

THE CONCEPT OF JUSTICE: HOW FUNDAMENTAL IS IT IN ETHICS AND POLITICAL PHILOSOPHY?

O CONCEITO DE JUSTIÇA: QUÃO FUNDAMENTAL ELE É NA ÉTICA E NA FILOSOFIA POLÍTICA?

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ABSTRACT

This article attempts to challenge those contemporary philosophical approaches to justice (and this is the majority of them) which ascribe to the notion of justice a dominant role within ethics and political philosophy. In the first section, this overestimation of justice is traced back to J.S. Mill (and to John Rawls). After having pointed out some of the essential features of the Millian (and Rawlsian) concept, I show how far these attributes are away from what we (in our everyday language) mean by the word 'justice'. Finally, I try to spell out what might be more plausibly seen as the focus of our shared moral intuition, and to highlight to which extent there is an overlap with our common idea of justice.

Keywords: Justice. Good. Evil. Mill. Rawls.

Many contemporary philosophers consider “justice” to be the crucial normative concept in ethics and political philosophy. The theoretical fundament for ascribing such a key function to our idea of justice has, as far as I can see, two different origins. It can be traced back, on the one hand, to J.S. Mill’s little treatise *Utilitarianism* (1861; ch. 5), and of course, on the other hand, to J. Rawls’ *A Theory of Justice* (1971). In this paper, I wish to challenge both of these views by raising a series of objections against those current ethical and political theories which ascribe such a dominant role to justice. To my mind, the wide-spread appreciation of the idea of justice is exaggerated. We should neither maintain that justice expresses the core of our normative convictions (in ethics as well as in political thought) nor defend the claim that, whenever our central normative convictions are involved, we are faced with questions of justice. As I will try to show, our idea of justice is a much more specific one. It turns out to be an important, but nevertheless subordinate normative concept. Instead, I think, one should reserve the role of the dominant normative concept for “good” and “evil” (in the moral sense); but I can’t argue for this in the present context.²

In order to achieve my purpose, I will also provide a series of semantic considerations about the meaning of “justice” and “injustice”, based on examples of how we use the expression in everyday life. In the vast philosophical literature on justice from the last four decades, I found astonishingly few reflections on these semantic fundaments; in contrast,

numerous philosophers and political theorists simply repeat the shared conviction which I would like to label “the primacy thesis”.

1. Preliminary remarks on the primacy thesis

To formulate my thesis in a somewhat provocative way: Justice is one of the most misconceived and overrated concepts in contemporary philosophy. Let me start with two preliminary remarks. (1) As I just mentioned, it is certainly a somewhat surprising fact that the concept under consideration has rarely been the object of close semantic scrutiny.³ My basic concern here is that, within the debate on Rawls, the expression ‘justice’ has started a career as a semi-technical concept more or less independent of our ordinary use of it. In this context, it is, to my mind, interpreted in an extremely incorrect way (given that the criterion for a correct use is our common everyday application of the term), and it is strongly overrated by philosophers, lawyers, and political theorists (namely compared with what we normally think of the importance of justice). I am well aware of the fact that not everybody using the concept of justice as a basic normative concept in his or her moral and political philosophy wants to give a semantic reconstruction of what we ordinarily mean by the expression. And of course, every theorist in this field is free to use ‘justice’ as a purely technical term. One might go as far as to define ‘justice’ e.g. as ‘what is normatively crucial in ethics (or political philosophy)’ – regardless of the content which might turn out to be crucial. But this should clearly be indicated; most authors, however, suggest that their philosophical considerations are close to how we are ordinarily thinking about justice.

