers bound by law locates responsibilities to assess facts in those institutions that are best equipped to handle this. Therefore, the initial assessment of facts may be initiated by government expertise, but has to be ratified by parliament, thus based on public debate, a diversity of views, science and research, and deliberated consensus. Then, courts decide whether challenges to this assessment are well founded, and intensify control in relation to the interests at stake. When constitutional courts decide, they do not silence a discussion, but set the frame to continue, and do better.

These days, this is very different. Measures to fight the pandemic are challenged, efforts to reject, denounce, ignore and simply replace science, data, expertise and knowledge with vague impressions of another “truth” are becoming louder and louder, to counter “the lies”, reveal “the truth about the Virus”, and “end the conspiracy of Big pharma, Big data, and government”, and the like. In courts, they present “alternative facts”, shaped just like good data, parading as expertise. But then, a court hearing is not fact finding anymore, but courts are called on to “take sides”, which contradicts the notion

of impartiality, and to opt for one “truth”, which runs counter the reasonable nature of judging. And if a court rules to uphold measures, it is described as joining “the conspiracy”, belonging to the “corrupted elites”, staffed with “enemies of the people”, “not in tune with reality”. If this version wins, courts and the law lose their function.

Trust!?

Similarly, trust is at risk, and more precisely: there is a worrying lack of trust in institutions. We see alienation, polarization, disrespect, and destruction. This is not entirely new, and it does not only affect the law, or courts. In fact, institutions like “the church” or labor unions or sports clubs, and in a broader sense, “marriage” or “work”, underwent substantial change, in that people do not join anymore, and also do not exit and voice (Hirshman), but simply do not trust institutions anymore, irrespective of membership. The UN Secretary General recently warned of a “trust deficit”, based on data that shows a decline in trust in public institutions in recent decades. People do not trust “the government” in many contexts, be it “the President” or “politics” or “the administration” or “bureaucrats” or, in Europe, “Brussels”. Instead, and similar to the crisis of facts, loud voices reject, denounce, ignore and eventually replace, namely, democracy. In some countries, this has already happened. In Europe, these destructive trends are most prominent in Hungary and Poland, followed by others in the region. Faking institutions, they practice “autocratic legalism” (Scheppele), in their version of “abusive constitutionalism” (Dixon and Landau). Courts are restaffed and disciplined, including the constitutional court, to now be able to do as seen fit to further any greedy interest. When people “leave” institutions, and when autocrats capture them, constitutionalism is gone, as a guardian of justice that requires independent control to make sure that “not just any law” (Baer).

Again, the COVID controversies serve to illustrate the case. Whatever governments do, parliaments decide and courts adjudicate to counter the pandemic, protesters do not criticize these measures in order to learn and modify accordingly – which would be important for responsible actors. Instead, from truck drivers in Ottawa to marches in Paris and Rome or Nikosia, from pretty aggressive “strolls” in German towns to violent unrest in Brussels, Bordeaux, the Hague, Vienna or Lisbon, from a man shooting a young cashier who asked him to put on a mask to attacking journalists from “systems media”, many reject, denounce, ignore and also aggressively fight institutions. Largely, this is, again, not a debate, but a “fight” or even “war”, not persuasion, but propaganda, not searching consensus, but “resistance”, and eventually, “heroes” to “storm” parliament, like the German Reichstag or the U.S. Capitol, to “take over”.

Last and certainly not least, courts, and thus, the institution to deliver justice, have been affected by this decline of trust as well. The Polish constitutional tribunal has been destroyed, and then redesigned to become a subservient and dependent assistant of the government, instead of independent control of power with that power. The Brexit campaign in Britain targeted European and British courts, the latter as “enemies of the people”, and set out to reform the legal system to make sure that the final word on justice is not in its hands. In the U.S., the position of judges is by now clearly politicized, with the Supreme Court as another version of polarized politics.

The German Constitutional Court, working hard to decide hundreds of complaints, has protesters in front of its building in Karlsruhe every week. These protesters are out to “remind us” of our job to protect fundamental rights. At some point I watched them more closely and noticed that they turn their backs to the Court, they speak to their cameras and produce images conveying the message that they own the court, that they “took it over”. Some even come in judges’ robes. Others mark the cover of the booklet of the constitution with a black cross, and by sending this to me tell me that the law dies at my hands and they are out to rescue it. The message is: We do not trust you. It is also: We will remove you when we can.

