

# 1 Issues in the study of justice

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Man, the social animal! For all its triteness, the statement somehow does not lose its appeal – reminding us both of our animal heritage and of the fact that we could not survive without the protective cocoon of the social fabric which surrounds us. Yet this figure of speech is patently wrong, at least judging from its surface meaning: man is not *the* social animal, in fact many animals, particularly among the mammals, are social, living in pairs, troupes, herds, swarms, or even in complex caste societies. What the trope conveys, then, at a deeper level of meaning, is that human sociality is special and that it marks out human nature. Just as man's repertoire of behaviour and modes of adaptation to the environment are vastly more extensive and complex than the species-specific and partly instinct-based behaviour of all animal species, so is human social organization much less constrained by genetic determination of forms of association and aggregation than animal social systems.

The very freedom from biological constraints on human social life has produced a plenitude of forms of social organization during the evolution of mankind, particularly as a consequence of a large part of the human race abandoning hunting and gathering as a way of life. It seems that, as a consequence of this malleability of social arrangements, and ever since acquiring the capacity for consciously evaluating factual and imagined forms of association, humans have been questing for the optimal, or at least the most desirable form of human coexistence and social interaction, for the ideal type of society and government.

The quest is still going on, unabated. The political developments in what used to be called the 'Eastern bloc' provide a dramatic example. Entrenched communist regimes have been toppled by massive protest movements in the population, the Berlin wall has come down, ethnic groups are struggling for self-determination, and mass demonstrations for a new social order are taking place even in the heart of the former Soviet Union. If one is to believe the political analysts, these events mark the pitiful end of a major experiment with a particular form of social organization, conceived by Marx and Engels, once heralded as the end of the quest for the ideal form of society and state: a social order that, among other things, was to be more *just*.

Ever since the beginning of human concern with desirable forms of

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social organization, justice has been one of the essential postulates for Utopia, the ideal state. But it is by no means the only one. In fact, it is conspicuously absent from the banner lines of some of the most treasured visionary postulates outlining the nature of such an ideal social order, as found for example in the manifestos of the French Revolution, or in the American Declaration of Independence. Freedom, equality and fraternity have often taken precedence in the various catalogues of demands for a new order. One might argue that the call for equality implies that for justice. However, acceptance of this argument is likely to be limited to proponents of a strictly egalitarian ideal of justice.

The reason for the relatively infrequent appearance of justice in revolutionary slogans may be due to its role as a fundamental and indispensable organizing principle for any kind of human association. The notion that every human being should be free and capable of self-determination is a very modern and very recent claim, slavery and caste systems with varying degrees of constraints of civil liberty having been an organic part of many societies over the past millennia. Similarly, the abstract notion of unconditional equality of human beings, irrespective of their station in life and their prior investments, as the major principle for the distribution of resources, treatment and esteem is a revolutionary conception and one that would have been considered as quite ludicrous by many social philosophers across the ages. Fraternity, finally, even today carries a somewhat visionary, romantic connotation which seems to embarrass *realpolitik*, even of the revolutionary kind; the ancient belief of *homo homini lupus* or Hobbes' pessimistic views of human social nature have probably been considered as a more adequate assumption for the construction of sociopolitical arrangements throughout history.

In consequence, societies openly based on slavery, inequality and cut-throat competition have thrived in many parts of the world and, with the likely exception of slavery, still find proponents today. However, no system of government, no matter how despotic or tyrannical, could have survived very long by openly admitting injustice as a principle of treating its subjects or for regulating relations and interactions between the members of the society. Tyrants seem to have dug their own graves precisely at the moment when they neglected to *justify* their political action within the context of the prevailing social beliefs, provoking feelings of injustice.

The relationship between 'justice' and 'justification' is revelatory (see also Kelsen 1953/75, pp. 15–18). A system of social distribution of rights and resources is considered just if it is justified by a particular principle of justice, based on entitlement, deserts, equality or needs. This principle must find a minimal consensus in a society, by accrediting the existence and legitimacy of any such entitlements, deserts, or needs or modes of equal distribution, and by rectifying any situation of injustice.

This is a social psychological definition of justice, of course. It focuses

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on the perception of injustice by individuals and groups and attempts to predict social and political behaviour on the basis of beliefs and judgements concerning the justness of the prevailing system of distribution and retribution. According to this view, judgements concerning justice and the behavioural choices which ensue are based on social representations, i.e. culturally shared systems of values and beliefs concerning the appropriate principles or criteria of justice, the legitimacy of government (which certifies the criteria and administers justice enforcement), and of the relative entitlements of significant others in the society.