(2) By pointing out that the emphatic interpretation of “justice” in moral philosophy can be traced back to J.S. Mill, I don’t want to claim that it was he who primordially brought up this way of employing our concept. As a historian of philosophy, I know very well that a similar use of justice can already be found, e.g., in Adam Smith who, for his part, received it as a coinage from the Protestant line of the early modern Natural Law tradition.⁴ Also in Kant’s *Metaphysics of Morals* (1797), we find the distinction between “duties of justice” (*Rechtspflichten*) and “duties of virtue” (*Tugendpflichten*), echoing the dichotomy of “perfect obligations” and “imperfect obligations” in the *Groundwork* (1785) and going back to the same historical line. This usage has roots in the medieval Natural Law tradition, and its origin can ultimately be identified in Cicero’s distinction between the *iustum*, the *honestum* and the

utile in his *De officiis* (II.10). But the decisive impact on modern debates is, I think, that of Mill's wide-spread and influential little treatise.

We can easily see the enormous impact of Mill's primacy thesis on the Anglo-American contemporary debate on justice. The same holds true for the discussion of this issue in German-speaking countries: We find the idea expressed in the primacy thesis in authors such as Otfried Höffe (2001), Stefan Gosepath (2004), or Rainer Forst (2007). The well-known philosopher Ernst Tugendhat even explicitly invokes Mill's treatise as the concept ever written on the fundamental signification of justice (1993: 364-391).

2. Mill's idea of the primacy of justice

In order to get an impression of Mill's use of the term, let us look at a famous quotation to be found in *Utilitarianism* ch. 5:

When we think that a person is bound in justice to do a thing, it is an ordinary form of language to say, that he ought to be compelled to do it. We should be gratified to see the obligation enforced by anybody who had the power. If we see that its enforcement by law would be inexpedient, we lament the impossibility, we consider the impunity given to injustice as an evil, and strive to make amends for it by bringing a strong expression of our own and the public disapprobation to bear upon the offender. Thus the idea of legal constraint is still the generating idea of the notion of justice, though undergoing several transformations before that notion, as it exists in an advanced state of society, becomes complete. (MILL 1991, p.183)

In the quoted passage, Mill tries to identify the core idea behind our notion of justice. For him, justice is basically a highly specific moral sentiment, namely an emotion which contains the desire for revenge or retaliation towards the perpetrator of a moral or juridical law. Mill's fundamental intention in ch. 5 is to reconcile our justice-based moral intuitions with utilitarianism (since the latter seems to leave no room for justice). According to him, utilitarianism is fully compatible with justice, if the latter is correctly understood. In Mill's view, justice has always to do with the desire for compulsion; obligations of justice are those the compliance of which we want to see enforced. Therefore, he contends, claims of justice constitute a normative class of its own, namely the so-called "duties of perfect obligation". This is expressed in a second passage from the same chapter:

Now it is known that ethical writers divide moral duties into two classes, denoted by the ill-chosen expressions, duties of perfect and of imperfect obligation; the latter being those in which, though the act is obligatory, the particular occasions of performing it are left to our choice, as in the case of charity or beneficence, which we are indeed bound to practice, but not towards any definite person, nor at any prescribed time. In the more precise language of philosophic jurists, duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality. (MILL, 1991, p.184)

Following Mill, the distinctive feature of a duty of justice is that it must be strictly fulfilled by the bearer of the obligation (the individual has to do some precisely defined actions). This implies the existence of a corresponding right on the part of the addressee. Cases of justice are what we would call negative duties: i.e. obligations to omit violations of some basic moral or legal rights. Furthermore, while we react on violations of duties of charity and beneficence with the emotion of disappointment, we are touched by cases of injustice in a much deeper form: we are outraged and feel the desire for revenge, sanctions, and punishment. As this emotional reaction shows, we regard the unjust person as someone who acts against absolutely crucial rules of conduct. Let me add a third passage from ch. 5 of *Utilitarianism*:

To recapitulate: the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule. There is involved, in addition, the conception of some definite person who suffers by the infringement; whose rights (to use the expression appropriated to the case) are violated by it. And the sentiment of justice appears to me to be, the animal desire to repel or retaliate a hurt or damage to oneself, or to those with whom one sympathises, widened so as to include all persons, by the human capacity of enlarged sympathy, and the human conception of intelligent self-interest. From the latter elements, the feeling derives its morality; from the former, its peculiar impressiveness, and energy of self-assertion. (MILL, 1991, p.188)

In this third quotation, we get a certain idea of how Mill tries to reconcile our common idea of justice with Utilitarianism, namely by interpreting justice as an expression of a fundamental anthropological capacity to expand our sympathy to all of humankind and to include other people in our well-considered rational interest. This is certainly an interesting, but ultimately doubtful strategy since justice, as described by Mill, need not imply the aspect of universalism

which is crucial for Utilitarianism. Be that as it may, what we found in Mill's text is the idea of a primacy of justice as a moral concept. Questions of justice are identified with the core of what is morally relevant.

