Justice

Justice has been of central importance to political philosophy for over two thousand years. Through the ages, political thinkers have portrayed the 'good society' as a 'just' society. However, there has been far less agreement about what justice stands for. In everyday language, in fact, justice is used so imprecisely that it is taken to mean 'fairness', 'rightness' or, simply, that which is 'morally correct'. Without doubt, justice is a moral or normative concept: that which is 'just' is certainly morally 'good', and to call something 'unjust' is to condemn it as morally 'bad'. But justice does not simply mean 'moral'. Rather, it denotes a particular kind of moral judgement, in particular one about the distribution of rewards and punishments. Justice, in short, is about giving each person what he or she is 'due'. However, it is much more difficult to define what that 'due' might be. Justice is perhaps the archetypal example of an 'essentially contested' concept. No settled or objective concept of justice exists, only a set of competing concepts.

Moreover, although justice is a distributive concept, it is less clear what it is trying to distribute. What rewards and penalties does the concept of justice address? Justice could concern itself with the distribution of almost anything: wealth, income, leisure, liberty, friendship, sexual love and so forth. The concept of justice could be applied to the distribution of any of these 'goods', but there is no reason why the same principle of distribution should be considered 'just' in each case. For example, those who may advocate an equal distribution of material wealth may nevertheless regard the idea of an equal distribution of sexual love as quite bizarre, if not as frankly unjust. In that sense, it is quite impossible to construct an overriding principle of justice applicable to all areas of life. As Walzer (see p. 36) argued, different principles of justice may therefore be appropriate in different spheres of life. During the twentieth century, for instance, justice came to be discussed usually in relation to social life in general, and the distribution of material rewards in particular. This is what is usually termed 'social justice', and is examined in greater length in Chapter 10.

In this chapter, however, justice is discussed primarily in relation to law, and therefore through the concept of 'legal justice'. Legal justice is concerned with the way in which law distributes penalties for wrongdoing, or allocates compensation in the case of injury or damage. Justice in this sense clearly involves the creation and enforcement of a public set of rules, but to be 'just' these rules must themselves have a moral underpinning. Two forms of justice can be identified at work in the legal process. First, there is procedural justice, which relates to how the rules are made and applied. Second, there is substantive justice, which is concerned

with the rules themselves and whether they are 'just' or 'unjust'. Questions about justice in either of these senses are crucial because they bear on the issue of legitimacy. People recognize law as binding, and so acknowledge an obligation to obey it, precisely because they believe it to be just. If, however, law is not administered in accordance with justice, or law itself is seen to be unjust, citizens may possess a moral justification for breaking the law.

Procedural justice

Procedural or 'formal' justice refers to the manner in which decisions or outcomes are achieved, as opposed to the content of the decisions themselves. There are those, for instance, who suggest that legal justice is not so much concerned with the outcomes of law – judgements, verdicts, sentences and so forth – as with how these outcomes are arrived at. There is no doubt that on certain occasions justice is entirely a procedural matter: a just and acceptable outcome is guaranteed by the application of particular procedural rules. This clearly applies, for example, in the case of sporting competition. The object of a running race is to establish, quite simply, who is the fastest runner. Justice in this respect is achieved if procedural rules are applied which ensure that all factors other than running talent are irrelevant to the outcome of the race. Thus justice demands that every competitor runs the same distance, that they start at the same time, that none enjoys an unfair advantage gained through performance-enhancing drugs, that officials adjudicating the race are impartial, and so on.

Legal systems can claim to be just in precisely the same way: they operate according to an established set of rules designed to ensure a just outcome. In short, justice is 'seen to be done'. These procedural rules can, however, take one of two forms. In the case of what John Rawls (see p. 298) called 'pure procedural justice' the question of justice is solely determined by the application of just procedures, as with the example of a running race or a lottery. In a court of law, on the other hand, there is prior knowledge of what would constitute a just outcome, in which case the justice of the procedures consists of their tendency to produce that outcome. For example, in a criminal trial the procedural rules are designed to ensure that the guilty are punished, that punishment fits the crime, and so forth.

