Prolegomena to a Theory of Judicial Power: The concept of judicial independence in Theory and History

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Abstract
This paper discusses the exercise of judicial power, analyzing it from a theoretical and historical point of view. It focuses on the independence and impartiality of this power in making decisions, which is different from the other roles played by the State that also involve decision-making activities. It is necessary to understand judicial power as independent in the sense that independence entails impartiality, so that the judge is not subordinated to external powers in a case and the decision does not contain personal elements of the judge.

Key words: Judicial power, independence, impartiality.

Resumo
Este texto trata do Poder Judiciário, analisando-o teórica e historicamente. Ele foca a independência e a imparcialidade deste Poder de tomar decisões, que é diferente das outras funções exercidas pelo Estado que também implicam tomada de decisões. É importante entender o Poder Judiciário como independente no sentido de esta independência poder trazer consigo a imparcialidade; assim, o juiz não estaría subordinado a poderes externos em um processo, ao mesmo tempo em que a decisão não conteria elementos pessoais do juiz.

Palavras-chave: Poder Judiciário, independência, imparcialidade.
Exercising judicial power, as distinct from other State functions, has been justified in different ways. All of them are somehow connected with the impartiality/independence or competence/expertise of the judicial decision-makers. This article is a first attempt to classify these discourses. Two Erkenntnisinteressen motivate the research: on the one hand, the attempt to rewrite the doctrine of the constitutional State distinguishing types of organs and their forms of legitimacy; on the other, the will to understand better what is now called the global expansion of judicial power.3

The focus here is not going to be on an analytical or normative doctrine of the “independence of judicial power” inside the modern political and constitutional theory, but more on what can be called the (self-) justification of the judicial function as distinct from other governmental decision-making activities — some would say its “legitimacy”.4

Independence, what?

To begin with, it may be useful to bear in mind something we may tend nowadays to forget. For a long time, and in societies as different as the Athenian democracy (Hansen, 1991, notably ch. 8 about the dikastereion), the Ch’ing Chinese Empire (1644-1911) (Sprenkel, 1962a, 1962b; Bodde and Morris, 1967a, 1967b; Chü, 1962), or the African cultures based on customary law (Epstein, 1954; Gluckman, 1969), the function of adjudication was not attributed to a distinct and “professional” judicial body. It was exercised directly by the political authority, as in Athens, or indirectly by State officials, such as mandarins in China. It was towards the end of the Roman Empire (certainly not during the Roman Republic) (Girard, 1901; Jolowicz, 1954) that the judicial function started to be exercised by specialized (not independent) officials. And it was only in England between the 16th and 17th centuries, to my knowledge, that members of courts of common law put forward the idea of independence vis-à-vis the King’s prerogatives. This is a point which will be addressed later.

Here shall be suggested a typology of recurrent discourses that have been used to justify the independence/distinctiveness of the judicial power — vis-à-vis the other functions of the State (legislative and executive) or, more simply, vis-à-vis the actor or the agency entitled to exercise political authority (sovereignty, as political and legal theorists started to say after Bodin and Hobbes); but also, and more basically, independence as impartiality, which justifies the exercise of judicial power; without taking into consideration the agency exercising it.

It may be worth saying a few words about the concept of “independence”, traditionally used in two different ways in connection with judicial function/power. By speaking of independence, in this context, we may design a similar structure of relation betwee-

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3 Tate and Vallinder (1995). John Ferejohn rightly suggested that it is important to distinguish between the expansion of power of judges, meaning that they exercise greater and greater percentages of executive or legislative power, and the expansion of the jurisdiction of courts as such. Torbjorn Vallinder, in his contribution to the quoted book, speaks of “expansion of the province (titicis mine) of the courts and judges at the expense of politicians and/ or administrators”, a phenomenon described as “judicialization of politics”. In the last few years I explored a special dimension of this expansion: the spreading of constitutional adjudication in the contemporary world, mostly in the framework of the post-authoritarian states: Ferejohn and Pasquino (2002, p. 21-36, 2003; s.d.).