3. Rawls' version of the primacy thesis

As is well known, we find quite a different idea of what is constitutive for the primacy of justice in the ground-breaking early monograph of John Rawls. Here, Rawls is not concerned with individual cases of morality (although the later Rawls shows some interest in justice as a personal feature of individuals as their 'highest-order interest'). Instead, he considers 'justice' as the most fundamental normative concept within a theory of social institutions. Rawls thinks that a society is adequately organized in a normative sense if its basic structure is 'just'. In order to be just, it must consist of institutions which establish a lexical priority for rights and liberties with relation to all other political goods, especially socioeconomic ones. What he has in mind are the rights and liberties of the early modern liberal tradition – and in this respect Rawls is not that far away from Mill. In a famous passage from the very beginning of *A Theory of Justice* (1971/1999), Rawls compares justice as the first and decisive virtue of social institutions with truth as the crucial virtue of epistemic systems such as theories. He then explains what he means by justice and by the analogy between justice and truth (*A Theory of Justice*, ch. 1.1):

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising (RAWLS 1999, p.3-4).

According to the quoted passage, justice signifies the idea of the categorical overridingness of certain basic liberties. For Rawls, a possible restriction (or abolition) of individual rights to freedom cannot be compensated by a higher degree of socioeconomic welfare or any other advantage; liberties must be distributed equally (and in the biggest possible "packages")

among the citizens of a legitimate society. Only if this idea is taken seriously, the society merits to be characterized as just. The concept of justice resembles, following Rawls, to the idea of truth in that both are absolute and uncompromising.

Both Mill and Rawls defend the idea of a strong normative primacy of the concept of justice, even if there are considerable differences between their views. Whereas Mill thinks that justice basically is a moral sentiment connected with a desire for retaliation – a sentiment directed to cases in which someone infringes the rights of some other person (and thereby contravenes his or her perfect duties), Rawls, emphasizing the overridingness of a set of basic liberties, believes that justice is the adequate label to designate a basic order of social institutions being in a normatively optimal state. And while Mill speaks of justice in a moral sense, Rawls uses the term in a socio-political context. The common point shared by Mill and Rawls is the idea of the primacy or a privileged normative function connected with the concept of justice. Both philosophers clearly want to be close to our everyday usage of the term (Mill more explicitly than Rawls, but I think it can also be said of the latter). Both philosophers exerted and exert an enormous influence on the following discussion and especially on the current debates.

4. Some fundamental considerations about justice

Justice is certainly one of the most important evaluative concepts in everyday life as well as in ethics and political philosophy. If we consider a person as just (or fair), then we believe to have identified a deeply valuable feature of this person; and if we regard a given social institution as deeply unjust, we find ourselves in a state of outrage and strongly demand for a change. As these examples imply, we use the term justice and its cognates both for individuals (*grosso modo* in the sense of a personal virtue) and for the conditions of social institutions (the organization of economy, the tax system, the educational system etc.). The oldest use in the Western conceptual history seems to be that of “cosmic justice” meaning the distribution of natural goods and evils among persons – and additionally signifying the “moral order of the world”, i.e. the principle of divine reward for the just individuals and of divine punishment for the unjust ones. Both the idea of personal justice and of cosmic (or natural) justice are not strongly present in contemporary philosophical debates, except in the sense that the former is discussed in the context of virtue ethics (including the topic of desirable persons features of citizens and politicians in our societies), whereas the latter appears in discussions

on the welfare state: We would ask, e.g., which natural handicaps of a person should be considered as reasons for support by a welfare state and which ones should simply be seen as someone's personal fate.