Perversely, in Germany, COVID measure protesters also put white roses on the steps of court buildings, to claim the history of resistance to fascism by Munich students, known as the “White Rose”. With this they celebrate a ruling by a first instance judge who, evidently beyond his powers, thus breaking the law, ruled against the obligation to wear a mask in school. In addition, some protesters now wear a yellow star, the stigma enforced upon Jews by German Nazis, to claim the status of “victims” of a “system” in which no institution is on their side anymore. They articulate distrust in courts. But they also build legitimacy, collect money, media power and weapons, and organize “resistance”, a “fight”, “to take over”, eventually. Yes, these are not majorities. But still, the trend is worrying. For the future of justice, this organized and spreading trust in institutions, including courts, is a serious challenge.

Rights!?

The third trend relevant to the future of justice is the definition of rights. In their “classic” version, fundamental rights are the foundation of constitutionalism past WW II, past colonial regimes, past dictatorships, and a prime ingredient, as human rights, of revolutions both in politics and ideas much longer. For sure, law and systems to safeguard justice also organize power, as democracy. But that is based on the fundamental political right to have a voice in a given democratic setting.

Along these lines, the history of Portuguese constitutions is a long and impressive one, including an attempt to constitutionalize an unconstitutional regime, in 1933, the socialist promises in 1976, or the reform in 1982, which created the Constitutional Court. Fundamental rights feature prominently, in Part 1 of the Portuguese Constitution. And at least after WW II, with the Declaration of Human Rights in the United Nations, societies around the world crafted, or revitalized, their version of these safeguards of justice, some more liberal than social, some shorter, some longer, but with a growing acceptance of a universal set of values, guaranteed by law, thus contributing to justice.

In the United Nations, conventions were passed, and eventually ratified, on political and civil rights, social and cultural rights, rights against racism and rights of women, rights of the disabled and of children. Measures also address stateless people, and refugees, and more. Regional systems like the Council of Europe, the Inter-American system or the African Union, and recently the EU, went on that path as well.

In international politics, states were, in varying degrees, held to this standard, relevant for economic cooperation. And recently, private enterprises are also called upon to care for human rights, in production and trade.

The story of fundamental human rights is, then, a story of success, of ever-growing acceptance. In most countries of the world, and for quite a while now, such rights are in place, at least, on the books. Contested, yes, challenged for sure, mobilized to advance their meaning, and usually not implemented completely, or to everyone's liking. Nonetheless, fundamental human rights became an accepted yardstick for humankind.

But this has also changed. Facts are undermined by fake facts and the crisis of knowledge. Institutions are undermined by distrust, attacked and destroyed eventually, to come back in fake versions. And fundamental rights are under pressure as well. To be sure, there are critical discussions of the meaning of fundamental rights, a necessity for constitutionalism to stay alive. But in addition, there are attacks, and an emphasis on dangerously limited versions of rights, which eventually destroy the very basis, i.e. constitutionalism.

On the side of necessary critique, a recent trend targets anthropocentrism. For very real reasons, there is a global search for a version of fundamental rights that allows us to live more sustainable, in that we include the earth, or nature, and the future, in our concepts. In the Paris Agreement, states embarked on a journey to use law. In Pakistan and Ireland, in Colombia and Germany, in the Netherlands and Ireland, courts have accepted fundamental rights claims to force states and corporations to respond to the climate crisis. The German Federal Constitutional court has held that there is an "intertemporal" dimension to liberty, and that our actions today need to be justifiable in light of the rights of others in the future. And there will be many questions to ask and answer. But these changes do not endanger fundamental rights, but call on us to learn, and eventually modify, to further justice.