4 The last book on the topic is, to my knowledge, Russell and O’Brien (2001).

5 It should be recalled that Aristotle was probably the first to single out a judicial function, long before the modern theory of the separation of powers, and by the way in a different perspective of developing conceptual tools, in order to provide a comparative analysis of different forms of government (politeia). In his Politics (IV.11 = 1297b3ff) he distinguished three elements (mónia, more exactly “constituent parts”) of any politeia: to bouleúmenon, to peri tas archeas, to dikazon (or dikastikón). The latter is normally translated as “judiciary” (Rackham) or “judicial element” (Barker) (1954, according to Liddell-Scott, means to give a judgement, to decide between persons and judge their cause). At 1306b13ff, he qualifies the dikastikón as the system of law courts (dikasteria).
en types of actors we have to distinguish. On one hand, we may want to stress that in the conflict resolu-
tion between two parties, we/they want to rely on a neutral, unbiased third party to settle the conflict. A
case in point, among many others, which clarifies this idea, is the Roman *iudex* (Broggini, 1957). The word
designated a sort of juror or arbiter chosen, with the 
consent of the two parties of the trial, from a list (album 
*judicum*) that the magistrate who prepares the case
(the *praetor*) presented to the parties. The *iudex*, who
is neither a magistrate nor a specialist of the law, will
render the judgment (*sententia*) that ends the trial. The
independence (neutrality) of the third party in charge
of the adjudication is a possible (and perhaps neces-
sary) condition for moving from the dyadic to the triadic
structure of conflict resolution.

On the other hand, we have spoken for some
centuries of an independent judge/judiciary in a slightly
different sense. What we have in mind most of the
time nowadays is not simply or essentially the neu-
trality vis-à-vis the two parties of a trial, but the non-
dependence on the other branches of political author-
ity in a constitutional system based on the separation
of powers. This seems important for two reasons. The
first was argued by Montesquieu in his criticism of the
despotism. To avoid the dangers threatening
individual liberty that stem from the connection be-
tween legislative and judiciary, he wanted, as we know,
to separate the “puissance de juger” from the other Sta-
te functions. The second reason is connected to the
American tradition of judicial review of statutes and
with the French development of “administrative” law
in the 19th century (Cassese, 2000). In the latter case,
judiciary independence seems to be welcome when the
conflicts are between branches of the national go-

ternment or quasi-sovereign entities (states, Länder, 
etc. – what Germans call Organstreit and the Italians
*confitti di competenza*), as well as in cases of conflicts
between citizens and the government. It is exactly in
this connection that Germans started to use the word
*Rechtsstaat*: a legal system where citizens can sue the
government and hope to have a fair conflict resolution
by an “independent” judge. Indeed, we have to notice
that we find once again in this last case the first form
of independence: the possibility for the judge to be
unbiased vis-à-vis the two parties of the trial.

To avoid misunderstandings, it must be stressed
that the type of analysis engaged in from now on is di-
fferent from an historical-sociological project. It is not
asked here why a more or less independent judicial po-
wer was established in modern society; in that perspec-
tive something like a Pontius Pilate theory of “washing
the hands” can make sense. The question to be discus-
sed is what type of *ideology* social actors produced in
order to find support for some (thin or thick) version
of a independent/distinct judicial power.

Moving from such a question, the triadic typo-
logy that is proposed for consideration goes under
the names of three rightly “celebrated” authors: Montes-
quieu, Edward Coke and Thomas Hobbes.