The concept of justice has a very complicated sort of usage. Let me illustrate this, in more detail, regarding the various objects which can semantically be characterized as just or unjust. As far as I see, one can distinguish between ten different sorts of objects: (1) persons and social groups (*personal use*), (2) characters, attitudes, motives of individuals (*virtue ethics use*), (3) judgments, ideas, values of persons (*ethical use*), (4) procedures, social principles, guiding lines (*procedural use*), (5) social institutions (*institutional use*), (6) abstract principles, theories, and arguments (*theoretical use*), (7) distributions of goods and evils (*distributive use*), (8) relation between a gift and a result or an investment and the benefit (*relational use*), (9) result of a procedure, e.g. a competition (*resultative use*), and (10) the state (of the world or of a particular social situation) in which goods and evils are allocated in a certain way (*situative use*, also *cosmic use*). I have argued at some length for the thesis that (10) is our primordial idea of justice while the other variants are derivation of it (see Horn/Scarano 2002).

A further point of some importance is that “justice” can mirror at least the following eight basic ideas: (i) Justice as equality in the distribution of goods and evils (distributive justice), (ii) justice as impartiality of the application of rules (impartial justice), (iii) justice as equivalence of goods in trade-offs (commutative justice), (iv) justice as compensation of disadvantages and handicaps (corrective justice), (v) justice as gratification of merits and achievements (meritorious justice), (vi) justice as equivalence of criminal action and punishment (retributive justice), (vii) justice as equivalence of investments and results (connective justice), (viii) justice as adequate distribution of natural goods and evils (cosmic or natural justice).

A point of even greater systematic relevance is the distinction between the Platonic and the Aristotelian ideas of justice. Both of them are still of major importance for our understanding of justice in general – in everyday life as well as in philosophical contexts. The Platonic concept can be rendered by the famous Latin formula *suum cuique tribuere* – “to give everybody his own”, whereas the Aristotelian idea is “equal cases should be treated equally and unequal cases unequally”.⁵ Justice in the first, Platonic sense is based on the idea that persons merit to gain something regardless of what the others get; they have a “right” to it or deserve it. Justice in the second, Aristotelian idea is founded on the idea of interpersonal

comparisons: some person A gets x *since* B gets y; what A and B are receiving, is always interrelated. One can easily see that justice in the Platonic sense is quite different from the Aristotelian idea: the first signifies an *absolute* or *personal* understanding of justice while the second is based on a *relational* or *interpersonal* concept. I will come back to the relevance of this distinction.

5. Objections against the primacy thesis

Whatever the precise conceptual content of “justice” may be, Mill and Rawls defend the primacy thesis – even if they do it in quite different senses. Since the impact of both philosophers on the current debate is deep and thoroughgoing, I would now like to raise several objections against it. To clarify my basic intention, let me explain that I wish to reject the following four claims:

- (1) Cases of essential moral importance are always simultaneously questions of justice.
- (2) Cases of justice are always at the same time questions of essential moral importance.
- (3) Cases of justice have basically to do with aspects of the legal or political order.
- (4) Cases of justice are never morally neutral or indifferent.

Let me try to provide some intuitive support for these rejections. One of the most serious cases in which we see someone violating a moral norm is that he commits a murder. We clearly consider cases of murder to be instantiations of what Mill calls perfect duties; having extremely strong sentiments, we wish the murderer to be punished by the legal order. Yet we would not call these incidents occurrences of injustice – in none of the Western languages (as far as I know). The same holds true for many other cases in which crucial moral rights or interests of persons are violated: I am thinking of torture, mutilation, rape, robbery, deprivation of personal liberty. It seems true for all of these crimes that, normally, they aren’t regarded as cases of injustice while they are unambiguously seen as hard moral cases, i.e. as violations of essential moral rights.