Way beyond critique, there are also attacks on fundamental rights. For quite a while, those who oppose the very notion of justice as a guarantee of fundamental rights target the universality, and their undivided nature, which is in fact equality throughout. Then, states do not sign treaties to protect rights, as when the US does not submit itself to the International Criminal Court. Or states withdraw from ratified UN or European Council conventions, like Turkey from the Istanbul convention, and no disadvantage occurs. Or states refuse to follow courts they assigned power to, like the Polish Tribunal against the ECJ, or Turkey and Russia against the ECHR. Or states simply disregard the law entirely, as in the case of Russia invading Ukraine.

In addition, there are very complicated and thus challenging dynamics. I am particularly worried about the new emphasis on a very limited and absolute idea of liberty, or freedom. It is anchored in a dominant liberal tradition, as the primary right (a First Amendment) of individuals against the state. But it suffers from a limitation to the state, and a radicalization as absolute autonomy. Certainly, the focus on the state makes sense in "constitutional moments" (Ackerman) when dictators leave, and the state is itself the problem. In the future, states will be a problem if they

infringe on people's rights, but if they are democratic states, they may be more often part of the solution, while by now extremely powerful private and corporate actors might offer solutions, but for sure will pose problems as well. Also, to focus on autonomy as free self-determination is indeed precious, and to guarantee for that, legally guaranteed freedoms are indispensable. But throughout legal history, the paradigmatic subject who enjoys such liberty was a naturally free and independent man, which always made limited sense, with so many – women, the “underserving poor”, indigenous people, slaves - excluded from the start. Today and in the future, such an atomistic notion of individuals does not fit into a world in which we relate to and depend on each other, more than ever before. In addition, recent versions of liberty suffer from absolutism, in that they ignore the fundamental rights next to them. Again, there is a liberal tradition of “in dubio pro libertate”, a priority for freedom. But today, this is radicalized into demands to do as I prefer, no matter what. It is an egocentric notion of liberty, and it disregards the fundamental rights of equality and dignity guaranteed as well.

Next to the problematic notion of liberty, there is an ongoing trend to reduce equality to formalism. This is rooted in dominant legal traditions as well, where equality is the guarantee of rational distinctions, “*sum cuique*”. Yet as the Canadian Supreme Court prominently argued in 1989, this is a symmetrical and formalist logic that informed racism in the U.S. and the murder of Jews in Germany. And it is still alive, even energized by those who consider a claim for equality to be obsessed with identity, or foster censorship, or simply overused.

Finally, fundamental rights shall safeguard justice, with independent courts to eventually implement them, against abuse. But this has changed as well. Today, there are alarming instances of rights not directed against abuse, but used for abuse, themselves abusive. This happens when private or public actors launch “SLAPP suits”, strategic litigation against public participation. In South Africa, mining companies bring defamation suits against environmental activists and lawyers, to intimidate and eventually silence their critique. In Turkey, the President initiates or brings charges against academics, journalists, oppositional politicians and activists, to take away their jobs, send them to prison, and lose their civil rights. Abusive uses of rights also inform authoritarian legislation. In Russia, the government changes the law to protect marriage and the family, and allow for domestic violence. In many countries, these rights are invoked to discriminate against non-heteronormative families. Also, reproductive rights are, again, redefined as rights of the fetus, directed against the mother, so that her choice is not a right, but a violation of them.

The COVID controversies may once again illustrate this trend. Notably, when measures taken against the pandemic, this is celebrated as a “Freedom Day”, i.e. in Britain. In Ottawa, the city is blocked by a “Freedom Convoy”. In Germany, protesters claim their “freedom has never before been violated as much”, by, notably, temporary and comparatively lenient lock downs and obligations to be tested and wear masks. As mentioned, some protesters claim a “right to resistance”, to use violence in

their “fight”, against measures agreed on in a democracy. Here, liberty is deemed endangered, and liberty trumps all other concerns. “My right”, “my freedom”, “my risk” – a classic yet limited version of egocentric, not least masculinist autonomy, ignoring our entangled world, or outright abusive use of rights.

Future?

Now what is there to do? When, and because, facts, trust and rights are under pressure, sometimes under attack and in some instances already destroyed, the future of justice is at stake. There will not be one single day in which its fate is decided, and not one location, one case, one moment in time. These are incremental developments and scattered instances that eventually evolve into clustered realities. But the future of justice definitely needs our attention. And it needs us to raise our voice. Specifically, law as one guardian of justice must respond to the challenges out there.

