

Of Justice and Law

Summary

The author, Prof. Garrett Barden, sheds light on the linguistic and conceptual challenges one faces when referring to justice. He argues that it is vital to be aware of presupposed intrinsic contextual elements which may affect our general understanding and application of justice as a concept. The author begins with comparing Sandars' translation of the concept of justice from the First Book of Justinian Institutes and an alternative version. He states that both translations lack the verbal association between justitia (justice) and jus (entitlement). Because the goal of justice is to discover who is entitled to what and to render what is due this subtle association is fundamental when pursuing the purpose and enforcement of justice. He then continues to reflect on entitlement, ownership and justice and illustrates that they may vary between social contexts. On this basis he argues that it is fundamentally important to have good law and that societies are continuously faced with the challenge to define what is good. The author concludes that the socially accepted good law is, like a scientific conclusion, what is accepted to be the best available opinion and therefore remains open for revision.

Samandráttur

Høvundurin, Garrett Barden professari, varpar ljós á tær málsligu og hugtaksligu avbjóðingar, ið taka seg upp, tá hugtakið rættvísi verður umrøtt. Hann argumenterar fyri, at tað er avgerandi at vera tilvitaður um atlit, sum eru undirliggjandi fortreytir fyri tað høpið, ið hugtakið rættvísi verður fatað og brúkt innanfyrri. Høvundurin byrjar við at samanbera umsetingina hjá Sandars av hugtakinum rættvísi frá fyrstu bókini í Justinian Institutes við eina aðra útgávu. Hann staðfestir, at báðar umsetingarnar mangla málslig frábrigdi millum justitia (rættvísi) og jus (rætt). Av tí orsök at endamálið við rættvísi er at finna fram til hvør hevur rætt til hvat og til at krevja handheving av rættindum, er slikt frábrigdi av stórum týðningi í sambandi við at skilja og íverkseta

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rættvísi, sum hugtak. Barden reflekterar síðani um hugtøkini rættindi, ognarskap og rættvísi og lýsir hvussu hesi kunnu broytast millum sosial høpi. Á hesum grundarlagi, er tað av alstórum týðnini at hava góðar lógir, og at samfeløg áhaldandi umrøða hvat tað góða er. Høvundurin kemur til ta niðurstøðu, at tann lógin, sum til einhvørja tíð er viðurkend sum góð, er, eins og visindaligar niðurstøður, bygd á ta til einhvørja tíð best møguligu meiningina. Sostatt kann hon altíð endurskoðast.

Introduction

When we think of *law* we commonly have dominantly in mind legislation by the State and the settlement of disputes, both civil and criminal, in courts. We often take for granted the underlying communal moral attitudes and their source in everyday living. It is suggested in this essay that the source of what we commonly mean by *law* is what is formally legislated and is the context of both civil and criminal disputes. However, underlying both criminal and civil law is the moral context of human – and indeed other animal – society without which no society could survive. Fundamental is *entitled* possession. To possess something may be simply a fact but may also be – and often is – *entitlement*. So, the first proposition in Justinian’s *Institutes* states that we do not simply possess things but are entitled or not entitled to do so. A person’s *ius* is what that person is entitled to and the virtue of justice is the intention of honouring entitlement. Law is the statement of what in particular circumstances a person is thought to be entitled to. This idea of entitlement is taught to children from a very early age as the story here of Eve and Adam and their parents illustrates. Humans – and somewhat differently other animals – do not simply possess but are entitled, or not entitled, to possess. A person’s *ius* is what that person is entitled to. The virtue of justice is the steadfast intention and practice of giving to each his own – *ius suum cuique tribuens*.

I

De Justitia et Jure is Title I of the First Book of Justinian’s *Institutes*. In his translation² Sanders leaves the original Latin title but translates the head sentence that in Latin is: *Justitia est constans et perpetua voluntas jus suum cuique tribuens*.

² Thomas Collett Sanders, *The Institutes of Justinian*, Longmans Green, London, 1922; reprinted Greenwood Press, Westport, Connecticut 1970.

His translation reads:

Justice is the constant and perpetual wish to render to everyone his due.

The translation is clear but, like all translations, makes choices that are not the only possibilities. Below is a slightly different version:

Justice is the constant and enduring intention of attributing (rendering, assigning) to each their due.

Missing from both translations is the verbal association between *justitia* and *jus*. My translation does, however, follow the original in using the present participle rather than the infinitive.