The point I have in mind is quite clearly expressed by a passage one finds in H.L.A. Hart:

There are indeed very good reasons why justice should have a most prominent place in the criticism of law arrangements; yet it is important to see that it is a distinct

segment of morality, and that laws and the administration of laws may have or lack excellences of different kinds. (...) A man guilty of gross cruelty to his child would often be judged to have done something morally *wrong*, *bad*, or even *wicked* or to have disregarded his moral *obligation* or duty to his child. But it would be strange to criticize his conduct as *unjust*. (...) “Unjust” would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer. (HART, 1961, 154)

I think that Hart is exactly right in pointing out that cruelty is usually not seen as an injustice. While nobody would classify one of the crimes mentioned above under the category of injustice, the issues which are in fact discussed in the debates on justice are mainly the following seven: (i) political justice (in the sense of basic rights and liberties), (ii) social and economic justice (questions of the distribution of goods within a society), (iii) justice between men and women (gender justice), (iv) justice with regard to social minorities, (v) intergenerational justice, (vi) juridical aspects of justice (especially the question of just and unjust punishments) and (vii) international justice (e.g. world poverty).

In our common language, nobody classifies crimes like murder as cases of injustice, and in contemporary philosophical debates, nobody subsumes questions of justice under the crucial issues of ethics. Seen in this way, it seems even difficult to figure out examples for which it might be true to maintain that they are simultaneously cases of injustice and hard moral cases (violations of perfect duties). Within the philosophical literature on issues of justice, we find instead such examples as that of a children’s birthday party. It serves as a typical paradigm for injustice that, *ceteris paribus*, one child receives a smaller piece of cake than the others. I will come back to this in a moment.

Let me first give two somewhat elaborate examples (a-b) showing cases in which the aspect of injustice can be more or less easily distinguished from the aspect of moral importance. (a) Think of two situations in a bakery shop. In the first, the customers are waiting in a queue, and Muhammed, an Islamic guy from Nigeria, is part of his line; but from reasons of racism and xenophobia, he is at first neglected for a while by the shopkeeper. In the second case, Sandra, a girl from the neighbourhood, waiting in the same queue, is also for some time neglected by the shopkeeper; but in her case, the reason for this is simply that a close friend of the shopkeeper enters the bakery and gets a privileged service. Suppose that both persons, Muhammed and Sandra, are treated in the same unjust way: they are not served when it is their turn. Nevertheless, the two different motives of the shopkeeper make the cases strongly different. In Muhammed’s case, the injustice is done from a genuinely immoral

attitude, racism; in Sandra's case, it is done from a (more or less acceptable, at least not discriminating) attitude of privileging friends. (b) Suppose that a military instructor treats young recruits quite differently. In the first situation, he privileges young men of his own ethnic origin assuming that they need to be supported and fostered in a more or less hostile surrounding. Let us add two elements: he is mistaken in his assumption (there is no disadvantage for the people from his group), and he does not damage the others. In this case, he commits an injustice without doing moral harm. But think now of a case in which he privileges his fellow-natives while seriously distressing and afflicting the young soldiers belonging to a different minority. In this case, we are confronted with a violation of basic moral rights which we wish to see legally punished and an instantiation of an injustice which "cries out to heaven".

So far, I think we have formulated considerable challenges for Mill's view: the moral primacy of "justice" is certainly not a highly convincing claim. Let us now have a look at the Rawlsian view. A first point to be made is that Rawls neglects all topics of justice except those of the "basic order". Aren't there genuine cases of justice and injustice which have nothing to do with the basic order of a given society? And aren't there virtues of a basic social order which aren't, at the same time, aspects of justice? It seems quite artificial to suppose that normatively virtuous, perfect, choiceworthy, or desirable institutions can simultaneously be called "just" in the same sense in which we say that normatively ideal scientific theories are those that turn out to be true. We wish institutions to be, e.g., efficient, lean, non-bureaucratic, open-minded, easily accessible, inexpensive, or flexible (which are different from being just and for which I see no precise equivalent in scientific truth). Consequently, not every respect in which a social institution can be excellent is a case of justice, and, *vice versa*, not every case in which a social institution is just is at the same time a case of essential normative importance.