Regarding facts, law has an important role to play. It must safeguard research and academic work to pursue the quest for truth, protect the media, and counter both censorship and manipulation. At stake are the acceptance of science and research as well as public discussions as sources of knowledge as such. Thus, legal actors have to make sure they do not fall for lies, in that they work with procedures to check what is fact. To return to the COVID controversies, courts must then hear all sides on a matter, and hold the exercise of power to a plausibility standard regarding the facts this is based on. This may require courts to find clear words on false facts and science, and contribute to a clarification on what we agree on what is reasonable and what not. For the future of justice, courts are knowledge actors as well.

Regarding trust, institutions that draft, pass and implement law must protect their standing and earn the trust they need. This is a self-critical call on courts as well. At stake is the reliability on independence and basic guarantees of fairness in legal systems. We need to counter the attacks on, namely, judicial independence. But inside, judges themselves must make sure people can still trust them. Ethics matter, as do rules, methods of interpretation matter, as does consistency, and language or “the message” matters a lot. Must courts modify their public relations? I think they do. The need for trust calls on courts to respond to people’s worries, intelligible beyond a circle of experts, in time, legally sound, and wisely.

Regarding fundamental rights, the future of justice depends on whether we are able to defend a “just” meaning, and prevent abuse. There is a choice out there, to abandon the “ideology of rights”, or its “idealism”, or to defend and upgrade fundamental rights in a meaningful way for all. To achieve the latter, we must clarify what we mean by liberty, equality, or rights as such, in the world we live in today. As one example, constitutional law has started to address the complicated task of the climate crisis. Here, fundamental rights must move beyond an anthropocentric idea, and our concept of liberty must take time and the future as well as dependency and interrelatedness into account. As another example, we need an adequate concept of equality. A formal notion does not allow us to address the challenges we face, including poverty, racism,

sexism, religious and ideological intolerance, all feeding polarization. And luckily, there are alternative concepts. Antiracist and feminist lawyers already understand equality in substantive terms, against disadvantages because of racism, sexism, ableism, ageism, etc. All in all, law, and courts, have to be rational and non-arbitrary, but in the future, this may require more realism than before.

To achieve justice also via law, we need what may be called a “holistic” understanding of rights. Then, liberty will not be an egocentric trump, but one corner of a triangle, with equality and dignity as its other cornerstones, to legally protect diversity in respect, against the inequalities that matter. Then, justice might be less of an idea and more of an attitude, less of an abstract individual claim and more concretely attentive, caring, friendly. This is a turn towards a revised concept of the common good. Imagine cohabitation in tender civility (Hark)! The COVID controversies illustrate the struggles. There and beyond, the future of justice will, at least, depend on our ability to understand, and defend, facts, trust, and rights.



Susanne Baer serves as Justice of the Federal Constitutional Court in Germany, elected by parliament in 2011 to the First Senate, for a 12 years term. She is the Professor of Public Law and Gender Studies at Humboldt University Berlin and a Lea Bates Global Law Professor at the University of Michigan Law School, and taught at CEU Budapest, in Austria, Switzerland and Canada. Her work is dedicated to a realistic, necessarily interdisciplinary understanding of legal practice (#rechtreal; *Rechtssoziologie*, 4th ed. 2020), to comparative fundamental rights (with Dorsen et.al., *Comparative Constitutionalism*, 4th ed. 2022; *Dignity, Liberty, Equality*, Toronto LJ 4 (2009) 417), and to critical, namely feminist, approaches to law. She has been active in movements against sexual harassment and domestic violence, founded the GenderCompetenceCentre to advise the government on gender mainstreaming 2003-2010, and co-drafted standards for equality in research for the German research foundation DFG. At Humboldt University, she served as Vice-President, Vice Dean and Director of Gender Studies, founded the Law and Society Institute Berlin and the Humboldt Law Clinic in Fundamental and Human Rights. She studied law and political science at FU Berlin, earned an LL.M. from Michigan, a Doctorate from Frankfurt/Main, and the Habilitation at HU Berlin.

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