

The Necessity for an Objective Basis for Morality if Law is going to become more than a Battle of Interests

The debate between Athens and Melos

In ancient Greece, Thucydides presents the rulers of Athens as claiming that 'right makes might', i.e., that the power of the Athenian state justified it in behaving exactly as it wished. In 416 BC, Athens demanded that the island of Melos become a subject state; when the Melians responded that they were a neutral state and that Athens' threats were unjust, the Athenians answered, 'the strong do what they can and the weak suffer what they must'. Athens' stance denied the existence of any standard of justice higher than the decisions of its rulers.

When the people of Melos refused to change their stance, Athens invaded. The Athenians experienced the consequence of their own logic, though, as Sparta won the Peloponnesian War and then around 80 years later, Athens was conquered by Philip II of Macedonia.

Two ways of thinking about law

There are two great families in the philosophy of law. One, called legal positivism, says that law is fundamentally about power. Law is nothing more than rules made by the powerful. Legal positivism is a way of thinking about law which says that the ultimate basis of law is power. Laws are rules made by, or authorised to be made by, the sovereign.

The other family is called natural law theory. Natural law theory says that law is fundamentally linked to justice. Laws are rules directed towards the common good of a community. Natural law theory is a way of thinking about law which says that the ultimate basis of law is justice, and that justice is ultimately derived from nature. Modern international law developed from the thought of Hugo Grotius, who derived from his extensive knowledge of classical and Christian sources, a theory of natural law and natural rights, to which all human beings are subject no matter how violent their disagreements about religion, political authority or human flourishing.

Law always claims to be morally justified

Everywhere I travel, I want to find out what the law courts are called and what the government department responsible for the legal system is called. The courts are often called Courts of Justice and the department is always called the Ministry of Justice. Given this fact,

why do legal positivists so obstinately object to the idea that there is a connection between law and justice?

One important reason is that legal positivists want to deny that there is any necessary connection between law as such and any particular morality. I agree with them about this. Whenever regimes choose to govern according to law, they make the claim that it would be morally justified, that it would not be morally wrong, to obey the rules they are making. The German legal philosopher and constitutional lawyer, Robert Alexy, calls this the claim of moral correctness. In order to commend the laws as common public standards worthy of general obedience by subjects, a legal system's officials must claim that law's rules are morally justified.

The problem is that the fact that a legal system claims that its rules are morally in order is no guarantee that the rules are morally in order. However, the difference between what law claims and what morality actually requires may or may not be apparent to those who are subject to the legal system. The laws may be perceived as unjust by those subject to them or those who are subject to the laws may be deluded into believing that the laws are just. If the laws are perceived as unjust then the legal system lacks legitimacy with its subjects; if the injustice of the laws is not perceived then the subjects have been seduced into a false consciousness of what justice requires.

Rulers can be insincere in their claim that the laws they have adopted are just. The claim can be nothing more than a pretence. Ambrose Bierce offers this satirical definition of politics in *the Devil's Dictionary*: "POLITICS, noun. A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage." Bierce cynically contends that politics is a battle of interests, in which political arguments are *presented* as arguments about justice.

The American philosopher of law, Philip Soper, says this: 'At least since Kelsen, positivists have insisted on reproducing within their models of law not only the obvious *de facto* power of the law, but the equally persistent *de jure* claims that accompany the exercise of such power. ... According to this brand of positivism legal systems share with other normative systems, like morality and religion, the claim or belief that what is done through law is morally justified.'

Victors' Justice

One of the many places in Europe which the French emperor, Napoleon, invaded was the island of Malta. The British then conquered, or as they put it, "liberated" it. Malta remained under British rule for 150 years. This is one of the buildings the British built. It declares, in Latin, that the "Great and Invincible Britain have erected this building in confirmation of their love for Malta and for the peoples of Europe".

Victors' justice led to the Spanish and the Portuguese imposing their laws on the defeated peoples of the Americas, and extracting vast amounts of silver, gold and other wealth. Victors' justice led to landowners in Scotland and England displacing farmers who had farmed their lands for generations. Victors' justice saw abuses in Ottoman rule in Macedonia, Greece and Albania. These examples are just the start of a long catalogue of laws and legal systems which perpetrated significant injustices, to say nothing of the violence against women and those of a different race which the law has cloaked or authorised.

What is the difference between a kingdom and a band of robbers?

In *The City of God*, Augustine poses a question: What is the difference between a kingdom and a band of robbers? You might expect the answer that a kingdom is committed to acting justly whereas a band of robbers is not. Augustine does not give that answer. Instead he says, with deliberate reference to the Roman Empire that was collapsing around his ears as he wrote, that a band of robbers only survives if there is agreement amongst its members as to how to divide up its spoils. At worst, he argues, that is exactly what legal systems do, they set out the entitlements of those who are recognised as stakeholders by the system. Law can be, Augustine warns, just a means for the insiders to exploit the outsiders more efficiently.

