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## The ‘Justice’ That Overrules the Rules of Justice

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**Abstract:**

Justice is intrinsically distributive; it distributes by its rules. ‘Distributive’ or ‘social’ justice redistributes by overruling them. It has theories that do not start ‘from here’. It has no rules; it makes claims instead. Both its names are fraudulent aliases, ‘social’ perhaps less blatantly so. Satisfaction of a claim in ‘social’ justice depends on politics and tends to favour the poorer half of society. This commands general sympathy, but sympathy does not make it any less unjust.

It is a hackneyed story, but fits the present context too well to resist re-telling it: the traveller asks the passing Irishman the way to Enniskillen. The Irishman replies that if he wanted to get to Enniskillen, he would not start from here.

Hartmut Kliemt (1998) rightly reproaches theories of justice that, much like the Irishman in the story, would start from somewhere else, from a *tabula rasa*, a hundred grains of manna to be divided among us all, a cake to be sliced, an Original Position, or—a concession to reality?—from the purported genetic survival strategy of the pre-historic hunter-gatherer that is to be understood as the precursor of the Original Position. Since he knows that we can only start from where we are, Kliemt denies himself the pleasure of showing up the inconsistencies and self-contradictions of the several theories of justice that have been launched to occupy the terrain vacated by the retreat of utilitarian ethics. He brushes them aside as irrelevant to reality, hence he treats it as irrelevant, too, whether they are well-constructed or jerry-built. He makes an exception, though, of contractarian theory, which he condemns explicitly for postulating a hypothetical contract concluded in hypothetical circumstances by hypothetical people. The condemnation seems to me richly deserved. However, his main interest is not in asking what would be just. He wants to start from the status quo shaped by what in Western democracies passes for the rule of law and its confrontation (or accommodation) with the *de facto* claims of what he, true to his magnanimously conciliatory nature, agrees to call “distributive justice”.

The present writer, who is much less good-natured, would line up the combatants differently and in particular would deny them the advantage of calling themselves by misleading names. For if we bear in mind that the status quo

is itself a distribution of goods and bads, benefits and burdens, rights and obligations, acquittals and sentences (or a macro-distribution of these things made up of micro-distributions of them), it must have reached this distribution by the operation of the rules of property and contract and the exercise of liberties. If it so happens that some part of the distribution has resulted from a breach of the rules or the violation of liberties, redress is due according to the same rules. All distribution is a self-contained and self-correcting result of fully enforced rules that delineate just and unjust, optional and obligatory. Whether all parts and aspects of a distribution are seamlessly encompassed by the rules is an open question that arises in regard to discretionary rewards or charges, and is not of paramount importance. The converse of the question, though, is not open. All distributions may not be matters of justice, but all justice is distributive. To speak of 'distributive justice' is a strict pleonasm like wet water or female woman. To reserve the name to breaches of justice that replace a rule-based distribution by something different, i.e. a redistribution, is fraudulent usurpation of the word 'justice'. The fraudulent effect subsists even if the misuse of the word was not due to deliberate deceit.

Trying to limit the damage, in the remainder of this paper I will avoid the term 'distributive justice', for the adjective 'distributive', redundant as it may be, designates any and all justice and does too much honour to what is, in my view, a systematic breach of the rules of justice. Failing a cleverer and less compromising alternative, I will henceforth call it 'social justice'.

Damage is still liable to be done, for it is confusing to use the word 'justice' to denote a practice that, I shall argue, is in a strict sense unjust. At least, however, the clumsy adjective 'social', though meaning precious little, is there to warn us that 'social' justice is a different animal from the justice whose rules it overrules.

Kliemt holds that different rules of justice govern distributions in the Aristotelian community and in the Hayekian "Great Society". Perhaps one should add to the community the Enterprise Association of Michael Oakeshott (1996), an idea of society he abhors, that places distributive duties on people they would not have if they were not engaged in a common enterprise. The idea is not implausible, but looks difficult to apply; for what I feel is a community strikes you as an enterprise association, while he thinks that it is really a 'great society', and I cannot imagine the sort of evidence that would reveal who of the three of us is right about the type of society we all three inhabit.

James Buchanan once<sup>1</sup> told a parable about a party of fishermen going out in a boat. Some fished from the starboard, the others from the port side. The starboard crew made a rich haul, the port crew caught nothing. They went share-and-share-alike as if each had contributed equally to the catch. Buchanan felt that any other distribution would have been unjust.

But this conclusion does not come as a matter of course. There might have been a local custom of equal shares (with something reserved for the boat), or

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<sup>1</sup> Personal communication.

perhaps an understanding that on this trip equal shares will be the rule. Failing custom or understanding, however, there is nothing to establish a presumption for equal sharing. If any rule of justice can be applied, it is 'finders keepers' with a share set aside for the use of the boat. Whether we are in the community or the 'great society' depends on the rule of justice, if any, that governs the case in hand, rather than *vice versa*. The rules of justice rooted in basic conventions seem to change but little cross-culturally, even if their elaboration in common or statute law differs as between states.

