

# **Justice**

## **A Beginner's Guide**

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Raymond Wacks



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For Penelope, ever just



# Contents

Preface	ix
<b>1</b> Justice and injustice	1
<b>2</b> Justice and virtue	10
<b>3</b> Rights, dignity and freedom	21
<b>4</b> Utilitarianism	33
<b>5</b> Justice as fairness	46
<b>6</b> Libertarianism	71
<b>7</b> Capability	82
<b>8</b> Justice and the free market	95
<b>9</b> Equality	104
<b>10</b> Fraternity	121
<b>11</b> Communitarianism	147
<b>12</b> Global justice	156
<b>13</b> Achieving social justice	179
Some key terms	188
Notes and further reading	194
Index	209





# Preface

The pursuit of justice is at the heart of social progress. Eliminating the despair and agony of poverty, persecution, disease and inequality is an honourable, if intractable, quest. It requires perseverance, commitment and dedication. Many individuals, groups, charities, domestic and international organizations devote themselves assiduously to relieving the burdens of adversity and suffering.

The question of what constitutes a just society is, however, always contentious. As will be perceived from the pages that follow, there is little consensus on the most desirable social, political and economic arrangements to create a community – or indeed, a world – that might be described as fair.

This book provides an introduction to the manifold theories of justice advanced since antiquity. It attempts to explain, illustrate and compare, as lucidly as possible, the nature, purpose and deficiencies of each of the leading philosophies.

My undertaking was rendered less demanding thanks to the helpful suggestions and advice offered by the anonymous reviewer to whom I am extremely grateful. I am also deeply indebted to Shadi Doostdar of Oneworld, who persuasively admonished me to elucidate and simplify successive drafts of my manuscript. Her extraordinary tenacity, and numerous practical ideas, greatly improved the volume in your hands. My good fortune

and gratitude did not end there. Copy editor par excellence, Ann Grand, more than lived up to her name. She detected and corrected my every grammatical infelicity and deftly polished my prose where it fell below her exacting standard.

When we speak of justice, it is well to recall Benjamin Franklin's dictum that 'justice will not be served until those who are unaffected are as outraged as those who are'.

Raymond Wacks

# 1

## Justice and injustice

Imagine a society in which a tiny minority exercises power over a large majority. Let's call the minority the Winners and the majority the Losers. The Winners deny the Losers a variety of important rights, including the right to vote, and they are therefore unrepresented in parliament. They may not live where they choose and the best jobs are denied them by law. Their homes, schools and hospitals are inferior to those provided for the Winners. Sexual relations and marriage between the Winners and Losers are prohibited by the criminal law and punishable by imprisonment. The Losers must carry identity documents at all times and are subject to a curfew at night.

Could such a society exist? Is injustice on this scale possible?

It did. And it was. I was born and grew up in this society. Under the system of apartheid, the white minority of South Africa reserved the most fundamental rights and privileges for itself. So-called 'non-whites' were considered inferior and were subjugated and oppressed, while the minority maintained a masquerade of parliamentary democracy – but only for the whites.

The legal system was the creation of that minority; the political system disenfranchised all non-white people and the law discriminated against them in almost every facet of social and economic life: employment, land, housing, education, even sex.

## 2 Justice: A Beginner's Guide

Their freedom of movement was ruthlessly curtailed. Deaths in detention and torture were systemic. Surveillance, intimidation and police brutality were routine. Apartheid South Africa was the very model of a modern police state. The *Broederbond*, a formidably powerful, secret, Calvinist, all-male society, fostered Afrikaner interests and white racial superiority. Every prime minister and state president throughout the apartheid era (1948–1994) was a member, including the architect of the policy, Hendrik Verwoerd, who famously declared that the role of his government was ‘the preservation of the white man and his state’. Under his premiership, apartheid was not only consolidated, but also clothed in philosophical, cultural and theological validation that drew on the seductive power of Afrikaner nationalism.

Apartheid, it is frequently forgotten, was not merely racial segregation. It was an elaborate, intricate project, sustained by a doctrinaire policy applied by a totalitarian regime bolstered by draconian legislation. It relied on an unaccountable security force holding sweeping powers and a largely enthusiastic legislature and mostly pliant judiciary whose jurisdiction over matters pertaining to human rights was severely limited.