As we know only too well, the social representations underlying justice perception are extraordinarily variable and changeable and highly subject to manipulation and manifold pressures for conformity. This is why despotic ruling elites have been able to 'justify' systems of social order and distribution that seem totally unreasonable and unjust to us, for considerable periods of time. Given the resulting fickleness of actual definitions and systems of administration of justice, it is understandable that social philosophers sought to discover principles of ethics that forcibly prescribe the ideal or at least optimal principles of justice and procedures for its administration, and find the social psychological approach, based on underlying social representations and consequent justice perceptions, of little appeal. We will return to the opposition between empirical and normative approaches below and at various points in the chapters in this book (see in particular Bell and Schokkaert, this volume).

To return to the arguments. The assertion is that no sociopolitical system regulating human social association and interaction can afford to neglect the maintenance of perceived justice and the need for corrective action in situations of perceived injustice, at least for any length of time. In consequence, justice is seen as such a basic component of any human society that it does not have to appear as an explicit postulate for an ideal social order. This implies that perceived injustice will readily provoke strong protest and demands for the reestablishment of justice. How can we explain the existence of such a powerful need for perceived justice in human social life? Some social psychologists have postulated a basic 'justice motive' which is seen as determining the perception of justice and the choice of behavioural alternatives with respect to justice considerations (Lerner 1977; Lerner and Lerner 1981). Since many social psychologists are hesitant to accept innate motives or 'instincts', the notion of a specific justice motive is not universally accepted (see Folger 1984; Törnblom, this volume). However, since so far no culture has been identified in which the concern with justice is totally absent, we may assume that a very primitive sense of justice is part of human nature as it has developed during biological and cultural co-evolution (Cavalli-Sforza and Feldman 1981; Chagnon and Irons 1979; Gruter and Bohannon

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1983; Hof 1983; see also B. Moore 1978; Weinberger 1985). Obviously, this assumption is quite compatible with theories highlighting the instrumental nature of justice, since co-evolution would obviously favour the development of this type of social-binding mechanism.

This claim may remind the initiated of the nativist position within the natural law tradition and of the famous speech (apparently to one of the most select audiences a jurist has ever confronted) in which Rudolf von Jhering ridiculed the nativist postulate of an innate and universally valid *Rechtsgefühl*, and argued that the acquisition of this human characteristic, the existence of which seems undisputed, is due to being socialized into a moral atmosphere shaped by historical development (using the simile of an inhalation of millions of moral spores) (Jhering 1884/1986). Unfortunately, the German *Rechtsgefühl* is generally translated as 'sense of justice' rather than 'sense of law'. Sense of justice is closer in meaning to *Gerechtigkeitsgefühl* in German and it is doubtful whether Jhering would have objected to the notion of the universal existence of a fundamental feeling of what is just or unjust and which is experienced by all members of a society. Obviously, the 'sense of justice' in the natural law tradition is something much more elaborate (more like a 'sense of what the law should be like') than the primitive 'feel for justice' which is postulated here as one of the psychological pillars of the organization of society. *Rechtsgefühl* (sense of law) implies notions concerning the functions of law, particular legal principles, and even specific prescriptions. Comparative legal studies and anthropological fieldwork have in fact produced little evidence for the universality of such elaborate social representations of law which could be used as evidence for the existence of an equally elaborate system of natural law (Pospisil 1974). While anthropological studies may reveal a number of general values which many societies use in their construction of justice systems, it has proved difficult to develop a consensual prescriptive theory, with specific shape and content, on the basis of a set of abstract principles distilled out of the actual practices in different societies (see also Finnis 1980).

It would seem that such elaborate systems are too far removed from the level of phenomena directly shaped by bio-sociocultural co-evolution to expect any degree of universality. The large number of different concepts of natural law which have been proposed across the centuries is in itself evidence for the difficulty of finding the one 'natural' basis for a sense of justice that prescribes a particular system of law (see Mayer-Maly 1984). More recent attempts to anchor the development of a comprehensive 'sense of justice' in mechanisms such as Freudian identification (see Rehbinder 1983) are interesting attempts at combining insights from different disciplines. However, in the final analysis, these may be more relevant for the understanding of the social representations of justice consequent upon rather than antecedent to or independent of the

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system of existing moral and legal values in a society (but see Würtenberger 1988, for an interesting discussion of how *Zeitgeist* can change *Rechtsbewusstsein* and in consequence affect adjudication).

