

# Justice Through the Looking Glass

Stephen Williams asks: Is That All There is to Justice?

It's not always easy being human. We have evolved to be a highly adaptable species, but the downside of that genetic advantage is that we frequently face unfamiliar circumstances. If we had to deal with each situation as something totally new, we would be immobilised by the amount of information we would have to process, so we rely on a range of fixed points, some psychological, some social, to create a manageable environment. However, if we try to interrogate those fixed points, the things we have been taking for granted, they often turn out to be more shaky than we had assumed.

That is what I've taken to be the thinking behind the theme of this Conference *Is That All There Is?* Within SOF, it's a perspective that we've often explored in the context of religion but it's not restricted to religion. There are assumptions about politics or economics which mostly go unchallenged and we could consider those, but for the purpose of this talk I want to look behind the idea of Justice. Is it something we can rely on or is it a will-o-the-wisp that disappears when we try to grasp it?

## Justice and Law

I'll concentrate on (English) criminal justice, partly because it's where I have some experience, but also because for many people it's the first thing to come to mind when Justice is mentioned. Television local news gives a lot of space to stories of crime and punishment.

The title of my talk refers of course to Lewis Carroll. In *Through the Looking Glass*, Alice finds herself in a world where everything is back to front – or almost so as the two worlds can coexist. As the White Queen tells her, 'There's one great advantage, that one's memory works both ways.' When Alice remarks that she can't remember things before they happen, the Queen replies that it's a poor sort of memory that only works backwards.



Later Alice learns from the White Queen that the Hatter is in prison. Apart from Alice herself, the Hatter and the Hare are the only characters to appear in both Alice books, and Alice is interested to know more. This is how the conversation unfolds:

'That's the effect of living backwards,' the Queen said kindly. 'For instance, he's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.'

'Suppose he never commits the crime?' said Alice.

'That would be all the better, wouldn't it?' the Queen said.

Carroll is playing with us, but his satire only works because he shares his readers' assumptions about how justice ought to happen. And about how justice has always been and how it always will be. At that time, Justice was understood as a response to past events, and in the case of criminal justice

came with the expectation that the punishment should fit the crime.

In the late 19<sup>th</sup> and 20<sup>th</sup> centuries, criminal justice policy took on a more instrumental character. Punishment now had to be for a purpose, which might still be about reflecting the seriousness of a crime, but also took in ideas of reform and deterrence, so it was expected to produce results. Probation, where I spent many years, had its origins in that period. For a more recent example, you may remember that when Michael Howard was Home Secretary, he promoted a large increase in the use of imprisonment, which he justified, not because it was what offenders deserved but with the slogan 'Prison Works'.

In the last thirty years, especially, there has been a focus in policy on preventing crime, so that often sentencing is concerned as much with what someone might do in future as with what they have done in the past. That can lead to defendants receiving much heavier sanctions than the original offence would justify. We are not far from the Looking Glass World of the White Queen and the Hatter and in some situations indeed, there may not be a crime at all. The most obvious examples are with sex offending, and the use of sex offenders' registers, and in measures to deal with people seen as potential terrorists. In both cases there are good arguments for pre-emptive action, but it's a novel understanding of justice that underpins it, and one that continues to be debated.

It isn't as if nothing changed before the days of Lewis Carroll. If we look back to the Middle Ages, we find criminal justice tied up with the concept of the King's Peace. Crime was then understood as a disruption of good order, and the task of the courts was to restore order and affirm the authority of the King. To achieve this, they had various measures at their disposal, but these could result in similar cases, or even separate defendants in the same case, being dealt with very differently. What mattered was that the King's Peace was upheld. Consistency, the like treatment of like cases, something which we would nowadays think a key element of Justice, was not that important.

Before the 12<sup>th</sup> century, criminal justice did not really exist as something distinct from Justice generally. In Anglo-Saxon times, the focus was on wrongs and redress. The law codes of the time contained tariffs of the compensation owed to victims. It was a hierarchical society, and those tariffs reflected social status, so that an offence

against someone of higher class would attract a greater penalty because they were deemed to have suffered a greater wrong.

