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Justice Re-examined*

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Philosophical analysis of the notion of justice must begin with the question: "Is justice the sole virtue concerning our relations with others or is it merely one of the virtues, in competition with others, such as equity, mercy and generosity?" *Plato* chose the first of these alternatives in his works, while *Aristotle* has shown a distinct preference for the second. The choice made by each of them is by no means arbitrary, since it is explained by the difference between their philosophies.

For *Plato*, the philosopher with his skill in dialectics can attain knowledge of the realm of ideas, and especially of the idea of justice. Accepting the existence of a realm, an order universal, harmonious and just, the wise man will draw upon this to present the ideal of a just political community for which he will formulate just laws which in his capacity as judge he will be able to apply in an unequivocal way, without giving rise to criticism or controversy. From this standpoint, nothing is more justified than the maxim *pereat mundus, fiat justitia*, that justice be done, though the world perishes; no consequence, whatever it may be, may hold us back from carrying out the requirements of justice.

Almost thirty years ago, at an International Philosophical Conference in Amsterdam, a Calvinist judge confided to me that he conceived his role as searching out in every case the just solution as known to God. In this he expressed the Christian, Augustinian, version of Platonism: the world of ideas being located in the divine understanding, man will strive to find what is just in the eyes of God. This end being achieved, the man who allows himself to be guided by God in his judgments and decisions can have no good reason for departing from the just solution. The person who knows the absolutely just answer to every human problem, wholly in accordance with truth, ought not under any circumstances to deviate from it. Each and every concession will be unworthy of an upright judge who will not allow himself to be corrupted, intimidated, or even moved by pity: *dura, lex, sed lex*.

Against this absolutist view of justice, inspired on the one hand by the spirit of mathematics, and by a religious ideal on the other, *Aristotle* has

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set the ideal of practical wisdom, *φρόνησις*, which is derived from long experience of how human institutions function. When called upon to judge, to reach a deliberate decision, the wise man is unable to find in matters of human endeavour the unique solution based on intuition or incontestable proof. Thus, in the domain of practical reason, he has no recourse beyond dialectical arguments which at best merely produce a reasonable solution. The norm on which the judge will draw is neither divine, nor absolute, since it is the man of practical wisdom who will be his only model. The rule formulated by the human legislator, even if it is just, is merely adapted to habitual situations. When faced with a situation which is out of the ordinary and which has not been foreseen by the legislator, the judge will have to seek, on the basis of equity, a solution which is more just than that of the statute law, and better adapted to the problem. When it is required, *Aristotle* opposes to justice conceived as conformity to the law a superior justice based on equity.

Human justice, consequently imperfect, cannot impose unconditional submission: it will be normal to temper its excesses by recourse to equity, charity, and generosity.

In the debate between *Plato* and *Aristotle*, I have no hesitation in placing myself on the side of *Aristotle*. For if I had the temerity thirty years ago to write that philosophy is the systematic study of confused ideas¹, it is the idea of justice which seems to illustrate this thesis best.

At first glance, it seems that a decision will be just if it conforms to a rule of formal justice requiring the same treatment for essentially similar cases. But this rule requires to be refined and even amended on important points.

We can begin by recognising, with *Norman C. Gillespie*², that it is not always unjust to treat essentially similar cases differently. For instance, if I give £1 to a passing beggar and an hour later give merely a quarter of this sum to a second beggar, I have not acted unjustly since the rule of justice does not transform at a stroke an act which I am free to do or omit into an obligatory one. If justice requires me to act in a determinate way in a certain situation, I must act in the same way in an essentially

¹ See "Concerning Justice" in: *The Idea of Justice and the Problem of Argument*, London 1963, p. 4.

² Norman C. Gillespie, "On Treating Like Cases Differently", *Philosophical Quarterly* XXV (1975), pp. 151-158.

similar situation. But if I am left completely free to act as I wish in the first situation, I retain this freedom of action in an essentially similar situation. My way of acting has not then set a precedent to which I will be held to be bound in virtue of the rule of formal justice.

I would add however that in my view there are few situations in which the act one was free to do or omit does not tend to become an obligatory act, in so far as it generates an expectation in the mind of the beneficiary. One knows how quickly a voluntary bonus awarded to an employee at the end of the year by his employer, is transformed into an obligation, a custom, from which it is difficult to disengage oneself.

We should also note that conforming to a rule or precedent will be considered just only if the rule or precedent is itself accepted. One would never say that the doctor carrying out the selections at Auschwitz and scrupulously following the rule directing him to send Jewish children under fourteen years of age to the gas chamber, had acted in a just manner by punctually and zealously carrying out a criminal order or precedent.

