Just Problems?

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Preservative Justice

Justice is normally the language of complaint, and sometimes of revenge. Justice is often, therefore, analysed as a negative virtue whose demands can be met simply by doing nothing beyond correcting the wrongs inflicted on others.[544]

However, most worked-out views as to what constitutes injustice involve at least an outline image of justice in a positive sense which goes beyond correcting the wrongs that have been done and include an impression of a "just" human relationship. The idea of injustice is closely associated with reactions to the disappointment of existing expectations.[545]

Hence justice, at least in its negative expressions, can have strong conservative implications in that it seeks to sustain the *status quo* in society against destructive and disorderly intrusions.

[544] Shklar for example argues that we cannot set rigid rules to distinguish instances of misfortune from injustice, as most theories of justice would have us do, for such definitions would not take into account historical variability and differences in perception and interest between victims and spectators. From the victim's point of view . . . the full definition of injustice must include not only the immediate cause of disaster but also our refusal to prevent and then to mitigate the damage, or what Shklar calls passive injustice. With this broader definition comes a call for greater responsibility from both citizens and public servants. When we attempt to make political decisions about what to do in specific instances of injustice, says Shklar, we must give the victim's voice its full weight." The Faces of Injustice - Shklar, J. N. - Yale University Press Pub. : July 1992.

[545] Vide also: Kuklin, Bailey H. - The Justification for Protecting Reasonable Expectations www.hofstra.edu/pdf/law_lawrev_kuklin.pdf.

Disputes between Individuals

When disputes between individuals or groups are considered and settled under private law, the intention is to protect an existing system of rights. If one man encroaches on the rights of another, he is liable to be required to restore the balance, (i) by making good for the damage he has caused or (ii) by paying compensation and/ (iii) or at least undertaking to respect the rights of the injured party in future.

This concept clearly stated in the Maltese Civil Code namely under Article 1047 (1)

"The damage which consists in depriving a person of the use of his own money, shall be made good by the payment of interest at the rate of eight per cent a year.

(2) If, however, the party causing the damage has acted maliciously, the court may, according to circumstances, grant also to the injured party compensation for any other damage sustained by him, including every loss of earnings, if it is shown that the party causing the damage, by depriving the party injured of the use of his own money, had particularly the intention of causing him such other damage, or if such damage is the immediate and direct consequence of the injured party having been so deprived of the use of his own money."

The Concept of Restitutio in Integrum

The procedures of legal justice, in these types of instance, are conservative, protecting and restoring an established order thus a form of *restitutio in integrum*. In the Roman empire, where Ticius did wrong to Caius, the former had to compensate the latter by a *restitutio in integrum*. That meant, and still means to this day, placing the victim of a breach of contract or a tortious act in the same position they were before the event. The Romans clearly understood the principle that a claimant must be put back to where they were before the damage was done to them, and this would be

never achieved unless the victim was fully compensated (*in integrum*). Roman law, then, conceived *restitutio in integrum* to be accomplished where the claimant received the principal sum due, interests at a certain rate from a certain date, compensation for their economic losses and the costs incurred by them in seeking justice.

Restitutio in integrum has since been fundamental rule of law in the countries that follow civil law. Traditionally, in the civil law system, it includes loss of profits or economic loss in both contract and tort (e.g. Article 1149 of the French Civil Code; Article 1106 of the Spanish Civil Code; Article 1995 of the Louisiana Code 1985). Damages in contract are deemed to be, except in cases of fraud, those which are direct and foreseeable at the time of the contract (Article 1150 France; Article 1107 Spain); damages in tort are those which are direct and immediate including loss of profit, so foreseeability is not necessary.

In civil law, interest is always awarded as part of the economic loss to which claimants are entitled. Interest is payable unquestionably where the debtor has delayed in performing their obligation to pay a sum of money (Article 1153 France; Article 1108 Spain). Pre-judgment interest is awarded as an integral part of damages, in all cases, in the currency of the loss, in both contract and tort, compounded at the average prime rate of the currency in which that loss or damage was sustained, from the date of the breach or the loss to the date of judgment. Post-judgment interest is awarded at the average prime bank rate (so to reflect the monetary value) for the period from the date of judgement until final payment.

