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JEDEM DAS SEINE

“*Servari enim justitia,
nisi a forti homine, nisi
a sapiente, non potest.*“
Cicero¹

A question that has worried me for many years – perhaps simply part of the larger question of whether, after Auschwitz, one can still speak in good faith of a European culture – yet a question that every jurist must take to heart: is that old phrase *suum cuique*, which on festive occasions fills every jurist with sublime feelings, not forever compromised ever since it stood – albeit translated in German – on the gateway of Buchenwald concentration camp: *Jedem das Seine*? 1

Was this just one of the well-known cynicisms of the Nazis, such as the slogan *Arbeit macht frei* on the gateways of Auschwitz and Theresienstadt? Or is there more to it? Thus, it is the case, acknowledged by many a philosopher, that the modern concept of justice is a purely formal one – an empty logical formula – which means that *suum cuique* does not specify whether that which actually is attributed to somebody is good or bad.² If that is so, there is nothing wrong with *Jedem das Seine*: it simply means that the people inside the concentration camp got exactly what they deserved. 2

A member of the Jewish Defence League said about an Arab murdered in the United States: “I do not mourn him, because he got exactly what he deserved.” No doubt the Basque who blew up some Spanish people thought the same, as did the Spanish policeman who shot some Basque terrorists, or the Palestinian who blew up a group of Jews at their dinner, or the Israeli soldier who shot some Palestinians in their car, or the terrorists who blew up the twin towers in New York. *Et sic in infinitum.* 3

1 *De fin.* 5.23.66. I took the liberty to change “vir” into “homo”. After all, strength and wisdom are not exclusively male virtues.

2 E.g. G. del Vecchio, art. Giustizia, in: *Novissimo Digesto Italiano* (1968-1975), Tom. VII, 1114.

If the phrase is no longer on the gateway of a Nazi concentration camp, it is nonetheless 4
on every page of our daily newspapers, reporting the events of our terror-ridden society:
Jedem das Seine. Men and women, blacks and whites, rich and poor, Jews and arabs,
Irish and British: *Jedem das Seine*. The United States, the strongest nation in the world
and the leader of the “free West“ where the rule of law is supposed to prevail, intercepted
the plane of an ally and forced it to land. The hijackers hijacked and many applauded it,
some even said that their sense of justice was satisfied. The president of the United
States, they said, did not want justice, but simply revenge, just as used to happen in the
cowboy-pictures in which he acted before becoming president. Indeed the present
President seems no less obsessed by phantasies of cowboy justice: ‘We will hunt them
down.’ Even a license to kill is issued. Justice does not seem tot be more than tit for tat,
an eye for an eye.

But how could *suum cuique*, sublime device of justice, have developed into *Jedem das* 5
Seine, the motto of an extremely arbitrary and violent regime? Could this be a sign of the
decay of our culture, or could it be true that, given certain conditions, the second will
follow logically from the first? I am afraid that it is. Nowadays, when we speak about
justice we mainly think of equality as its defining characteristic; but, from an historical
point of view, it is quite paradoxical to connect *suum cuique* with the principle of
equality.

Since we must begin somewhere, we should start with Aristotle, since he has had a 6
determining influence on our theories of justice. Aristotle distinguished two kinds of
justice, which have traditionally been labelled as “distributive“ and “commutative“.³
Justice is proportion. Commutative justice is simple. It concerns the reciprocity of
contract (Aristotle also calls it synallagmatic) or the retribution of crime. Its aim is
settlement.

The theory of distributive justice is less straightforward. It is intended to explain the 7
unequal distribution of political power in an existing class society.⁴ It is evident that, in
this world, power, distinction, and wealth are not distributed equally. The existing
distribution may still be just, however, because it is based on distribution according to
merit (*kat’axian*). The *honoratiores* have more power and distinction because they – or
their parents – are more meritorious for the state. This distinction into two kinds of
justice has become part of European philosophy. It is found in countless treatises, from
the time of Thomas Aquinas⁵ to the present day.⁶

3 *Ethica nicomachaea*, book 5, cap. 2-4.