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1 In other words, in speaking of independence we must ask: independent from what/whom?
2 On this conceptual distinction, see Aubert (1983, p. 58-76).
3 It is clear that in the international arena the equivalent of these branches can be either States or any other biased or partisan international actor.
4 There is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject
would be exposed to arbitrary control; for the judge would be the legislator (“Montesquieu, s.d., p. 99). Elsewhere (Pasquino, 1994), the author offered the following
comment on this doctrine: “A judiciary power, separated from the legislative, in an institutional system which distinguishes the organs exercising these two functions
and not only the functions themselves, is, in its autonomy, according to Montesquieu’s literal phrasing, a null power. The judges act as nothing more than the ‘bouche de
la loi’. They should also confine themselves to applying a general and abstract norm to concrete cases without any possibility of modifying, in particular instances, the
set definition of crimes and punishment. That definition is in the hand of the legislator, who must enact laws without considering any influence they might exert when
applied to this or that concrete case. Characterized in this way, the judiciary power also appears as a sort of neutral power which protects citizens from the legislative
while depriving both legislators and judges of the possibility of modifying the law in response to concrete cases. The judges become accordingly the guarantee of citi-
zens’ equality before the law. However, Montesquieu was perfectly aware that the person who exercises judicial power is the one who owns the most worrying power of
all. In daily life it is not the legislator who renders judgments or passes sentences, but the judge. Now, the separation of powers guarantees that the judge will pass
judgment only on the basis of a norm of which he is not the author, but simply the material executor. The judge protects the citizen from caprices and the arbitrary
will of the legislator, just as the existence of the law protects the accused from the caprices and arbitrary will of the judge. All that is the substance of the principle
of the judicial culture called the independence of the judiciary. If this independence is threatened, there is no longer any protection for citizens confronting the possibly
arbitrary will of the legislator. The Rechtsicherheit would disappear if the judge could pass his judgment without being bound by the existence and the content of a
law. Finally, the essential and unavoidable core of this version of the separation of powers lies in the principle of a strict distinction between those who enact the law
and those who pass judgments.” This commentary to Montesquieu’s text was written without awareness of a problem that limits the dependence of the judge on the law
– the other side of his independence from the legislator: As Gustavo Zagrebelsky has shown in a recent text, Studi in onore di Livio Paladin (unpublished), the judge
sometimes has the possibility to define the legal character of a fact. A killed B. This is not yet a legal fact if the judge does not state that the action is murder or was
married in self-defense. The text by Zagrebelsky illustrates the important implications of such philosophical platitude.
5 On these questions, see the important article by Eckhoff (1965, p. 11-48).
6 This is the idea that the sovereign delegated judicial power to a specialized organ to avoid paying the costs of exercising directly a repressive and unpopular function.
This theory was put forward by Savigny (s.d., p. 286-287) at the beginning of the 19th century, concerning the distinction in Rome during the Republic between the
prae
tor and the judex. Versus Girard (1901, p. 79): “C’est trop peu dire que de traiter cette suppression de grauité”.

PASQUALE PASQUINO
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Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD), 2(2): 193-200

195
The pouvoir nul. The “zero” degree of power

The ideology of the French Revolution, which has long been very influential in the European continent, proposed a special interpretation of Montesquieu's formula according to which the judiciary is a “null power”. To summarize briefly, the idea is that the legitimacy and the justification of an independent judiciary originates from the paradoxical circumstance of its lack of power! In fact, the exact meaning of the expression “pouvoir nul” in the Esprit des Lois XI.6 was that the judicial power had to be exercised (or more precisely was exercised in England, according to Montesquieu) by popular juries, and not by professional judges. The point here is not to re-examine the historical truth of what Montesquieu did really say. It is a destiny common to many great thinkers that they have been misunderstood and become famous and influential through misunderstandings. It suffices simply to draw attention to the fact that the French Revolution and a large part of the continental legal culture introduced both professional, bureaucratic judges and the fiction of a null power. Michel Troper goes even further, writing that “le système juridique français, parce que il est fondé depuis la Révolution sur la primauté de la loi, ne saurait admettre l'existence d'un pouvoir judiciaire.” Cazalès, an ultra-conservative and memonarchist member of the first French National Assembly, spelled out the same point: “le jugement est l'acte matériel de application de la loi” (Royer, 1996, p. 263). What does that mean?

The judge produces decisions concerning the liberty (and sometimes unfortunately the life) of citizens by a judgment, a sentence. But what is a sentence? The French Revolution, Cazalès, Condorcet and Kant (names which are not normally associated!) claim that the sentence is simply the conclusion of a syllogism. Kant, in the Metaphysische Anfangsgründe der Rechtslehre (1797), paragraph 45, writes:

Every state contains three powers, i.e. the universally united will is made up of three separate persons (trias politica). These are the ruling power (or sovereignty) in the person of the legislator, the executive power in the person of the individual who governs in accordance with the law, and the judicial power (which allots to everyone what is his by law) in the person of the judge (potestas legislatoria, rectoria et iudiciaria). [...] They can be likened to the three propositions in a practical operation of reason [syllogism]: the major premise, which contains the law of the sovereign will, the minor premise, which contains the command to act in accordance with the law (i.e. the principle of subsumption under the general will), and the conclusion, which contains the legal decision (the sentence) as to the rights and wrongs of each particular case.