That emphasis on compensation is a reminder of the original use of law to settle private disputes, what we now call civil justice. I won't go further into that now, except to say that similar processes can be seen in the history of both civil and criminal law. When we take a long view, we see law as dynamic, altering over time and with the principles dominant at one time often contradicted in the practices and procedures of a different age. Of course, it's not particularly ground-breaking to say that social institutions change. However, I suggest that if we were to stop the clock at any point in that history, instead of an acknowledgement of that reality, we would find an assumption that the current expression of justice is the only right one, the embodiment of an eternally valid principle.

## Justice and Virtue

Aristotle understands the relationship between law and justice differently. Law must still aim to deliver just decisions but its primary purpose is to encourage the habit of Justice. 'Legislators make the citizens good by forming habits in them.' Justice is therefore a state of character, a virtue, and a just society is one made up of just citizens.

A virtue, however, is not a personal, individual attribute. Aristotle speaks of people who take refuge in theory, thinking that they are philosophers and that they will become good in this way. He compares these to patients who listen attentively to their doctors but do nothing. Just as these will not be made well in body, so those who would be just will not be made well in soul by a course in philosophy! Justice has meaning only in relation to other people. 'States of character arise out of like activities' and 'by doing the acts that we do in our transactions with other men, we become just or unjust'. We learn by doing, and the more we adopt the habit of justice the more just we become.

The corollary of that is that justice does not come naturally. 'Neither by nature nor contrary to nature do virtues arise in us... Rather, we are adapted by nature to receive them, and are made perfect by habit.' However, if through our transactions with others we can also become unjust, clearly habit alone cannot guarantee virtue, and we must say more. In Aristotle's theory, Justice is teleological; he emphasises the purpose of objects

and institutions, so that excellence is found where there is a fit with that purpose. One of his examples is a flute. Its purpose is to make music, so the just way to deal with a fine instrument is to give it to the best flute-player who will produce the finest music. However, this is not a reward for that flute-player or because he deserves it. It is because that is what flutes exist for.

Moving beyond flutes into the nitty-gritty of daily living, matters become more complicated. Justice is still about excellence and enabling institutions to achieve their purpose, but it is not self-evident what that means. Aristotle himself could maintain the justice of slavery as an institution on the basis that it is what slaves are fitted for. He does, however, offer a route to an understanding of Justice, that he calls 'Practical Wisdom'. Justice is then what just people habitually do, so that Justice is based on shared appreciation. It is arrived at through conversation and deliberation, so that justice is as much about politics as ethics. It requires the seeker after justice to be an active and engaged member of a city or *polis*, the highest manifestation of civic life.

A weakness in Aristotle's approach is its specificity to fourth century Athenian democracy. The idea of Justice as teleological, a reflection of the purpose of objects and institutions, and therefore virtuous, has persisted but without the intrinsic safeguards of shared conversation and deliberation. It easily became authoritarian and oppressive, as later communities adopted ideological approaches to the question of purpose. Religions have been particularly susceptible. Christianity, for instance, developed doctrines of the true purpose of mankind in Christian salvation, which justified (literally, declared to be just) crusades and the suppression of heretics.

In the 18<sup>th</sup> century, Jeremy Bentham saw the purpose of human life as to maximise pleasure and minimise pain. That was true for individuals but could be generalised to the principle of 'the greatest happiness of the greatest number' as the primary social virtue, trumping abstract notions of justice, or any separate community interest.

How might it work? It implies decision-making based on a calculation of all the pleasures and pains caused to all the members of a society but that is not practical; the alternative is to leave it to individuals to determine where the balance lies for them, so that the greatest happiness is found in the summation of all their choices. It's what we now call

the free market. Or decisions could be put to a vote where individuals in an electorate can register the pleasure or pain they anticipate from a proposal, without reference to any wider interests. It's what we now call populism.

At its extreme, therefore, Bentham's utilitarianism, in the name of satisfying the purpose of human existence by maximising pleasure, subordinates justice to impersonal and irrational forces like the market (that cannot be bucked) or the popular will (that is beyond challenge).

John Stuart Mill, for one, was not happy with that position. He saw himself as a utilitarian and probably coined the term, but he recognised the dangers in a system governed by subjective and sometimes unconsidered preferences. There is such a thing as the tyranny of the majority. Mill saw Harmony as a necessary objective alongside Pleasure if we are to make good choices about where happiness lies. The goals we seek must be in harmony with each other and with those of others. For utilitarianism to work it must be supported through education, promoting the rights of women, and other measures that cultivate the mind towards the idea of harmony.

