

THE NARROWNESS OF MODERN JUSTICE (I)

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Part I Grotius' Conceptual Innovation

"Justitia . . . tota in alieni abstinentia posita est."

(Grotius, *De Jure Belli ac Pacis*, Prolegomena, 44.)

1. Introduction

This paper forms the first part of a project. The project attempts to explain the origin and development of the classical-liberal concept of justice. It attempts to explain, in historical terms, why that concept is so "narrow".

Defenders of classical liberalism, as well as its critics, often point out that there is peculiar narrowness in the classical-liberal concept of justice. They may refer to Locke, or Smith, or Hume, to prove that these theorists attached primary importance to corrective justice rather than social justice or distributive justice.¹ Or they may point out that the classical-liberal concept is devoid of any positive moral element often associated with justice.² Or they may stress the fact the classical-liberal concept of justice is primarily—or sometimes, exclusively—concerned with the protection of private property.³ These are three legitimate characterizations of the concept of justice which figures in the tradition of classical liberalism. This concept of justice is, indeed, narrow.

Why is it narrow? We are seldom given an explanation. The historical explanation I intend to offer is that its narrowness originated in, and developed out of, a conceptual innovation by Hugo Grotius. In this paper, I shall explain how he narrowed the traditionally complex concept of justice. In a sequel to this paper, I shall trace the influence and modifications of Grotius' concept of justice in the writings of classical liberals such as John Locke, Adam Smith and David Hume. Since these liberal theorists are independent thinkers, we should not assume that they took over Grotius' concept without revising or criticizing it. Nevertheless, we shall see that there is a significant continuity of thought in the modern tradition which Grotius started and his liberal successors developed. This tradition might be called the modern Ciceronian tradition. It derived main ideas from Cicero, and adopted a very restricted concept of justice.

I shall begin by outlining Grotius' place in the history of the concept of justice. This outline will be brief. Ever since Aristotle started an academic discussion of the concept of justice in Book V of the *Nicomachean Ethics*, a great many theorists have followed in his footsteps and treated the concept of justice as a complex concept. But a few theorists were not content with the conventional treatment of justice. They undertook to simplify the complex concept of justice by isolating some elements of it as essential, or discarding other elements as unessential. They were conceptual innovators. In the modern era, Hugo Grotius was the first major theorist who innovated the concept of justice. He attached special importance to that branch of justice which Aristotle called "cor-

rective justice" (*diorthotikon dikaion*). He transformed the concept of corrective justice by linking it with a new concept of right (*jus*), and thereby created the new concept called "expletive justice" (*justitia expletrix*). The significance of this concept of justice was that it defined "justice" in unequivocally negative terms. Justice became a matter of not interfering with another man's "right", or a matter of abstaining from what another man already possesses by his "right" (in Grotius' strict sense of the word "right"). "Justice" became subordinate to the preexisting "rights" of other men. Furthermore, he claimed that this negative justice is what "justice" properly and strictly means. In his view, "distributive justice"—the branch of justice which Aristotle called *dianemetikon dikaion*—does not count as "justice" in the proper or strict sense. Thus Grotius radically transformed the complex concept of justice into a narrower one. In what follows, we shall look at his conceptual innovation in more detail.

2. Grotius' Conceptual Innovation

Well-informed historians of the modern theory of natural rights and natural law, such as Jean Barbeyrac and Henry Sidgwick, agree that Grotius' *De Jure Belli ac Pacis* is an epoch-making work. But they do not tell us very much about Grotius' significance in the history of concept of justice.⁴ His significance, as I already stated, lies in his attempt to formulate an unequivocally negative concept of justice, in opposition to Aristotle's idea of distributive justice. It is worth drawing attention to the word "unequivocally" here. For it seems that some theorists before Grotius adopted, or formulated, a

more or less negative concept of justice. Cicero, for instance, stressed the negative character of justice long before Grotius. His formulation of the concept of justice was primarily, if not solely, negative. The first principle of justice, according to Cicero, is that “no harm be done to anyone”; or “to keep one man from doing harm to another, unless provoked by wrong”.⁵ Justice at its core is to avoid harming another man. Thus he assimilated the principle of “*suum cuique tribuere*” (“To render to each man his due”) to that of “*neminem laedere*” (“To harm no one”). Nevertheless, it is questionable whether Cicero was prepared to define justice solely in terms of the avoidance of harm. His point seems to be that the avoidance of harm is *the most fundamental* principle of justice.⁶ By contrast, Grotius tried to define justice solely in negative terms. Furthermore, he made use of the concept of right and thereby provided a conceptually rigorous formulation of what justice is. For these reasons, it is significant to claim that Grotius formulated an *unequivocally* negative concept of justice.

According to Grotius, the negative concept of justice is based on the prior concept of “right” or what he regards as a “right” in the proper and strict sense. The Aristotelian idea of distributive justice, on the other hand, is said to rest on an imperfect kind of “right”, or a “right” in an extended and improper sense of the word. Since Grotius’ discussion of the concept of justice rests on his prior classification of rights, we shall start with what he says about rights.

