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"CASE 1393": A CASE OF VICTIMIZATION, UNCLAIMED BY EITHER RETRIBUTIVISM OR UTILITARIANISM

Abstract: Case 1393 was made famous by a journalistic investigation, published by a Romanian newspaper, 7 years ago. This case is an example of judicial error, but also an example of how a superficial act of justice turns the very justice into its contrary. The result of this error was the sentencing of an innocent man to 20 years of prison. Such judicial errors prove that justice is possible in a society, only if responsibility for a wrongdoing is properly assigned to the offender; more than that, punishing the wrong person cannot be justified by either retributivism or utilitarianism, while the institution of punishment falls between the two. Such thing troubles the very structure of society that loses the balance, made possible by the principles of fairness and justice (Rawls). The interesting thing about case 1393 is that Romanian justice system did not recognize its error; instead, it fought to cover it up.

Key words: retributivism, utilitarianism, punishment, justice, desert

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I. Justice as a *First Virtue* of Social Institutions

John Rawls considers justice amongst the *first virtues*; I believe any discussion on justice, nowadays, should visit the Rawlsian view, which puts justice and truth on the same level (both as *uncompromising*): "Justice is the first virtue of social institutions, as truth is of systems of thought"[1]. This connection justice-truth is more than arbitrary: against any utilitarian view, it can be maintained that there is nothing just in basing a sentence on untruth, even if it's for the greater good of society.[2] Only provided that justice is connected to truth (meaning that innocent people are not punished for an offense they never committed), can it be flexibilized, as far as the *social utility* of a specific punishment goes. The utilitarian influence cannot affect the connection justice-truth, if it wants to keep its essence and be functional in a society based on values such as freedom, democracy, equality, human rights. Basically, what is implied here is that, once justice is accepted in its "fairness" (a similarity with social contract theories is indubitable), one must assume that all individuals have agreed that society would function better if it is clarified, from the very beginning, that some things are allowed (legal), while the unpermitted ones are considered wrongdoings (illegal); also, those responsible for committing such wrongdoings are to be punished.

The need for punishment in such cases should be interpreted as a way of reestablishing the *initial Rawlsian equality of all individuals*; once one commits a wrongdoing, and thus assumes an "unfair advantage", the *balance needs to be reestablished, trough the principles of fairness and justice*. There is an impressive debate about the institution of punishment, focusing on whether reestablishing the balance in society, through justice, justifies the need for the institution of punishment. Mentions of barbarism are made, nevertheless, to cases such as ***1393***, where innocent people are convicted to prison.

My take on this is that a realistic/pragmatic motive for people to abide to the law is the fact that they would keep in mind that breaking the law comes with a punishment. Only if we believe that courts of law can make mistakes and convict innocent people, can we agree that punishment is not useful. Justice in itself becomes self-contradictory, in this case. Thus, the idea of identifying the responsibility for a wrongdoing is essential.

In a complex society, like ours nowadays, where we assume predictability, the first step in understanding the concept of responsibility cannot avoid Kant. Finding the one responsible for a wrongdoing comes before social utility, according to the German

philosopher. This leads the discussion toward the two main doctrines in the theory of punishment: *retributivism* and *utilitarianism*. If the first is analyzed as a "backward-looking" theory, the latter is seen as "forward-looking." If the first insists on the desert, the latter denies any moral justification of punishment, *unless valuable consequences result from its carrying-out*.[3] In what follows, I will clarify the two doctrines, and prove that neither finds any reason to punish the innocent.

Even if both theories make sense, a just society cannot ignore the idea of legal responsibility. *Who is responsible for a specific deed*? – is the question that first comes to mind, when acknowledging a crime, and it is the clear sign that the one analyzing the crime intends to find the person responsible for it.