In the common law countries, the courts often refuse to award complete compensation (*restitution in integrum*). Most of them have been unwilling to award damages for pure economic loss (i.e. damages in tort when there is no physical damage) even if the damages were direct and foreseeable.[546] Also, almost regularly, damages in foreign currency were refused (until **Miliangos** [1975] in England and **The Amoco Cadiz** [1992] in the US 7th Circuit).

[546] The Mineral Transporter [1986] AC 1; [1985] 2 Ll R 303.

For example, the common law courts refused pre-judgment interest and interest above a certain rate, although in Admiralty jurisdictions, equity has been recognised and damages have been awarded in a way close to *restitutio in integrum*.

The courts in the UK, US and Australia have very rarely granted economic loss where the claimant did not sustain direct physical damage. Also, common law jurisdictions have been more restrictive regarding interest, though they are opening up gradually (S.35A The Supreme Court Act 1981) so as to render it a matter of the discretion of the court, as opposed to a right of the claimant successful in the judgment.[547]

The discrepancies between civil law and common law over the application of the rule of *restitutio in integrum* have given rise to conflict of laws and to somewhat irrational solutions to the assessment of damages. The laws applicable to damages differ among themselves because some jurisdictions and the practices of certain courts depart from the Roman rule to adopt rules of thumb and unsubstantiated criteria for special circumstances. In Maltese law the *restitutio in integrum* concept is explicitly mentioned in the Commercial Code (Chapter 13) Article 541,[548] regarding the prescription and inadmissibility of action in certain commercial matters, and also in the Civil Code, more precisely under Article 1765[549] relating to the form and effects of donations[550] and also in the Patents Act (Chapter 417) under Article 46 concerning the re-establishment of rights.[551]

Progressive Justice

However, law has a progressive or reformative aspect as well. Laws promulgated by the legislature from time to time change the

[547] Making it a discretionary remedy only: House of Lords in President Of India vs La Pintada Cia Navegacion [1984] 2 Ll.R 9 at p23.
[548] Title I
[549] Restitutio in integrum. Amended by: XLVI.1973.92.
[550] Sub-title II
[551] PART XIII

rules in accordance with new conceptions of what is fair and proper. Such as Human Rights legislation, changes in the Maltese Civil Code promoting parental authority instead of paternal authority, changes concerning the promotion of equality between man and woman, the granting of parental leave for both parents, a better distribution of children's allowance benefits, the recognition of the housewife's work through a bonus, there have been new laws about protection at work, requiring safety precautions in industries, forbidding unfair dismissal, limiting the power of employers to make workpeople redundant; and internationally the promulgation of the United Nations` Convention on the Rights of Children, the recognition by the International Community of the principles of Common Heritage of Mankind, of The Rights of Future Generations, and of Common Concern about the planet's climate and so on.

In social deontology, as in law, the preservative aspect of justice upholds the established order of things. Persons are entitled to keep what they have, their rights and property. Many feel that it is unjust to upset the existing differentials in pay for different jobs. At the same time nearly everybody also attributes to justice a reformative role, allowing "new" (or should one say newly-recognised) rights to be set up on the basis of (a) ***need*** *or (b)* ***merit****.*

The idea is that justice, in the sense of retaining differentials for different jobs does not require any class of persons to stay where they are in the established hierarchy, on the contrary, if they are especially talented or especially hard-working, it is just for them to be rewarded and to move up the social scale. What we have up till now called preservative justice tries to keep things as they are, on the assumption that everyone benefits from a stable society, despite the defects of any actual social order.

Reformative Justice

Reformative justice tries to remedy the defects, to redistribute rights in such a way as to make a fairer society. But what is fair? There have been two different, and apparently incompatible, ideas

about this. First there is the idea of justice as depending on merit or desert. It can be seen in criminal justice as well as in ideas of fairness in social ethics. For example, criminal justice is a matter of punishing people who have been found guilty of breaching the law; it would be seriously unjust to punish people who have done nothing to deserve it.

Likewise, just desert has to do with merit - this means that a reward or honour, should go to the person who earns it, who deserves it. To pass over the candidate or contestant who deserved the reward and to hand it to somebody who did not deserve it would be unjust, unfair. Why?