What is worse for the Rawlsian view is the fact that not even the moral implications of institutions can always be classified as cases of justice or injustice. Take the case of a protester beaten up by some policemen in a dark narrow street at night. To my mind, we should distinguish here between two possibilities: (i) The violation of the protester's bodily and psychic integrity and civil rights is simultaneously a case of injustice if there exists, e.g., an order given by a local politician who instructed the officers to do so. (ii) Imagine the policemen are frustrated by their hard working conditions, drunken, and feel underprivileged compared with the academic protesters they are facing; then their aggressive act of beating up

a protester would still be morally intolerable, but we should not classify the case under the heading of injustice. It would rather be something like “aggressive behavior” or “unacceptable brutality”.

If I am right what we see from our considerations is the following: The examples of the queue in the bakery shop and the military instructor make plausible that the perspective of justice (at least in many cases, perhaps even always) presupposes the element of interpersonal comparisons. What is unjust about the shopkeeper’s and the instructor’s behaviour is that he is treating the recruits unequally. In the case of the aggressive policemen we are confronted with an example of injustice only if they are following an official rule or a decree that allows or orders them to behave like that. But seen from this perspective, the discriminating decree is what is really the unjust element here. If the policemen acted out of some spontaneous frustration or hatred, they would not have behaved unjustly, but then they were simple criminals who should be punished and should quit their service. If this distinction is correct, then cases of injustice have (at least) two possible constitutive features: They either have to do with unequal treatment in relevant respects (which implies interpersonal comparisons), or they presuppose rules of conduct, decrees, or guiding principles which are unlawful or normatively inappropriate.

In many contexts, justice can be understood in terms of lawfulness. An example illustrating this intuition is, to my mind, that of a referee involved in a soccer game: if the referee privileges one of the teams while disadvantaging the other, he commits the paradigmatic case of an injustice. He neglects the principle of impartiality which is one of the key ideas constitutive for lawfulness. Note that we would count an unfair soccer match neither among the cases of violating a perfect moral duty (in the Millian sense) nor among the cases of disorganization of the basic social order (according to the Rawlsian understanding). But clearly we would speak here of a basic instantiation of unfair conduct.

I think we have so far considered a sufficient number of examples to come to the crucial point within my line of argument. We can clearly see that it is not due to the component of being just or unjust that a given case of misbehavior can be characterized as morally essential or marginal. There exist lots of cases in which perfect duties and moral rights are violated that aren’t simultaneously cases of injustice: murder, torture, rape, robbery, and so on, and there are lots of cases in which justice is involved without a strong element of morality being present. Only think of the standard example of a children’s birthday party where the underprivileged child receives a minor piece of cake, but is thereby *not really*

damaged. If we would speak here of a damage at all, we might perhaps say that the detriment is confined to the *surplus zone* of the child's goods. Even if the child might feel outraged and believes to be strongly disrespected, it is not mistreated in a moral sense. As Mill correctly points out, our sense of injustice gives us a strong feeling of being discriminated even in peripheral cases of an affront. To corroborate this point, imagine the following possibility: the father who wanted to prepare the cake for the birthday party failed and had to put the cake ultimately into the rubbish bin; in this case, no child is "damaged" at all by the fact that none of the children receives a piece of cake.

Let me now make just a little detour or digression. I would like to give an extremely brief (and necessarily insufficient) answer to the question of what is the moral element – the fact of being moral or immoral – within our actions. I think that an adequate answer should be founded in the idea of *basic human goods*, goods which can either be respected and supported in our interpersonal relations or disrespected and destroyed. I think that the list of morally relevant goods (and evils) must include survival, physical health, bodily integrity, social and political autonomy (and their contraries respectively). And I think that our basic intuition here is that there exists morally central goods of a minor, peripheral interest such as, e.g., spare time interests, travel habits, musical or artistic taste etc.

