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SOCIAL JUSTICE AND LEGAL JUSTICE

ABSTRACT. The main aim of this paper is to challenge the validity of the distinction between legal justice and social justice. It is argued that what we usually call "legal justice" is either an application of the more fundamental notion of "social justice" to legal rules and decisions or is not a matter of justice at all. In other words, the only correct uses of the notion of legal justice are derivative from the notion of social justice and, hence, the alleged conflicts between criteria of social and legal justice result from the confusion about the proper relationship between these two concepts. Two views about the "social justice/legal justice" dichotomy are of particular importance and will provide the focus for the argument: this dichotomy is sometimes identified with a classical distinction between "distributive" and "commutative" justice and sometimes with the distinction between "substantive" and "procedural" justice.

1. INTRODUCTION

Both in our common, intuitive thinking about justice and in the writings of legal and political philosophers, a distinction between legal justice and social justice is frequently made. We often suggest that certain rules, acts and allocations are "legally just," although they fail to meet any acceptable criteria of social justice. It is "legally just," we say, that a legitimate heir in law inherit the testator's estate, that a freely made contract be enforced or that the insurer pay damages in accordance with the policy irrespective of whether or not the pattern of distribution produced by these acts meets anyone's criteria of social justice. On the opposite side, we suppose that, for instance, preferring the members of a disadvantaged minority in job placements may be an act of social justice in so far as it offsets some of the consequences of past injustices and yet it would lead to an intolerable "reverse discrimination," thus raising cries of legal injustice.

In this paper, I shall attack this dichotomy. The upshot of my

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discussion will be that what we usually call "legal justice" is either an application of the more fundamental notion of "social justice" to legal rules and decisions or is not a matter of justice at all. In other words, the only correct uses of the notion of legal justice are derivative from the notion of social justice and, hence, the alleged conflicts between criteria of social and legal justice result from the confusion about the proper relationship between these two concepts. The arguments that the concerns of "legal justice" may sometimes override the considerations of social justice are morally unsound. Legal justice is, as it were, at the mercy of social justice: it cannot do any independent job. The only job it can do is rather trivial and parasytic: it can translate the postulates of social justice into the language of legal rules and judicial decisions.

This conclusion, if correct, has a significance reaching beyond the area of terminology and semantic disputes. It suggests the substantive limitations and inconsistencies of the arguments which attempt to block socially just interventions by appeals to the criteria of legal justice. This conclusion may play a useful role in demystifying the alleged weight of the considerations of legal justice unless they can be derived from prior substantive criteria of social justice.

Two views about the "social justice/legal justice" dichotomy are of particular importance and they will provide the focus for my paper. First, this dichotomy is sometimes identified with a classical "distributive/commutative justice" distinction.[1] It is sometimes

[1] In my brief characterization of "distributive/commutative" distinction I attempt to make explicit a distinction which is often implicit, embedded in a broader context and qualified. What follows is, therefore, a reconstruction of the distinction employed by different writers rather than a description of the views of one particular student of justice. Common for them is the inspiration by the Aristotle, *The Nicomachean Ethics* trans. F. H. Peters, (London: Kegan Paul, Trench, Trubner and Co., 1901), Bk V. See, in particular, Morris Ginsberg, *On Justice in Society* (Penguin, 1965), pp. 71–73 (restatement of the Aristotelian distinction; "corrective justice" corresponding to the law of contract and tort, "distributive justice" applying to the distribution of the means to well-being); F. A. Hayek, *Law, Legislation and Liberty*. vol. 2

suggested that social justice is essentially a matter of distribution, with the three following implications: this distribution operates along the lines of proportionality, on the basis of merit and with social groups (rather than individuals) constituting the units of comparison. As for legal justice, the argument goes, it is essentially a matter of "remedial" (or "corrective," or "commutative," or "rectificatory") justice, with the three corresponding implications that it typically operates along the lines of strict equality, on the basis of legal entitlements and with the particular individuals (rather than groups) constituting the units to whom the benefits are allocated. The general view about this distinction can be, therefore, reconstructed in the form of the following antinomy: a decision-maker concerned about social justice distributes goods among social groups, or subclasses of citizens, in proportion to their merit (however that merit is defined), while a judge allocates goods to particular individuals according to their entitlements, in order to assure equal protection of the law, or to restore the upset *status quo ante* (thus re-establishing the ideal equality between the parties to the dispute before him). I shall deal with this view in part 2 of this paper. In part 3, I will attempt to undermine a theory which identifies the "social/legal justice" distinction with the "substantive/procedural justice" oppostition. It is sometimes

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(London: Routledge & Kegan Paul, 1976), pp. 62–100 (social justice identified with distributive justice, criticised as incompatible with the rule of law); J. A. Passmore, 'Civil Justice and its Rivals' in *Justice* ed. E. Kamenka and A. Tay, (London: Edward Arnold, 1979), pp. 25–49 ("reparative" social justice interpreted in distributive terms; opposed to "civil" justice); A. M. Honoré, 'Social Justice' in *Essays in Legal Philosophy* ed. R. S. Summers, (Berkeley: University of California Press, 1968), p. 61 ("individual" justice defined as "justice between the wrongdoer and victim," distinguished from social justice which is illustrated by "[t]he cry for equality of opportunity for the underprivileged"). For the other aspects of the "distributive/commutative" distinction see also F. A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), p. 440–41; W. B. Gallie, 'Liberal Morality and Socialist Morality' in *Philosophy, Politics and Society*, ed. P. Laslett, first series (Oxford: Basil Blackwell, 1967), pp. 120–28.

claimed[2] that social justice is characteristically justice of outcome, that is, it applies to the pattern of distribution achieved by the employment of any procedures whatsoever, while legal justice refers to the procedures themselves, irrespective of the outcomes they generate. I do not suggest that these are the only two possible interpretations of the distinction between social and legal justice but they seem to be by far the most important ones. If, therefore, I succeed in showing that on both these interpretations "legal justice" is reducible to the criteria of social justice or else does not denote "justice" properly speaking at all, this may constitute an important blow to the attempts to construe the criteria of legal justice in separation from substantive social morality.