A person's *jus* is what they are entitled to. To discover who is entitled to what, and to render what is due is the goal of *justitia* (justice), that is, the goal of the virtue of justice. In contemporary English the word *justice* is commonly used as a conclusion as in *justice was done* whereas in this passage *justitia* is a virtue, the goal of which is to discover and assign a person's *jus*. A basic and necessary presupposition is that the person has rights even if not necessarily those that they claim. Someone may claim the right to be given the money that has been found lying on the floor. They claim that the money is theirs. The finder's task is twofold, to discover if the money is in fact the claimant's, and to give it to the claimant if it is – fallibly – judged to be.

Obviously – so obviously that it is easy to overlook – the presupposition is that the money is owned by, belongs to, someone and that to be given the money is that person's *jus*, right or entitlement.

Title I.3 states *praecepta* – in Sandars' translation *maxims* – of justice:

Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.

The *precepts* of justice are these: to live honourably, to damage no-one, to attribute (assign, give) to each what is their due.

The Latin *praecepta* has come into English as *precept*, *rule* or *command*. The etymological reference to – *taken before* – is lost. Sandars' *maxims of law* may well be an effort to recover that meaning. Each of the three maxims is in the infinitive: *honeste vivere* is not command just as Sandars' maxims are not

commands. Compare the imperative „read the instructions carefully before turning on the machine“ with „to look carefully before turning on the machine is wise“. Here „to live honourably, not to damage another, to give to each what is due“ are habits, attitudes and practices that make it more likely that one’s judgement will be correct.

II

Few if any readers will utterly fail to understand the three precepts but, if asked what is demanded by living honourably, damaging no-one and attributing (assigning, giving) to each what is due may be somewhat nonplussed. What must one do in order to live honourably? The question seems to look for a comprehensive account of what living honourably requires but if one tried to give such an account one would soon discover the task to be impossible. We learn how to use „honourable“ and „dishonourable“ as we hear or read them used to praise or blame certain acts and kinds of acts. If, for example, at the supermarket checkout one were given more change than was due, the honourable thing would be to point out the mistake, and return the surplus. To return the surplus is to give what is due which suggests that the three precepts of justice are closely linked. On further reflection it becomes clear that not to return the surplus damages the person who, in this situation, ought not to be damaged. To live honourably includes not damaging another and giving to each what is due.

So much for a brief discussion of the passages discussed.

III

A related question concerns not what was meant but what was presupposed. For example, when enquiring at the ticket office in Kent station in Cork for the time of the next train to Dublin you presuppose that the official would know and would tell you. That presupposition is not usually explicit but is part of the intellectual background within which the question arises.

Similarly, I am now writing in English because I have presupposed that those attending the meeting presuppose that the discussion will be in English. Those and similar presuppositions are so spontaneous and implicit that they are rarely noticed but are nonetheless intrinsic to the action.

I have given the passage from Justinian I.I in the original and in translation because I have explicitly presupposed that not every listener will be familiar

with Latin yet may be interested in seeing the original particularly as my translation differs somewhat from that of Sandars.

Because presuppositions are intrinsic and unavoidable it is worth trying to discover what presuppositions are behind the assertion: The virtue of Justice is the constant and enduring intention of assigning (attributing, giving) to each what is due, what is justly theirs, what, at least for the time being, as when a thing is borrowed, belongs to them. (More accurately in that case, what they own, what belongs to them, is not the thing itself but the use of the thing borrowed.)

Grammatically, the sentence is a factual statement that may be true or false; as may be the sentence, „Justice is the constant and enduring intention of assigning whatever one wants to oneself“ as, throughout human history, has been assumed by victorious armies – *Macht macht Recht* – but is taken to be false within a society in which the ownership of different things by different people is „what is due“.

Were readers to come upon Justinian’s or some similar definition of justice they might be interested in it simply as a definition, but to read the sentence in Justinian as merely a definition or as a description of a Roman attitude is clearly mistaken. The presuppositions in Justinian are that people are entitled to different things, and ought to be given what they are entitled to. There is no argument as to why they are so entitled, nor as to why they should be given what they are entitled to. The lack of any such argument reveals a further presupposition. Tribonian and his colleagues presuppose that their readers will agree.

IV

Entitlement and ownership, although obviously related, are not identical. If someone owns a car they are normally entitled to drive it but there are circumstances in which they are not. When one borrows a car, one is entitled to drive it although one does not own it. There are very ordinary occasions when we are entitled to use something that we do not own and yet would not commonly say that we had borrowed. No one at this meeting owns the chair they are sitting on but it would be unusual to say that they had borrowed it. In so far as they think about it at all, they think of themselves as entitled to sit on it during the meeting, and to exclude someone else from doing so. Their *jus* for the time being is the entitlement to sit on „their“ chair.

