

# MINIMAL JUSTICE

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## I

Stating what maximum justice demands is straightforward. Justice prevails if everyone is treated equally whenever anything is distributed or if any unequal distribution reflects a particular achievement or needs, and if compensation is always granted if something is taken. Such distribution includes according or assigning any kind of right or duty, which may take the form of opportunities, positions, services, and obligations. When it comes to what may be taken and the form that compensation assumes, the spectrum ranges from property or life and limb, taken through criminal acts and paid for by punishment for such crimes, to intentional or negligent damage and payments to remedy it, and even encompasses contractual agreements that stipulate precisely what the contracting parties shall give and take.

Whereas justice used to concern *the way* in which distribution was conducted, nowadays it also involves the question of *whether* distribution should occur at all. In the past, wars, epidemics, natural and technological disasters, and economic hardship were viewed as blows struck by fate, while those affected could hope for assistance but could not rely upon it, and were simply forced to accept the injustice of fate; nowadays it is widely acknowledged that a precondition of justice lies in ensuring that help is given to people unjustly afflicted by fate. In the past, there was also a general sense that the course of history, including everything given or taken, simply revealed the hand of fate; nowadays questions are being raised about the justice or injustice of everything given and taken in days gone by. Compensation is demanded for what was taken unjustly, for

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colonial oppression and exploitation, enslavement and forced labor; restitution is demanded where something taken has survived, be it land, a house or a painting.

Recognizing what maximum justice demands has overlaid a dense mesh of expectations about justice upon our society. There is an expectation that economic, social, educational, and cultural policies pursued by governments or included in party manifestoes will not only have a positive impact on economic and social affairs, education, and culture, but will also be just; foreign policy is required not merely to serve a country's national interests, but also to uphold justice around the world. That holds just as true on a small scale: neighbors are not merely annoyed in disputes over noise or garbage but feel unfairly treated and take each other to court; parents do not believe bad grades could be due to their child's poor performance but are convinced the teacher has been unfair and threaten to call a lawyer; rather than appraising its aesthetic merits, literature read in schools and universities is scrutinized to see whether those depicted are treated fairly.

It is not merely that more justice is expected nowadays than in the past; there is also more justice. Oppression and exploitation, mistreatment of women, child abuse, hunger, and disease have become less prevalent and are criticized and combated where they persist. However, this dense mesh of expectations about justice comes at a price. Such expectations are normative and, unlike fact-based expectations, are maintained counterfactually. Fact-based expectations that are not de facto fulfilled are refuted and must be adjusted. There is no corresponding need to correct expectations of justice if the world is not as just as we expected. In other words, we are forced to change our stance if we have fact-based expectations that are disappointed; that is however not the case if our expectations of justice are not fulfilled, for this, in the best-case scenario, underscores a need for even greater resolution to uphold those expectations, pushing us to confront the enemies of justice with renewed vigor.

That is what renders contemporary social conflicts so intractable. Rather than conflicting interests, the clash is now between expectations of and demands for justice. Compromises can be found when there are conflicts of interest; not receiving as much as you would like or having to give more than you would like does not call your moral identity and integrity into question. Being forced to abandon what you believe is just and to accept an injustice imposed upon you is quite another matter. It is precisely because different ideas of justice are at loggerheads that there is so much emotion invested in conflicts surrounding abortion, homosexuality, and transsexuality, racial and cultural self-assertion and self-realization, climate change and the environment, and reception of

migrants, refugees, and asylum seekers, and that is also why struggles concerning these issues are so heated. In conflicts over migration, for example, there is on the one hand the conviction that those who want to come are as entitled to be here as those who are already here, because all people are equal; that is set against the view that all people are equal in the sense that they live in a linguistic, cultural, and economic community and are entitled to preserve it and themselves within it, and to protect themselves against any threat posed by foreigners who want to enter into that community. While these concepts of justice view people differently, both are global in scope, yet that does not make it any easier to reconcile them; for the former views the latter as selfishly provincial, while the latter views the former as nothing but a meaningless abstract concept.