Mill's utilitarianism is ingenious and is more accommodating of the virtue of Justice. However, a century later, Aneurin Bevan, the founder of the NHS, was still grappling with the same problem. In his book *In Place of Fear*, he wrote: 'Not even the apparently enlightened principle of "the greatest good of the greatest number" can excuse indifference to individual suffering.'

Mill's other contribution was his exposition of Liberty, that regardless of the wishes of the majority, there can be no justification for restricting individual liberty unless it is to prevent a greater harm. It represents another qualification of the excesses of extreme utilitarianism. However, it has since been taken in other directions. For present-day libertarians, Liberty itself has become the human purpose, and to restrict it unnecessarily is an injustice. Taxation is such a restriction, unless it is to meet the cost of defending liberty, and it is unjust to levy taxes on one individual so as to provide income or resources for another. If someone wishes to be philanthropic, then that has to be their free choice. For the true libertarian, the very idea of a welfare state is an injustice. It's an argument especially associated with the American writer, Ayn Rand, but has many supporters, and

according to some commentators may have purchase with our new government.

What happens if I do with Justice and Virtue, the idea that justice is found in the elucidation of the purpose of human life, what I did with Justice and Law? I think I find the same, that over its history it is manifest in widely different and often contradictory ways, but that at any specific point the prevalent view is seen as the only one.

## Justice and Fairness

In our time the leading thinker about Justice has been John Rawls, to the point where even those disagreeing with his conclusions have had to engage with his arguments. In *A Theory of Justice* he rejects both utilitarianism and libertarianism completely and argues instead for 'Justice as Fairness' as the central principle of social living. He nails those colours to his mast at the very beginning of the book:

**'Justice is the first virtue of social institutions, as truth is of systems of thought. A theory, however elegant, must be rejected or revised if it is untrue; likewise laws and institutions, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust.'**

Rawls isn't talking here about the specifics of justice and recognises that it will have different manifestations in different contexts. He is describing a more fundamental conception, the principles governing justice in any society. Those principles are necessarily public; everyone accepts them and knows that everyone else accepts them (even if they don't always abide by them).

He follows Kant in treating all rational human beings as ends in themselves, so that it is unjust to regard them as means to someone else's ends. Justice is universal, what Kant calls categorical, which doesn't mean that Justice is always expressed in the same way but that the principles of justice, once established for a specific social setting, are universally applicable. The rights secured by Justice are not subject to political bargaining or a utilitarian style calculus of social interest.

Rawls asserts that in a just society, when humans are seen as ends in themselves, the liberties of equal citizenship are taken as settled. He recognises that his approach has a 'tendency to equality', but he also acknowledges differences and that different people want different things. A society is both a co-

operative venture for the benefit of all, and a focus for conflict as individuals seek potentially competing benefits. Some of those differences are down to individual predilections but there will be certain things that everyone can be assumed to want, a society's primary social goods.

**The Good is the satisfaction of rational desire. Primary Social Goods are things that a rational person is supposed to want, whatever else.' These are:**

**Rights and Liberties  
Opportunities and Powers  
Income and Wealth**

**How these primary social goods are distributed is the business of Justice.**

How can there be justice if there are differences in the way those primary social goods are distributed? Rawls argues for a principle that difference must benefit the whole of society, and the test for that would be the benefit it brings to the least advantaged. An example would be giving higher pay to doctors if it leads to improved medical care for the poorest.

So how might this all work out in a real society? Rawls looks to the classic idea of a social contract, the notion that members of a society are bound together by their consent to the disciplines of social living. It's hypothetical, of course, and no-one believed in an historic moment when people came together and contracted to live as a society. It's only useful as a myth superimposed on already existing societies, but the question can still be asked: 'What would social justice look like if we had gone through that process?'

For Rawls, that question does not go far enough. If the present-day members of a society attempted it, they would necessarily bring to it all the distinctions in their various circumstances, in wealth and income, of course, but also in health, intelligence, level of education, political power, quality of social relationships, and indeed talent. Their contribution to the process would inevitably be coloured by the knowledge of where they would end up in the eventual social contract.