‘Anti-terrorism’ legislation was skilfully crafted to stifle political opposition. The breadth of the Suppression of Communism Act of 1950 was equalled by the Terrorism Act of 1967, which defined ‘terrorism’ to include anything that might ‘endanger the maintenance of law and order’. Life sentences in South Africa were exactly that. And the gallows were kept busy: between 1910 and 1989 more than 4,200 executions were carried out. About half of those hanged met their end between 1978 and 1989, when the struggle against apartheid was at its peak. The overwhelming majority of those put to death were black; many were political prisoners. At the end of July 1989, for example, 283 prisoners were being held on death row at Pretoria Central Prison. Of these, 272 were black, eleven were white. In March 1988, fifty-three people were hanged for politically related crimes.

On arrival in the country, any white-skinned foreigner with no connection to South Africa and the appropriate visas was instantly entitled to most of the privileges denied to blacks, whose links went back centuries. The white foreigner would be free to choose schools, universities and homes and could enjoy a range of public and private facilities – hospitals, housing, cinemas and theatres – reserved for whites.

Injustice in our world is pervasive. But the abomination of apartheid was especially inhuman. In 1973, the United Nations sought to crystallize apartheid's essence by establishing it as a crime. According to the Apartheid Convention, the offence consists of inhuman acts committed for the purpose of maintaining domination by one racial group over any other and systematically oppressing them. The drafter, in pursuit of greater precision, provides a catalogue of the acts that are embraced by the crime, including murder, torture, inhuman treatment and arbitrary arrest of members of a racial group, legislation that discriminates in the political, social, economic and cultural fields, separate residential areas for racial groups, the prohibition of interracial marriages and the persecution of opponents of apartheid.

The text of the convention captures the quintessential elements of apartheid as applied in South Africa, even though it drains it of much of the system's malevolence and authoritarianism. And, despite the demise of apartheid in 1994, the offence lives on. The Rome Statute of the International Criminal Court (ICC) which came into effect in 2002, included apartheid, along with a catalogue of other wrongs such as murder, extermination, enslavement and torture, as a crime against humanity. The 'crime of apartheid' is defined as 'inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'.



**Figure 1:** The author with Nelson Mandela in 1991 after Mandela's release from 27 years' imprisonment.

The experience of living in South Africa during the dark years of apartheid had a profound effect on my political outlook. From an early age I was unable to comprehend how a community could subject fellow humans to the misery, humiliation and poverty on which the system was built. Yet most whites had little difficulty in rationalizing this cruelty. The bastions of this unjust society, of course, came crashing down with the freeing of Nelson Mandela and the establishment of a democratic non-racial constitution in 1994.

Apartheid is an extreme example of injustice. It imposed not only racial inequality but the denial of the most basic rights to non-whites. Although blacks constituted some seventy percent of the population, they were restricted to about thirteen percent of the land. The system of 'influx control' restricted their entry into 'white areas', save as itinerant workers.

These are merely the rudiments of an unjust society that was universally stigmatized as wicked and heartless. But its features provide a template by which we can recognize the central elements of injustice and so seek to identify the components of a *just* society. Can we work backwards like Aristotle and, by constructing a model of a fair society, endeavour to avoid an *unjust* one? Does this assist our quest for a compelling theory of social justice that is the principal purpose of this book?

Consider some of the characteristics of apartheid South Africa. If you turn the denial of rights, interests or values on its head, you will gain a sense of what *positive* principles drive the theories discussed in the pages that follow. For example, racial discrimination is the very opposite of equality. The humiliation of its victims deprives them of human dignity; their exclusion from political participation is a fundamental denial of civil liberties; the inequitable distribution of resources is unfair; the poverty caused by inequality thwarts human flourishing; and so on.

Look around. There is little evidence of justice in our world. War, hunger, exploitation, environmental despoliation, corruption, racism, sexism, disease and poverty seem endemic. Forty percent of our planet's population – three billion people – exists in dire poverty, earning less than US\$2 per day. The gap between the rich north and the poor south continues to grow. The average per capita gross domestic product in the north is almost twenty times that of the south. A quarter of the world's population enjoys the fruits of wealth and consumerism as it exploits eighty percent of the earth's resources. In developing countries, one person in five goes hungry every day. Two out of three lack safe drinking water. Illiteracy and unemployment are rife. A quarter of adult men and half the women of the south are illiterate. One child in six is born underweight. Every year one child in ten dies from water-borne diseases or malnutrition. Women constitute seventy percent of the world's poor and, in much of the south, they work harder but earn less than men; they are more likely to be undernourished as a consequence of discrimination in the allocation of food.

## 6 Justice: A Beginner's Guide

Discrimination on the grounds of race, sex, religion and belief continue to be an intractable impediment on the path towards justice. The enormous inequalities in wealth between rich and poor countries create the need for 'global justice' that extends beyond individual states to the world at large. The statistics are disturbing and distressing. It is astonishing to think that, according to the World Health Organization (WHO), about 2.4 billion people – half the developing world – do not have access to toilets and 1.8 billion people are forced to drink water contaminated with faeces. As a result, 1.6 million people die every year from diarrhoeal diseases (including cholera) attributable to lack of access to safe drinking water and basic sanitation. Ninety percent of these are children under five, mostly in developing countries.