The problem in practice lies in how do you assess who is more meritorious than whom. In other words, how should we classify who is the best candidate? What criteria should we use to assert that "A" is for example, more intelligent than "B" in order to reward him? For now suffice it to say that something which is not due to someone and which is given to him, makes that *donation,* an unfair and unjust act.

However, there is another idea of justice, based on equality and need. According to this view, justice requires us to treat all human beings as equal worth and as having equal claims. According to this view it is unjust to discriminate in favour of some and against others - except in order to meet special needs – what we call positive discrimination. And what is discrimination? Discrimination may be descriptively summarised as treating people unequally and therefore that is often unjust (according an egalitarian concept of justice), discrimination in favour of need has an egalitarian purpose. It gives more to the needy because they have less - it is an attempt to reduce inequality, to approach that ideal of equality for all which according to this view, would be perfect justice.

Other kinds of discrimination, however, are *inegalitarian* in effect as well as in method - they increase the existing inequalities. The idea behind this conception of justice is that the particularly

talented individual already has an advantage over ordinary people. If he is given special rewards, or special prizes, or a specially good job, you will increase his advantage. It may well be advantageous to the community to do this - in that the person with special talents for a particular job, such as running a business or running a school, will no doubt bring more benefit to the community in doing that job than would someone else of less talent.

So it makes sense, it is reasonable to train the talented individual, put him in the responsible job, and pay him well as an incentive. It is socially useful, and right for that reason but if this view is adopted one cannot conclude that this is necessarily just or equitable. Strict justice, according to this view, requires us to treat everybody alike, apart from helping underdogs to approach equality with the rest.

Each of these theories of justice appears to have an intuitive appeal for our moral consciousness. They both make a persuasive case. Professor John Rawls has produced an ingenious suggestion for settling the principles of justice in a rational way. It is intended to be a method of avoiding appeals to intuition with the consequent risk of inconsistent answers.[552]

Rawls uses the device of a hypothetical social contract, a notion familiar in earlier political philosophy but employed for a different purpose. Rawls asks us to imagine a number of people who know the general laws of social science but are ignorant of all particular facts, including their own abilities, their won history, their own position in society, or indeed the time and place of that society. They are asked to agree upon principles for the distribution of benefits and burdens. We can suppose, Rawls adds, that they will think about the matter in terms of self-interest, trying to maximise benefits and minimise burdens for themselves. They do not know where they themselves will be in the ordering of affairs. They might be at the top of the social scale or they might be at the bottom. So, says Rawls, they will take care to make conditions as

[552] Rawls, John, A Theory of Justice, Oxford University Press, 1973, especially chapter III.

good as possible for the person at the bottom of the scale, in case they turn out to be there themselves. Their decisions will be motivated by self-interest but will have the effect of serving the interest of everyone impartially, because of "the veil of ignorance".

In Rawls`s view, that is what constitutes the idea of justice as fairness. Justice then is an institutional arrangement which will, in Rawls`s view benefit everyone impartially, and we can reach an understanding of it by imagining a social contract made in ignorance of one's personal situation.

Rawls is not here suggesting that the concept of justice can be identified with an idea of self-interest. Justice is essentially impartial between one person and another. This reminds us of Finnis`s requirements of practical reason.[553] The third requirement in Finnis`s list refers to the fundamental impartiality among the human subjects who are or may be partakers of those goods. So, the only reason for me to prefer my well-being is that it is through my self-determined and self-realising participation in the basic goods that one can do what reasonableness suggests and requires, i.e. favour and realise the forms of human *good* indicated in the first principles of practical reason; and so add or contribute to the common good which insures justice for all. As Rawls puts it, if you ask yourself in any situation what would be the just or fair solution of a problem, you should not think in terms of self-interest, giving yourself priority over others. The difficulty is that if people are simply told to think intuitively in terms of justice, they will come up with different and inconsistent answers.[554]

A rational calculation in terms of self-interest will avoid the bare reference to intuitions of justice, but in the ordinary way such a calculation would not give us the impartiality that we need. Moreover, the hypothesis of making the calculation under a veil of

[553] Coherent life plan; No arbitrary preferences amongst the basic values; No arbitrary preferences amongst persons; Proper sense of detachment; Proper sense of commitment; limited relevance of efficient means; Respect for every basic value in every act; Common good of one's community; Follow one's conscience;
[554] Raphael, D.D. Moral Philosophy, pp.72.

ignorance about one's personal situation is a method of adding impartiality. If one have to provide for my own interests in any and every possible contingency, one am providing for the interests of any everyone, not just for my own. This should remind us of the Kantian Categorical Imperative in the form of "act as if you were legislating for everyone", Rawls would add, starting from the poor.

