JUSTICE
A MONEY AFFAIR

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Images: Ashkan Honarvar, Rodeo

It is astonishing how easily the masses can be deceived. Anything can be sold by well conceived marketing. And the intellectual elites are as gullible as the illiterate folk when the sales pitch is adapted to the pretentiousness of such an audience. From time immemorial Justice has always been a market where ideas of equality are hyped to deliver inequity.

Modern constitutions are no exception. Imagine that the Founding Fathers had believed, rightly or wrongly, that a special class of people, the well-off citizens for instance, deserved to be subject to more lenient judicial rules. It would have been very simple to rule this difference in the Constitution or in its Amendments, but such a forthright statement would have been unsellable. To be appealing, such a questionable concept must be cunningly constructed in such a way that it appears to enhance the equality of rights, not to discriminate against anybody.

This is easily done by hiding the discrimination under the positive stance of a Bill of Rights: "(Any person) shall have the right to...equal protection of the laws…..(and) the right… to have the Assistance of Counsel for his defense…..". Who could object, what could be wrong with such generous resolution? As always, the devil is in the details, which in this case take the shape of an complex labyrinth of laws, and a judiciary, that, to be safely traversed, need skilled lawyers whose talent comes at a price. It is hard to challenge the fact that the best paid counsel provide the best success rate; it would be a weird violation of the market laws if it were otherwise. But, if equal protection under the law has a price tag, who are those more equal than others?

En passant, it is puzzling to observe how the sharp mind of Alan Dershowitz, while recognizing that this disparity is not fair, cannot free himself from the bonds of his trade and refuses to draw the obvious conclusion. In many occasions, he has defended the status quo, venturing, with a tad of chutzpah, into the illogical argument that fairness should be achieved not by lowering the standard of defense of the rich, but rather by increasing that of the indigent. Clearly, he misses the point that in this context the issue at stake is not the quality of justice, but its equality. Which is surprising for a lawyer, and Harward Professor of Law, well aware that the complexity, bureaucracy and intricacy of the judiciary system originate from the obsession for equality. If the legal disparity – between the rich and the poor, the South and the North, the past and the future, one judge and another – was not be a problem, every trial could be much simpler and faster.

> **"… today's Justice is definitely permeated with money."**

Maybe, masterminding the protection of the affluent was not the real intent of the Founding Fathers or, at least, not the only one, but today's Justice is definitely permeated with money. And, if a good defense team can still serve the affluent with impunity, today the lottery of justice has become open to other kind of rewards extending the participation to a more democratic attendance. Even the needy, or the cunningly naive, can try their luck betting on the capricious nature of the judiciary.

For instance, as few limits are posed to the claims of ignorance of the risks that living in the world implies, there is ample room to play the role of the victim. Then, with the help of the strict liability doctrine, the support of a well conceived media campaign, a carefully selected target and some good luck, lawyers may win hefty cash prizes for themselves and their customers – regardless of whether the rulings hurt millions and enrich only a few. An often cited example is what happened, in the Eighties, when the US General Aviation was decimated by escalating insurance fees as a result of staggering costs of litigation on design defects of obsolete planes, decades

old. Most of these claims lacked any merit but they were expensive to defend. Especially because new trends in the courts endorsed an extensive interpretation of the Strict Product Liability, thus opening up the road to any kind of pretext to blame the manufacturers. This is an extreme case – mitigated in 1994 by an Act designed to save what was left of this glorious industry.

Usually the industry survives, because the costs of the insurance fees can be passed to the buyer, however, contrary to what he and you may think, the buyer doesn't get this insurance with the product. He rather buys a ticket for the lottery of product liability. A lottery where blindfolded courts draw from a basket of contradictory criteria the ones to be used for their decisions. A lottery managed by lawyers that make money whatever the outcome of these litigations, and backed by insurance companies that profit from an expansion of their business. It is true that the pressure to extend the scope of strict liability, and the consequent upsurge of claims, stemmed from the legitimate need to mitigate the reckless pursuit of profit of corporations used to taking advantage of a consumeristic society. The paradoxical outcome, though, has been that these good intentions have soon been corrupted by the system into a greedy frenzy of legal opportunities that have spread far beyond any legitimate use. Especially since lawyers have realized that life is dangerous and eventually ends in death, thus offering a limitless growth potential for the business of medical litigation. But the social cost of the game of justice is huge in both direct legal fees and indirect costs related to the attitudes brought by the fear of unpredictable massive indemnifications, of which the abuse of medical malpractice claims is another textbook example; the waste induced by the consequential recourse to the legal strategies of defensive medicine not only leads to useless, expensive and invasive procedures, but also includes the avoidance of valuable, but risky, therapeutic measures.