The primitive 'feel for justice' postulated here, which is closer to socio-psychobiological thinking than to legal philosophy, has not so far been subject to serious intercultural and historically comparative investigation, simply because notions such as the 'justice motive' have appeared only recently in social psychology and have not yet been well conceptualized. Similarly, recent attempts to exploit ethological and sociobiological concepts and data for the comparative study of law and legal institutions (see Gruter and Bohannon 1983) have suggested a large number of interesting leads for investigating the evolutionary origin of a 'sense of justice' but have not yet yielded a clearly defined concept. While it cannot be the task of this introduction to attempt such a conceptualization, it might be useful to examine some of the likely features of such a concept in trying to understand the need for future interdisciplinary study of justice in the social sciences.

It may be useful to ask what would be the most fundamental, abstract way of evaluating outcomes of human behaviour and social exchange in interpersonal and group interaction without presupposing any content in the sense of particular moral or legal norms. The notion of 'feeling of entitlement' which one already finds in Hume's treatise on human values is an interesting candidate for such a mechanism (see also van der Veen and Van Parijs 1985; Lerner 1986). It is possible to derive a basic feeling of entitlement from very modest assumptions about fundamental characteristics of human behaviour, mostly linked to notions about the perception of causality. Modern psychology has been able to show quite convincingly that the perception of causality is a powerful determinant of human experience and human behaviour. Heider's (1944) and Michotte's (1946) early experimental demonstrations of the overpowering tendency humans have to interpret even movements of inanimate objects, by attributing causality and intention have laid the ground for one of the most lively areas of psychological research. The results of theorizing and research on the perception and attribution of causality and its powerful influence on impression formation, judgement and decision, and behaviour now fill volumes (Fiske and Taylor 1984; Harvey, Ickes and Kidd 1976, 1978, 1981; Hewstone 1983). It seems quite reasonable to assume that this powerful human propensity toward causal analysis, which has the function of making the world more predictable and thus confers a sense of control, plays a major role in the perception of the justness of behavioural or interactional outcomes.

The argument could be construed as follows. Whether there is an innate propensity or not, the young infant quickly learns that virtually all of its behaviours have immediate effects. Similarly, children very quickly

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learn to perceive the patterns of causality that underlie effects that have been produced by other people or inanimate forces (Piaget 1927). In consequence, very early on there is a strongly developed and quite sophisticated representation of the cause–effect link, including the notion that a certain input behaviour will reliably produce a particular output effect. While there is little formal work on this (even though one finds the idea in Aristotle’s *Nicomachean Ethics*), it seems reasonable to assume that this perceived cause–effect link is subject to an equivalence or proportionality rule, i.e. type and magnitude of input should be matched by type and magnitude of output effect, albeit transformed (in a sense, an extension of the conservation of energy principle into the perceptual domain). If I hit my doll with heavy blows I should see more and deeper dents than if I tap it lightly (if only ever so briefly, as with a rubber doll). In other words, I feel entitled to an outcome that is equivalent to my input – as a direct consequence of a proportionality rule in the perception of causality. This, one could argue, is the most primitive form of a ‘feel for entitlement’ – the right to expect proportional effect to behavioural input – which could be the precursor of a ‘feel for justice’ (see Cohen 1979 for a discussion of the relationship between these concepts). Interestingly, even at that very rudimentary level we find an emotion that antedates the powerful emotional reactions to perceived interpersonal injustice (see Mikula 1986, 1987; Mikula, Petri and Tanzer 1990), namely frustration and disappointment. For animals and humans alike, the non-occurrence of expected effects, particularly if a strong behavioural investment has been made, reliably produces disgruntlement and even aggression (see Baron 1977).

The extension of this mechanism to interpersonal interaction is obvious. Any action intended to have an effect on another person can be considered a causal investment for which proportional effect (in type and magnitude) can be expected. If I hit my brother hard I expect strong blows in return, if I give many of my sweets to him I expect him to give me many of his marbles. We are on familiar ground here since anthropologists and sociologists have long since postulated fundamental norms of reciprocity (Mauss 1965; Gouldner 1960) in human interaction (a recurring idea in writings about the dealings between members of the human race, see the Latin *do ut des*). Similarly, exchange theory (Homans 1961) and equity theory (Adams 1965; Walster, Walster and Berscheid 1978; see detailed discussion of these two theories in Arts and van der Veen and in Törnblom, this volume) have attempted to specify the psychological dynamics underlying expectations of proportionality of investment and outcome and of reciprocity in human exchange. These theories make assumptions about underlying motivational factors, like learning-theory notions of incentive in the case of Homans, or affectively toned reactions to the lack of equity in the case of Adams. It would seem, though, that the



constant experience of a proportionality rule in cause–effect links may be sufficient to set up the exchange/equity expectations. Strong expectations coupled with the feeling of having invested in making the expectations come true obviously produce feelings of entitlement. Violations of such entitlements can then be defined as perceived injustice and will reliably provoke strong negative emotional reactions.