However, one disclaimer is necessary at the outset. The general notion of "justice" that I am employing here must be such that it does not preempt the conclusions I am seeking to establish. I shall, therefore, avoid the temptation to undermine current notions of "legal justice" by appealing to an arbitrarily adopted generic notion of "justice." It follows that I should use the broadest possible concept of "justice": the more narrower notion of justice adopted, the less significance my conclusions will have because the more they will hinge upon definitional *fiat*. I will, therefore, presuppose here a very broad notion of justice without going to the extreme where justice becomes identified with all the virtues that law (or rule, or an act, or a man, etc.) can display. I suggest that, in our intuitive thinking of justice, we take it to be a "part of virtue" rather than "a complete virtue," to use the classic Aristotelian distinction.[3] Justice is an important value but not an all-encompassing one. There are good actions which are unrelated to

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[2] See in particular Iredell Jenkins, *Social Order and the Limits of Law* (Princeton: Princeton University Press, 1980), pp. 325–326 ("the purposes and conditions that law is intended to further can be distinguished from the procedural standards it is expected to adhere to: this distinction is clearly marked in everyday speech by the two phrases, 'social justice' and 'legal justice'," ibid., p. 326.

[3] See Aristotle, *Nicomachean Ethics*, Bk V, chap. 2.3.

the virtue of justice (such as those displaying courage, generosity, truthfulness) and there are morally reprehensible actions which cannot be described as unjust (for example, deceit or undiscriminating cruelty). Justice, then, occupies only a part of our moral landscape, although it is an extremely important part.

Now, without attempting to provide precise criteria of the concept of justice, let me suggest that it is perhaps best grasped by Aristotle who states, among other things, that a man can be said to be unjust (although not necessarily criticised on other grounds) when "he takes more than his share."[4] This is an important insight, because it suggests that justice is concerned with the way goods generally sought (or, conversely, burdens generally avoided) are divided among people. In Sidgwick's words, "the laws in which Justice is or ought to be realised, are laws which distribute and allot to individuals either objects of desire, liberties and privileges, or burdens and restraints, or even pains."[5] To many people this delineation of the area of justice may still seem too vague but this is all we need for the purposes of the present argument. This description of the area of justice is broad enough to accommodate different substantive conceptions, and thus to protect me against the charge that I have attempted to "solve" the substantive moral problems by definitional tricks, and yet it is not so broad as to become an overall judgment of moral appraisal which fails to grasp the specificity of justice-talk.

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[4] Ibid., p. 143.

[5] Henry Sidgwick, *The Methods of Ethics* (Chicago: The University of Chicago Press, 1962), pp. 265–66. See also Brian Barry, *Political Argument* (London: Routledge and Kegan Paul, 1965), p. 96 ("justice" belongs to distributive, as opposed to aggregative, principles); Jonathan Harrison, *Our Knowledge of Right and Wrong* (London: Allen and Unwin, 1971), p. 370 ("All justice has to do with the distribution of rewards and penalties, emolument and burdens"); John Rawls, *A Theory of Justice* (London: Oxford University Press, 1972), p. 7 (the primary subject of justice – the way in which institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation).

2. COMMUTATIVE AND DISTRIBUTIVE JUSTICE

Distributive justice, according to Aristotle, governs "things that are divided among the members of the body politic," such as honour, wealth, etc. It follows from the principle of proportional equality in that it divides those goods among people in proportion to their merit. Commutative justice is a matter of "redress in private transactions" and requires equivalent exchange; it follows, therefore, from the principle of arithmetical equality.[6] However, the distinction is not as clear in actual social life as it is in theory; in reality the processes of allocation and of exchange are closely interconnected and may be viewed as two aspects of the same process. For instance, the payment of a wage by an employer to an employee may be viewed as the exchange of money for services rendered (commutative justice) or as a process of distribution of material gain among members of an organization in proportion to their merit as assessed by the allocator (distributive justice). In this case, the process is perceived as an exchange (equal for equal) only if isolated from the entire context in which it occurs. I wish to claim, therefore, that the considerations of "commutative" justice either have distributive criteria built into them (and then the commutative/distributive dichotomy is groundless because commutative justice is a derivative of distributive considerations) or do not belong to the realm of justice because they represent the idea of keeping promises irrespective of whether they are just or not.

To take the first point first, the example of employee/employer relations illustrates the idea that commutative-justice standards are derivative, not primary. What is an "equal exchange" between employee and employer cannot be determined without making a judgment about the hierarchy of merits within the structure. The principle of commutative justice demands equivalent exchange but whether an exchange is equivalent cannot be ascertained without seeing what is the relevant contribution of this particular worker

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[6] Aristotle, *Nicomachean Ethics*, Bk V, chap. 2.12.