## II

Can the price to be paid for the dense mesh of expectations about justice be reduced by demanding minimum justice instead of maximum justice? In his book *A Pluralist Theory of Constitutional Justice: Assessing Liberal Democracy in Times of Rising Populism and Illiberalism*, Michel Rosenfeld addresses justice essentials or minima, without which liberal constitutionalism cannot function. He understands pluralism, part of the quintessence of liberal constitutionalism, as comprehensive pluralism, which is based not only on individuals in all their diversity, but also on the various groups in which individuals come together, organize, and act, and which sees the liberal state as responsible for the development of both individuals and groups. Justice minima are intended to ensure that the singular, the plural, and the universal are given their rightful place.

Rosenfeld examines the minima of distributive justice; he does not address commutative justice, the justice that grants compensation, perhaps considering it to be less threatened under authoritarian constitutions. He identifies threats to distributive justice in three areas: economic redistribution, recognition, and representation; this distributive form of justice requires constitutional guarantees to safeguard material welfare, ensure individual and collective rights to freedom and equality, and secure democratic participation. At the end of the book, Rosenfeld summarizes: The constitution should guarantee a minimum of material welfare that allows all to enjoy their freedom and equality rights and to participate in the democratic process, and an adequate education for all; it should further encompass the classical civil rights and liberties such as freedom of speech, of assembly, of conscience, and of religion, furthermore the right to privacy and to a private life regardless of sexual orientation or of lifestyle, and should finally

guarantee equality and equal opportunity for all to pursue, shape, preserve, and enjoy their singularity. The constitution should also protect groups in their identity, solidarity and autonomy, and at the same time protect the freedom to join and leave groups. The guarantees need to be supplemented and safeguarded through institutional and procedural regulations.

In addressing these concerns, Rosenfeld discusses the possibility and necessity of variants. Economic redistribution depends on the state of the economy; representation can achieve what is not attained by recognition of groups and vice versa; and a minimum degree of mutual respect between individuals and groups, which is vital to co-exist in a liberal state, can be demanded and enforced in various ways. Different constitutional traditions give differing forms of expression to some justice minima.

When it comes to implementing the considerations outlined briefly here, Rosenfeld presents justice minima more clearly and precisely and in greater detail. They form a rich edifice composed of the rights of individuals and groups, along with the duties and activities incumbent on the state. In fact, the justice maxima mentioned above are all encompassed within these rights, duties, and activities or can be derived from them. This edifice admittedly has its merits; the liberal state with its constitutional guarantees that Rosenfeld depicts is the state that must be preserved and defended against rising authoritarianism. Nobody would willingly relinquish any of the justice minima he addresses, even though they are maxima rather than minima. But what happens if you are forced to do so? Are there essentials of justice that would be painful yet not destructive to abandon, while relinquishing other such essentials would be destructive and unacceptable? Are there minima for Rosenfeld's justice minima?

### III

The key question is whether it is possible to consider justice minima individually or whether such minima can only be implemented in conjunction; it is only possible to talk about more or less of these minimum requirements if they can be separated one from another. Another crucial question is whether implementing such minima to a greater or lesser degree would be an option. A mother slicing a cake and sharing it among children must observe one sole imperative of justice; she must share out the cake equally, unless a child's particular achievement or special need is to be acknowledged or unless there is some other good reason for unequal slices. What about the question of more or less? A mother acts unjustly if she gives her favorite child the biggest piece of cake; does she act even more unjustly the bigger that slice is? Would she

act with superlative injustice if she gave her favorite the entire cake? That sounds reasonable, and in response minimal justice would require that none of the children be left empty-handed. Yet it remains unfair even if no child is left empty-handed unless there is some good reason for the discrepancy between the small slice the others receive and the favorite child's large slice, a slighter injustice that seems just as problematic as the more pronounced injustice in which the others receive nothing at all. A child may prefer to take a small slice rather than receive nothing at all. But this is about wanting cake, not about justice. That leaves us with the question of whether justice minima can be considered individually.

The issue that can be addressed separately does not concern a greater or lesser degree of implementation but the question of whether something should be distributed at all. The question of *whether* any right or duty should be accorded or assigned must be addressed before the question of *how* to do so fairly. That first question is no longer raised when a long-standing tradition has established how rights are allocated and duties assigned; rights to freedom and equality are enshrined in every constitution nowadays, and every state levies taxes.