While the mechanism itself seems reasonably straightforward, its actual use in scientific prediction presents almost insurmountable problems, mainly because of two factors: one, the extreme variability of inputs (e.g., the perceived origin of the entitlement), and, two, the subjectivity of the evaluation of inputs and outcomes. The criticism levelled against exchange and equity theories exemplifies these problems very well: almost any situation of interpersonal exchange can be readily and elegantly analysed with the conceptual instrumentarium of these theories, identifying investments and outcomes and explaining the protagonists' reactions on the basis of the adequation between input and output. However, it is extremely difficult to conduct this analysis other than in a *post hoc* manner and other than by using the protagonists' evaluations of the respective worth of investments and outcomes.

Unfortunately, the predictive weakness of such models is a direct consequence of the nature of the phenomenon: perceived entitlement is in fact an expectation, and thus of necessity highly personal and subjective, based on differential perception and evaluation. Obviously, people can construe entitlements in very different ways and one of the strengths of such subjective models of investment–outcome adequation is that any of the principles of justice proposed in the literature can be derived from specific types of construals of entitlement. Desert is the most obvious, given a direct adequation between investment and pay-off. Merit, often couched in terms of status or position, in some sense is accumulated desert, or desert passed down the generations (it would be interesting to analyse transferability of merit and desert across time and family lineages). Need as a principle of distribution can be justified by entitlement to a minimum by the fact of one's very existence, or in terms of prior investments of some higher principle, such as a deity, on behalf of a person. Similarly, equality can be treated as perceived entitlement, owing to all human beings having been created equal and in consequence having equal rights.

The feature which is at the same time the strength and the weakness of a psychologically orientated subjective perception of entitlement approach, then, is to allow very plausible *post hoc* explanations of individual construals of entitlement, taking into account the individual's background, motivations and experience as well as the social context, the cultural ideology and other particularistic factors, at the expense of generalizability of the determinants or the principles used for a reckoning

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and compensation of the different factors. In addition, this approach is highly dependent on the protagonists' ability and willingness to verbalize the respective motives and beliefs, if indeed they are represented in consciousness to begin with.

But access to consciousness, verbalizability or subjectivity are not the most significant hindrances to the utilization of a subjective entitlement approach in theories of justice. The subjectivity and relativity of value judgements underlying entitlement perceptions are, according to Kelsen (1953/75), among the major reasons why there could never be, according to this view, consensus on justice criteria which could help to settle conflicts of interest concerning distribution.

But Kelsen goes further than this. Very much in the spirit of legal positivism, of which he is one of the leading proponents, he firmly asserts that *Sein*, i.e. that which is, existing fact, can or should never be used to derive *Sollen*, that which ought to be, the prescribed state. In consequence, even if one were able to identify a consensus about a priority of values determining entitlement, this should not in any way inform the quest for a normative, and presumably ideal, solution to the problem.

This, in fact, is one of the key problems in the social sciences' concern with justice – to what extent should one attempt to distinguish the strictly separate empirical, often psychologically or sociologically orientated, approaches (which are mainly concerned with subjective factors likely to intervene in judgements of injustice), and normative, ethical approaches, generally originating from social philosophy, law, or economics (which are concerned with issues of moral desirability and/or socio-economic functionality)? While it is too early to answer this question in the introduction to this volume, it seems that a hermetic separation between the two approaches may be detrimental if not downright dangerous to both. Normative philosophy which attempts to be practical philosophy should guide ordinary individuals in everyday life – it must therefore reflect the psychological, social and economic conditions in which these individuals live. The empirical sciences, on the other hand, must be aware that they are unlikely to find universal truths for many areas of social life by merely observing regularities. They will scarcely affect normative and political action by the blind accumulation of ever greater mountains of data without a concern for ethical and normative perspectives towards which present-day society should evolve. It would seem, then, that healthy debate between the two approaches might be more profitable for both than strict separation.