Joel Feinberg distinguishes between moral responsibility and legal responsibility; in his opinion, the latter is characterized by a *certain vagueness*, since it is something that *needs to be decided rather than discovered*.[4] If we take into consideration the fact that courts apply *arbitrary rules*, the relativity of legal responsibility does not come as a surprise, since, unlike moral responsibility, it "cannot simply be read-off facts."[5] "Is he really responsible?" is, according to Feinberg, the main question about a defendant, in the case of legal responsibility. The main coordinates of the approach, in the case of legal responsibility, according de Feinberg, are best expressed by the following question: "who ought to be punished and how much?" No theory of punishment can be plausible if it's not based on desert.[6] Kant's view – nobody should pay for something she is not guilty of – is seen by Corlett as the symbol of *retributivism as an anti-utilitarian view of punishment*.[7]

In other words, a state can't be fair if it punishes innocent people, and without *desert* that's what it would do, no matter whether it exercises a *right* or a *perfect duty*. Feinberg also notices the close connection between justice and desert, and schematically expresses the latter in "Doing and Deserving" as follows: "S deserves X, in virtue of F"(S is the person that deserves X – a mode of treatment, only because she is responsible for a fact F).[8]

According to all definitions, retributivism[9] is based on *two core features*: the *commission of a crime* justifies the punishment, while the *justification* of the latter "holds quite independently of any consequentialist considerations."[10] The main discussion is on the coordinates of a direct connection between two concepts: *punishment* and *wrongdoing*. No matter how relevant the criticism to punishment, the latter needs to exist in the mechanism of justice, even if one looks at this from the utilitarian point of view; I find it hard to believe that deterrence would have any chance without the punishment incentive. In other words, it would be unrealistic to expect that human beings

would decide, all of the sudden to be ideally fair, when life is perceived as a competition, within the boundaries of law. I doubt two competitors would not commit a wrongdoing (just for the sake of getting ahead), if they were not afraid of a certain punishment. Obviously, the punishment – I agree – can be debatable (and this is where utilitarianist perspectives come into play, when deliberating on choosing the most useful, punishment, from a social utility perspective); this is the point where things can be flexible, but only insofar as the system of justice accepts the retributivist premise of the direct connection between crime and punishment.

The main issue, which can't be reduced to retributive justice only, is that, in order for a society to function justly, punishment should be inflicted only on guilty people. After connecting the two sides – crime and punishment – utiliarianists can play with a plethora of punishments, based on the criterion of the *social utility maximization*. From this point of view, I believe that any debate, in a just, functional, realistic society, ought to begin in assessing whether the starting point, of a retributivist nature, has been achieved.

Here, Mark Thornton identifies the four claims that justify a punishment:

1. Criminal is guilty of the wrongdoing she is accused of;
2. The punishment the offender receives is deserved;
3. Punishment annuls the crime (Hegel's *negation of a negation*);
4. Punishment is required by principles of fairness and justice.[11]

The first claim is fundamental in a state that does not favor *telishment*, while the fourth one restores the initial coherence of society (through the ideal initial agreement signed by all men), once the guilty one gives up, through justice, the unfair advantage she unlawfully assumed, by way of a wrongdoing. The third claim is also supposed by the coincidence between the offender and the one that is punished. This construction needs this as a starting point, before talking about proportionality of punishment or utility, since social maximization of utility cannot be an excuse for punishing innocent people. Once this is settled (something similar to the Hegelian *normative foundation*), one can study whether society can respond in other ways (besides punishment) to wrongdoings, or, as Thornton puts it, whether fairness is sufficient or not to "carry the load of validating a retributive theory of punishment,"[12] and alternatively, according to Nozick, whether an individual inside a community can object to certain rules, imposed by the respective community.[13]

Still, a community functions on the basis of laws. Falcon considers that the *sanctionary end* of law is *subsidiary.* What comes first is the hope

that "what law orders, is obeyed."[14] Should people adopt the so-called legal *norms of conduct*, sanctions would not be needed. Experience shows us that it is not always the case. Still, *negative general deterrence* is something functional in a society, in the form of *intimidation*.[15] The prospect of punishment is needed in the case of such utilitarian doctrine. The social contract would not function if punishment is not accepted. It must be widespread that crime comes with a punishment; only thus honest people that respect the laws get guarantee that everybody will do the same – "In the absence of punishment, criminals would enjoy a decisive advantage over non-criminals. Punishment annuls this advantage."[16]

According to a social contract philosophy, this perspective can be accepted as a *normative foundation*. Further, utilitarians can imagine an infinity of options that best serve society. Nevertheless, there is one un-negotiable rule in a just society: no one can be punished for a crime she never committed. The latter was not respected in "case 1393" by Romanian justice. Therefore, a person was *victimized*.