What is, to use fashionable language, 'hard-wired' in civilised man in any type of reasonably civilised society, great or small, is two sets of rules with a small and uncertain overlapping segment between them. One we might call the justice of property. It takes care of the integrity of persons and their property, the keeping of reciprocal promises, the protection from nuisances and incivilities. It answers most questions of right or wrong, free or unfree. The other set could be called the justice of equality. It settles questions of distribution not automatically determined or deliberately decided by the justice of property. In fact, it would have little relevance, and might not even be recognised as a distinct set of rules, if the justice of property were elaborate enough to settle all questions of distribution. Requiring equality in distributions not otherwise determined springs from acceptance of the axiom that like cases must be treated alike. Since all cases are both like and unlike each other, likeness reduces to cases being 'relevantly' functions of the same variable, other variables being ignored as irrelevant. For example, if the relevant variable for the distributions due to two workmen is the number of hours each has worked, equality demands that the one who worked twice as long as the other should get twice the wages. This is the familiar Aristotelian equality in its simple form. However, a distribution may be composed of many different simple equalities. Take, for example, a micro-distribution such as a firm's payroll. Some employees may be paid according to hours worked, others according to skill, yet others by seniority, while the managers' pay may be governed by responsibility. The payroll displays much inequality, but it is in fact a compound of a number of simple equalities, each the function of its relevant variable. In this micro-distribution, the justice of contract and the justice of equality may overlap: the wage scales may be settled by contract, but if they diverge widely from the justice of equality, they will be a source of disapproval.

Radical egalitarians will disregard compound equalities and condemn a distribution that is in effect a compound equality for failing to be a simple equality. They will attack it like bulls in the china shop, ironing out the apparent inequalities and thus devastating the underlying compound equality which was in perfect compliance with the justice of equality.

Some distributions are entirely discretionary, independent of consent by the recipient. The marking of examination papers, the award of prizes and honours, the sentencing of criminals (within broad limits) or the furloughs of frontline soldiers all fall in this category. Inasmuch as justice can be resorted to in the

awarding of such discretionary goods or bads, it is the justice of equality that can be of albeit limited help. The justice of property is, of course, not concerned.

One of the many things that discussions with Hartmut Kliemt have made clear to the present author is that there is no injustice *stricto sensu* unless there was an unjust act to bring it about. Unjust states of affairs are not born by immaculate conception, nor are they auto-generated. Moreover, the unjust act that serves as their necessary condition must not simply be one that most of us would disapprove of. It must be an actual, ascertainable breach of a rule of justice. Obedience to the rules and redress of disobedience make a just state of affairs at least logically possible.

Reflection on the nature of 'social' justice and more particularly on what may distinguish it from justice *tout court* and earn it the adjective 'social', leads to the conclusion that seems merely formal but, if right, sheds light on political practice of the day. Social justice has no rules. None can be discovered by logical or factual inquiry. Instead of rules, it operates by staking claims to specific changes in any existing distribution. However, as it has no rules, it recognises no state of affairs as socially just. All its claims can never be fully satisfied and a socially just state of affairs created, because there are infinitely many redistributive claims capable of serving someone/s interests and the satisfaction of any number of such claims must still leave any number unsatisfied.

Any person whose claim was satisfied in a redistribution may have further claims under the new distribution.

It is widely believed, I think on no solid ground, that social justice does have a rule, namely the reduction and ultimate abolition of inequalities, and that the social justice and the egalitarian agenda are synonymous. Dealing for the moment only with money incomes this would mean that once all incomes above the mean were cut off at the mean level and redistributed to those having below-mean incomes, equality having been reached, a socially just state of affairs will have been reached. But this is only too obviously not the case. Equal money will leave many inequalities and, worst of all, create new non-monetary ones. Moreover, monetary equality will generate claims of social justice on grounds of unequal desert unequal need, merit goods, or some less plausible pretext. Since there is no rule in social justice for ruling out claims on certain grounds, and since substitute grounds could always be found by claimants, any given distribution resulting from redistribution would bear in itself reasons for renewed redistribution. This mechanism is not the same as the 'cycling' that characterises, for instance, a three-person distribution game, though it resembles it to some degree.

In justice, redress can only follow a breach of a rule. In social justice, a claim for a redistribution is not grounded on any rule. It is simply a good try. Whether it is satisfied depends on the politics of the time and place. Where political decisions ultimately depend on majority vote, claims in social justice that ostensibly or really favour the poor have a better chance of being satisfied than claims having no income or class bias, but this will not necessarily be the

case. Measure favouring the poor at the expense of every body else will usually command sympathy, but sympathy does not make them less unjust.

Kliemt is persuaded,—as are most social scientists and most intelligent laymen, though the present author is trying to make the contrary case—that enforcement of the rules of justice can only be assured by a central authority with coercive power to raise the wherewithal by taxation. Taxation is almost inevitably redistributive. Hence the legal order presupposes coercive redistribution. The argument can be extended to all public goods if they, too, cannot be provided by some mechanism of voluntary cooperation. Willy-nilly facing the danger of slippery-slope arguments, Kliemt regards a “minimal welfare state” as the provider of the legal order as a necessary condition of social coexistence. He is, however, also persuaded that there are good reasons for calling a spade a spade. Instrumental redistribution should not be dressed up as distributive or social justice (Kliemt 1998, 635).

The logical and semantic muddle of assimilating redistribution to justice is indeed hard to pardon and there is not the slightest reason why one should pardon it. But it is even more unforgivable that the sloppy language of ‘social’ justice has by and by become, by force of relentless repetition, a bearer of moral truth. Mild-mannered, courteous and indulgent as always, Kliemt regards the deceitful exploitation of the persuasive terms ‘distributive’ and ‘social’ justice more in sorrow than in anger. More anger, more contempt or more of both might have been unseemly, but not undeserved.

## References

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- Oakeshot, M. (1996), *The Politics of Faith and the Politics of Skepticism*, New Haven–London: Yale University Press.