(as compared with other workers) to the production of the total output of the enterprise. What amount of money is commensurate with my work can be determined only in the light of my share in the making of the total product; there is no absolute and objective equivalent where the exchanged goods (here: labour and salaries) are not of the same nature. Therefore, the just wage is determined, of necessity, by distributive considerations; there is no escape from a consideration of distributional context when discussing justice in exchange.

The primacy of distributive considerations is brought out even more clearly in another case of equivalent exchange cited by Aristotle: justice in punishment.[7] Unless we accept some sort of "*lex talionis*" approach, or unless we try to postulate purely utilitarian criteria of penalty-fixing (such as deterrence, prevention and reform), the principle of just punishment is inevitable based on the idea of punishment proportionate to crime. The idea of proportionality belongs to the realm of distributive justice. Clearly, in the case of punishments, we "distribute" burdens of different gravity to people who harm others, just as in the distribution of rewards and prizes we distribute goods to people in proportion to what we regard as their desert. Punishment "fits" the crime not in the sense that it is equal to it but only in the sense that it remains in an adequate proportion to other punishments for other offences.

A useful way of looking at Aristotelian commutative justice is to identify it with the principle that no one should gain by another's loss. It aims at restoring the *status quo ante*, that is, before the exchange has begun: "the party who has lost resources to another has a claim for the amount necessary to restore his

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[7] Ibid., Bk V, chap. 2.13. To be sure, Aristotle does not distinguish between civil injuries and crime, hence his account of corrective justice in the case of "involuntary transactions" does not draw the line between wrongs which call for damages only and those which call for punishment. This, however, does not affect the substance of the present argument.

original position."[8] But only very rarely may this restitution be taken literally. If you damage my fence, it is just (in a commutative sense) that you restore it to its prior shape. But in the case of exchanges between people the issue is usually more complicated than in the case of simple restitution: we have to compare goods of different types. No one should gain by another's loss, but what is a loss for particular people often depends upon their relative power. Andrew exchanges five oranges for two pineapples of Bert's but Charles, who is very rich and hasn't had any oranges for a long time, will happily exchange his two pineapples for one orange of Bert's. Has he lost anything? Well, this depends on the relative value which he attaches to oranges and pineapples. Having a great surplus of pineapples, he will value each individual pineapple much less than Bert, who is much poorer, does. Therefore, Bert will be happy to trade his two pineapples for five oranges, while Charles doesn't mind giving up his two pineapples for one orange only. But the opinion that the exchange of two pineapples for one orange is equitable relies upon a prior distribution of oranges and pineapples between Andrew, Bert and Charles.

As another example, one might consider this. I know that if I drive twenty kilometres out of town on Sunday to a farmer's market I will buy meat much more cheaply than at my local butcher's shop. However, being a rich man, I value more highly the pleasure of going bushwalking on Sunday than the economies which I may make by buying meat at the farmer's market. Should I say that the exchange between my expensive local butcher and me is inequitable; should I say that his gain is to my detriment? No, because what I gain (leisure time) is more important for me than my loss: there is, therefore, no overall loss. But my neighbour, who is much poorer than I am, would feel that the transaction at our neighbourhood butcher's is inequitable since he can buy the same quality meat much more cheaply at a farmer's market. Hence, he would feel a sense of injustice in this exchange. The

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[8] James Gordley, 'Equality in Exchange,' *California Law Review* 69 (1981): 1587, 1589.

judgment of commutative justice here depends on a feeling of loss and, hence, on the structure of preferences which in itself is a result of a prior distribution of resources.

In this sense distributive considerations constitute the basis for commutative ones: the justice of the exchange cannot be separated totally from the justice of (prior) distribution. However, there is a sense in which "commutative" justice is independent of distributive considerations: if Andrew and Bert agree to exchange five oranges for two pineapples, it is "just" that Bert gives his pineapples to Andrew against Andrew's oranges *solely* because he promised to do so. This demand belongs to the group of principles such as keeping promises or obeying rules: both rules and promises give birth to persons' entitlements and other persons' correlated obligations. But this does not warrant the justness of the outcome. Promises should be kept but relations produced by their fulfilment are sometimes unjust; rules should be obeyed but they, again, happen to be unjust.

To say that it is just that you get whatever you are entitled to, relies on the notion that the rules which confer the entitlement are just. Thus, "commutative justice" reducible to the duty to fulfil promises is not really a matter of justice because promises themselves (or rather, the structure of distribution produced by their fulfilment) may be assessed by standards of justice. It is just that I fulfil duties arising from consent freely given but, on the other hand, the content of this agreement may be unjust. Sidgwick notes that a contract may be free and yet unfair: when, for instance, one of the contractors is ignorant (for reasons other than fraud on the part of the other contractor) of the real value of what he exchanges.[9] To deny this and to say that whatever is voluntarily agreed upon is just, is to turn arguments over justice into the following sophism: it is just that I fulfil my promise and this promise is just because it is *my* promise.