We know that this doctrine of the practical syllogism, applied to the judicial power, has been denounced as fiction for a long time. It is less well known, parenthetically, that Carl Schmitt published a radical criticism of the same doctrine in 1912, in his first book Gesetz und Urteil, the starting point of his so-called “Decisionismus”. Nonetheless, that fiction produced two practical effects. This is, by the way, a good reason to take it into account. On the one hand, it justified the absence of responsibility of the judge. An automaton that does not exercise any will cannot and does not need to be accountable, notably since there is always a superior court (the Cour de cassation) checking the logical deduction of the judge. On the other side, the same “fiction” justified the constitutional subordination of the judiciary to its two more important brothers: the legislative and
the executive powers. As Adrien Duport said in the debate on the organization of the judiciary in the Constituent Assembly: “il n'y a réellement de pouvoir dans l'ordre judiciaire que le pouvoir exécutif [...]
" (Royer, 1996, p. 263).

To summarize that point, the doctrine of the independence, subordinate judiciary asserts that where there is no will, there is no responsibility, since responsibility, accountability and control imply the exercise of some decision, volition or discretion that by this ideology are denied to judges and judicial function. So if it is accepted that the judge does not do anything else than applying/enforcing the law, then there will be no specific problem of legitimacy for the judicial authority! This must be obeyed because the judge is just the mouth of the law, applying the general will of the people to a concrete case. To speak like Rousseau, in obeying the judge, we just obey ourselves (or the elected legislator) and remain perfectly free because no heteronomous will is imposed on us.

A special knowledge. Edward Coke, Artificial Reason and James I

The second model or discursive ideal type of legitimizing judicial power comes from a conceptual world older than democracy, or French liberal culture. It is found in the universe of competence or expertise, among judges of English common law courts, which, in a context different from the French Revolution, opposed the monarchical power.

Why do we obey the prescriptions of a medical doctor? We certainly believe she is making a choice and even imposing prescription on our behavior. But we believe also that we will be better off in obeying her if we really think the doctor knows what she is doing. A sophisticated version of this type of argument was first spelled out by the judge Sir Edward Coke in the conflict between King James I and the English courts of common law, of which Coke was the chief justice. In a remarkable text he argued against James that the knowledge of the laws of England “requires long study and experience before that a man can attain to the cognizance of it”. This argument was made to persuade the King that he might have the constitutional power to be the final judge of a conflict, but he had not the “artificial reason” in order to correctly exercise it. So, King James would have to leave that power/competence to his competent judges.

To understand better this type of argument we may turn briefly to the contemporary historical context. The English 17th century was characterized by a conflict of arms and words among different segments of the ruling elite. The best-known aspects of this conflict are those between the crown and the aristocracy and the clash between the King and the Parliament concerning the question of the prerogative, when the Stuarts tried to break the mixed government in favor of an absolutist version of the monarchy (this at least is the parliamentary version of the conflict). The focus here will be on a different aspect, probably less well known, but of great interest to the present topic: the conflict between James I and the courts of common law.

Sir Edward Coke is famous in the history of legal doctrine as the champion of the judiciary independence vis-à-vis the political power of the King. The victory in 1688, thanks to the Glorious Revolution, of a strong parliamentary version of the ancient doctrine of King in Parliament puts this event into perspective. The reason why it is also addressed here is that it contains the matrix of one of the important ideologies of a legitimate judicial power, the ideology that in a particular taxonomy can be called “legitimacy through expertise”. In 1607, in connection with a dispute between the High Commission, an ecclesiastical court of which the chief justice was the Archbishop Bancroft, and the Court of Common Pleas, its chief justice, Coke, issued an opinion that may be considered as the manifesto of that ideology. In the opinion known as Prohibitions del Roy (12 Coke’s Reports 63) we read:

[...]

21 Here, independence in the narrowest sense of the word means that the judiciary is not exercised by the legislative power and that judges cannot be fired because of their judicial decisions.

22 For the conception of the judiciary as an independent and “coordinate” power in America at the end of the 18th century, see Kramer (2001).