Kant's "Categorical Imperative" reveals the injustice of "excepting" ourselves from conventional social practices like promise keeping. But can it equally reveal the injustice of "complying" with socially entrenched unjust maxims, e.g., slave-holding maxims in colonial America? Standard Kantian arguments against slavery depend on overly narrow definitions of slavery and by requiring *universalisation* across all rational beings, beg the moral question of whether differences ever warrant different treatment.[555]

To get back to Rawls, behind the veil of ignorance though you might think self-interestedly, you are really constrained reasonably to act as if you were legislating for everyone. This point about legislating for everyone compels us to analyse what would be the result of such a hypothetical contract made under a veil of ignorance about particular facts? According to Rawls, people in this system would go first for a maximum of equal liberty, and then secondly they would agree to such departures from equality as would improve life for everyone, including the least fortunate. The point of the second principle is to make a distinction between just and unjust inequalities. If the giving of special rewards or special opportunities to talented people not only produces substantial benefit for those few, with consequent inequality, but also has the result of improving the general standard of life of the whole community, including the standard of its poorest members, then the inequality is justified.

[555] Calhoun, Cheshire, Kant and Compliance With Conventionalised Injustice - SJ Phil, 32(2), 135-159, Sum 94

However, we have a condition imposed by Rawls: if the benefit accrues only to the privileged group and does nothing to improve the situation of the poor, of those least advantaged, then it is not justified. This is the main argument against factionism. But this is not just a justice argument in favour of charity.[556] There is an economical aspect to it as well; after all a *wealthier* lower class enhances the general good of the whole society. This conclusion gives priority to an equality concept of justice. It also makes some provision for the alternative concept of differential reward, though not in terms of merit, strictly speaking. It says that differential rewards are justified, not because they are deserved by the individuals who get them, but because they benefit the whole community and especially its poorest members. Inequality is supported on the grounds of social utility[557] and helping the needy. So Rawls`s idea of justice maintains priority for the *equality-needs* concept, including in it a hint of common utility, but really without any valuation of merit or desert as such.

The conclusion will not be to everyone's liking, but at least it is quite definite in settling the dilemma of choosing between the two traditional concepts.

Furthermore, if the conclusion really has been reached by a rational process of thought instead of appealing to intuitive conviction, we ought to accept it. In fact, Rawls`s conclusions do not rest purely on rational calculations which would seem obvious to anyone.

[556] Stressing the point that charity and justice are in fact two very distinct concepts.

[557] 'Social utility' arguments have a strong political impetus, however they might create aberrations. Consider Sottomayor-Cardia, a Portugese-speaking philosopher, his ideas departs from classical utilitarianism in many ways. In the first place emphasis is laid on the concept of "interest" rather than in "happiness". At the same time there is a vindication of a certain sort of preference for our own interest when confronted with the maximizing principle in its most radical form, as this radical maximizing principle could lead to a sort of "pathological Kantianism". Exception is made in cases of "negative" utilitarianism, that is, when great greatest common "evil". In such cases the author would even allow for some "unjust acts", so that suffering, and every sort of evil for the greatest number could be avoided.

The general idea of equality in the absence of special considerations is rational enough. So is a departure from equality for the sake of benefit for all.

Why should there be special emphasis on benefit for the poor? Intuitively, of course, this appeals to our sense of justice, or at any rate to our sense of morality. Does Rawls succeed in showing that it would appeal to our sense of self-interest if we were clothed in a veil of ignorance concerning our personal situation?

Rawls assumes that a rational self-interested man will always play safe, will think most of cushioning his position if he should turn out to be unlucky. Suppose this hypothetical contractor contemplates two alternative forms of society. One follows the policy of a radical Welfare State, always providing quite a soft cushion for the people at the bottom of the social scale but inevitably at the expense of high taxation for the rest, so that nobody is excessively well off.