4 E. Barker, *Greek Political Theory*, London 1960, 13f.

5 *Summa theologiae*, 1a, 2ae. quaest. 21. art. 1.

6 e.g. P. Stein, J. Shand. *Legal Values in Western Society*, Edinburgh 1974, 60f.; R.W.M.Dias,
Jurisprudence. 3rd edn., London 1970, 163f., 183.

Now it is fairly certain that the term *suum cuique* originates in the theory of distributive justice; thus, it is not about equality, but about inequality. This is not directly apparent from the Corpus Juris Civilis, the work that has dominated continental legal thinking for many ages. In this connection, the best known definition is undoubtedly that of Ulpian, which is copied in Justinian's Institutes, and which has therefore been transmitted in two versions, that are not identical. Digest 1.1.10 pr. (Ulp. 1 reg.) reads:⁷
Justitia est constans et perpetua voluntas jus suum cuique tribuendi.

In Institutes 1.1.1 the text reads:⁸
Justitia est constans et perpetua voluntas jus suum cuique tribuens.

The difference is in the last word: should it be 'tribuendi' or 'tribuens'? The reading of the Institutes concurs with those found in the Greek text, so this may be the better one.⁹ The difference could seem futile to some, but it is not for philosophers, and over the ages much ink has been expended on it. The 'will that attributes' (*voluntas tribuens*) can be seen as an inclination inherent in human nature, whereas the 'will to attribute' (*voluntas tribuendi*) sounds more like a moral purpose that is not necessarily a given with human nature. Another question is connected to this: did Ulpian really here define human justice? A reason for doubt is that an unchanging and permanent will is something no human being can have; it is an attribute solely of God.¹⁰ This suggests that 'tribuens' is indeed the better reading and that the phrase *constans et perpetua voluntas* is intended to describe an innate inclination, some sort of social instinct.

Both texts cited speak of giving everybody his *right* (*jus suum cuique tribuere*); 'giving everybody his due' however, follows directly in the second sentence of Ulpian's text, D 1.1.10.1, a text cited as often as the earlier one:

Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.¹¹

This text does not talk of attributing *according to merit*; that idea pops up in other texts, however, although, according to present-day distinctions, these are not strictly legal. Cicero wrote:

Justitia est habitus animi (there is the instinct!), communi utilitate conservata, suum cuique tribuens dignitatem.¹²

7 'Justice is the unchangeable and continuous inclination to attribute his right to everybody.'

8 'Justice is the unchangeable and continuous inclination that attributes his right to everybody.'

9 See Mommsen, *editio major*, 1. 2:33.

10 Gloss 'justitia' ad D 1.1.10 pr.; Thomas, *ST* 2a 2ae, quaest. 58, art. 1, num. 3.

11 'The commands of the law are these: to live honestly, not to hurt your fellow creature, to give everybody his due.'

12 'Justice is a condition of the soul which, while preserving common utility, gives everybody his dignity.' In this text we find, apart from *dignitas* (obviously a translation of aristotelian *axia*), another element: justice gives everybody his dignity *with due regard for the common good*. The same element is found in another definition by Cicero (*de fin.* 5.23.65): ...qua animi affectio, suum cuique

The auctor ad Herennium was even more outspoken:

Justitia est aequitas, ius unicuique tribuens pro dignitate cujusque.¹³

That *suum cuique tribuere* concerns distributive justice also appears from other texts that use the concept in relation with the distribution of property, the very foundation of the distinction between rich and poor in society.¹⁴ We may also note that Cicero also used the verb ‘distribuere’¹⁵, and in another text explicitly referred to a Greek term for the origin of *suum cuique tribuere*.¹⁶