It is necessary then, for an act to be just in virtue of the rule of formal justice, not only that the new case be essentially similar to the previous case, but also that the decision which furnished the precedent be equally accepted. But that these two conditions have been met is rarely beyond challenge.

When are two situations essentially similar? In other words, when is one to say that what differentiates the two situations is negligible?

In 1944, in my first work on justice, I listed six principles of justice which present different criteria on this point. These were:

1. To each the same thing.
2. To each according to his merits.
3. To each according to his works.
4. To each according to his needs.
5. To each according to his rank.
6. To each according to his legal entitlement (*cuique suum*)³.

The choice of one or other of these principles will make situations which appear essentially similar according to one principle appear different according to others. Do differences of sex, age, or race need to be taken into account when it is a matter of working out the just wage? Is

³ The Idea of Justice and the Problem of Argument, pp. 16-26.

it necessary or not to take family responsibilities into account? Or productivity? One sees immediately that controversies can rage on such issues, and that even if the solution adopted in a given context is the one we prefer, and seems reasonable, it is not necessarily the unique solution, imposing itself as just in a way beyond dispute.

The second condition, determining the rule to which it is just to conform, or the recognised precedent, poses a problem which cannot be solved in any way that is absolute.

So, when is a rule just or a precedent recognised? One could reply that this is the case when the rule or the precedent is justified or does not stand in need of justification. The latter case arises when the one who sets the rule or precedent is not open to criticism. When is the matter of laying down a rule or an act open to criticism? When the rule or act is in opposition to a recognised norm or value.

From this standpoint, *Patrick Day* has shown in a stimulating paper entitled "Presumptions"⁴ that presumptions exist with regard to some principles, which absolve those who adhere to them from having to present any justification, but which demand a justification from those who go against them. What is characteristic is that these principles do not amount to universally valid truths, but represent different attitudes which the author describes as conservative, liberal, or socialist.

The conservative presumption works in favour of what exists: only change, always, everywhere and in anything, requires justification⁵. The liberal presumption demands the justification of every restriction of liberty: "leaving people to themselves is always better, *ceteris paribus*, than controlling them" (*J. S. Mill*, "On Liberty", ch. V, in: *Utilitarianism*, ed. M. Warnock (Collins, 1964), p. 228). The socialist presumption on the other hand demands that inequalities be justified. As Isaiah Berlin affirms, "equality needs no reasons, only inequality does"⁶.

In this way, adherence to particular principles or values will result in dispensing with justification for any rule or action which conforms to

⁴ *Actes du XIII Congrès International de Philosophie* (Herder, Vienna 1970), Vol. V, pp. 137-143.

⁵ *Op. cit.*, p. 139, following B. Wootton, *Social Foundations of Wage Policy* (London 1958), p. 62.

⁶ I. Berlin, "Equality", *Proceedings of the Aristotelian Society*, Vol. LVI (1955-56), p. 305.

them: this is an approach of the same sort as that of *consensus*, which supplies jurists with a criterion frequently employed as a basis for justice. Three variants of this criterion can be distinguished, in terms of whether it is a matter of personal and express consent, or a collective and implicit consensus, or finally an indirect consent, not to the rule, but to the authority which proclaims it.

a) The first form of *consensus*, giving rise to rights and obligations which it is just to recognise, is that which is found in one or several wills expressed in a promise or agreement. It is just to respect every arrangement which stems from a promise, contract, or pact. Well known legal maxims follow from this: *Volenti non fit injuria*, no injustice is done to him who consents, and *pacta sunt servanda*, contractual agreements are to be respected.

b) The communal, implicit form of *consensus* is to be found in custom which, because it has been followed by the members of a community for a long time, seems to express a consensus to which it is just to conform.

c) The final form of *consensus* is indirect: the question of agreement upon a rule or precedent considered as just does not enter into it, rather it is a matter of a trust placed in an authority which is accepted by the members of a community, whose decisions are binding and to which it will accordingly be just to conform. This will be a matter of a religious authority such as God or his spokesmen for a religious community, or of a political authority such as a monarch, parliament or judge, whose powers will be admitted within the framework of an accepted ideology in the political community.