There neither is, nor can there be, a human society in which there are no entitlements, no rights, where no-one owns anything, and in which no-one is due anything.

Although they cannot speak of entitlements, the societies of animals other than ourselves are networks of rights. In very large colonies of some, but not all, birds – Penguins and Puffins for instances – parents (or, in some cases, one parent) and chicks recognize one another. The chick is entitled to its parents' care and parent(s) are entitled to their offspring.³

An elephant calf's mother recognizes her calf who, reciprocally, recognizes her. That reciprocity is recognized in the community of elephant cows. The relationship between cows and their calves is not simply a physical relation between an adult female and her offspring, any more than is the relationship between a human mother and her baby.

It is, perhaps, somewhat unusual to think of a human mother as being entitled to her own baby but it is unusual only because it is commonly uncontroversial to think so. But when that question is raised in Ireland it is worth remembering that there was a time when women who had babies out of wedlock had their babies taken from them. Their *jus* was judged not to include – and so in that society did not include – the right to keep their babies in those circumstances.

Every human society is a network of entitlements (*jura*) and for the society to survive the entitlements must largely be honoured. No society can survive if no-one is entitled to anything or if entitlements are insufficiently honoured. The moral education of children must, therefore, include that the accepted entitlements be taught – which includes teaching not alone what the entitlements are but that they are to be honoured. As the late French linguist, Jean Gagnepain, held, we learn our morals as we learn our language⁴ but how we live with them is our decision for we cannot be compelled to know, to believe or to act

Young children begin to learn the practical meaning of ownership and theft when the parents think that a particular situation demands it, as the following story shows.

Adam and his parents visit Eve and her parents. The two children spend the

³ That is not true of every species – ornithologists think that Kittiwakes do not distinguish their own offspring in the colony.

⁴ „As“ means both „in the same way as“ and „at the same time as“.

afternoon playing happily together with Eve's toys. Adam particularly enjoys playing with Eve's furry camel and, when their time together comes to an end, takes it home with him. Not yet having a clear idea of ownership Adam does not recognize that the camel belongs to Eve, and that he ought not to have taken it but ought to have left in her house. When they get home, Adam's parents notice what has happened and, because they accept that the camel belongs to Eve, and that her right is to have the camel restored to her, they ring Eve's parents to tell them what has happened, and that they will return the camel as soon as possible. They are left with the question as to how to talk about the camel with Adam.

V

Adam has other toys that his parents think rightly belong to him. But what does Adam think? His experience is of playing with the toys. Does he think of them as belonging to him, as owning them? Or does he simply play with them?

A baby still being breast fed by his mother would be likely to recognize the difference if breast fed by another woman, and might respond negatively to the difference but would have no idea of being entitled to be fed by his mother. Nor would anyone try to explain to him why he was now being fed by another person. In the story, Adam's situation is crucially and uncontroversially different for he is used to playing with his toys and, crucially, beginning to talk to his parents about them and other things. He begins to talk of „this toys“. His parents may ask „Where is your giraffe?“ As he is learning his language he is learning his morality, that is, what is the accepted morality of his community which he may later repudiate. He begins to learn that the toy giraffe with which he regularly plays is his, and to think and speak of it as „my giraffe“. Thus he begins to learn the notion of ownership and belonging. Because he often plays with his giraffe, he knows that he has it, and expects to find it next morning in the toy box where he had put it. He begins to learn in practice that it is his that he *owns* it because that is how his experience with the giraffe is talked about.

When he returns from Eve's house with her camel, his parents will try to explain to him that it belongs to Eve and, whatever his own desire, will insist that it be given back to her. Adam begins to generalize, and to learn that he will be required to give the owner what belongs to her. He will learn that to give the camel back to Eve is thought to be the right thing to do. He will have learned more or less clearly that what is to be done with the camel is to be done with other things. But he will also learn that if no-one notices that he has taken something without the owner's knowledge or consent he can keep it without

too much fear of his being discovered. He learns, as do we all, without yet knowing the word, that what he has done is to steal and that to steal is thought wrong. He begins to learn, clearly without knowing Justinian's formula, that to steal is to take without permission and so to deny someone what is their right, their *jus*.

Intrinsic to proposition I.I is that people have rights. Intrinsic to the story of Eve, Adam and the furry camel is the idea that the camel belongs to Eve, that it is her right (*jus*) to keep it. One who agrees with that right, will agree that the virtue of justice is the constant and enduring intention of rendering to each what is due. „X is due to NN“ is the answer to the question „What in this (kind of) situation is due to NN?“.