Aristotle employed an example from arithmetic to explain the difference between commutative and distributive justice. Justice is about proportion: commutative is an arithmetical proportion, distributive a geometrical.¹⁷ What he meant by that will shortly be explained. It is understandable that this example had great appeal in the seventeenth century, when the *mos geometricus* became the basis of every science. Grotius, the father of modern natural law, cited Aristotle,¹⁸ and again and again we find the same example given by later jurists, such as with Voet¹⁹ and Noodt.²⁰ Commutative justice is comparable to the simple relation between those numbers between which there are equal intervals: 2-4-6. Distributive justice, the geometrical relationship, does not concern equality, but proportion. It includes, for example, four numbers that are related proportionally two by two: 2:4 ‘ 3:6. One could argue that here began the formalization of the concept of justice; but it is doubtful if Grotius himself intended that.²¹

In the seventeenth century, it was in fact already often argued that the comparison with arithmetic did not hold good. There are many cases in the field of contract and criminal law – the area of commutative justice – where the geometrical proportion reigned. Noodt for instance remarked that in criminal law nobles were often punished less severely than commoners.²² The commoner taking bribes is dismissed, fined and imprisoned, the prince who did the same was only forbidden to wear his general’s uniform.

tribuens, atque hanc, quam dico, societatem conjunctionis humanae munifice et aequè tuens, justitia dicitur. The meaning of this element cannot be discussed here.

13 ‘Justice is the equity which gives everyone his right according to his dignity.’

14 *De off.* 1.5.21: ‘...ex quo, quia suum cuique fit, quae natura fuerant communia...’ See also Gellius, *Noct. Att.* 13.24.

15 *De nat. deor.* 3. 15.38: ‘...justitia, quae suum cuique distribuit...’.

16 *De leg.* 1.6.19: ‘... eamque rem illi Graeco putant nomine, a suum cuique tribuendo, appellatam...’.

17 *Eth. nic.* V.3.

18 *De jure belli ac pacis*, 1.1.8.2.

19 *Commentarius ad Pandectas* 1.1.9.

20 *Commentarius ad Pandectas, Opera omnia* II, p. 2.

21 Het still does maintain the traditional distinction between general and particular justice and stresses the relationship between distributive justice and other virtues.

22 *Opera omnia* II. p. 3. Noodt refers to D 48.8.16; D 48.8.3.5; D 47.17.1; D 47.18.1.1 and 2, and in

The principle of distributive justice was confirmed by Christ's own word: "Render unto Caesar what is due to Caesar".²³ It suited perfectly the class society of the seventeenth century and justified the constitution of feudal society. A man did not have political rights as an individual, but as a member of his class. Everybody had what was fitting for him: the nobility its share in political power, the church its jurisdiction over the soul, the citizen his freedom, the poor man his alms. 13

There were, however, some theoretical problems in reconciling the metaphysical basis of this world view with the newly emerging theory of natural law. According to the traditional medieval theory of natural law the distribution of property and slavery – outstanding examples of inequality, of *suum cuique* – were not instituted by nature. By nature, all property was common and all men were free. But I will put that discussion aside here. 14

Spinoza undoubtedly provided the most extreme formulation of the relation between *suum cuique* and natural law. According to him, natural law was only the law of nature that determined the conditions of existence for every creature. Thus the end of fish was to swim in the water, and the end of big fish to eat the small ones.²⁴ Thus, the *ius suum* of small fish was to be eaten. Every creature was entitled to realize that of which it was capable of.²⁵ Right was power. It was an universal and fundamental law that everybody only pursued what he regarded to be in his own interest and was only prepared to give this up for hope of greater gain or fear of greater loss. From this it followed that nobody would enter an agreement without the aim of cheating, unless he feared greater mischief or hoped for greater gain.²⁶ Should a robber force me to promise something, I might do that with the aim of cheating him, and could break my promise as soon as I had the opportunity to do so.²⁷ Any contract could only be valid as long as it was profitable; its validity ceased when its utility ended. Therefore, it was idiotic to demand eternal faith, unless one ensured at the same time that a breach of contract caused more mischief than profit for the other party. That held true in particular for the institutions of the state. It is no surprise that Spinoza's doctrine was strongly contested by jurists, such as Ulrik Huber;²⁸ but it can hardly be denied that it gave a realistic picture of the politics of his day – and indeed of ours. It showed how a formal *suum cuique*, without illusions, obeyed existing power relations and fitted seamlessly with *raison d'état*. 15

general to D 48.19.16.3.