The study of legal institutions shows how the various bases of *consensus* can be contested. Some have sought to show in certain cases that the accepted commitment does not amount to a freely given consent, since it was obtained under constraint or was given as a result of false information. Or that the agreement is illegal or immoral, and consequently void. Or that the custom is unclear, or has been overtaken by a legal ruling which runs contrary to it. Or that the religion or ideology, treated as accepted, is in fact contested or has been perverted in application to particular situations. Or that the justice of a rule or decision, even if it is presumed just when emanating from a recognised authority, may be contested when the rule or decision is in flagrant conflict with a principle which expresses established values.

In such a debate where it is normal for divergent points of view to be manifest, it is rare for unanimous agreement to be reached. Thus, the arguments put forward on one side or the other are more or less strong, more or less pertinent, and although this does not mean that they all have the same value, they are never compelling. In the practical domain where it is a matter of morals, law or politics, one has recourse to arguments which are dialectical in the sense of *Aristotle* who contrasted them with analytical arguments. Such arguments allow certain decisions to be dismissed as unreasonable, but they almost never amount to demonstrating in a way which is beyond dispute that the envisaged solution is the only reasonable one.

It is important to notice here that the category of the *reasonable* which plays an essential part in argument, in what I have called the *new rhetoric*, differs from the *rational*. While the rational refers, in a way which varies according to individual writers, to eternal immutable truths, to a law or morality of universal validity, to compelling proofs, to the appeal for system, to the use of the best means to a given end, the reasonable is a more flexible notion with a content influenced by the history, traditions, and culture of a community. What is considered reasonable in one society, at one period, may not be regarded as such at another period or in another society.

An example taken from the law of Belgium illustrates this. On 11th November, 1889, the Belgian Supreme Court refused a Belgian woman access to the bar although she was a doctor of laws who fulfilled all the requirements for admission set out in the law. While 6 of the Belgian Constitution proclaims the equality of Belgians before the law, the Supreme Court nonetheless ruled that if the legislator had not explicitly excluded women from the bar, it was "an axiom too evident to require legal pronouncement that the administration of law was reserved for men". What was evident and therefore reasonable in those days, can appear unreasonable and even ridiculous today. I might also add in this connection, that it was not until 1922 that a statute admitted women to the bar in Belgium, and it was not until after the last war that they were admitted to the bench.

For all that the notion of the unreasonable is a fluid changing notion, it sets, in every state based on law, a limit to the exercise of legally recognised discretionary power. Wherever it applies, such a power confers the right to choose among the different options which are open but only on condition that the choice is not unreasonable, because otherwise it

will be considered contrary to law, whatever the precise grounds may be which result in this choice being refused legal recognition⁷.

Moreover, the idea that there are principles of justice analogous to principles of mathematics, which will always provide just solutions when correctly applied, whatever the circumstances may be, proves itself to be contrary to reality.

Legal history shows how long-standing precedents lead, in special situations or changing conditions, to decisions contrary to equity. To obviate what seems unacceptable several solutions have been adopted: sometimes distinctions have been introduced into the *ratio decidendi*, into the rule which furnishes the decision; sometimes there has been recourse to a fiction, that is to say a false construction of facts; sometimes the rule on which the decision is based has been reinterpreted; and sometimes there has been recourse to a "court of equity" in which an injunction is demanded against the carrying out of an iniquitous measure. Finally, the most radical solution is recourse to the legislator who will replace by statute the rule which was followed previously. The change introduced in this way prevents the application of the rule of formal justice requiring the same treatment for essentially similar cases: the same situations will in future no longer be treated as in the past; what had been considered to be just will cease to be so after the adoption of the new law.

If jurists have been accused of being conservative, it is because they refuse to accept any unjustified change in the law: the stability of rules and decisions stemming from them contributes indeed to important values such as legal security, the predictability and reliability of the law. But if they think that every arbitrary, unjustified change in the law is unjust and partial, they nonetheless admit that there can be good reasons for modifying a previous rule, though it is very rare for these reasons to be recognised by everyone as having most weight. That is why some recognised procedure such as a majority vote in competent instances will be indispensable to decide the lawful character of the change, to which it will be just to conform in future.

This rapid examination of problems involved in the pursuit of justice in human institutions, shows what is imperfect and open to question in the

⁷ See Ch. Perelman, "Le raisonnable et le déraisonnable en droit", *Archives de Philosophie du Droit* 23 (1978), pp. 35-42.

solutions adopted. The administration of justice, a human and imperfect affair, will never be the sort of absolute and divine justice before which all objections must evaporate. This is why it is very necessary to recognise alongside justice, in the functioning of human societies, a place for other virtues such as equity, mercy, and generosity.