Almost a billion people lack adequate shelter and 1.6 billion have no electricity. There are 218 million child labourers. It is inexcusable that in the twenty-first century, one-third of deaths – eighteen million every year – is due to poverty-related causes that are easily preventable through improved nutrition, clean drinking water, vaccines, antibiotics and other medicine.

Although there are signs that progress is being made, famine, environmental degradation, disease (including the devastation wrought by AIDS), deforestation, natural disasters and war are pervasive in developing countries. The effects of climate change were recently described as one of the gravest threats facing the planet. But there is growing anger and impatience across the world about the injustices of the widening gap between rich and poor, government corruption, the huge bonuses paid to bankers and the general tardiness in palpable progress towards greater fairness. The resentment sporadically spills over into protests, occasionally violent, in many parts of the world. The Occupy movement, for example, is a conspicuous global crusade against social and economic inequality. It pursues greater equity in the distribution of wealth with a particular emphasis on the



negative impact of the international financial system on democracy and justice.

The concept of justice clearly requires some model to which societies can aspire. It requires a theory. Every society is organized according to some theory of justice, whether express or implied. A recurring theme in theories of justice is the conflict between the rights of individuals to live the lives they choose, on the one hand, and the right or duty of the community to interfere with this autonomy for one reason or another, on the other. Justice – or ‘social justice’ as it is often called – is not merely the absence of injustice. Any theory of justice includes ideas about how society and its laws should be arranged, what is best for both individuals and the community and how the legitimate ambitions of people can best be realized.

## **Social justice**

The idea of justice is employed in numerous disciplines, mainly in philosophy but also law, politics, sociology and gender studies, to mention a few. Our principal concern in these pages is with ‘social justice’, whose main focus is on how to create a fair relationship between society and the individual. In particular, it looks to the distribution of wealth and opportunity and how people can best exercise and develop their roles in, and expectations of, society. It calls for a number of factors, including taxation, education, medical services and the regulation of markets to be established in order to arrive at a more just social order.

Any theory of justice must confront the recurring question of how goods are to be distributed in society. Co-operation is at the heart of any community. Humans are not hermits; we interact socially and economically to our mutual advantage. Principles of distribution should specify how the benefits and burdens are to be allocated. Theories differ as to how this should be done.

## 8 Justice: A Beginner's Guide

Egalitarians argue that everyone should get an equal slice of the pie. Utilitarians favour increasing the overall happiness or welfare of the community. Rawlsians prefer the adoption of the difference principle, which ensures that the least well-off are protected. Libertarians oppose any set (or what they call 'patterned') distribution and support the right of people to own what they have legitimately acquired. Desert-based theories of justice advocate the idea that people should get what they deserve as a result, for example, of their hard work or need. These theories – and a number of others – are the main subject of this book.

### RIGHT AND WRONG

**Nelson Mandela:** 'Our human compassion binds us the one to the other – not in pity or patronizingly but as human beings who have learnt how to turn our common suffering into hope for the future.'

**Sophocles:** 'The golden eye of justice sees and requites the unjust man.'

**Joseph Conrad:** 'The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea; and an unselfish belief in the idea – something you can set up and bow down before and offer a sacrifice to.'

**Aristotle:** 'All virtue is summed up in dealing justly.'

**Heraclitus:** 'If it were not for injustice, men would not know justice.'

**Edmund Burke:** 'What is the use of discussing a man's abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics.'

**Montesquieu:** 'There is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice.'

**Samuel Johnson:** 'Justice is my being allowed to do whatever I like. Injustice is whatever prevents my doing so.'

Any fully developed theory of justice must articulate and justify how to organize a community according to circumstances that are morally appropriate. The emphasis of today's many social justice movements is on the injustices they perceive to be a consequence of capitalism and the means by which the least advantaged might be protected from the system's worst excesses.

Consider your country. Is the gap between the rich and the poor widening or closing? Do women have equal rights to men? What about the disabled, the LGBT community, other minorities? Are they denied the opportunities that are afforded to the able-bodied? Is the welfare of animals adequately protected? If you had the power to decide how your society could be made more just, what principles would you adopt? A free market economy? One in which justice is measured by what created the greatest happiness for the majority? Or perhaps a society in which everyone has equal opportunities or equal pay? These, as we shall see, are merely some of the possible models you might want to adopt.