However, even if such rights and duties are established, the question of the form which they assume remains. Freedom of expression may be safeguarded yet subject to varying degrees of restriction; taxes may be paid by everyone at the same rate or at a progressively higher rate; the right to vote may exist within a first-past-the-post or proportional system. Do requirements of fairness apply to the decision to opt for one variant or another? Is unrestricted freedom of expression fairer than restricted freedom? But what about justice for those hurt by expressions of opinion? People with more money should pay more tax, but that goal is achieved irrespective of whether there is a flat or a progressively higher rate of taxation. Is one tax rate fairer than another? If a progressively increasing rate is chosen, is one progression-based system fairer than the other? Are proportional representation systems fairer than first-past-the-post systems by ensuring that each vote is not just numerically equivalent but also affords the same prospect of success? But what about candidates in a proportional representation system who are denied the success they might have enjoyed by being elected by the majority within their constituency?

Opting for one approach or another always means opting for unequal treatment. Some people are allowed to express their opinions, while others may not because a restriction is in force; some pay more taxes than others; sometimes it is votes for the party that matter and sometimes votes for candidates are instead most significant. These however constitute forms of unequal treatment that are inevitable one way or another and parameters other than justice take center-stage in the

decision-making process. Restrictions on freedom of expression are less urgent when exchanges of opinions occur in a civilized manner and are more crucial when debates are venomous; tax rates depend on what the state needs and what an economy and society can afford; choosing between the two electoral systems is based on considerations of representation, stability, and effectiveness. Such considerations are actually justifications for the unequal treatment involved; thanks to those justifications, the unequal treatment does not lead to injustice, even if that is always a risk with any kind of unequal treatment. However, being inevitable, these kinds of unequal treatment are not viewed as primarily decisions related to justice but above all as decisions about systems, in favor of one taxation or voting system or another. Questions about justice only become pressing when a systemic decision is implemented; if taxpayers or voters are not treated equally within the same system, it is fitting to consider whether there is some justification for this or whether the unequal treatment is unjust. However, decisions in favor of one system or another, even if they are traditional and tried-and-tested, may become questionable, once again raising the issue of the justice of the unequal treatment inherent within the systems.

#### IV

It is more difficult to answer the question of what justice means when considering how rights and duties are distributed in areas beyond those in which such rights and duties are already firmly established. Does granting more extensive civil liberties and freedoms make matters fairer or simply freer? Do greater opportunities for education and advancement ensure more justice or simply increase the number of people who obtain better positions and salaries and satisfy a growing demand for skilled workers? Is providing assistance to those in hardship an act of justice or an act of mercy? Does the question of whether those afflicted are in some way to blame for the hardship they are suffering play a role? Does making military service or a year of social service compulsory rather than voluntary simply benefit the armed forces and ensure social needs are met, while perhaps fostering a sense of responsibility, or do such measures make society fairer?

If measures to allocate resources and accord rights or duties apply to everyone in equal measure, more equality is established, and an egalitarian society is more cohesive and shows greater solidarity, so that it functions better than a divided society. Creating and maintaining equality within society is thus certainly desirable. Questions of justice arise more frequently as more equality is introduced, for justice calls for equal treatment for those who are equal and only authorizes unequal

treatment for specific, justifiable reasons. In that respect, creating more equality also accords greater importance to the imperative of justice. There are however countless areas of society in which greater equality could be achieved; whether this should be done in a particular area calls for a separate decision before the principle of justice is applied. Political concerns are involved in deciding whether equal treatment of people facing hardship through no fault of their own should address their material needs or should also enable them to participate in cultural and political life, and that is also the case when deciding whether the same assistance should be given to people who bear some responsibility for their situation; political concerns likewise come into play when deciding whether educational and career opportunities should be opened up to everyone and guided by individual interests and wishes, or whether the determining factor should be economic demand for skilled workers; and the same holds true when determining whether universal compulsory service should be introduced and whether it should primarily tackle specific challenges in society or aim to foster cohesion and solidarity. Those decisions define who should be treated equally in relation to whom and in what respects. Such appraisals are not self-evident, not even in light of the imperative of justice. There may well be growing acknowledgment that help should be given to people who face an unfair fate, in an ever-broader range of circumstances. Yet that acknowledgment does not apply to everyone, and sometimes such acknowledgment does not grow out of a spirit of justice, but stems from society wishing to be merciful and kind or because a society can afford to be charitable at little cost to itself or because it seems impossible to enjoy prosperity when confronted with blatant need. However, once a decision is taken to promote equality, justice will serve as a safeguard to ensure genuine equal treatment, with unequal treatment permitted only if there is some particular, justifiable reason.