I want to go one step further with my observation that justice is not the constitutive aspect for the morality or immorality of an action since there are both cases of injustice which are morally marginal and cases of morality which have nothing to do with justice. This step goes as follows: cases of justice and injustice are not only sometimes morally marginal; they can also be morally neutral or even deeply immoral. Take the simple example of a band of robbers that discusses the problem how to distribute the haul: they can allocate goods, e.g., according to the rank of a robber within the gang or according to his achievement or according to his neediness or health state or whatever else. If they are discussing their standards, they might finally arrive at a solution which is regarded by them as just. Here then we are confronted with a just distribution of goods (let us assume: with a *perfectly just distribution*), but it is a case of immoral behavior from the outset, since the goods under consideration have been robbed from their legitimate owners. Compare the following four examples:

(1) Just and unjust distribution

(a) A band of robbers is discussing how to distribute the haul: according to the rank of a robber or according to his achievement or according to his neediness or according to whatever else. Depending on how they decide we might be willing to concede that their distribution is just. But this just distribution does not legitimize the entire situation *in a moral sense*. On the contrary, we would say that there is an overriding aspect that determines our moral judgment in this case, namely that the goods to be distributed have been gained before in an immoral way, by an act of robbery. Note the remarkable fact that a just distribution does not outweigh this immorality committed before, it does, from the moral point of view, not even count here to the slightest extent.

(b) A group of nuns living in a monastery prepares lunch for homeless people. They do it every day, seven days a week, and it is a quite demanding and expensive element in the life of the monastery. Among the homeless coming to the meals is Carl, a funny and good-humored guy who is the favorite guest of the nuns. They always prefer him and give him a better share of the lunch (without giving less than a normal share to all others). Carl is privileged, but all other homeless are not in danger of malnutrition or starvation. In this case, again, the injustice committed by the nuns does not modify the fact that they are doing a morally admirable job. Again, the aspect of justice does not morally count.

(2) Murder

(a) There is again a band of robbers. After having distributed the haul, one robber, Jim, brutally kills one other, Tom, from avarice. Suppose that it is a clear case of murder showing all the constitutive elements of such a crime. Assume additionally that the distribution which preceded the murder was unjust, and this injustice was part of the motivation of Jim to kill Tom. Even then the only thing that counts for our moral judgment is the murder. Note the fact of an unjust distribution which immediately preceded the murder may *explain*, but not *justify* the conduct of Jim. In our moral judgment, Jim is guilty of having participated in a robbery and of having committed a murder. The additional injustice is without any relevance.

(b) A group of nuns again, on a regular basis, serves lunch for homeless people. They are distributing the meals in exactly equal portions. But one day Herbert, one of the homeless, wants to have a double portion. He accuses the nuns of committing serious injustices, which is a completely unjustified allegation. Bernadette (one of the nuns) thereby becomes so angry that, finally, she murders Herbert by beating him with a fry pan on his head. In this case again, the unjust allegation might explain the murder, but not justify it. And also the fact the

Bernadette is usually doing a morally admirable job does not justify her conduct. Nevertheless, we have to take it into account when we try to give a moral judgment on her. But note that the fact that Bernadette always distributed the meals equally does not count at all for our moral judgment on this situation. Even if she might have been unfair, this would be an irrelevant part of the story.

Note that justice is not only morality-neutral (in the sense that it does not constitute morality), but also morality-insensitive (in the sense that it is perfectly compatible with deeply immoral background conditions).

Take a very classical example to see this point even clearer. In the Homeric *Iliad*, the hero Achilles is angry and outraged since he has been deprived of his concubine named Briseis. The young female has been given as a present to king Agamemnon because of his higher rank, although Achilles has been the most courageous and efficient warrior so far. We are clearly confronted here with a case of injustice, and this explains the extreme anger (*mênis*) of Achilles. But obviously, we are at the same time confronted with a case of serious immorality – namely the practice of giving young females captured during war to merited warriors as their awards. If someone regards his slave as legitimate property gained by his enormous efforts, he is clearly justified in feeling outraged when he is treated in a unjust manner. But slavery is immoral in itself. As this shows, justice is nothing but a secondary normative idea, an idea which can even be applied when we are facing cases of serious immorality.