23 I am fully aware that it is a little bit of an anachronism to speak of judicial power, as such, in England during the 17th century. But I am not taking sides here on this institutional question. Coke seemed to believe that legislation and jurisdiction are basically the same function.

24 The Septennial Act of 1730 forbade the courts to overrule legislative enactments.
carning his inheritance, chattels, or goods, etc., but this ought to be determined and adjudged in some court of justice, according to the law and the custom of England […] Then the King said, that he thought that the law was founded upon reason, and that he and others had reason, as well as the judges; to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the law of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it; and that the law was the golden met-ward and measure to try the causes of the subjects; and which protected his Majesty in safety and peace; with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege.25

We have to bear in mind that, since the 13th century, England was one of the first countries in western society where an elite group of law specialists existed, exercising, by the King's delegation, the judicial power. Coke was the ideologue and spokesman of those judges of common law. To follow the traces of this ideology in the American continent would be an interesting inquiry, but is certainly not possible here.

The direction shall turn instead to the third element of the taxonomy directly connected with Coke's doctrine. Indeed, his defense of the independence of judicial power and its foundation on the judges' expertise became the polemical target of a radical criticism by one of the strongest and least-listened to supporters of the King's power: Thomas Hobbes.

Impartiality. The moral foundation of Judicial Power

During the 1760s, Hobbes wrote a book, The Dialogue between a philosopher and a student of common law of England,27 entirely devoted to the criticism of Coke (who died much earlier, in 1633 or 1634). But the essential core of his argument was presented in chapter 26 of his Leviathan devoted to "civil laws".28 It is important to analyze this text in some detail, since it incorporates the essential core of what might be called the ideology of impartiality as a foundation of the judicial function.29

Hobbes (Hobbes and Curley, 1994, p. 197-198) starts by distinguishing the role of judge [the good Interpreter of the Law] from the figure of the attorney [Advocate]. Only the latter, he claims, needs to study the law of the land. As to the former, he is only supposed to know facts from the witnesses and statutes with the help of competent individuals authorized by political authority. Intuitively, it appears that Hobbes is opposing Coke herein on the Roman republican division of competencies between the praetor and the iudex! In any event, his argumentative strategy consists of separating expertise from judgment/adjudication. In order to support his point, he puts forward examples drawn from English institutions: the House of Lords as a court of justice ("few of them were much versed in the study of the Laws, and fewer had made profession of them") and the popular jury ("Twelve men of the common People are the Judges, and give Sentence not only of the Fact, but of the Right"). Now, says Hobbes, since these "judges" are not supposed to know the law, there is somebody "that hath the Authority to inform them of it" [of its content].

Having established this distinction between the two functions of judging and knowing the law – exactly the contrary of what Coke argued – Hobbes goes on to explain the (moral) qualities that are "required in a Judge". In opposition to competence and expertise, he puts at the bottom of judicial power the moral quality of impartiality, which in his own language is called, surprisingly enough, equity.

The things that make a good Judge, or good Interpreter of the Laws, are, first, A right understanding of the principal Law of Nature called Equity; which depending

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25 "For the King ought not be under any man but under God and the Law". On Coke's theory of law and reason, see Lewis (1968, p. 330-342).
26 On the professionalization of English judges at the end of the Middle Ages, see J.H. Baker, "The Legal Profession" and "The Legal Profession and its learning" (unpublished manuscript communicated by the author).
27 The Dialogue was first published posthumously in 1681, by William Crooke: "The Dialogue is less a survey and exposition of the law than it is an attempt to show how it should be understood on Hobbesian lines and an attack on English legal theorists. especially Edward Coke, who adopted a position that Hobbes regarded as theoretically wrong and politically pernicious" (Goldsmith, 1996, p. 287). ("From Hobbes's point of view, Coke's theory asserts the authority of judges, courts, and lawyers over that of the legislator", iv, p. 293; "Hobbes's hostility to Coke and the common law is a direct result of his adherence to the primacy of legislation. From Hobbes's point of view, Coke's view attributes sovereignty to the judges", iv, p. 296).
28 Opposed by Hobbes to "natural laws".
29 Strictly, it is not possible to speak of independent judiciary in Hobbes' political theory since he rejected any separation of power. He presented nonetheless a doctrine of judicial function that will be analyzed.
not on the reading of other men Writings, but on the goodness of a man own natural Reason, and Medita- 
tion, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate 
thereon. Secondly, contempt of unnecessary Riches, and 
Preferments. Thirdly, To be able in judgment to divest 
himself of all fear, anger, hatred, love, and compassion. 
Fourthly, and lastly, Patience to hear; diligent attention 
in hearing; and memory to retain, digest and apply what he 
hath heard.