Each of the following chapters attempts to illuminate the central features of the leading conceptions of justice. This is not to say that each is discrete; there is an inevitable degree of overlap. My purpose is to enable you to see the main approaches to this elusive ideal.

What follows is, I hope, a voyage of discovery; a voyage not merely of academic but of practical importance in our endeavour to secure a just society and a better world.

# 2

## Justice and virtue

The British philosopher, Alfred Whitehead (1867–1941), famously remarked that the development of Western philosophy is a series of footnotes to Plato. Despite the passage of thousands of years, the starting-point of any discussion of justice is the writing of the great Greek philosophers. Plato (c. 424–348 BCE) was disenchanted with the state of affairs in Athens – especially its extreme individualism – and presents an elaborate model of an ideal society in which justice is paramount. In his book, *Republic*, he describes it as a ‘human virtue’ that secures order and generates both individual goodness and social harmony.

Plato’s pupil, Aristotle (384–322 BCE) advances a less comprehensive account of justice that remains highly influential. In his book, *Nicomachean Ethics*, he probes deeply into the moral and political virtue of justice, and in his book, *Politics*, he examines the relationship between political justice and equality. But his approach, like that of Plato, is not what we would today describe as egalitarian (that is, based on equality). Justice, he argues, means equality *only for those who are equals*. Agreeing with Plato that political democracy is inherently unjust because it seeks to treat unequals as if they were equals, justice, he claims, requires *inequality* for those who are *unequal*.

His analysis of equality is part of a much broader and more intricate account of humanity and politics. He differentiates

between numerical and proportional equality. In the first, everyone is treated as indistinguishable; they receive identical treatment in respect of the goods they receive. The second, proportional equality, arises when the goods people obtain are proportional or roughly equal to what they are considered to be entitled to. Numerical equality is fair only when people are equal in *relevant respects*. This means that while we can and should aspire to treating people equally, it is clear that we cannot *make* everyone equal, since everyone is different. For example, no two stones are exactly equal; they are different in weight, shape and colour. Similarly, in the case of living creatures, each individual is unique. For many years I kept chickens (strongly recommended), and it soon became evident that every hen has her own personality and character. Likewise, we humans differ markedly in our talents, abilities and appearances.

To attempt to make us all equal would be to reduce the most able to the level of the least. Giving every person an *equal opportunity*, though difficult, is vital, but some people will be lucky, or work harder and achieve more. But we are equal in relevant respects: for example, we all have feelings, needs and desires. Proportional equality is more detailed: it sets out a complete formulation of formal equality, a matter to be discussed in Chapter 9. As we shall see, all disagreements about the ideal theory of justice – that is, who is entitled to what – turn on the central question of which cases are regarded as equal and which are considered unequal.

Aristotle's important claim is that justice consists of treating equals equally and 'unequals' unequally, in proportion to their inequality: everyone must be treated in such a way that the outcome is equal for them. People who for whatever reason are considered equals must receive the same degree of respect. For example, suppose Boris and Doris both teach history at the same school to pupils at the same level. Since there are no relevant differences between them or their occupation, they should

receive the same salary. If Boris is paid more than Doris merely because he is a man or because he is white, this would be unjust. Doris would be a victim of discrimination on the grounds of her sex or race, neither of which are relevant.

It is worth reflecting for a moment on a general question that is touched on in many of the theories discussed in this book. It is often thought that in democratic societies there is an unavoidable conflict between liberty and equality. This view is based on the idea that liberty or freedom to do as one pleases (provided it does not affect someone else's liberty), is restricted by attempts to create equality between individuals, that in a truly free society the government should resist introducing measures that seek to make people equal by, for example, redistributing wealth. Libertarians, in their defence of the free market, generally oppose any redistribution by means of taxation, which promotes equality (as will become clear in Chapter 6). But some doubt whether liberty is incompatible or in conflict with equality. Ronald Dworkin, for example, contends that there is no necessary conflict. This is because a genuine restriction on liberty occurs only when it affects someone who has done nothing wrong. It is perfectly legitimate for the state to curtail my liberty, for example, by enacting laws against murder or rape. But when no wrong has been committed, liberty is not restricted by measures to advance equality. We will return to this question in Chapter 9.

Aristotle's approach to equality reveals a rather hierarchical view. To him, women and non-Greeks were inferior to male Greeks. His strong belief in their inequality led him to assert that 'inferiors' ought to be deprived of certain political, legal, social and economic rights. He therefore fails to respect all individuals as rational and free. This concentration on *inequality* results in his failure to recognise the moral equality of all. Aristotle also distinguishes between *corrective* justice on the one hand and *distributive* justice on the other. Corrective justice is, in his opinion, the

justice the courts employ to redress crimes or civil wrongs. It is an attempt to put things back in the position they were. For example, a court may award an injured party pecuniary damages (that is, money) to compensate for pain and suffering. Corrective justice requires that all must be treated equally.