A corollary of the position that justice is a basic and indispensable principle for any kind of human social association is that it will be very difficult to find examples of societies that are to be considered unjust, based on the empirical perception rather than an ideal normative definition, since such societies should be unable to survive for very long, even



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using severe repression. In consequence, there is little empirical evidence on which forms of distribution and retribution need to be actively avoided. In other words, an *empirically* guided quest for an ideal normative definition of justice cannot proceed by default, i.e. identifying which justice-related social arrangements need to be avoided. The ideal system of justice needs to be positively described. Given the many different models of justice definitions and modes of administration that have survived, it is difficult to find obvious models for normative prescription, based on past experience.

Given the multitude of possible entitlements, the manifold contradictions between them, the large variety of possible alternative justice principles for distribution, and the apparent lack of clear-cut empirical evidence for the relative superiority of one model over another, a plethora of proposed justice norms has resulted. This has led many scholars in the area to conclude that we will never be able to find consensus for an ideal justice norm, binding for all. The suggestions on how to deal with this unsatisfactory situation are abundant. Among these suggestions one finds calls for tolerance (Kelsen 1953/75) or attempts to define rules for discourse or negotiation procedures that at least allow a rational debate about the principles to be used in a particular case (e.g. Rawls' (1971) reflective equilibrium or Habermas' (1983) and Alexy's (1989) discourse proposals; see Cullen, this volume).

In view of the complexity of the issues and the important role of value relativity this may in fact be the only solution, modest but realistic: defining a *procedure* to adopt in the discussion of justice questions and relinquishing the dream of being able to agree on universal principles of justice. However, before going that far, we might want to explore whether all of the different approaches that our disciplines offer have been used to good effect in the quest for understanding and defining justice. Obviously, this does not obviate the need to develop appropriate procedures for discussing justice issues – on the contrary, this might be one of the preconditions for interdisciplinary dialogue. Looking at the state of the art in the different disciplines relevant to this enterprise, as represented by the chapters in this volume, one would think that much remains to be done. So far, each discipline seems to have contented itself with a detailed investigation of the phenomena and concepts within its proper domain, generally neglecting issues studied in other areas. Because of the basic importance of the justice principle for all forms of human association, social interaction, social institutions, economic exchange, political-legal organization, with an important interdependence between these domains with respect to justice norms, it is obvious that any attempt at a definition of an ideal justice norm has to take into account the specific demands as well as the constraints identified by the discipline specialized for a particular domain. For example,

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economists have attempted to determine empirically the effect of specific forms of income distribution on the economic system, e.g. on productivity, labour supply, investment and overall effect on GNP. Clearly, such data and the models built upon them constitute important constraints for any normative theory of justice.

Similarly, no normative-ethical theory of the *Sollen* of justice can afford to overlook the *Sein* in the sense of the givens, such as the 'nature' of man, as a product of biocultural co-evolution or of fundamental facts related to the environment or to historical development. Any attempt to do so, following Kelsen for example, must necessarily lead to disaster since it would seem unthinkable to devise a social organization that is not at least minimally adapted to the characteristics of its members or to its environmental and historical niche. No engineer would ever think of designing a blueprint for a machine without taking into consideration the nature of the parts to be used and the fundamental laws of physics. It is no wonder, then, that the idealistic approaches toward a definition of justice have had so little effect on politics and legislation – the idea that the ideal systems are to be constructed in the head of a social philosopher, unconstrained by the constraints of reality, will seem like starry-eyed *naïveté* to the practitioners of justice politics – including members of the legal profession, called upon to safeguard the daily administration of justice (see Bell, this volume).

One of the most important constraints for any normative justice principle is the fact that the people whose affairs are governed by the said principle are, on the whole and in the long run, willing to accept and be satisfied by the outcomes of its rulings. If the assumption about the fundamental role of perceived justice in human association outlined above is correct, no principle will survive that leads to perception of injustice and consequent political action. Many liberal social scientists see the incipient decline of communism as empirical evidence of the failure of Marxian justice principles (however implicitly they may have been defined; see Cullen, this volume) which tried to satisfy the need for perceived justice but neglected some fundamental characteristics of human motivation (with others arguing, of course, that the true Marxist socialist ideas have never been put to the test in the Eastern Leninist/Stalinist-inspired socialist states).

Obviously, it is patently true that the contradictions and conflicts in entitlement perception will never allow a situation where all members of a society will feel justly treated, and so most normative theories argue in terms of majorities or minorities (e.g. the greatest happiness for the greatest number, or the most tolerable situation for the worst-off minority; see chapters by Cullen and Schokkaert, this volume). It seems that both the need to avoid the perception of injustice by large parts of a population and the need to balance the demands of different groups