II. "Case 1393": The Facts

It all began at the end of 2005, when a newspaper from Bucharest, "Jurnalul National," received a letter from an inmate, named Vasile Chicioroaga, who was claiming to be the victim of a judicial error. Basically, he was convicted to 19 years and 6 months of prison for a crime he allegedly had never committed.

The two investigative journalists who read the letter, Valentin Zaschievici and Veronica Micu, started "digging up" all the facts of this contemporary *Miorita* – a popular Romanian story with 4 shepherds, in which one of them is killed, and, apparently, a fifth person (in this case, Chicioroaga) is held responsible, even though innocent. The two journalists became even more intrigued, after talking to another convict who knew Chicioroaga in prison. Apparently, that particular inmate was also convinced of Chicioroaga's innocence; his argument was that, even after 5 years of prison, Chicioroaga was not at peace with his presumed offense. It is said that convicts accept the crime, eventually (if they committed it) – they tell their fellow inmates about it, which was not the case here. The two journalists started investigating and the result was a lengthy story, with many episodes,[17] which eventually proved that an innocent man had been put behind bars, after a superficial penal investigation and a trial where both prosecutor and defense failed to serve the act of justice appropriately.

According to the Romanian Penal Code, an investigation needs to gather the facts, so that truth can be found, while the offender (ONLY if proven to be the one responsible for the wrongdoing) is to be brought to justice. In "case 1393," the two people that were convicted to almost 20 years of prison (one of which was Vasile Chicioroaga) were given a trial that was suspected of unfairness, to say the very least.

There were five main characters involved in this case: Vasile Chicioroaga (who had never met the victim), three shepherds (which have been proven to have had an enmity relationship in the past with the victim), and the victim (the fourth shepherd). Further, according to the journalists' investigation, here are a few facts that should have raised a lot of questions during the trial, but were overlooked in court:

- While Chicioroaga presented an alibi for the day of the murder (his sister and her neighbors stated Chicioroaga had been with them the day of the crime, meaning 20 miles away), the other three shepherds admitted to having interacted with the victim, the very same day;
- One of the three shepherds was mentioned as an eye-witness: a statement under his name was on file, saying that two of the shepherds and Chicioroaga were responsible for the murder of the fourth shepherd. The judge didn't notice the fact that he was an interested party and maybe an accomplice to the murder. More than that, when the two journalists talked to him, he denied having signed any statement and accused the police investigators of abuses when interrogating the suspects – he literally accused the chief of police to have written his statement for him;
- The two journalists present a lot more inconsistencies. One of the most obvious is that the file does not contain the evidences Chicioroaga had submitted, in order to prove he had been to the hospital the day before the crime and the day of the crime. He declared he never met the victim. More than that, witnesses the court did not take into consideration stated they had seen him at a reasonable distance from the crime place that day.

All of the above could not be found in the file, when the journalists started their research. The conclusion of the prosecution was that the three shepherds approached the victim in order to rob him (this was the only motive mentioned by the prosecutor); when they showed up, Chicioroaga was struggling with the victim (according to one of the three shepherds). One of the three shepherds (actually the richest of them all, rich enough to not have interest in robbing a significantly poorer person) presumably helped Chicioroaga murder the victim (and

was sentenced to 20 years of prison), another one assisted them, and the fourth one played the eye-witness role in the indictment. The prosecution doesn't cover what happened after the struggle. Did they all take the victim's money? Did any of them try to help the victim? Such questions are not answered in the indictment.

Also, robbery was the only hypothesis investigated by the accusation as motive for murder, just because Chicioroaga had been charged with robbery 6 months before (he had stolen 4 chicken from a neighbor). An alternative reason for murder – enmity (between the victim and the other 3 shepherds) – was never investigated by the D.A. or the police, even though the witness maintains to have mentioned it to the police. Most probably, since Chicioroaga had previous robbery convictions, he was a safe bet – somewhat a usual suspect…? Perhaps the justice system wanted to get rid of a case that involved insignificant – as far as means go – people, like 3-4 poor shepherds in the rural part of Romania.

After reviewing all these inconsistencies, the two journalists reached reasonable doubt regarding the decision, so they organized a virtual jury, formed by 9 of the best specialists of penal law in Romania, in order to give a verdict. This jury admits that robbery may have not been the motive for crime; thus Chicioroaga was serving almost 20 years in prison for nothing. The trial was blind to anything that could contradict the prosecution.