The second society still has a cushion for its poorer members, but a less comfortable cushion, and therefore it can leave scope for a few people to gain glittering prizes as the result of special talent, special effort, or simple luck. If we are asked which of the two is the more just society, we may well say the first, but that is an intuitive judgement. If we are asked which of the two would be chosen by a purely self-interested individual who did not know what his personal abilities and fortunes would turn out to be, is it clear that he would go for the first alternative? Why should he necessarily play safe and think mainly of what will happen to him if he is unlucky? Why should he not take a bit of a gamble? In the second society, he will not be so badly off even if he lands up at the bottom of the pile, and there is always the chance that he might turn out to be one of the fortunate few.

The idea of self-interest itself does not imply any preference between timidity and boldness in making this choice. Rawls is not justified in assuming that a self-interested man will be timid rather than bold. This is obvious from the fact that Rawls`s first principle of justice assumes the opposite, namely that a self-interested man will prefer boldness to timidity. The first principle requires a maximum of equal liberty.[558] This means that the people taking part in this hypothetical social contract, and choosing from a self-interested point of view, will give priority to maximum of liberty for all.

Rawls makes it quite clear that his specification of equal liberty, rather than some other kind of equality,[559] is deliberate. Is it clear that a self-interested person, dissociating himself from the kind of society he lives in, would necessarily give the highest priority to freedom? Presuming that it makes sense at all to think of self-interested persons making choices in genuine ignorance of their own situation and unaffected by the experience of a particular society, why should we say that their choice would be intrepid rather than insecure in selecting their first principle of justice, and fainthearted rather than resolute in selecting their second principle? Rawls`s artifice of a social contract, then, does not give us a rational method of deciding between two rival concepts of justice.

The purpose of the device is to reach impartiality. But that can be done in a simpler way. To get away from a self-interested to an impartial judgement, all one needs to do is to imagine oneself in the shoes of someone else. Is not this in fact the psychological basis of the *needs* concept of justice? If one says that justice requires special attention to the needs of the poor, the idea of self-interested is quite irrelevant.

[558] First Principle: Liberty - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Second Principle: Wealth - Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

[559] Such as equality of equal goods, for instance.

It is not a question of making sure that there will be help for yourself if you ever find yourself landed among the poor. It is a question of a sort of self-identification with the poor, an empathic bondage between your present "self" and the Poor's condition. One can only appreciate what the poor feel if you imagine what you would feel if you were one of them.

But this is not supposing that you really are one of them, and the moral judgement which it produces is an altruistic one, not a self-interested insurance policy. The question that does need to be raised is whether the moral obligation which arises from sympathy for the disadvantaged is an obligation of justice.

Those who have a predilection for the merit-concept of justice will not dispute that there is a moral obligation to succour the needy, but they will deny that it is an obligation of justice. It is the duty of charity, they will say, a finer thing than justice but not to be confused with it.

Justice has to do with entitlements or rights. There is no right to charity, as there is a right to what you have earned for yourself. Charity is a matter of grace and favour. By all means, a conscientious person will feel that he has a duty to be charitable; if he thinks of himself merely as doing a favour, he may be tarnishing the sheen of charity as a virtue. But for the recipient it is a favour, not a right. As a duty, charity is a `duty of supererogation`,[560] it goes beyond what is absolutely required of us by duties of `perfect obligation`, by the demands of justice.

In referring to Rawls's definition of justice as a sort of ethical yardstick hardly propounds a novel concept.

[560] Raphael, D.D. Prof. Op. Cit. Pp. 75.

Aristotle considered in his Nicomachean Ethics what it means to be unjust and it is submitted approached that word as a symbol in the Jungian sense of the word.[561] One ends up asking the question whether these are *just problems* or *problems* of the *just*?

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[561]Thomson, J.A.K., translator of The Ethics of Aristotle, The Nicomachean Ethics, Markham, Penguin Books Canada Ltd., (1980), p.172. "the word is considered to describe both one who breaks the law and one who takes advantage of another, i.e. acts unfairly.... just means lawful and fair; and unjust means both unlawful and unfair."