## V

Societies ensure more justice or less; they create areas with more equal treatment, which must then be fair treatment, or with less. Maximum justice exists when equal treatment and thus justice is ensured in all areas that fall within the ambit of state regulation.

When does minimal justice exist? Minimal justice certainly demands that the state treat people equally and fairly in all areas in which the state encounters pre-existing equality rather than needing to define an area and ensure equality within it. All the citizens of a nation make up the people of that state, everyone is equal in that capacity, and must therefore also be treated equally and fairly as voters, as well as when

seeking to express their opinions, practice their religion, assemble and unite, as taxpayers, and when the rights and duties arising in these contexts are accorded and assigned. That is why these rights and duties form part of a long-standing tradition and are firmly established. Unequal treatment is always subject to the imperative of justice, although of course the unavoidable nature of certain systemic decisions renders the imperative of justice less acute.

When and how does minimal justice extend beyond this and make it necessary to define certain areas of society as areas governed by equality and thus also by justice? “Never,” liberal rigorism would reply, underlying the invigorating, purifying effect of competition between everyone. But competition between everyone neither strengthens nor purifies society, and creating equality is an undertaking that no society, legislator, or government can avoid. The question that remains unresolved concerns the areas in which this will occur and the issues that will be prioritized: combatting poverty, improving education and training, integrating migrants, promoting industries, or whatever else society needs. Those decisions can only be taken politically. However, the political process in which decisions are made is subject to the imperative of justice, which requires that all members of the population are treated equally as voters and participants in the political process. Earlier I mentioned essentials of justice that are painful but not destructive to relinquish, whereas abandoning other essential elements of justice would be destructive and unacceptable. In some areas of society, opting not to establish equality and create justice is painful. Relinquishing equal and just recognition of everyone that makes up the state as voters and participants in the political process would be more than painful—it would be destructive.

In his book, Rosenfeld addresses justice minima that are vital to the functioning of liberal constitutionalism. Such minima extend beyond the concept developed in this paper as minimal justice. Their starting point and goal is not justice, but rather liberal constitutionalism, considered not in its unchallenged, ideal form, but in the light of the current threats posed by populism and illiberalism. Certainly, those threats can only be countered if many areas of society are defined as areas of equality and thus also areas of justice. However, it is likewise certain that simply encompassing as many areas as possible will not provide a solution; seeking equal treatment of foreigners who live in the country legally and illegally, of foreigners and nationals, of those who belong to majority and minority groups, of advocates and opponents of vaccination, or of women and trans women in sport gives rise to conflicts that are no longer viewed and negotiated as conflicts of interest; political decisions are no longer accepted in this context. These issues have become conflicts between different expectations of and demands for justice, sparking



populist agitation, and the impossibility of reconciling the various positions proves to be the price of justice. Defining as many areas of society as possible as areas of equality and therefore also of justice would be over-simplistic. Instead, it is important to consider the conflicts that arise from defining a particular area in this way and whether society can handle those conflicts.

If liberal constitutionalism wishes to assert itself in the face of populism and illiberalism, its justice minima must move beyond what has been developed in this paper as minimal justice. Liberal constitutionalism must constantly wrestle with the question of quite how far beyond such minima it must advance. “The liberal secularized state lives by prerequisites which it cannot guarantee itself,” to cite a famous statement by Ernst-Wolfgang Böckenförde, German judge and scholar of constitutional law.<sup>1</sup> Such prerequisites do exist. The liberal constitutional state’s justice minima are certainly among the prerequisites it can and must constantly redefine and guarantee. In his book, Michel Rosenfeld has demonstrated the extent of this challenge in the light of the current threat from populism and illiberalism.

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<sup>1</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, GESELLSCHAFT, FREIHEIT* 60 (Suhrkamp Verlag, 2d ed. 2016).