6. The Aristotelian and the Platonic idea of justice

I have been discussing until now all of my four theses. Let me add one final remark. One might object that so far I only considered the Aristotelian concept of justice and neglected the Platonic one. This is certainly correct, and I want to catch up this now in a very brief form. I take both classical theories – the Platonic and the Aristotelian one – as genuine paradigms of our ordinary way of thinking about justice. Justice is always about the distribution of benefits and burdens, of goods and evils, of advantages and disadvantages. These can be distributed according to a relative, interpersonal principle (Aristotelian idea) or according to an absolute, personal principle (Platonic Idea). But our moral idea of how goods and evils should be distributed is at best partially that of justice: Person A sometimes deserves a good X because

person B already has it; and sometimes person C unconditionally deserves the good Y irrespectively of what person D should get. But the paradigmatic case of our moral intuition is none of them. Instead, we are accustomed to think that A, B, C, and D should get the *moral goods* X and Y simply as human beings. But to elaborate and defend this line of thought would be a different story to be told.

Notes:

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² I will do that in Horn 2014 (forthcoming).

³ An exception is an essay written by Koller 2001; Koller to some extent undertakes a semantical analysis. Cf. also Krebs 2000 and Horn/Scarano 2002.

⁴ We find a quite similar distinction as that provided by Mill in Smith's *Theory of Moral Sentiments* (1759) where he contrasts justice and beneficence and parallels this distinction with a antithesis between enforceable and voluntary moral duties (Part II, Sect. II).

⁵ Plato, *Republic* IV, 433a8 ff.; 586e and Aristotle, *Politics* III 12, 1282b14-22.

References:

- FORST, Rainer. *Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit*. Frankfurt a.M.: Suhrkamp, 2007.
- GOSEPATH, Stefan. *Gleiche Gerechtigkeit. Grundlagen eines liberalen Egalitarismus*, Frankfurt a.M.: Suhrkamp, 2004.
- HART, H. L. A. *The Concept of Law*. Oxford: Clarendon Press, 1961.
- HÖFFE, Otfried. *Gerechtigkeit. Eine philosophische Einführung*. München: Beck, 2001.
- HORN, Christoph. Kritische Bemerkungen zum aktuellen Gerechtigkeitsdiskurs. In: *Jahrbuch für Angewandte Ethik I* (forthcoming in 2014).
- HORN, Christoph; SCARANO, Nico (hrsg). *Philosophie der Gerechtigkeit. Texte von der Antike bis zur Gegenwart*, Frankfurt a.M.: Suhrkamp, 2002.
- KOLLER, Peter. Zur Semantik der Gerechtigkeit. In: _____ (hrsg), *Gerechtigkeit im politischen Diskurs der Gegenwart*, Wien: Passagen, 2001, 19-46.
- KREBS, Angelika (hrsg). *Gleichheit oder Gerechtigkeit. Texte der neuen Egalitarismuskritik*. Frankfurt a.M.: Suhrkamp, 2000.
- MILL, John S. *On Liberty and Other Essays*, Oxford: Oxford University Press, 1991.
- RAWLS, John. *A Theory of Justice*. Revised Edition. Cambridge (MA): Belknap, 1991.
- RINDERLE, Peter. John Stuart Mills Theorie der Gerechtigkeit. In: ASSLÄNDER, Michael; ULRICH, Peter (hrsg). *John Stuart Mill – der vergessene politische Ökonom und Philosoph*. Bern: Haupt, 2006, 79–123.
- TUGENDHAT, Ernst. Bemerkungen zu einigen methodischen Aspekten von Rawls' *Eine Theorie der Gerechtigkeit*. In: _____. *Probleme der Ethik*, Stuttgart: Reclam, 1984, 10-32.
- _____. *Vorlesungen über Ethik*. Frankfurt a.M.: Suhrkamp, 1993.
- _____. *Dialog in Leticia*. Frankfurt a.M.: Suhrkamp, 1997.

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