23 *Matth.* 22:21.

24 Spinoza, *Tractatus theologico-politicus*, ed. G. Gawlick and F. Niewöhner, Darmstadt 1979, 468 (175 of the original edition).

25 ..jus naturale sola potentia uniuscujusque determinari..., Spinoza (note 24), 476 (179).

26 Spinoza (note 24), 472 (178).

27 Spinoza (note 24), 474 (178).

28 See T. Veen, *Recht en nut, studiën over en naar aanleiding van Ulrik Huber (1636-1694)*, Zwolle

It was still clear in the eighteenth century that *suum cuique* was not the formula of equality but instead of (justifiable) inequality was. On 17 January 1701, the day before he was crowned king in Prussia, Frederick I, elector of Brandenburg, instituted the order of the Black Eagle, which only admitted nobles as members and had *suum cuique* as its motto. The same motto was found in the arms of many elite-regiments of the Prussian army that his son, the soldier-king Frederick B William I, made into a formidable power, and that played a prominent role in European power politics, until, in 1806, Prussia came up against Napoleon, a bigger fish. Big fish eat the small ones and the spoils are for the victor: *Jedem das Seine*. How many steps are we still here removed from the gateway of Buchenwald, from an absolute to a totalitarian state, from specious *raison d'état* to plain cynicism? 16

This is not the place to reconstruct these steps in detail. Our question only was: what became of *suum cuique*? Here I should like to stress one more factor that played a role in the growing formalization of justice: the isolation of law, which made law politically blind just as much as it made politics lawless. 17

In the eighteenth century, progressive civil society became increasingly impatient with the incurable legal uncertainty that the civil law seemed to imply. Its foundation, the Corpus Juris Civilis, was an ancient lawbook, transmitted through a disputed manuscript tradition, that contained many provisions that evidently could no longer apply, and which was often obscure or open to different interpretations. Because obedience to the law was the guarantee of civil liberty, it was necessary to know precisely what was the law. One fundamental axiom was adopted: a rule was valid or it was not, there was no third possibility. In this sense, attempts began to distinguish much more precisely between legal and non-legal precepts, between rules and maxims, principles, advice, admonitions. Grotius had already argued that, for the construction of an axiomatic deductive system of natural law, it was necessary to distinguish law from politics.²⁹ It took more time to separate law and morals, and in fact the separation has never been completed in a satisfactory way. 18

In the heyday of legal positivism the isolation of law was also projected back in history, as is inevitable. According to Schulz, it was the Romans – who else – who succeeded for the first time in isolating law from all that is not law.³⁰ In retrospect, this seems an absurd thesis, which can only be maintained if one bravely decides to ignore scores of texts from the Corpus Juris Civilis itself as well as the work of many Roman authors. The last was 19

1976, 202f. and passim.

29 *De jure belli ac pacis*, Prolegomena, par. 57; on this Veen, *op.cit.* (note 27), 29f.

30 F. Schulz, *Principles of Roman Law*, Oxford, 1936, 19f.

easy enough, however, because all those writers were non-jurists. The thesis of isolation itself decided which historical sources were relevant for the study of Roman law and thus became almost a self-fulfilling prophecy.

The background of Schulz' argument became clear when he cited Jhering: the Roman spirit of freedom demanded restraint in the creation and recognition of legal principles.³¹ What Schulz, on the authority of Jhering, presented as history was nothing else than nineteenth century bourgeois ideology (which, by the way, had already been formulated by Montesquieu in the middle of the eighteenth century): civil liberty could only exist when state and civil society were strictly separated and the former intervened as little as possible in the latter. In this ideology the jurist had his own essential place: he served the state; but, unlike any other state servant, he was the guarantor of freedom, the border guard between state and civil society. 20