The conclusions: the penal investigation was superficial, procedures were not properly followed, the judges lacked interest and showed superficiality, the defense was only formal and, thus, unprofessional; therefore, it is hard to believe Chicioroaga was guilty. The same goes for the rich shepherd, so the other two (of which one served as witness for the accusation, even though he was an interested party) were, most likely, the authors of the crime.

The obvious conclusion of the investigation: judicial error. Justice was not served: at least one of the people imprisoned for murder was innocent. The rich shepherd also, if the robbery hypothesis is accepted, did not have any reason to commit murder. Finally, the prosecutor's office agreed to review the case, and start a penal investigation based on possible suspicions of perjury. The consequence was that judiciary revision was taken into consideration.

Chicioroaga received a *pro bono* lawyer and he was brought to court. Right before the hearing (needed in order to get an annulment), the lawyer convinced him to withdraw his review request, which he did. Later, Chicioroaga called the journalists to let them know that he had been tricked by the lawyer. The lawyer acted against her client's best interest, but she defended the state in punishing an innocent man.

III. The Legal Ethics Interpretation of *Case 1393*

What happened in Chicioroaga's case? From the beginning, one can notice that justice lost its Rawlsian connection to truth, at the same time as overlooking important parts of the penal code. According to Feinberg, justice and desert are "closely connected"[18]; the Feinbergian scheme turns *rogue* (same as justice), when looking at *case 1393*. Somebody in Chicioroaga's case is considered to be, according to Maria Falcon, victimized,[19] since any guilt is a "logical prerequisite for punishment" only if there was an offence that had been committed. Thus, according to neither retributivism, nor utilitarianism is the conviction in case 1393 a just one.

To begin with, the Rawlsian social balance is not reestablished when punishing the wrong person for a crime she had never committed. It is even worse that an individual gets the proportional punishment for a crime, which he has no responsibility for. What the journalist investigation proved was that Chicioroaga was completely innocent, nevertheless he got the kind of punishment that is given to proven murderers, according to the law. This shows the irresponsibility of the justice system, willing to punish an innocent person, just to send a strange message to society and honest people in general, that need to believe that they are protected by the law: *nobody gets away with murder, even if he/she didn't commit one*.

This could be seen as an exaggeration of the utilitarian doctrine, offering both *pros* and *cons* for it. On the one hand, it proves that the institution of punishment can be *barbaric*, especially in the case where the wrong person is inflicted for somebody else's sins, while, on the other hand, should we reinterpret this backwards, beginning with the lawyer's decision to protect the system, one could say that it proves the limits of a utilitarian perspective, i.e., it is a social utility maximization to send to the people a message that justice is served and the offender is caught. Still, we are talking about a *scapegoat*, but his example may serve as a deterrent (see Falcon's aforementioned concept of intimidation or negative deterrence). Is this just, though?

This case also proves the limits of retributivism, especially when it comes to the obsession of finding, always, a "guilty part," which Falcon calls "the necessary guilty one."[20] The justice system needs to prove efficiency, nevertheless, when cases such as 1393 happen, somebody ought to pay in an exemplary way, just to prove that justice is responsible when punishing. Punishment, as "necessary evil,"[21] is justified, as long as it represents the state's duty (Kant) and only IF it annuls a crime (Hegel). I have to agree with Kant here that the state

does not fulfill its duty in *scapegoat cases* like the one here – *punishing is a duty* and needs to be considered from the perspective of categorical imperative. Without the connection between guilt and punishment, Kant's philosophy of right maintains that there is no *legitimacy* in inflicting the punishment.

Utilitarian purposes cannot be an excuse for conceiving *judicial punishment* in such a way, as to deny the right of a human being to be *treated as purpose*, according to the categorical imperative. Looking at the whole line of events in case 1393, it is obvious that the only good thing would be to consider that Chicioroaga was punished for a *potential/imaginary social utility*; such view is anti-Kantian and would be intolerable even today. Jeffrie Murphy talks about such a case, where an innocent man is punished on purpose for something he didn't do:

> To intentionally punish an innocent man, no matter how good the consequences of so doing, is a conceptual and a moral pathology. To punish an innocent man in the mistaken belief that he is guilty is a danger that we must carefully guard against.[22]

Excluding the *barbaric* side of the Kantian retributivism, the view on punishment in a just society is not out of line. No justice system would agree to punishing innocent people.[23] Another part that is correct in Kant's philosophy of right is the one emphasizing on *vigilantes*. The German philosopher believes that such *private revenges*, possibly based on *biased decisions* (Murphy), are not acceptable either. A hypothesis worth analyzing is that of the *pro bono lawyer* in case 1393 being a vigilante – trying to serve justice by convicting somebody, even if not the right offender, so that society can feel safe.