“Equity” in the language of contemporary En-
lish jurisprudence meant “the recourse to general 
principles of [natural] justice to correct or supplement 
the provision of a law” (Oxford English Dictionary). 
According to Grotius: “the correction of that, wherein 
the law (by reason of its universality) is deficient” (in 
meaning of words! Equity is according to him a law of 
nature, exactly the 11th. Here is the definition from 
chapter 15:

If a man be trusted to judge between man and man, it is a precept of the law of nature, that he deal equally 
between them. For without that, the controversies of men cannot be determined but by war. He there-
fore that is partial in judgment, doth what in him 
lies, to deter men from the use of judges, and arbi-
trators; and consequently, against the fundamental 
law of nature, is the cause of war. The observance 
of this law, from the equal distribution to each man, 
of that which in reason belongeth to him, is called 
EQUITY, and, as I have said before, distributive justice: 
the violation, acquisition of persons, προσωποληψις 
[partiality].

I do not want to offer here a conclusion to this 
first genealogical exploration, but perhaps only stress 
that independence of the judicial power has always to 
be understood as an instrument to achieve the goal of 
impartiality; and that independence has to be conceived 
of as neutrality, and absence of the subordination of the 
judge to (a) the parties to the conflict, (b) to any other 
power interested in a given resolution of the conflict, 
and as far as possible (c) to the bias of passions and 
partiality of the judge himself or herself.

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30 “Though it be true”, Hobbes added in the Dialogue (1840, p. 14), “that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to laws […] may be as fit for and capable of judicature as Sir Edward Coke himself, who whether he had more or less use of reason, was not thereby a judge, but because the King made him so” [1].

31 In his De aequitate, Grotius wrote: “Lex non exacte definit, sed arbitrio boni viri permittit”. Pufendorf (De jure naturae et gentium, l. Ch. 12, § 8) mentioned a Bolognian law which determined that “whoever drew blood in the streets should be punished with the utmost severity”, adding that for the sake of equity it was held, after a long debate (sic!), not to extend it to the surgeon, who opened the vein of a person who fell down in the street with a fit (I.60). Equity, equities, is the equivalents of the Aristotelian EKEVME. See Aristotle (Rackham’s ed., 1975, p. 1137b, line 1, Book 5), “Justice and equity are therefore the same thing, and both are good, though equity is the better”; Aristotle (Rackham’s ed., 1975, p. 1137b, line 1, Book 5), “The source of the difficulty is that equity, though just, is not legal justice, but a rectification of legal justice”; Aristote, Rhetoric (section 1374a), “For that which is equitable seems to be just, and equity is justice that goes beyond the written law” Aristote, Rhetoric (section 1374a), “If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms; so that, if a man wearing a ring lifts up his hand to strike or actually strikes, according to the written law he is guilty of wrongdoing, but in reality he is not; and this is a case for equity” Aristote, Rhetoric (section 1374b).

“Actions which should be leniently treated are cases for equity; errors, wrong acts, and misfortunes, must not be thought deserving of the same penalty” Aristote, Rhetoric (section 1374b), “And it is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the act itself, but to the moral purpose; not to the part, but to the whole; not to what a man is now, but to what he has been, always or generally: to remember good rather than ill treatment, and benefits received rather than those conferred; to bear injury with patience; to be willing to appeal to the judgment of reason rather than to violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.”

32 Oxford English Dictionary: “acception of persons or faces (A Hebrew phrase masoe phon, accepting of the face), verbally rendered in Gr. προσωποληπτης, L. acceptio personne, arum, the latter simply adapted in Fr. and Eng.). The receiving of the personal advances of any one with favour; hence, corrupt acceptance, or favouritism, due to a person’s rank, relationship, influence, power to bribe, etc. (The earliest sense in Eng.).” Liddell-Scott translated the Greek term with “respect of person”, a quite unclear translation.