This is closely connected to *retributive* justice (which Aristotle does not consider in any detail). The general purpose of retributive justice is to impose a proportionate punishment on those who commit crimes. It is based on the moral idea that wrongdoers *deserve* to be punished for their crime because it is just that they should be. Distributive justice has a similar objective: it seeks to give to each person according to his desert or merit. It emphasises fairness in what people receive, especially goods; it is sometimes called ‘economic justice’ for that reason. Distributive justice, in Aristotle’s view, should be left to the legislature. Such distribution will depend on the nature of the government in question; a capitalist society will distribute wealth differently from a socialist one.

Aristotle also proposes an important theory of how we ought to live. Following Plato, he regards the *ethical virtues* (including justice, temperance and courage) as rational, emotional and social skills. If we are to live well, we must grasp how values such as friendship, pleasure, virtue, wealth and honour form a coherent whole. By learning general rules, we develop the practical wisdom to behave in the most rational way. We also require emotional and social skills to put into practice our general understanding of well-being.

Central to his discussion of virtue is the quest for the ‘Golden Mean’. If justice is a virtue, he argues, it must be a kind of mean: a halfway point between the two extremes of excess and deficiency. The virtue of courage – if present in excess – becomes recklessness and, if deficient, it takes the form of cowardice. Our lives are replete with moral dilemmas. But there is no *single rule* that we can apply to them all. Our obligations cannot be frozen in a code

that is all-encompassing. This is the core of the 'doctrine of the mean'. Aristotelian virtue ethics thus escapes the uncompromising forms of duty embraced by both philosophers who base their theories on duty (deontologists), such as Immanuel Kant, and those who base them on outcomes (consequentialists), such as Jeremy Bentham (discussed in Chapters 3 and 4).

Aristotle stresses the importance of both character and virtue. Character is a state of being: if I am a kind person I have the right *feelings* toward others. But our character or inner temperament also dictates our *action*. This differs from the approaches of deontology and consequentialism, which are more concerned with *right action*. The virtue ethics approach associated with Aristotle looks to the question of *what constitutes a good life* and what kind of person we ought to be. It is, therefore *character-based*.

There is no absolute precision to be found in Aristotle's concept of justice. Instead, he attempts to identify the key characteristics of *injustice* and works backwards from there to comprehend the elements of justice. This is similar to the method we employ when we try to define what constitutes a healthy person: we know when someone is *unhealthy* and are thus able to identify its opposite. An individual who is greedy or who disobeys the law is unjust, whereas one who obeys the law and seeks only his fair share is just.

## Political animals

Aristotle's notion of justice is related to his general theory of constitutionalism and citizenship. The politician, he writes, 'is wholly occupied with the city-state and the constitution is a certain way of organizing those who inhabit the city-state'. In Athens, he distinguishes citizens from other inhabitants, including, in his words, 'resident aliens', people we would today call



immigrants and slaves. A citizen is defined as one who has the right to participate in political or judicial office. The constitution is the means by which to arrange the offices of the city-state, principally the office of sovereign or ruler. The constitution therefore determines what constitutes the governing body, which may take different forms depending on the nature of the state: in a democracy it is the people; in an oligarchy it is a select few (the affluent or well-born).

We are by nature, Aristotle contends, political animals who want to live together. He differentiates the forms of rule by which one individual or group can rule over another. First there is *despotic rule*, which is typified by the master-slave relationship. He – surprisingly – justifies slavery by asserting that natural-born slaves lack the ability to make purposeful decisions and therefore need a master to direct them. Second, he identifies *paternal* and *marital rules*, claiming that men (as opposed to women) and senior members of society possess a natural capacity for leadership.

Such paternalism jars with contemporary views on equality, but for Aristotle, children and wives are to be looked after, just as doctors look after patients. He argues that paternal and marital rules are applied in the interest of the child and wife in the same way as medicine is pursued for the sake of the patient. In this sense they are similar to political rule, which is the form of rule suitable when the ruler and the subject have equal or comparable rational capacities. This is illustrated by naturally equal citizens taking turns at ruling for one another's advantage. This leads him to conclude that constitutions that advance the common benefit are perfectly just, while those that seek only to benefit the rulers are unjust, because they entail despotic rule, which is wrong for a community of free people. Drawing on this analysis, he identifies six possible constitutional arrangements (see Table 1).