The hypertrophic growth and economic relevance of the legal business parallels that of the financial activities, both key elements of the disease of affluence that is plaguing the Western democracies and contributing to their decline. Considerable resources are diverted from the concreteness of productive activities to the realm of bloodsucking parasitical business, but what are the benefits of this hidden tax? Of course there is a good reason d'être for a legal system, as there is for the floor of a stock exchange. Yet, long ago, these institutions have lost sight of the intended purpose for their existence because the human beings that animate their bodies are often possessed by more personal inclinations: money being the weakness of lawyers, the lust for power and hubris the failing of judges and prosecutors. But the injustice of justice has many accomplices, the first of which is the adversary system so prized in common law countries and now, regrettably, gaining ground in other jurisdictions, often as a contamination of the inquisitorial method. It is a shame that the libertarians have not been able to pursue their noble cause going beyond a system conceived many centuries ago, in a cultural and social context totally different from our reality. Possibly unfair even then, today the adversary system is conceptually flawed and has little to do with justice, at least in the sense of assuring the fair and equitable social order that we expect from democracy.

It is a contradictory system that, while demanding the unattainable standard of judgment beyond any reasonable doubt, reduces the trial to a competition between two parties none of whom is bound to any standard of truth or justice. It is a game of skills and power, a boxing match between two fighters – the prosecution and the defense counsel – that have the only constraint of playing according to rules whose compliance is checked by a referee – the judge. Eventually, a jury, or the judge itself, decides the winner on the basis of the exchanged punches, occasionally certifying a true knockout. This is the trial, but this is not justice. To assume that from pursuing two wrongs can emerge a right has a very weak logical substance. Unless the truth stands out very obviously, the most likely event is that the wrong supported by the wiliest party and greater means will prevail, which is often the case given the rules of the game. In defense of these rules it is customary to assert that they represent the best compromise, distilled over centuries of legal wisdom, for the resolution of a dispute.

Maybe, but let's have a look at how the game is played. Among other vagaries, the defense lawyer has the ethical duty to prevent the discovery, or use, of any truth that may hurt his client; and similarly devious is the game of the prosecutor. Key evidence can be ignored in force of the Exclusionary rule that protects the defendant's rights, while the Double Jeopardy Clause assures that, once acquitted, a defendant cannot be retried irrespective of any evidence later discovered. But, if these can be reassuring news if you are guilty, the widespread practice of coercive plea bargaining will make you scared. While jury nullification, that is a jury decision that violates the laws as spelled by the instructions of the judge, cannot be practically prevented and can work for you or against you.

"... we are such stuff as judgments are made on ..."

But even when no tort, violation or crime is involved you can be touched by the whimsical arm of the law. Any creative mind could be caught in the legalities of the patent saga, and its mischievous patent trolls, because any trivial idea has a chance to come first in the race to the flag of novelty.

Although some of these remarks may not apply to some judiciary systems, Western democracies are similar to each other and continuously converging. Moreover, in every legal system the verbose and invasive nature of the law has produced a massive body of documents where every detail, and even a single court decision, can generate papers or entire books. As endless are the discussions on the cost-benefit of tort, civil rights and other law related topics. But this article, whose scope dared to touch a few aspects of civil and criminal law, has instead the purpose of directing the attention towards the basics of the legal system, not the details. And I believe that the goals a legal system shall serve, and the principles it should follow, should be reassessed under the light of our times and without the conditioning of paradigms that derive their authority from bygone traditions, vested interests and, above all, accepted fallacies whose origin has been long forgotten.

To restore the lost faith in a justice, reduced to no more than a myth corrupted by money, it is necessary to realize that a fair social order, as anything rooted in the materiality of life, is a very practical endeavor that needs something very different from the wordy atmosphere of trials. Neither should it be forgotten that trials are not a business between the law and the defendant, but a zero sum game where often to acquit a criminal is tantamount to sentence the victim; the acquittal of DSK, that made of Mrs. Diallo a perpetrator, being a case in point. And last but not least, as we are such stuff as judgments are made on, a wise human mind, not an inanimate body of laws, should rule our fate.