To do the thing properly would require an original position in which members of a society can consider the requirements of social justice without knowing how they will be affected. He assumes, for instance, that a system producing large financial disparities would be rejected, where people don't know their eventual place in that system. The

approach rests on what Rawls calls 'the veil of ignorance'.

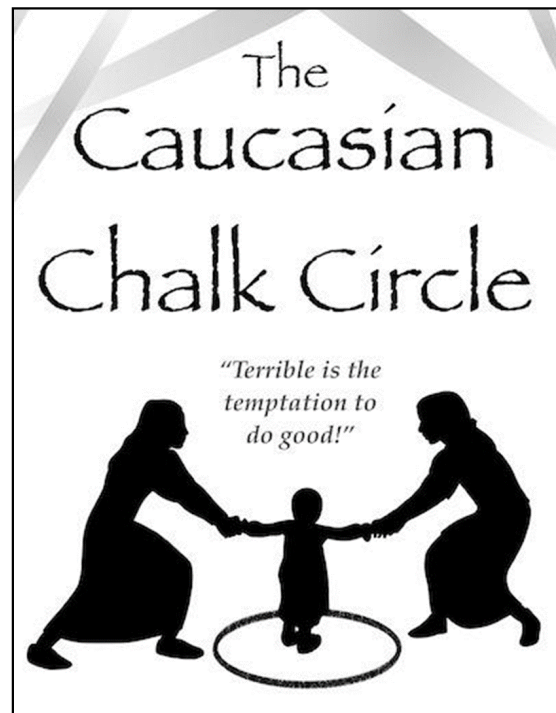
So is that all there is to Justice? We have seen that Justice in relation to both Law and Virtue is fluid and inconsistent. Rawls' Justice as Fairness approach explicitly allows for variability. However, it cannot be demonstrated in real life but rests ultimately on a thought experiment, an original position relying on a veil of ignorance.

But might that be the way forward? For all the difficulties, we can't easily do without a conception of Justice and Rawls is surely right to see it as fundamental to living socially. We can't get there by prescriptive statements of what is just, but by giving us a thought experiment, he is offering us a route to understanding through imagination, just as in a rather different way Lewis Carroll did. But imaginative contributions demand an imaginative response. Justice is not a given but has to be worked at.

I will end with another literary reference. *The Caucasian Chalk Circle* by Bertolt Brecht concludes with a dispute between two women as to who is the mother of a young boy. To resolve the question, the judge places the boy in a chalk circle and has the women compete to pull him out, only to conclude that the one who lets go is the true mother. It's based on a Chinese story, although there are parallels with the Biblical account where Solomon faced a similar situation.

The difference is that that story is taken as a demonstration of the wisdom of Solomon, while Azdak, Brecht's judge, is corrupt, looking to make money from his office and coming to decisions as the fancy takes him. And with Brecht, we know all along which is the biological mother.

The boy, Michael, is the child of the governor and his wife; the governor has been overthrown and killed in a revolution and the boy has been left with Grusha, a kitchen maid. When the old regime is restored, the boy is potentially the heir to a fortune if he is acknowledged as the governor's son, and his mother wants him back.



During the hearing, Azdak finds pretexts to fine both women for contempt of court and makes a nice profit in the process, but at the crucial moment of the test, Grusha lets go of the boy and cries in despair, 'I brought him up! Shall I also tear him to bits? I can't.'

Azdak replies immediately to Grusha: 'The Court has determined the true mother. Take your child and be off.' To the governor's wife he says: 'Your estates fall to the city. They'll be converted into a playground for the children. They need one and it will be named after me: Azdak's Garden.'

The governor's wife has been supported by lawyers arguing for the ties of blood, but Azdak has rejected legal assumptions in favour of what felt right at the time. The play ends with a song:

*And after that evening Azdak vanished and was never seen again.  
The people of Grusinia did not forget him but long remembered  
The period of his judging as a brief golden age,  
Almost an age of justice.  
But you, you who have listened to the Story of the Chalk Circle,  
Take note what men of old concluded:  
That what there is shall go to those who are good for it,  
Children to the motherly, that they prosper,  
Carts to good drivers, that they be driven well,  
The valley to the waterers, that it yield fruit.*

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