Many of these procedural rules are, however, not exclusive to the legal system but also apply to other areas of life, ranging from formal debate in legislative chambers or committees to informal discussions among friends or family. Indeed, it is often suggested that these rules reflect a widely held

and perhaps innate sense of what is fair or reasonable, what is usually called 'natural' justice. This can be seen, for instance, in the widespread belief that it is fair in argument and debate for all parties to have the opportunity to express their views, or when decisions are taken for those affected by them to be consulted beforehand. Because the fairness of such rules is considered by many to be self-evident, there is often considerable agreement about what makes the administration of law procedurally just.

At the heart of procedural justice stands the principle of formal equality. The law should be applied in a manner that does not discriminate between individuals on grounds like gender, race, religion or social background. This, in turn, requires that law be impartially applied, which can only be achieved if judges are strictly independent and unbiased. Where the judiciary has clear political sympathies, as in the case of the US Supreme Court, or when judges are thought to be biased because they are predominantly male, white and wealthy, this may be seen as a cause of injustice. The widespread use of the jury system, at least in criminal cases, may also be justified in terms of procedural justice. The virtue of trial by jury is that juries are randomly selected and so are likely to be impartial and to be capable of applying a standard of justice commonly held in society. The defendant is judged by his or her 'peers'.

Moreover, the legal system must acknowledge the possibility that mistakes can be made and provide some machinery through which these can be rectified. This is achieved in practice through a hierarchy of courts, higher courts being able to consider appeals from lower courts. However, miscarriages of justice may be more difficult to rectify when the process of appeal is placed entirely in the hands of the judges, who may fear bringing the court system, and the judiciary itself, into disrepute. This was highlighted in the UK by the cases of the Guildford Four and the Birmingham Six, whose convictions for terrorism were overturned in 1989 and 1991, but only after they had served 14 and 16 years in gaol respectively. Procedural justice is also said to require the presumption that the accused is 'innocent until proved guilty'. This has been described as the 'golden thread' running through the English legal system and those derived from it. The presumption of innocence ensures that the mere fact of an accusation does not in itself constitute proof; the onus is on the prosecution to offer evidence which can prove guilt beyond 'reasonable doubt'. This is also why certain evidence, for instance about the accused's previous criminal record, may be inadmissible in court, since it could taint the jury's views and prevent a verdict being reached on the 'facts of the case'. In the same way, an accused person has traditionally been accorded a right to silence, on the grounds that it is the prosecution's job to establish guilt. In the USA, for example, this is enshrined in the Fifth Amendment of the Constitution which guarantees the right to avoid self-incrimination.

The principle of equal treatment has applications at every point in the legal process. For example, it suggests that ordinary citizens should not be disadvantaged by their ignorance when dealing with the police, the prosecution or the judiciary. It is normally accepted therefore that an accused person should be clearly informed about the charges made, and that he or she should be informed at the outset about their rights, notably their right to legal advice. Such rules of procedural justice have been most clearly defined in the USA. For example, in *Miranda* v. *Arizona* (1966), the Supreme Court laid down very strict procedures which the police have to follow when questioning suspects; and in *Gideon* v. *Wainwright* (1963) it guaranteed defendants the right to a lawyer, regardless of their financial circumstances. In other cases, however, governments have ignored such principles in the belief that they unnecessarily hamper the pursuit of criminals or others who threaten public order. In the UK, the Terrorism Act 2001, passed in the aftermath of the terrorist attacks on New York and Washington, included the power to hold terrorist suspects without trial, infringing the right to liberty as set out in the Human Rights Act 1998.

Substantive justice

As pointed out earlier, the requirements of legal justice cannot be entirely met by the application of procedural rules, however fair these rules may be and however scrupulously they may be applied. This is the sense in which law is different from competitive sport; its outcomes, and not merely its procedures, are claimed to be just. The legal process may thus generate injustice not because law is unfairly applied but because law itself is unjust. For instance, laws which prohibit women from voting, or which ban ethnic minorities from owning property, are not made 'just' by the fact that they are applied by courts whose procedures are fair and impartial. The content of law must therefore be judged in the light of a principle of substantive or 'concrete' justice.