Augustine's answer to the question he posed about the difference between a kingdom and a band of robbers is a disturbing one. Augustine starts by drawing our attention to the fact that, in order to survive, a band of robbers must have a conception of justice internal to it, an agreement as to how the spoils of their robberies are to be divided up. Without such an agreement and the trust it generates, every robbery would end up in the internecine violence so graphically displayed in Quentin Tarantino's 1992 film, *Reservoir Dogs*.

Having shown us that every band of robbers has its own conception of internal justice, Augustine then draws the comparison with kingdoms. Each kingdom has its own conception of internal justice, a conception addressed to those the kingdom treats as subjects. That conception may be, however, for internal consumption only, leaving the kingdom free to prey

on those it treats as slaves, non-persons, non-citizens or others not accorded legal personality or legal standing.

Augustine's target is the universal standard of justice which the Roman Empire proclaimed was the *Pax Romana* and Roman law. Augustine's warning is that what is presented as universal justice is, all too often, merely tribal.

Augustine draws our attention to an important feature of law. Laws and legal systems do not have to persuade everyone. A legal system can function effectively, at least for a time, by persuading some and coercing others. The obvious example is a society where slavery is practised. So long as those who are free citizens in that society are persuaded of its justice, it only matters that the society is strong enough to crush any slave uprising which any Spartacus tries to attempt. Augustine's band of robbers illustration confronts us with the question: *With liberty and justice for whom?*

Being critical about law's claims to be morally justified

The claim may be a lie

At one point in his writings, the American legal philosopher Philip Soper grounded a *prima facie* obligation to obey the law on the sincerity of the claim by rulers that the laws of their legal system were just. This seems to be obviously false. What matters is not whether the claim that the law is just is made by officials acting in good faith (contra Soper, *A Theory of Law*, 120), what matters is how officials act. It is the actions and not the motivations of officials which are accessible to their subjects. The cynical pretence that the law is just is the homage vice must pay to virtue. Corrupt and self-serving officials in a legal system must publicly justify their actions by reference to a conception of deep justice, however immoral their private motives may be. The point is this: even wicked legal officials must present the application of the law as being justified, as being a credible response to the requirements of deep justice.

The claim may be self-interested

Conversely, a sincere claim that the laws of a system are just is not, unfortunately, a guarantee that its laws are in fact just. Rulers brought up to believe that their status is their due and who are blind(ed) to the realities of their subjects' lives may sincerely believe that the social order which the laws support is just, even though that is not the case. A ruler's conception of deep justice may have a high degree of fit with life as it appears from their

perspective, so long as they do not take Buddha's steps out of the palace to discover others' realities.

Human beings, as a species, are not only experts in deceiving others, we are experts in deceiving ourselves. Oxford University Professor of Law, Hugh Collins, has argued from a Marxist perspective that the rulers' 'sense of justice' within a legal system is ideological in nature. Each legal system expresses a legitimating ideology, in which the interests of the ruling class are presented as 'natural and necessary to all sections of a society.' This ideology is made up of what the ruling class takes to be a common sense understanding of the world and of elementary principles of morality. If the ideology is successful, the working class will also come to accept it as truth about who they are and what they deserve.

The German legal philosopher Robert Alexy insists that law always makes a claim to moral correctness. Priel has pointed out in response that 'legal correctness is not tied to moral correctness but to *what is morally accepted at the time* a decision is made.' Alexy concedes this, acknowledging that 'even the [Nazi] judge who applies the principle of race and the *Führer*-principle lays claim to correctness with his decision.' All too often, the conception of deep justice to which rulers appeal is a conception of "Victors' justice" like that advanced by the rulers of ancient Athens, in which might is justified as right.

The claim may be wrong

Margaret Atwood is a Canadian author who wrote a book called *The Handmaid's Tale*. The book describes a future in which there is a country called Gilead. In Gilead, there are two classes of women: an upper class of women and a working class of women. The upper class of women have become sterile, unable to have children. So the husbands of the upper class of women use the working class of women, called the handmaids, to have children. Once the handmaids have given birth, their children are taken up away from them and brought up as the children of the upper class.

Gilead is a country in which handmaids are treated as being of less worth than the upper class. Their rights not to be raped are violated, their rights to bring up their children are ignored, their rights to live a free life are denied. "That's just how we do things around here" is not a reason for regarding Gilead as anything other than abhorrent.

Critiquing a legal system's claims to be morally justified

An internal critique

I was speaking this morning at the University of Pristina about the relationship between law, justice and power. An internal critique of a legal system challenges the legal system to live up to its own promises. My audience were clear that their legal system is failing to do so.

Shallow Justice: the rules are applied consistently. Like cases are treated alike. The rules apply to both the powerful and the powerless. Everyone is given what the rules promise to give them.

Shallow justice is the justice which is immanent to a legal system: it is justice according to law. Justice according to law occurs when rulers govern in accordance with the rules which have been laid down. Justice according to law occurs when rulers enforce the rules which have been laid down.

The American philosopher Nicholas Wolterstorff, in his memoir, *In this World of Wonders*, describes a conversation with Carlos Hernandez, head of the Honduran NGO Sociedad má Justa, in which Mr Hernandez told him that 'the deepest cause of injustice in Honduran society is that the laws are often not enforced. Though the laws, in general, are quite good, public officials often do not enforce them, especially in the case of crimes against the poor.'