J. A. Corlett approaches the matter of *vigilantism* considering it worse than *rogue justice*, due to its *lack* of *empiric certainty*. His reply to such an option is that "Justice and fairness demand that we exert the time, resources and effort for full-scale investigation, interpretation and evaluation of the facts of each case."[24] Rawls also sides with the view that violating the rights of the innocent cannot benefit society in any way. Thus, the only solid ground that a vigilante-type decision, like Chicioroaga's pro bono lawyer could stand on, gives way; between retributivism and utilitarianism, there is no room for an *intermediary* ground, where innocent people can be punished, at least not in a society that pretends to be just. Corlett excludes even the excuse of *social stability*[25] as justification for inflicting pain on innocent people.

The way I would interpret the lawyer's decision to unethically act against her client's interests, is based on a *trident* formed by Rorty, Boia and Marx, and a *mutation*. Both the trident and the mutation are linked to the level of maturity of society and social institutions, at the time, in Romania; I would start with the latter – the mutation. Once

Chicioroaga's trial gets in the phase of revision, there is an obvious mutation at the level of the offended: now the presumed offender does not have to quarrel with the victim of a crime he had never committed, but rather with the justice system, represented by the pro bono lawyer. She (the lawyer) has a sole mission: to cover up those that were guilty to have punished an innocent person. It may come as a surprise, but there are such irresponsible solidarities in Romania, even today.

This takes us to *trident* mentioned above and gives one the opportunity to conclude that, in cases like this one, the state loses its *buffer function* between the offender and the victim. Unwillingly, Chicioroaga is punished for two offenses he didn't really commit: murder and the exposing of a judicial error and, thus, of a few incompetent individuals belonging to the judiciary. The pro bono lawyer lies between the two sides. She lives the Greek dilemma of *Nemesis* and *Themis*, choosing a "private revenge" (which is not even hers) that "grows from the blind passion of the offended."[26] The only difference is that the offended is the justice system itself, which the lawyer identifies with, more than she does with her client. Chicioroaga can be sacrificed, in order to save a prosecutor's or a judge's career. This is also something specific to Romanian social and professional systems: the lawyer is loyal to a handful of incompetent, mediocre colleagues of hers (in the justice system), rather than to an innocent person. She most probably meditated about Chicioroaga, as Rorty suggests in "Justice as a larger loyalty"[27] – *he is not one of us*. In such cases people are willing to commit even perjury, the American philosopher adds, as their loyalty goes towards a specific group, which makes them ignore what is right and wrong anymore.

This can be approached using Lucian Boia's view about Romanians' mentality, a superficial mentality that always expects understanding and indulgence. An explanation could be found in history: Romanians always chose to be the buffer between the East and the West,[28] never making a choice that could define them. Not able to take a stand, but rather staying in the middle, between black and white, one can end up by opting for grey. I wonder whether Chiciroaga's lawyer may have asked herself that, when she chose to not be loyal to her client. Her client was, obviously, of a lower condition than the judges that sentenced him to 20 years in prison for a crime he never committed. Such superficiality in the judiciary is common in contemporary world globally. It is not an excuse though and it needs ways to intervene in fixing such errors.

There is a third way of looking at this, following Marx and neo-Marxists; reading them, we have to wonder whether law could be seen as an instrument for *class domination*, or even *class terror*.[29] The result

would be the maintaining of "social order," by "controlling the poor." This control would be exercised by the bourgeoisie who is in control of the *production relations* and have a predominant role at the level of real *infrastructure*, which is the Economy. They would use, in their conflict with *the exploited proletariat*, the Superstructure; an aspect of the latter is Law.[30] It may be a bit too much seeing things like this; still, the lawyer's lack of loyalty taken to a point where she acts against her client's interests may make one draw strange conclusions.