Whereas there is considerable agreement about the rules of procedural justice, the same cannot be said of substantive justice. Legal justice has traditionally been linked to the idea that law aims to treat people according to their 'just deserts', or, in the words of the Roman Emperor Justinian, justice means 'giving each man his due'. The difficulty of doing this was illustrated by the earlier discussion of competing theories of punishment. Supporters of retribution may argue that in principle justice demands that the murderer's life be forfeit in punishment for his crime; those who advocate deterrence may accept capital punishment but only when empirical evidence indicates that it will reduce the number of murders; rehabilitation theorists reject capital punishment in all circumstances, regarding it as little more than a form of legalized murder. No

amount of debate and analysis is likely to shift any of these positions because they are based upon fundamentally different moral principles. The same applies to the attempt to distribute material rewards justly. While some argue that social justice requires a high level of material equality on the grounds that wealth should be distributed according to individual needs, others are happy to accept a high level of material inequality so long as this is based upon the unequal talents of the people involved.

Like all normative principles, the idea of substantive justice is subjective; at heart, it is a matter of opinion. Notions of justice therefore vary from individual to individual, from group to group, from society to society, and from period to period. Indeed, the decline of religion and traditional values, and the growth of both social and geographical mobility, has encouraged the development of moral pluralism. Ethical and cultural diversity make it impossible to make any firm or authoritative judgements about the moral content of law, or to establish reliable criteria for distinguishing just laws from unjust ones. Justice is, in this sense, a relative concept. It perhaps has meaning only for particular individuals or groups, and cannot be applied to society at large.

One way round this problem is to try to relate justice to a set of dominant or commonly held values in society. This is precisely what Patrick Devlin (1968) meant when he proposed that law should 'enforce morality'. In Devlin's view, law is based upon the moral values of the average citizen or, in his words, 'the man on the Clapham omnibus'. Thus he proposed a distinction between what he called 'consensus laws' and 'non-consensus laws'. Consensus laws are ones which conform to commonly held standards of fairness or justice; they are laws which, in Devlin's view, people are 'prepared to put up with'. On the other hand, non-consensus laws are ones widely regarded as unacceptable or unjust, normally reflected in the fact of widespread disobedience. Devlin did not go as far as to suggest that breaking non-consensus laws was justified, but he nevertheless warned that their enforcement would only bring the judiciary and the legal process into disrepute. An example of non-consensus law might be the 'poll tax' in the UK, which, when introduced in England and Wales in 1990, gave rise to a widespread campaign of protest and non-payment, based upon the belief that the tax violated generally held views of social justice.

Devlin believed that judges, who are strictly impartial and stand apart from the political process, are in the best position to apply the distinction between consensus and non-consensus law. After all, judges have had years of experience adjudicating disputes and arbitrating between conflicting interpretations of law. However, this form of judicial activism has proved to be highly controversial, allowing as it does non-elected judges to make decisions that have a clear moral and political content. The issue has been

particularly relevant in the United States in view of the widely acknowledged role of the Supreme Court in making public policy. During the New Deal period of the 1930s, for instance, the Court struck down important social welfare programmes. In the 1950s and 1960s, however, the Warren Court was responsible for advancing civil rights on a number of fronts. The danger of such 'activism', however, is that there is no way of knowing whether judges' interpretations of law reflect widely held views about what is right or acceptable, or simply their own personal beliefs. It is clear that, since they are not elected, their definition of consensus morality enjoys no electoral mandate. Moreover, in the light of the socially unrepresentative nature of the judiciary, it is questionable that the judges know much about what Devlin called 'the man on the Clapham omnibus'.