That free consent is not a sufficient criterion for a just agree-

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[9] Sidgwick, *Methods of Ethics*, p. 287.

ment is recognized by the law of contract in so far as it departs from strict and rigid juridical individualism (labelled by Georges Burdeau "imperialism of independent wills"[10]). A few illustrations will show how the different legal systems confront the situations of unfairness and of inequality in bargaining power between the parties. In English law, one of the important purposes of equity is to protect one of the parties to the contract even when, apparently, the principles of freedom to contract are satisfied. Courts of equity have acted to protect persons in cases of inequitable and unconscionable bargains, that is in cases of bargains that "no man in his senses" would make and "no honest and fair man" would accept.[11] It was stated in 1818 that "[a] Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."[12] The equity jurisdiction, therefore, recognizes in practice that there are standards of just contract independent of the will of the parties and that, in certain situations, legal intervention is warranted not only for the public interest but also by the protection of a contracting party. This view was expressed in a dictum of Lord Cozens-Hardy M. R., in 1916: "it is no answer to say that an adult man, as to to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action."[13] In this case, the Court declared void the terms of an agreement which reduced one of the parties to a position of strong subjection to the will of another (almost to an "*adscriptus glebae*").

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[10] Georges Burdeau, *Traité de science politique,* tome V (Paris: Librarie générale de droit et de la jurisprudence), p. 89.

[11] *Halsbury's Laws of England* (London: Butterworths, 1977), 4th ed., Vol. 18, 344. On the development of this doctrine in the United Kingdom, see S. M. Waddams, 'Unconscionability in Contracts,' *Modern Law Review* 39 (1976): 369–93.

[12] Wood v. Abrey (1818) 3 Madd. 417, at p. 423 *per* Leach V.C.

[13] Horwood v. Millar's Timber and Trading Co. Ltd. [1917] 1 K.B. 305, 311.

A good illustration of the statutory use of the concept of a "harsh and unconscionable" transaction (the function of which concept is to introduce distributive considerations into the realm of commutative justice) may be found in the English Moneylenders Act of 1900.[14] The Act conferred extensive powers upon the courts to reopen transactions when the interest charged, in respect of the sum actually lent, is excessive and the transaction is "harsh and unconscionable." Similar provisions, but applying to a greater variety of unfair contracts, have been included in recent statutes such as the Unfair Contract Terms Act, 1977 (U.K.) and the Contracts Review Act, 1980 (N.S.W.). These statutes were, no doubt, influenced by the growth of consumerism and the growing general awareness about the lack of bargaining power of the consumers in the market-place. The Contracts Review Act provides that "[w]here the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made," the Court may grant relief by making declaration that a contract is void, or by refusing to enforce the contract, or by varying its terms.[15]

Yet another example of applying standards of just agreement, independent of free consent given by contracting parties may be provided by cases relating to the unreasonable restraint of trade. In 1960, the Supreme Court of New South Wales declared void part of an agreement because under the provisions of this agreement it was possible for the plaintiff (an owner of a dry-cleaning enterprise) unilaterally to determine the net amount of the commission payable to the defendant (its agent to conduct the business) at a figure which might not yield to the defendant a return which would reasonably compensate her for the loss of her right to engage in other trade.[16] More recently in England, on

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[14] This Act has been replaced by the Consumer Credit Act (1974).

[15] Contracts Review Act, 1980 (N.S.W.), s. 7 (1). See John Goldring, Joan L. Pratt, D. E. J. Ryan, 'The Contracts Review Act (N.S.W.),' *University of N.S.W. Law Journal* 4 (1981): 1–16.

[16] Tasman Dry Cleaners (Balmain) Pty. Ltd. v. Diamond [1960] N.S.W.R. 419.

similar grounds, the House of Lords struck down the agreement between a young songwriter and a music publishing company as involving unreasonable restraint of trade.[17] The agreement combined a virtual lack of obligation on the part of the publisher (who was not required to publish any of the songwriter's compositions) with a total commitment on the part of the composer who assigned to the publisher the full copyright in each composition created by him for a period of five years. Lord Diplock stated *inter alia*:

> the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: was the bargain fair? The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promiser under the contract.[18]

Implicit in these decisions is the premise that the reasonableness of the agreement may be assessed independently of the party's consent. After all, the consent of a party may be the result of urgent need, ignorance or lack of experience, and even though no force or fraud is applied, independent criteria of substantive justice may override the "commutative" justice based merely on free consent.

Based upon this general proposition, the doctrine of "unconscionability" is perhaps the most characteristic and direct technique in American law (and, as already noted, in English law too) of policing the fairness of contracts. In the United States, although the doctrine was established in the 19th century,[19] it entered in 1950s into a new period of growth when section 2–302 of the Uniform Commercial Code permitted courts to refuse to enforce

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[17] A. Schroeder Music Publishing Co. Ltd. v. Macaulay [1974] 3 All E.R. 616.

[18] Ibid., p. 623. Cf. also Lloyds Bank Ltd. v. Bundy [1974] 3 All E.R. 757.

[19] Scott v. U.S 79 U.S. 443, 445 (1870). On the recent development of this doctrine in the U.S., see particularly M. P. Ellinghaus, 'In Defense of Unconscionability,' *Yale Law Journal* 78 (1969): 757–815; John E. Murray, 'Unconscionability: Unconscionability,' *University of Pittsburgh Law Review* 31 (1969): 1–80; Richard E. Epstein, 'Unconscionability: A Critical Reappraisal,' *Journal of Law and Economics* 18 (1975): 293–315.

