

Justice, Theory and the Law

Justice Theory & Law

According to John Rawls, 'Justice is the first virtue of social institutions, as truth is of systems of thought'. Justice then provides a standard against which particular laws, legal decisions and the legal system as a whole can be measured.

Theories of Justice

- *Justice as divine command*

Justice is a universal and absolute concept, an objective standard against which all laws and legal processes can be judged.

- *Justice as positive law*

Justice is whatever the law says

- *Justice as mutual agreement*

Justice is whatever the community agrees that it is

- *Justice as consequentialism*

Justice is the decision or action that has the best consequences for total welfare.

1. Types of Justice

James & Field (2013), 'The New Lawyer', pg. 406 - 412

Distributive Justice

Distributive justice is concerned with the fair and proper distribution within a group or a community of things such as wealth, resources and power. Distributive justice is achieved when these things are distributed fairly and equally. This could occur in a number of possibilities:

- **Egalitarian** – According to egalitarianism, resources should be distributed equally within the group or community, either in terms of equality of opportunity or equality of outcome.
- **Desert Theory** – According to desert theory, resources should be distributed according to what each member of the group or community deserves, the basis of which is not equality but some other criterion such as need, talent or effort.
- **Unitarianism** – According to utilitarianism, resources should be distributed so as to maximise the total or average happiness or welfare across all members of the community.

Procedural Justice

Procedural justice is achieved if a person receives a fair hearing or trial. A legal system is said to be procedurally just if safeguards have been built into the legal system to ensure that a person being prosecuted for a crime receives a fair hearing. Some safeguards include:

- The requirement that a person be forcibly detained by the State only if they are reasonably suspected of having committed an offence.
- The requirement that a defendant be informed of the matters alleged against them.
- The right for a legal matter to be heard before a jury.

Retributive Justice

Retributive justice is the 'proper' response by the state to a wrongful act. It is concerned with the appropriate response to criminal and other harmful behaviour. There are different types of retributive justice

- **Desert Theory** – According to desert theory, punishment should be decided according to what the offender deserves. Any benefits of the punishment for the community are not as important

as the impact of the punishment upon the individual and achieving a balance between the offender's actions and punishment the offender receives

- **Utilitarianism** – According to utilitarian approach to retributive justice, compensation and/or punishment is justified if it maximises the overall welfare of the community by deterring other offenders, ensuring that the law is complied with.

Difference

Retributive justice can be contrasted with **restorative justice**. Where retributive justice is concerned with how best to punish a person who has engaged in wrongdoing, restorative justice is concerned with restoring or healing the victim and reintegrating the offender into the community.

Virtue ethics emphasizes the role of one's character and the virtues that one's character embodies for determining or evaluating ethical behaviour.

Deontological ethics is the normative ethical position that judges the morality of an action based on the action's adherence to a rule or rules. It is sometimes described as "duty" or "obligation-" or "rule-" based ethics, because rules "bind you to your duty.'

Consequentialism is the class of normative ethical theories holding that the consequences of one's conduct are the ultimate basis for any judgment about the rightness or wrongness of that conduct. Thus, from a consequentialist standpoint, a morally right act (or omission from acting) is one that will produce a good outcome, or consequence.

Amnesty International (2013), "This is Breaking People: Refugee Status Determining Interviews", pg. 63-64

Access to lawyers

In 2013, the Coalition Government removed access to representatives from Claims Assistance Provider Scheme (CAPS) for asylum seekers in the facility. This indicates that asylum seekers at the facility were left without CAPS officials to assist in compiling evidence of their protection claims, and it is unclear whether or not any new Refugee Status Determination interviews were carried out in the intervening period.

Neither Papua New Guinea nor Australia provides free legal services to asylum seekers during the Refugee Status Determination process.

Azadeh Dastyari, "Why Refugees need legal Aid", New Matilda, 2014

Asylum seekers arriving without a valid visa... will no longer be eligible to obtain independent and professional immigration advice and assistance through the Immigration Advice and Application Assistance Scheme (IAAAS).

While the government has indicated that it would not block community organisations from providing free immigration advice and assistance, these overstretched organisations are unlikely to be able to provide the help that is needed without government funding.

The government has indicated that it will provide asylum seekers with information in their own language, however, this is insufficient as most asylum seekers will not be in a position to understand the many intricacies of our status determination regime.

Some asylum seekers are illiterate in any language, and many arrive in Australia confused and frightened and overwhelmed. Many are distrustful of bureaucracy and government services because of their experiences of being persecuted by their own governments.

The UN High Commissioner for Refugees has stated, a person does not become a refugee “because of recognition, but is recognised because he [or she] is a refugee.”

Australia has voluntarily signed on to the **Refugee Convention**, which requires it to protect refugees from being returned to persecution. The rejection of refugees because of their inability to state their need for protection, without help, is therefore illegal.

What is justice?

Justice includes fairness, moral rightness and a scheme or system of law in which every person receives their due from the system, including all rights, both natural and legal. Injustice is the withholding or denial of the concept of justice. Injustice is also when it benefits one (or the majority) at the expense of others (minority etc.)

What is procedural justice?

Procedural justice is achieved if a person receives a fair hearing or trial. It is important because it implements safeguards in the legal system to ensure that a person being prosecuted for a crime or who is a party to civil litigation receives a fair hearing.

Structural injustice

Structural injustice is injustice that results not from the “bad” behaviour of an individual or institution (i.e. from someone acting outside the accepted norms and laws of society) but from every day, normal behaviour. Everyone who participates in the system (society) is responsible.