Regardless of who is empowered to define consensus morality, there are reasons to believe that the idea itself may not stand up to serious scrutiny. In the first place, it implies that a reliable distinction can be made between consensus and non-consensus laws. In practice, few, if any, issues provoke widespread agreement, still less unanimity. All governments pass legislation that is politically controversial in that it provokes protest or at least a significant measure of criticism. This could be applied to almost every area of government policy, economic management, taxation, industrial relations, education, health, housing, law and order, race relations and so on. The danger of Devlin's argument is that it threatens to classify most laws as non-consensus on the grounds that somebody or other is not 'prepared to put up with' them. This leads to difficult questions about how many people need to object, and what form their objections need to take, before a law can be regarded as non-consensus. Such difficulties, however, merely reflect a deeper problem. In many respects, the idea of a consensus morality is simply a hangover from the days of traditional and homogeneous communities. In modern societies, characterized by ethnic, religious, racial, cultural and moral pluralism, any attempt to identify consensus beliefs is doomed to failure.

Justifying law-breaking?

The question 'Why should I obey the law?' elicits from many people the simple response: 'Because it is the law.' The law, in other words, is usually acknowledged to be legitimate, in the sense that most citizens accept an obligation to obey it. Law is therefore recognized as binding upon those to whom it applies. In a formal sense, the law is the law only because it is obeyed – at least by the vast majority of the population. There is thus a sense in which laws remaining on the statute book, but which are no longer obeyed or enforced, cease to be law. This applies, perhaps, in the

case of copyright laws which prohibit the taping of audio or video cassettes and, in some countries, laws which ban the use of so-called 'soft' drugs like cannabis. Indeed, in countries such as the Netherlands an attempt has been made to formalise this anomaly by 'decriminalizing' the use of 'soft' drugs. Nevertheless, despite the general acknowledgement that law is legitimate, it is clear that all laws are broken to some degree – otherwise the machinery of law enforcement would simply be redundant. It is important to acknowledge, however, that incidents of law-breaking fall into two separate categories.

In most cases, laws are broken by people described, rather quaintly, as 'common criminals'. Common criminals seldom put forward a moral justification for their actions, and rarely portray their behaviour as other than nakedly self-seeking. Criminal behaviour of this kind undoubtedly raises some interesting questions, for example, about the psychological or social factors which help to explain law-breaking, and the possible means through which others can be deterred from pursuing the same course. However, these are descriptive questions about why the law *is* obeyed, or why it *is not* obeyed. However reluctant they may be to be caught or prosecuted, so-called common criminals usually acknowledge that they *should* have obeyed the law, and so recognize the law as binding. On the other hand, there are incidents of law-breaking which are principled and, maybe, justifiable in moral or political terms. Some legal systems, indeed, acknowledge this fact by categorizing certain law-breakers as 'political prisoners' and treating them differently from everyday criminals. The distinction between the two may, however, be both unclear and politically controversial. This has been evident in the case of terrorist groups, such as the IRA in the UK and ETA, the Basque separatist movement in Spain, which have at different times aspired to be granted 'political status' on the grounds that they are not criminals but 'freedom fighters'. Some go further and extend the notion of 'political' crimes to include criminal acts which result from social circumstances like deprivation, poverty or inequality, even though their perpetrators may not claim any conscious political motivation. Anarchists, in fact, are not prepared to recognize any distinction between criminal and political offences, in that they regard all laws as immoral and therefore tend to see moral justification in each and every case of law-breaking.

The moral justification for law-breaking can be examined in two ways. One is to ask the question: 'Why should I obey the law?' This raises the issue of political obligation and is addressed more fully in Chapter 7. The alternative is to stand the question on its head and ask: 'What justification is there for breaking the law?' This raises the issue of what is called civil disobedience, law-breaking that is justified by reference to religious, moral or political principles. Civil disobedience has a long and respectable

heritage, drawing as it does upon the ideas of writers such as Henry David Thoreau (1817–62) and the example of political leaders such as Mahatma Gandhi and Martin Luther King (1929–68). Under Gandhi's influence, non-violent civil disobedience became a powerful weapon in the campaign for Indian independence, finally granted in 1947. In the early 1960s, Martin Luther King adopted similar political tactics in the struggle for black civil rights in the American South.