an entire contract, or its particular clause, if it found that the contract or its clause were unconscionable. Courts may also limit the application of any unconscionable clause so as to avoid any unconscionable result. The cases in which the courts in the United States struck down unconscionable contracts (both in the application of the Code and in non-Code cases) show that, among other things, two considerations of a clearly distributive character have to be taken into account. First, gross inequality of bargaining positions of the parties may indicate that the aggrieved party had no meaningful choice, was in a "take-it-or-leave-it" situation and had very little ability to protect himself. In the *Frostifresh* case the Court found unconscionable the contract signed by a non-English speaking buyer (the contract was printed in English and contained complex installment provisions) after he negotiated, with a salesman, in Spanish for the purchse of a refrigerator.[20] Secondly, gross disparity in the values exchanged indicates the unconscionability of the contract; the contract is unfair when, for instance, the amount paid for goods is radically in excess of their market value. In the *Campbell Soup* case, the Court struck down a contract in which the farmer had agreed to supply carrots at a price three times lower than the market price at the time of delivery. The Court came to a conclusion that the contract protected only the manufacturer's interests and not the farmer's: "We think it too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience."[21]

Also, the Civil Law systems of contract permit the courts to take into account considerations which transcend the expressed will of contracting parties. For example, the French *Code Civil*, article 1674, confers upon the seller the right to rescission of the sale (even if he expressly renounced in the contract the right to demand rescission) if the seller has been harmed by more than 7/12 in the price of an immovable. This doctrine of *lésion* was expan-

[20] Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct. 1966); 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (Sup. Ct. 1967).

[21] Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d. Cir. 1948).

ded by 20th century legislation to other objects of contract; for example, to literary and artistic works. This particular technique of approaching the problem of gross unfairness of exchange originates in the mediaeval doctrine of *laesio enormis* developed on the basis of a late Roman Law principle which allowed sellers of the land to obtain rescission if the contract price was less than half of the "just price." These are only a few illustrations of the proposition that justice of fulfilling contracts transcends a purely formal principle of keeping promises but incorporates (in various ways in different legal systems) ideas of what is just independently of the expressed will of the parties.

Significant doubts about the commutative/distributive distinction in theorising about justice were expressed by Thomas Hobbes:

> And therefore this distinction, in the sense wherein it useth to be expounded, is not right. To speak properly, Commutative Justice is the Justice of a Contractor; that is, a Performance of Covenant, in Buying, and Selling; Hiring, and Letting to Hire; Lending, and Borrowing; Exchanging, Bartering, and other acts of Contract. And Distributive Justice, the Justice of an Arbitrator; that is to say, the act of defining what is Just.[22]

The upshot of Hobbes's argument is that the distinction between commutative and distributive justice is not a proper dichotomy. They do not apply to two, parallel types of situations, but rather involve standards located on different levels: distributive justice is a matter of "defining what is just" while commutative justice is a matter of "a performance of covenant." In other words, the Aristotelian idea that distributive and commutative justice operate indendently, applying to two distinct spheres of life (public distributions and private transactions), obscures the fact that in reality both concepts of justice apply at the same time though in a different way. "Commutative" justice, in the interpretation suggested above, is identical with a vindication of legal rules, distributive justice is a matter of moral demands.

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[22] Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (Harmondsworth: Penguin, 1981), p. 208.

This is nicely brought out by the biblical parable:

The kingdom of Heaven is like this. There was once a landowner who went out early one morning to hire labourers for his vineyard; and after agreeing to pay them the usual day's wage he sent them off to work. Going out three hours later he saw some more men standing idle in the market-place. 'Go and join the others in the vineyard,' he said, 'and I will pay you a fair wage'; so off they went. At noon he went out again, and at three in the afternoon, and made the same arrangement as before. An hour before sunset he went out and found another group standing there; so he said to them, 'Why are you standing like this all day with nothing to do?' 'Because no one has hired us', they replied; so he told them, 'Go and join the others in the vineyard.' When evening fell, the owner of the vineyard said to his steward, 'Call the labourers and give them their pay, beginning with those who came last and ending with the first.' Those who had started work an hour before sunset came forward, and were paid the full day's wage. When it was the turn of the men who had come first, they expected something extra, but were paid the same amount as the others. As they took it, they grumbled at their employer: 'These late-comers have done only one hour's work, yet you have put them on a level with us, who have sweated the whole day long in the blazing sun!' The owner turned to one of them and said, 'My friend, I am not being unfair to you. You agreed on the usual wage for the day, did you not? Take your pay and go home. I choose to pay the last man the same as you. Surely I am free to do what I like with my own money. Why be jealous because I am kind?' Thus will the last be first, and the first last.[23]

Now this is an obvious case of a conflict between the principles of distributive justice and "commutative justice" reducible to the fulfillment of an agreement. Let us call, for the sake of simplicity, those workers who worked the whole day, Blacks, and those who worked merely one hour, Whites. On the basis of distributive justice the allocation of their wages should be proportionate to their merit; since the only relevant information that we have about their merit is the length of their work,[24] the just distribution should operate proportionately to the length of their work. But the second principle, invoked as an argument for equal pay, is

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[23] Matt. 20.1–16.

[24] Hence, there is no reason to suppose that their skills, or quality of their work, are different to the extent that it can explain the differences in wages.

contained in the words: "You agreed on the usual wage for the day, did you not?" The owner does not break the agreement: he gives the Blacks what he promised. The agreement became a source of their mutual legal obligation; since they exchanged their services and money in accordance with the agreement, law was respected. But the action may be both lawful and unjust. The Blacks' complaint is not of a legal but a moral nature. They have got their due in the legal sense, and yet they feel morally wronged because, as compared with the Whites, their contribution was not reflected in their share of the total benefit distributed.