As the antithesis to the Roman principle of isolation and restraint, Schulz pointed to the codifications of the era of the Enlightenment, some of which which seemed to have intended to rule life in the most minute detail. An example was the *Preussische Allgemeine Landrecht* of 1794 which contained provisions concerning intercourse and breast-feeding, and which, among other things, forbade mothers to let their children below two years sleep with them in their own bed.³² Now, it cannot be denied that enlightened absolutists had a fairly broad idea about the role of the lawgiver as fatherly educator of their people. But by presenting the antithesis in this way Schulz actually produced a caricature of history. If the *Preussische Allgemeine Landrecht* was extreme, it was not because it brought something new, but because it tried to realize the age-old aspirations of the law with the perfected apparatus of the absolutist state. All those rules about intercourse came from a branch of medieval learned law, that is, canon law. The prohibition of letting small children sleep in one's own bed came from the same source.³³ The *Landrecht* did no more than codify long established doctrines. 21

Ancient Roman law cannot have known a sharp division between legal rules and everything else, if only because it did not know the underlying axiom that a rule was valid or not. Schulz himself acknowledged, by the way, that the Romans in separating law from non-law sometimes proceeded arbitrarily.³⁴ In a casuistic system such as that of the Romans a sharp division between positive law and principles, guidelines and recommendations was hardly feasible.³⁵ The glossators, those excellent scholars of the *Corpus Juris Civilis*, did not fail to notice this. When they reached the somewhat 22

31 Schulz (Note 31) 21.

32 Schulz (Note 31) 22.

33 Decretum Grat. C. 2 q. 5 c. 20.

34 Schulz (Note 31) 21.

35 F. Horak. *Rationes decidendi*, Aalen, 1969, 31f.

positivistic sounding statement of Modestinus in D 1.7.3, namely that it is the power of the law to order, to forbid, to admit or to punish,³⁶ they remarked, with references of course, that the law had a fifth task, that is, to give advice.³⁷ Among the examples given was the well-known advice of Gaius in D.6.1.24: ‘Someone who intends to claim a thing, must consider whether through some interdict he can obtain possession of the thing, because it is much easier to possess yourself and force your opponent to take the burden of proof, than to claim from someone who possesses.’ Even the emperor himself gave advice: ‘Take legal action against Geminianus...’³⁸

The lack of a strict separation between legal and non-legal rules, between law and morals, between rule and advice is characteristic of the whole history of the *ius commune* up to the nineteenth century. The *Preussische Allgemeine Landrecht* is to be considered rather more as the swan song of that learned tradition than as a new beginning. Which does not mean, of course, that, in that tradition, one could not tell the difference between those things. Distinguishing is not the same as separating. 23

We may draw the same conclusion when we look at the history of the concept of justice. 24 Although the distinction between justice as a general social virtue, encompassing all other virtues, and specifically legal justice is part of the lasting legacy of Greek philosophy, a strict separation of both was unthinkable, both in ancient Roman law as well as in the later learned law. Here the view that Cicero set out in the book from which I took the motto of this essay prevailed: justice is not a virtue which can be exercised in isolation from other virtues.

One cannot serve justice when one is not strong and wise. One has to be wise enough, for instance, to keep in check the desire for revenge. It is in this sense we must read, I believe, Ulpian’s famous words about the three commandments of the law (D 1.1.10.1). According to Villey, who mainly follows Schulz, *suum cuique tribuere* by itself sufficed to define justice as purpose of the law; the two other commandments were no more than moralizing Stoic trivialities. But that is not true. It is necessary to take the three commandments together if we want to determine the full range of just law. Here again the words of Celsus hold good: ‘It is tyrannical to judge or advise on the basis of one arbitrary part of the law without looking at the whole of it.’³⁹ When the *suum cuique tribuere* was isolated from the other two commandments, the way was laid open to a gateway on which *Jedem das Seine* was written. That gateway was not closed for good at the end of the second world war. 25

36 (Mod. 1 reg.) ‘Legis virtus haec est imperare vetare permittere punire.’

37 Gloss ‘legis virtus’ a.h.l.; cited are D 5.2.1; D 6.1.24; C 2.4.3.

38 C 2.4.3 with the gloss.

39 D 1.3.24 (Cels. 14 dig.): ‘Incivile est nisi tota lege perspecta una aliqua particula ejus proposita iudicare vel respondere.’