A radical critique

History offers examples of communities which had a conception of justice according to which women are inferior to men and which reflected this concept in not only its social norms but also its laws regarding sexual crimes, divorce and inheritance. In such a community (particularly if a false consciousness about their worth has been inculcated into the women and the voice of the women who resist is suppressed) there may be a high degree of fit between the shallow justice enforced through law and the deep justice which represents the dominant voices in the community. The people may appear happy that their laws reflect their understanding of deep justice, but is that all there is to be said?

We would want to say that both the community and its laws are seriously and systematically unjust to the women within it. On what basis can such a critique be offered? If it is merely that we hold to a different concept of deep justice from that which dominates this community, then how is the stand-off to be resolved?

How do we condemn the injustice of a system which says that Jews or Roma are worth less than other human beings, a system which says that men can have more than one wife but women can have only one husband, a system that says that children with Down's Syndrome

are worth less than other human beings, or a system which says that corporations need to pay no taxes in the countries in which they make their profits?

The Nuremberg Trials: Victors' Justice or based on Objective Morality?

In 1945, the Allied Powers had to decide what to do with those senior Nazis who they had captured. This was before the Universal Declaration of Human Rights, this was before the European Convention on Human Rights. On the basis of what law were the Nazis to be tried? The Nazis were tried on the basis of breaching the law of war, the law which Hugo Grotius had identified as part of the natural law. Despite the absence of any written international law, the Nuremberg trials proceeded on the basis that, you could see from the reality of the concentrations camps that the Nazis' conduct had violated an international standard.

If there is no objective basis for morality, if things are only crimes because there is a written law to that effect, then the Nuremberg trials were only victors' justice. But, if there is an objective basis for morality, then the Nazis who were condemned at Nuremberg were justifiably punished because they ought to have known that what they were doing was wrong.

Human rights theory is a theory of natural law. Human rights theory is a theory that there is an objective morality. Human rights theory is a theory that there are certain ways of treating human beings which are inconsistent with their dignity and with their worth. Without that, they are just human inventions.

British Atheist philosopher John Gray says this:

“human rights originated in monotheism – the belief that there's only one God, who creates a single moral law for all human beings. And there's a sense in which human rights still depend on some sort of religious commitment. For unless these rights are grounded in something beyond the human world, they can only be a human invention.”

How do we choose between different systems of value?

The difficulty Augustine's band of robbers example identifies is that accounts of deep justice can seem plausible to the robbers which are profoundly unjust to those on whom they prey. Michael Walzer, in his book, *Spheres of Justice*, argues from a communitarian perspective that what is just and unjust can only be discerned from within a particular framework of commonly held assumptions. He then goes to say that for conceptions of deep justice to

change, someone has to contend successfully that the assumptions previously commonly held are false.

Two difficulties arise with this communitarian approach. First, if what is just and unjust depends on a particular framework of commonly held assumptions, on what grounds can those commonly held assumptions themselves be challenged and declared to be false? Second, if frameworks of commonly held assumptions are the only basis upon which questions of justice and injustice can be determined, why is one set of commonly held assumptions better or worse than another? On what basis are we to conclude that any particular conception of deep justice is true or false?

Critical theory depends, for its purchase, on the assertion that there is *something wrong* with the status quo. The gender pay gap matters because it is wrong that men are paid more than women for doing the same jobs and/or because it is wrong that more of the top jobs go to men. White privilege matters because it is wrong that, in all sorts of ways both visible and invisible, BAME people are disadvantaged. The ineffectiveness (or is it complicity) of liberal regimes of human rights with hyper-capitalism matters because it is wrong that the incomes of a few billionaires continue to grow whilst those of the proletariat, the precariat and now the petit bourgeoisie decline.

Theorists making and supporting such critiques mean more than the current arrangements are not to their liking. The objection is meant to be stronger than: "I don't happen to like what you are doing to me". The force of the critique is not that if its validity is not recognised there will be violence on the streets. The claim of such critiques is that the status quo is *unfair*, that a system which silences or stifles the voices of those it routinely disadvantages, is *unjustifiable*.

It is no answer to respond to complaints about the gender pay gap by denying women the right to vote; it is not acceptable to reply to complaints about white privilege by introducing apartheid; it is iniquitous to react to complaints about expanding inequity by allocating votes in accordance with wealth. Legal systems founded on each of those principles: votes for men only, votes for whites only, votes allocated to or bought by property owners, have (and do) exist. Relativism cannot save them.

If there is no grounding for our ideas of justice then the struggle against domination in the name of freedom has no rational basis. Our preferences for a particular account of justice are purely arbitrary if there is no true truth or goodness to which they are referable. Without an independent, true standard of justice against which our conceptions of deep justice are to be

measured, why is the justice of the excluded and oppressed to be preferred to the justice of the powerful and victorious?

Conclusion

Is law nothing more than a battle of interests? If there is no objective morality judging our local understandings of what is right and wrong, then law cannot be anything more than a battle of interests.