These are, therefore, considerations of different types; the Blacks argue about social justice, the owner about his legal duty. Here the conflict between two orders of reasoning is not very dramatic in its consequences because the Blacks received what they expected (before having learnt about the Whites' wages) while the Whites have got *more* than distributive justice dictated. Injustice which consists in allocating more than one deserves is not a tragedy but still it is an injustice because the proportion of benefits (or burdens) is not respected. The analogy would be to a parent who punishes one of his children and forgives another one for the same misbehaviour. No one has *lost* anything but injustice was committed because the proportion of guilt and punishment was not respected.

It is possible to conceive of objections to that way of tackling the problem. Suppose someone says that what the Parable really exemplifies is not the conflict between social and legal justice but between justice and generosity. The owner asks: "Why be jealous because I am kind?" In this question he focuses on the moral character of his action: kindness. He has decided to be generous although in an arbitrary way; he did not deprive anyone of his entitlement but he gave some workers *more* than they deserved. Suppose, for the sake of this hypothetical argument, that the Blacks were paid as much as they would be anywhere else, so that in terms of comparison with other workers in a community (with the exception of the Whites in this particular day) there was no distributive injustice done. Suppose also that the Whites were not

otherwise treated preferentially and that this particular remuneration was a windfall rather than a part of the general pattern of privileges.

If, however, we accept this hypothetical argument and we view the main issue of the Parable as justice *versus* generosity, then we inevitably reach the limits of the moral argument within the conception of justice. The latter is unable to decide the conflicts between justice and other values. What it can do, is to declare incompatibility of justice with some other values. Justice excludes arbitrariness; generosity (in the form manifested by the vineyard owner) *is* arbitrary. Justice requires good moral reasons for a proposed distribution; generosity does without them; actually, part of the nature of a charitable act is that it does not have to be just. That was, in any event, the case of the vineyard owner who explicitly declined to give any reasons for his distribution other than "being kind".

Moreover, the owner *can* be generous only because he has legal entitlements over his resources; therefore, he has legal power to allocate wages. In this sense, these two phrases are inherently linked: "Why be jealous because I am kind?" and "I am free to do what I like with my own money." The supererogatory action suggested by the first sentence is made possible by the legal entitlements described by the second. But this only means that a legal set of entitlements makes it possible for some people to distribute goods arbitrarily, even if generously. In the case of *U.S. v. Bethlehem Steel Corporation* it was argued that "[i]t always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."[25] Equal legal status of parties may lead to unjust agreements when economic disparities give one of the parties (here, the vineyard owner) power to dictate the conditions of contract. "[I]f one party has the power of saying to

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[25] U.S. v. Bethlehem Steel Corp., 315 U.S. 289, 326–327 (1941) (Frankfurter J., quoting Holmes J.).

the other: 'That which you require shall not be done except upon the conditions which I choose to impose' no person can contend that they stand upon anything like an equal footing."[26] This is illustrated by the vineyard Parable and that explains the incongruity between legal correctness and the substantive injustice of the distribution of salaries among vineyard workers. We may say that Blacks legally have no cause for complaint over their shares but still we may believe that injustice was done: what appears offhand to be a commutative/distributive distinction, is actually the distinction between legal obligation and social justice.

3. PROCEDURAL AND SUBSTANTIVE JUSTICE

The second distinction to be discussed in this paper may appear unproblematic: substantive justice is the justice of *outcome* while procedural justice is the justice of *process* which brings about this outcome. Procedural justice, it is claimed, imposes restraints on processes by which a distribution comes about and, in so far as these restraints are respected, the action is "procedurally just". My goal is to show that this distinction is misleading: so-called procedural justice is either a derivation from and reducible to substantive justice or is not a category of justice (in the strict sense of the word) at all.

Let us start with the second type of candidates for "procedural" justice: those which cannot be shown to maximize the probability of a just outcome. Gambling is a good example: there are no criteria of a "just outcome" in roulette or poker; whenever the procedural rules are kept, the action is said to be "procedurally" just. Gambling is the example John Rawls gives to illustrate his concept of "pure procedural justice": there is no independent criterion of a just result but only criteria of "fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."[27] It is significant

[26] Ibid., p. 327 (Frankfurter J., quoting Abbott C. J.).
[27] Rawls, *A Theory of Justice*, p. 86.

that Rawls avoids using the adjective "just" in this context and talks about "fairness" of the procedure. Also in the phrases following this definition of "pure procedural justice" he talks about "*fair* bets," "*fair* conditions," and "*fair* distributions" arising out of these procedures. Now, the fact that he is reluctant to talk straightforwardly about "*just* bets," "*just* conditions" of gambling, and "*just* distributions" arising out of gambling is an important symptom. Indeed, it would be odd to talk about "just gambling" even with the explicit reservation that "justice" is used merely in the procedural sense. We demand that procedures be kept, in gambling as well as in other social practices, but in the case of gambling we do not evoke "justice" as an argument for keeping procedures. An appeal addressed to a croupier in a casino, "Be more just!" sounds out of place; he is not in the business of being just, his duty is to see to it that the whole game is carried out according to the rules. Whatever is the outcome of a game properly carried out, it must be accepted as final and binding for participants. There is, as Rawls rightly observed, no criterion of just outcome and, we might add, there is no criterion of "just procedure." Procedures in games may be most arbitrary and bizarre, but once we agree to play the game, we must respect the outcome. It is not the alleged "justice" of procedure that compels us to abide by its rules but our voluntary consent to participate in the game.