Civil disobedience is an overt and public act: it aims to break a law in order to 'make a point' rather than in an attempt to get away with it. Civil disobedience is thus distinguished from other criminal acts by its motives, which are conscientious or principled, in the sense that they aim to bring about some kind of legal or political change; it does not merely serve the interests of the law-breaker himself or herself. Indeed, in many cases it is precisely the willing acceptance of the penalties which law-breaking involves that gives civil disobedience its moral authority and emotional power. Finally, at least in the tradition of Thoreau, Gandhi and King, civil

Mohandas Karamchand Gandhi (1869–1948)

Indian spiritual and political leader, called Mahatma ('Great Soul'). A lawyer trained in Britain, Gandhi developed his political philosophy whilst working in South Africa where he organised protests against discrimination. After returning to India in 1915, he became the leader of the nationalist movement, campaigning tirelessly for independence, finally achieved in 1947. Gandhi was assassinated in 1948 by a fanatical Hindu, becoming a victim of the ferocious Hindu–Moslem violence which followed independence.

Gandhi's ethic of non-violent resistance, *satyagraha*, reinforced by his ascetic lifestyle, gave the movement for Indian independence enormous moral authority and provided a model for later civil rights activists. First outlined in *Hind Swaraj* (Home Rule) (1909), it was based upon a philosophy ultimately derived from Hinduism in which the universe is regulated by the primacy of truth, or *satya*. As humankind is 'ultimately one', love, care and a concern for others is the natural basis for human relations; indeed, he described love as 'the law of our being'. For Gandhi, non-violence not only expressed the proper moral relationship amongst people, but also, when linked to self-sacrifice, or *tapasya*, constituted a powerful social and political programme. He condemned Western civilisation for its materialism and moral weakness, and regarded it as the source of violence and injustice. Gandhi favoured small, self-governing and largely self-sufficient rural communities, and gave support to the redistribution of land and the promotion of social justice.

disobedience is non-violent, a fact which helps to underline the moral character of the act itself. Gandhi was particularly insistent upon this, calling his form of non-violent non-cooperation *satyagraha*, literally meaning defence of, and by, the truth. Civil disobedience thus stands apart from a very different tradition of political law-breaking, which takes the form of popular revolt, terrorism and revolution.

In some cases, civil disobedience may involve the breaking of laws which are themselves considered to be wicked or unjust, its aim being to protest against the law in question and achieve its removal. In other cases, however, it involves breaking the law in order to protest against a wider injustice, even though the law being broken may not itself be objectionable. An example of the former would be the burning of draft cards or the refusal to pay that proportion of taxation which is devoted to military purposes, forms of protest adopted by opponents of the Vietnam War in the USA. Similarly, Sikhs in the UK openly flouted the law compelling motorcyclists to wear crash-helmets because it threatened their religious duty to wear turbans. On the other hand, Thoreau, who refused all payment of tax in an act of protest against the Mexican–American War of the 1840s and the continuation of slavery in the South, is an example of the latter. On some occasions Gandhi combined the two goals. In his famous 'march to the sea' in 1930, for instance, he sought to protest against the law banning Indians from making salt by making a symbolic amount of salt from sea water and thus courting arrest, but only as part of a larger campaign for national independence.

Whether it is designed to attack a particular law or advance a wider cause, all acts of civil disobedience are justified by asserting a distinction between law and justice. At the heart of civil disobedience stands the belief that the individual rather than government is the ultimate moral authority; to believe otherwise would be to imply that all laws are just and to reduce justice to mere legality. The distinction between law and justice has usually, in the modern period, been based upon the doctrine of human rights, asserting as it does that there is a set of higher moral principles against which human law can be judged and to which it should conform. Individuals are therefore justified in breaking the law to highlight violations of human rights or to challenge laws which themselves threaten human rights. Arguments about the existence of such rights, and about how they can be defined, are examined in the next chapter.