Adam discovers that what he has done is thought to be unacceptable or wrong and that, whatever his own attitude, he will be compelled to return the camel. He learns what will be the consequence if what he has done is discovered. Sooner or later he will learn that actions of that type are thought intrinsically wrong, and that not to engage in them thought intrinsically good. He has yet to decide what his own attitude is to be. Having learned that different things are accepted to be owned by different people in different circumstances – that is, that people have rights and that it is accepted that one of the commonplace but crucial attitudes to living in society is to determine what those rights are – and that the virtue of justice is both to render to each what is their right (*ius suum cuique tribuere* I.I.3) and, when an owner already possesses what they own, to respect their right to retain it.

There remains the crucial, and necessarily personal, question which is, in its general context, „Do I respect the right of an owner to keep what they own?“, and, in its particular context, „Shall I on this occasion respect the owner's right?“ Adam took Eve's camel simply because he wanted it. He had not yet learned that he had no right to do so, but had – without yet knowing the term – stolen it.

VI

His parents teach him that he had „stolen“ the camel, that it was Eve's camel, that it belonged to her and, for that reason, require him to return it. Thus he learns the universally found law, that in Buddhism is the second of The Five Precepts: „abstain from taking what is not given“, in Judaism, and hence in Christianity, is the eighth commandment of the Decalogue in Exodus 20:15 and Deuteronomy 5:19, „Thou shalt not steal“, in Islam in the Koran in The

Imran's (3:160) and The Table (5:38). Of these sources the dominant in Europe has been Exodus.

In Exodus and the other books of the Laws, such as Leviticus and Deuteronomy, the laws are said to be God-given. The set of laws that have come into European culture as the Ten Commandments are introduced as divine commands: „And God spoke all these words, saying, I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage. Thou shalt have no other gods before me ... Remember the Sabbath day, to keep it holy... for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the Sabbath day and hallowed it. Honour thy father and thy mother: that thy days shall be long upon the land which the Lord thy God giveth thee. Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbour ... “ (Exodus 20, 1–16).

The rhetoric of the Ten Commandments (in Deuteronomy referred to as Ten Words) is „command by one entitled to command“. Thus, the rules against killing, adultery, theft, and false testimony may seem to be rules or laws *because* commanded by God, even as good or indifferent ways of acting until then unknown to be wrong. On reflection it becomes clear that to think so is utterly mistaken for they are laws of behaviour which if not sufficiently observed would make social life impossible. There can be no human society in which no-one in any sense whatsoever owns anything and anything can be taken as one wills.

When thinking of Adam's taking of the camel at least two quite different questions arise. Why do Adam's parents require him to return the camel? And generically, why is it thought wrong to steal?

There are at least three possible answers to the first. Adam's parents may require him to return the camel simply because they do not want to risk being discovered to have allowed him to keep it. Or they may insist on his returning it because they think that he has in fact – although not yet in his own understanding of the situation – stolen it, and that they want him to restore to its owner what he has taken and begin to learn that stealing is wrong. A third answer is that they want him to give the camel back simply because there is a rule against theft – „Thou shalt not steal“ – that they have been brought up to accept.

Returning to the question, why is it thought wrong to steal? To steal is knowingly, and with the intention of keeping, to take from another without their consent what they own, or are for the time being are entitled to keep – as one might steal from X what X had borrowed from Y with the intention of appropriating what one had taken.

In the story of Eve, her camel and Adam, Eve was said to own the camel but, as is often the case with every day and perfectly intelligible words, what her *ownership* involved is understood in everyday conversation but is easily obscured. Is she entitled to sell it or give it away? The owner of a private company may be entitled to sell it rather than to leave it to offspring; in Europe the present „owner“ of a great house is often not so entitled. What is Eve entitled to do?

VII

The general form of question as to what Eve is entitled to becomes „what in these circumstances is X entitled to?“ The virtue of justice is the constant and enduring intention of assigning to her what is her entitlement. Obviously, she cannot be assigned what is her entitlement until her entitlement in this situation is discovered. Her entitlement is her *jus*, her entitlement or due.

VIII

When her camel is returned to her, Eve has again what belongs to her, what she is entitled to, what in this situation is her due. Having been upset with the loss of her camel, she is pleased that with its return. She is unlikely to think about its return as being just but in fact is pleased with the outcome, and experiences the imposition of the just solution as advantageous. Contrariwise, the implementation of the just solution is precisely what Adam did not want. To have the camel returned was Eve's *jus*, whereas Adam's *jus* was to have camel taken from him and given back to Eve. Thus, what someone is entitled to – what is their *jus* – may not be what they want. Adam has experienced the outcome as negative, and contrary to his wishes as the expression „he got his just deserts“ suggests.