The example of gambling *qua* a paradigm of "pure procedural justice" shows that "procedural justice" is a matter of combination of the following two principles: (1) abiding by the publicly announced rules (whatever the rules are, they must be followed) and (2) the liberty of adult individuals to engage in lawful practices, even if they are detrimental to them. Neither of these principles is a principle of justice properly so-called. The first principle excludes cheating in gambling, not because of injustice but rather because it is *improper* to cheat, just as it is improper to break any other rules. This is a purely formal principle: general rules (here, rules defining procedures) must be correctly adhered to. If, therefore, someone reduces procedural justice to the strict

application of general rules of procedure, he speaks in fact about the principle of consistency in the enforcement of valid rules. The second principle is one of nonpaternalism: people may voluntarily agree to participate in practices which might be detrimental to them. *Volenti non fit iniuria* is not a principle of *justice*. There is nothing inconsistent in saying that I engaged in an unjust practice voluntarily. I may be silly to do it or I may do it just for fun, knowing in advance that I have little chance to turn the practice to my benefit; in either case, my voluntary access does not automatically make the practice just. I may be entitled to the money I win at roulette but there is nothing just about the distribution after the game.[28] My entitlement is of a formal, not moral, nature: according to valid public rules, or promises given, I have entitlements over certain goods if I satisfy the conditions stated in the rules. Procedures which yield those entitlements cannot be called "just" if the resulting distribution is not characterized properly in terms of justice.

"Pure procedural justice" is, then, no principle of justice at all. It is not the case that, as Rawls alleges, "[a] fair procedure translates its fairness to the outcome."[29] Rather, it is the other way round: a just outcome makes the procedure just if this procedure maximizes the probability of bringing about this outcome. Since in "pure procedural justice" cases no outcome can be just (or, for that matter, unjust; there is simply no standard of justice of outcome), talk about "just procedures" seems inappropriate there.
It seems appropriate, however, where we *do* have a criterion of a just outcome. Those types of justice Rawls calls "perfect procedural justice" and "imperfect procedural justice." The difference is that "perfect procedural justice" guarantees with full certainty the attainment of the just outcome when a proper procedure is followed (e.g., equal division of a cake by the person who is to get the last

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[28] See also William Nelson, 'The Very Idea of Procedural Justice,' *Ethics* 90 (1980): 502–11.
[29] Rawls, *A Theory of Justice*, p. 86.

piece) while "imperfect procedural justice" yields the just result in most cases, although not always (e.g., procedural justice in criminal trials).[30]

Let us abstract from the question whether "perfect procedural justice" is possible at all: Rawls himself expresses doubts about it.[31] His example about the division of the cake would cease to be one of "perfect procedural justice" if we rejected his asssumption that "the fair division is an equal one" and adopted a desert-based assumption; for instance, that the person who contributed most to baking the cake should have the biggest slice. But the main point is that in those cases of "procedural justice" where the justice of procedure is derived from the justice of outcome, it would be an error to make a dichotomous distinction between "procedural" and "substantive" (or "material") justice. "Procedural" justice is derivative from substantive justice. We call certain procedures "just" in so far as we believe that they tend to produce materially just outcomes.

A criminal trial is a good example of the latter point. We have certain criteria of substantive justice referring to the outcome of the procedure: we believe, for instance, that only the guilty should be punished, that punishment should be proportionate to guilt and we also accept codified measures of punishment as just. Procedures are just if they are devised in such a way as to maximize the probability of this outcome. The prerequisite of a just outcome is the discovery of the truth about the criminal. Guarantees of "natural justice," or of "due process of law," are meant to maximize the probability of such a result.[32] They deserve to be called "just" only in so far as we believe that, better than any other procedures, they lead to a just result; they are not just *per*

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[30] Ibid., pp. 85–86.

[31] Ibid., p. 85: "[P]erfect procedural justice is rare, if not impossible, in cases of much practical interest."

[32] In the following pages I discuss *legal* procedural justice, but of course the concept "procedural justice" is broader: it may be applied to an account of procedures governed by any rules, not necessarily legal.

se. They are considered to be principles of justice because of their tendency to produce just outcomes; consequently, it may happen that their observance, in some particular cases, will not lead to a just result, or even that just outcomes may be reached while proper procedures of "natural justice" are disregarded.

This last case is, of course, highly unlikely; however, if we consistently believe that there are independent criteria for a just outcome, we must at least envisage theoretically a situation in which justice is achieved after any procedure whatsoever; that, for example, an innocent defendant is acquitted after a procedurally incorrect trial. A connection between procedural safeguards and material justice is empirical, not conceptual: we are entitled to ask whether the outcome of a correct procedure in any particular case is itself just. Whilst we admit that there are independent criteria for assessing just outcome, there is no reason to believe that "any treatment that would have been just according to an independent criterion for assessing outcomes, is in fact unjust if performed without employing an appropriate judicial process."[33] I find this last statement internally contradictory: the existence of an "independent criterion for assessing outcomes" entails that any distribution consistent with this criterion *is* just (not: "would be" just), no matter how it was brought about. If, in a particular case, a random procedure happens to lead to the punishment of a guilty person, the outcome is just. A distribution may be just by accident; the advantage of following the principles of "natural justice" is that they design procedures which maximize the probability of just decisions, while random procedures do not. But this is a matter of empirical wisdom, not of the intrinsic character of "natural justice." Therefore, it is not true that "[d]ue process is a necessary, but not sufficient condition for just treatment."[34] It is neither a sufficient, nor necessary condition, although it is

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[33] David Resnick, 'Due Process and Procedural Justice' in ed. J. Roland Pennock, John W. Chapman *Due Process, Nomos XVIII* (New York: New York University Press, 1977), p. 213.