Other justifications for civil disobedience focus upon the nature of the political process and the lack of alternative – legal – opportunities for expressing views and exerting pressure. For example, few would fail to sympathize with the actions of those who in Nazi Germany broke the law by sheltering Jews or assisting their passage out of the country. This applies not only because of the morally repulsive nature of the laws

concerned but also because in a fascist dictatorship no form of legal or constitutional protest was possible. Similarly, the use of civil disobedience to gain votes for women in the nineteenth and early twentieth centuries can be justified by the simple fact that, deprived of the right to vote, women had no other way of making their voices heard. Civil disobedience campaigns were also used to achieve black suffrage in the American South and in South Africa. Even when universal suffrage exists it can perhaps be argued that the ballot box alone does not ensure that individual and minority rights are respected. A permanent minority, such as the Catholic community in Northern Ireland, may therefore turn to civil disobedience, and at times support political violence, even though they may possess formal political rights. Finally, it is sometimes argued that democratic and electoral politics may simply be too slow or time-consuming to provide an adequate means of exerting political pressure when human life itself is under imminent threat. This is, for example, the case made out by anti-nuclear campaigners and by environmental activists, both of whom believe that the urgency of their cause overrides what by comparison appears to be the almost trivial obligation to obey the law.

Since the 1960s civil disobedience has become more widespread and politically acceptable. In some respects, it is now regarded as a constitutional act which aims to correct a specific wrong and is prepared to conform to a set of established rules, notably about peaceful non-violence. Civil disobedience is, for example, now accepted by many as a legitimate weapon available to pressure groups. Sit-ins or sit-down protests help to attract publicity and demonstrate the strength of protesters' convictions, and may, in turn, help to promote public sympathy. Of course, such acts may also be counter-productive, making the individuals or group concerned appear irresponsible or extremist. In these cases, the question of civil disobedience becomes a tactical matter rather than a moral one. Critics of the principle nevertheless argue that it brings with it a number of insidious dangers. The first of these is that as civil disobedience becomes fashionable it threatens to undermine respect for alternative, legal and democratic means of exerting influence. At a deeper level, however, the spread of civil disobedience may ultimately threaten both social order and political stability by eroding the fear of illegality. When people cease obeying the law automatically and only do so out of personal choice, the authority of law itself is brought into question. As a result, acts of civil disobedience may gradually weaken the principles upon which a regime is based and so be linked to rebellion and even revolution. This was evident in 1989 when a mounting wave of illegal but usually peaceful demonstrations in countries such as East Germany and what was then Czechoslovakia led eventually to the collapse of their political regimes.

Summary

1 Law consists of a set of general, public and enforceable rules, usually regarded as binding in the society to which it applies. It is valued as the principal means through which liberty and order are maintained. This is usually achieved through the rule of law, the belief that all behaviour should conform to a framework of law, a doctrine closely linked to constitutionalism and limited government.

2 Whereas law is a distinctive form of social control, morality addresses normative or ethical questions: what *should* be. Although they are analytically separate, some believe that law and morality do, and should, coincide. This is advanced by natural law theorists who hold that human law reflects higher moral principles. The alternative idea of positive law suggests that its defining feature is that it is obeyed, moral questions being set aside.

3 Order may universally be regarded as a good thing, bringing with it the promise of stability and personal security, but attitudes diverge about how it can best be secured. Some argue that since human beings are imperfect, order has to be imposed; it can only be achieved through discipline and control. Others place their faith in reason and social solidarity, believing that the natural relationship amongst people is one of harmony.

4 Justice is about giving each person what he or she is 'due'. It can be understood in a procedural sense to refer to the rules which guide the legal process, and in a substantive sense to refer to the outcomes or content of law. The issue of justice lies at the heart of questions about legitimacy and orderly existence, determining whether citizens are willing to accept the law as binding.

Further reading

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