Adam's parents command him to do what they think is just, and are sufficiently powerful to ensure that he does so. Eve has experienced the law – that is, the expression of what both sets of parents consider to be just – as to her advantage; Adam to his disadvantage. Present readers may be expected to

agree with a rule or law requiring Adam to return the camel. That the ownership of the camel remained with Eve is to us obvious but it is so only because we distinguish between „giving“, „lending“ and „stealing“.

Adam learns that to return the camel is required of him. He is compelled to return it, and is told that to do so is the right or just thing to do on this and similar occasions, but *experiences* the compulsion as being forced to do what he does not want to do. His parents want him not only to return the camel but to accept that to do so is the right or just way to act. They want him to accept that to return the camel is the right or just thing to do. They can compel him to do what in this situation they think is just. They can try to convince him that to take Eve's camel is wrong, but they cannot compel him to think so. Adam may remain convinced that he is perfectly justified in taking the camel. Likewise, it is not possible to compel someone to be either personally convinced or to believe that a particular factual judgement – for example: „The set of three sequential numbers, 1,2,3 is the only such set in the infinite set of positive whole numbers in which each number is prime.“ – is true.

Adam may, however, have been convinced that to have taken Eve's camel was wrong, and so is now faced with an entirely different question. In its general form his question is this: when I see something I want but that I know belongs to another and that it is wrong to take it (to steal it), what shall I do if in the present circumstances I am reasonably sure, and am willing to take the chance, that I shall not be discovered? He may well decide to steal when he is confident that the chances of his being discovered are small. The structure of stealing is the same whether the proposed theft is relatively small – say, 20 Euro – or very great – say, the embezzlement of millions.

The thief knows more or less clearly that the survival of society depends on the incidence of theft being sufficiently rare to allow the society to survive. More or less clearly he knows that, as Adam Smith wrote in *The Theory of Moral Sentiments*.⁵

IX

„Beneficence, therefore, is less essential to the existence of society than justice. Society may exist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.“⁶

⁵ The Theory of Moral Sentiments. Adams Smith. 1759, II.ii.3.3. Oxford U.P., 1976, p.86

⁶ Ibid.

More or less – perhaps commonly *less* – clearly the thief knows that what Adam Smith claimed is true but that what will constitute destructive *prevalence* is unknown. The thief knows more or less explicitly – again, commonly *less* – that theft tends to undermine the society within which he lives and works, and upon the survival of which he depends, but is either oblivious to, or insufficiently convinced, of the fact that his actions tend to *utterly destroy it*.

In the light of Adam Smith's contention let us return to the story of Eve, Adam and their parents. Were Adam's parents to connive in his taking of the camel, and fail to ensure that it was returned, Eve's parents would find that injustice had corrupted their friendship, even had it not yet utterly destroyed it Adam's parents would have failed to act in accord with the three principles of justice: to act honourably, to refrain from damaging another, and to render to each what was due. The small society that was their mutual friendship would have been undermined, if not utterly destroyed.

The function of law is to establish a social context within which each has what is (judged to be) theirs. Good laws state what in particular circumstances has been thought to be just, what in the described circumstances is thought to belong to whom, as shown in Title I of Book II De Rerum Divisione (The Distribution of Things) which determines who owns what in specified situations.

The 13th rule or law is this:

„It has been asked, whether, if you have wounded a wild beast, so that it could easily be taken, it immediately becomes your property. Some have thought that it does become yours directly when you wound it, and that it continues to be your while you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become yours until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.“⁷

Their acceptance of that opinion, which they take to be better than what had been until then accepted, makes it the law. But just as a scientific conclusion may be found by the majority in the scientific community to be the best available, the personal acceptance of the conclusion is an individual responsibility. As no-one can be forced to accept a factual conclusion that they personally

⁷ Ibid.

reject, so no-one in the moral community in which the law is established can be forced to accept that it is just and, therefore, to be obeyed.

The fundamental law is „Do what is just.“ Ideally, laws state what has been thought and established to be just. Like any human discovery, jural discoveries, may be correct or incorrect, and on occasion corrupt, and „When a piece of legislation is, for one reason or another, clearly evil, and prevents him from following his conscience, the judge is morally obliged to resign. For he is not simply a calculating machine. In contributing by his agreement to the continuance of an evil order, he cannot hope to avoid his responsibility.“⁸

X

What is accepted to be a good law is, like a scientific conclusion, what is accepted to be the best available opinion. It remains open to revision.

Finis operis

⁸ Perelman, Chaim: *Droit, Morale et Philosophie*, L.G.D.J, Paris, 1976. p. 100. [My translation].