[34] Ibid., p. 213.

probably the most reliable safeguard for reaching substantive justice.

My proposition that procedural justice is derivative from justice of outcome may be subject to the following objection. There are certain principles of due process of law which cannot be shown directly as more helpful than other alternative procedures in the discovery of truth about a criminal. For example, torturing the accused might, in particular circumstances, be a more efficient way of obtaining evidence; however, in civilized legal systems it is considered impermissible. The entire issue of inadmissible evidence cannot be reduced (an opponent of my argument might continue) to the question of achieving a *just* verdict because in some situations certain types of evidence which are considered inadmissible might lead more effectively to a just verdict, yet it would remain "unjust" to use them. Hence, the argument would run that the justice of procedure is not always derived from the justice of the outcome.

My reply to this hypothetical argument would be as follows. There may be several reasons for making some types of evidence impermissible and not all of these are reducible to arguments about justice. For one thing, some methods of obtaining evidence entail the commission of a crime: torturing a suspect in order to obtain a confession involves infliction of suffering which is unlawful. Legalizing its use in the process of extortion of confessions would lead to a situation of using one evil in order to discover the truth of another evil. Certain prohibitions on some types of evidence (such as involuntary confessions) should be viewed, therefore, not as a matter of procedural justice but as bans on committing particular crimes. Even if these methods increase the probability of the discovery of the truth about a crime in some cases, it will be done at the price of committing another crime: between the justice of punishing the criminal and avoiding cruel measures, criminal law chooses the latter for humanitarian reasons. To a similar (although not exactly the same) category belong procedural privileges against self-incrimination or incrimination of a spouse (in some legal systems). The principle that a wife is absolved from

a duty to give evidence against her husband means that the law deliberately gives up the possibility of maximizing substantive justice for the sake of humanitarian ends. Cross in his textbook on evidence admits that "reliance on the privilege [of non-self-incrimination] will sometimes obstruct the course of justice in the case in which it is claimed, and may militate against the discovery of crimes which ought to be traced in the public interest"[35] but this consideration is overridden by the humanitarian principle that no one should be obliged to jeopardize his life or liberty by answering questions on oath. The rationale for these privileges is similar to the rationale for inadmissibility of the previous examples of evidence unlawfully obtained. The just outcome of the criminal trial is its most important aim but we must not try to achieve it by any means whatsoever. In certain situations justice must be sacrificed for the sake of important humanitarian values which must be protected even more stringently than the principle of justice. In other situations, the centrality of substantive justice is overridden by other important values, such as candour in relations between patients and physicians, necessary for the proper excercise of the medical profession (hence, medical professional privileges in criminal trials); mutual trust required in the exercise of the legal profession (hence, privileged professional communications between a lawyer and his client); confidentiality of religious confessions (hence, privileges of clergymen); national security (hence, privileges protecting military and State secrets), and so on and so forth. In a word, many restraints are imposed upon a procedure not for the sake of justice but in order to protect other substantive values.

But the rules governing inadmissibility of evidence are not always justified by arguments relating to humanity, confidentiality, security, etc., as opposed to arguments of justice. Two other main types of argument are related directly to justice of outcome: the first is about frustrating criminal justice in the long run, the

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[35] Rupert Cross, *Evidence,* Australian Edition by J. A. Gobbo (Sydney: Butterworths, 1970), p. 288.

second is about the unreliability of certain types of evidence. First, it may be said that although certain types of evidence (for example, that extracted by torture) might in individual cases be useful in discovery of the truth, they will lead to the degeneration of the entire apparatus of law enforcement if legally permitted and, therefore, in the long run they will frustrate the justice of outcome. The legal possibility of using such inhuman means as torture would necessarily lead to disrespect (by police officers) for important procedural guarantees, including those that *are* justified by maximization of a just outcome. Thus, the use of those measures would entail the sacrifice of substantive justice, in the long run, for short-term gains in substantive justice. A second argument is that most of these measures are unreliable, *ergo* counter-productive in attaining justice of outcome. After all, one of the reasons why involuntary confessions are inadmissible is that they may well be untrue: history provides many examples of people confessing, under physical violence, to crimes which they did not commit. The argument about lie-detectors is similar: as long as scientists are not absolutely sure about their reliability, the mandatory use of lie-detectors in the criminal process could lead to false impressions about certain things being proved beyond reasonable doubt through the use of this device. To this category also belong arguments about the hearsay rule in those legal systems where hearsay is inadmissible as evidence. It is often claimed that reported statements are untrustworthy evidence of the facts stated.[36] The weakness of this type of evidence is supported by the fact that the accuracy of the person whose words are quoted by another witness cannot be tested under cross-examination. By the same token, the rule mentioned earlier that husband and wife are incompetent as witnesses for or against each other, is defended not only on humanitarian grounds but also on the basis of "a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely."[37]

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[36] Ibid., 497–99.

[37] Hawkins v. United States, 358 U.S. 74, 75 (1958).

In a word, certain procedural prohibitions which, at first sight, seem to put obstacles in the way of obtaining substantive justice, in reality are dictated by the principle of justice of outcome. If not, they are dictated by principles other than justice and cannot be called principles of "procedural justice" but rather of humanitarianism; the only type of "justice" which might be attributed to them is purely formal principle of consistent application of valid rules.

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