IV. Conclusions

Against all legal ethics theories, the state punished an innocent person; 1393 is an example of a scapegoat case. Being thus far in history, we have to expect the state to act in a Kantian manner, that is, to responsibly punish only the guilty, which is a *duty*, and not just a *right*. Such superficiality, like the one observed in case 1393**,** can weaken the institution of punishment, which is still needed in an updated "hybrid" theory of justice, where retributivism and utilitarianism communicate in a pragmatic manner.

Justice is not infallible, and is exercised, in the interest of society, by people of the same society; when it fails, it would be advisable that it admits its errors and attends to them. Scapegoat cases should be treated as outrageous failures of the judiciary. Investigative journalism, and free press, in general, can be essential to a democratic society in making sure that, as in Vasile Chicioroaga's case, the voice of possible victims of a perfectible justice system can be heard. Conclusively, a just society cannot have cases of victimization.

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Notes:

[1] Rawls, J., *A Theory of Justice*. Revised Edition, Harvard University Press, 1999, p. 3.
[2] Rawls maintains that "*Each person possesses an inviolability founded on justice that even the welfare of society cannot override(…) the rights secured by justice are not subject to political bargaining or to the calculus of social interests,*" Idem, p 3- 4.

[3] Falcon y Tella., M., Falcon Y Tella, F., *Punishment and Culture. A Right to Punish*? , Brill Academic Publisher, 2006, p. 49.
[4] Feinberg, Joel, *Doing and Deserving*, Princeton University Press, 1970, p. 26-27.
[5] Idem, p. 27.
[6] Corlett, Angelo J., *Responsibility and Punishment*, Springer, 2006, p. 3.
[7] Idem, p. 4.
[8] Feinberg, p. 61.
[9] According to J.A. Corlett, retributivism is defined as "*that theory of punishment which advocates the hard treatment by the state(through an institutionally approved system of due process) of an offender because the guilty offender deserves it, based on her degree of responsibility and in proportion to the harm caused by her wrongful act*(…)", p. 71.
[10] Thornton, M., *Against Retributivism*, in Cragg, W. – *Retributivism and Its Critics*, Franz Steiner Verlag Stuttgart, 1992, p. 83.
[11] Ibidem.
[12] Ibidem, p. 88.
[13] Nozick, R., *Anarchy, State, Utopia*, Basic Books, NY, 1974, p.90.
[14] *Punishment and Culture…*, p. 72.
[15] Ibidem, p. 151.
[16] Ibidem, p. 115.
[17] http://jurnalul.ro/campaniile-jurnalul/cazul-1393/pictures/7056_poza.jpg, in ***Jurnalul National***.
[18] *Doing and Deserving*, p. 55.
[19] Falcon separates between error and victimization - "If those who punish the innocent do so because they consider them guilty, we should be faced with a supposed error. However, when we knowingly inflict a punishment upon someone who does not deserve it, then we can speak of victimization…", p. 11, Falcon y Tella., M., Falcon Y Tella, F., *Punishment and Culture. A Right to Punish*? , Brill Academic Publisher, 2006.
[20] Idem, p. 94.
[21] Ibidem, p. 101.
[22] Murphy, G.J., *Kant. The Philosophy of Right*, Mercer University Press, 1994, p. 119.
[23] Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, Translator (London: The Macmillan Publishing Company, 1965), p. 100 – "(…) a human being may never be manipulated merely as a means to the purpose of someone else…He must first be found to be deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citiznes".
[24] Corlett, Angelo J., *Responsibility and Punishment,* p. 39.
[25] Ibidem, p. 40.
[26] Falcon, p. 67.
[27] Rorty, R., *Justice as a larger loyalty*, in Rorty, R – *Philosophy as a Cultural Politics. Philosophical Papers*, Cambridge University Press, 2007.
[28] Boia, L., *History and Myth in Romanian Consciousness*, CEU Press, 2001 - "The Romanians are neither Western nor Eastern. They lie between these two worlds and can be a unifying bond: 'We are between the Near and Far East (...) and the West. Neither the one nor the other put its seal on us, but, just as we mediate geographically, could we not also mediate spiritually?", p.148.
[29] Falcon, p. 56.
[30] Ibidem, p. 50-52.

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