2.1 Grotius on Rights

In *De Jure Belli ac Pacis*, Bk. 1, Ch. 1, Sects. 3–9, Grotius dis-

tinguishes three different senses of *jus*. The term *jus* has more than one meaning, and no single English word can express the multiplicity of its meanings. But significantly, one of its meanings can be rendered as a "right". (Unfortunately, Francis Kelsey's English translation, published in 1925, makes Grotius' discussion of *jus* unintelligible. I shall quote from W. Evats' 17th-century English translation (1682).) Of the three senses of *jus*, the first sense of *jus* signifies that which is not unjust (1, 1, 3, 1), and the third sense of *jus* is an equivalent of *lex* or a law (1, 1, 9, 1). What concerns Grotius most is the second sense of *jus*. *Jus* in the second sense may be rendered as "a right". It is said to arise from the first sense of *jus*, and it relates to a person. He says that *jus* in this sense "signifies a moral Quality in any person, sufficient to enable him justly to have or to do something" (1, 1, 4).

Grotius goes on to distinguish between two kinds of "a right" or "a moral quality" (*qualitas moralis*). One is a perfect moral quality called "faculty" (*facultas*); the other is an imperfect moral quality called "aptitude" (*aptitudo*) (1, 1, 4). The difference between the two types of moral qualities or rights consists in this: If a man has a perfect right (or "faculty") over an object, then he can justly demand this object from others on his own authority and can use *force* to protect or restore it. By contrast, "aptitude" or an imperfect right to an object cannot be protected by the use of force against others. Other men cannot be justly punished for not respecting a man's imperfect right.⁷ After distinguishing "faculty" from "aptitude", Grotius proceeds to make a significant declaration: "we henceforth call it [i. e., the faculty] Right [*jus*] properly and strictly taken" (1, 1,

5). By this simple declaration, a man's "faculty" becomes a "right" (*jus*) in the proper and strict sense. This right, Grotius adds, is what Roman lawyers used to call *suum* (as in their definition of justice, *suum cuique tribuere*), i. e., "that Right which a man hath of his own" (1, 1, 5).

We have seen above Grotius' stipulation of the proper and strict sense of "right" (*jus*). It is worth noting that his stipulation implies two things. First, a perfect right is the right in the proper and strict sense. Secondly, a perfect right is "*jus*" in the proper and strict sense. In other words, Grotius excluded from the proper and strict sense of *jus* not only an imperfect right, but any objective or intersubjective sense of *jus* (e. g., the sense of a law). Thus his innovation consists not only in creating the perfect right, but also in subjectivizing and individualizing the entity "*jus*" which used to be considered (primarily) an objective entity. As John Finnis has correctly pointed out, the primary meaning of *jus* for Thomas Aquinas was "the just thing itself" (in the sense of the objectively fair state of affairs), whereas *jus* for Grotius and other 17th-century theorists is primarily an individualized entity assimilated to the power each man possesses.⁸ If we focus on Grotius, we can clearly see how this subjectivization of *jus* takes place. *Jus*, he says, is the "faculty" each man possesses, rather than an intersubjective norm of actions (i. e., a law) or the state of affairs which is not unjust. This is the first step in the subjectivization of *jus*. The second step is the following: This faculty, or the perfect right, is something that each individual possesses independently of a law (*lex*).⁹ In Grotius' view, the faculty (or the perfect right) is paradigmatically "power" (*potestas*).¹⁰

"Power" or "*potestas*" is supposedly a normative concept, yet given the separation of the faculty from a law, this power can easily get confused with physical power. Thus *jus* comes to be regarded as the power which each man possesses independently of an inter-subjective norm of actions.

It is against the background of this radical subjectivization of *jus* and rights that we can properly understand Grotius' concept of justice. For his concept of justice presupposes *jus*, or a right in the proper and strict sense of the word.

2. 2 Grotius on Justice

Now we are in a position to consider Grotius' concept of justice. "Justice" in the proper and strict sense is called "expletive justice", and it presupposes the existence of a man's "faculty", or a "right" in the proper and strict sense. Justice, properly and strictly, means an act of abstaining from what another man already possesses by his perfect right. In his famous Prolegomena to *De Jure Belli ac Pacis*, Grotius says the following: "Justice . . . wholly consists in abstaining from what is another mans [sic]", whereas "Injustice" is "nothing else but the detention of another mans Right" (Prolegomena, 44). It should be clear that when Grotius speaks of justice, he has in mind an act of justice or a just act. *Alieni abstinencia* is rendered here as abstaining from *what is another man's*, and *what is another man's* should be understood in the sense of what another man already has by his perfect right. Grotius also quotes Porphyry's definition of justice in his Annotation: "to abstain from what is anothers [sic], and not to harm them that are harmless" (*ut abstinenceatur alienis*

neque noceatur non nocentibus). To abstain from another man's perfect right (or the object of his perfect right) implies that if one man borrows or uses or damages a part of another man's object, he should restore it to him. Thus Grotius couples "restoration" with "abstention" in speaking of justice in the proper sense. He refers to "our abstinence from that which is anothers, and our restoring of that which we have detained, together with the full profits we have made of it" (*Prolegomena*, 8).

The restoring of another man's own object is an apparently positive act. But Grotius seems to think that it is tantamount to performing the negative obligation of abstention which a man should have performed in the first place. The name "expletive justice" itself seems to derive from the notion that if someone returns an object of another man's perfect right to him, he performs the negative obligation which he ought to have performed all along and thereby *fills* the kind of empty space which has been in existence. To use Pufendorf's illustration of Grotius' idea, a man who has borrowed a book from another man's library does not add anything to his library by returning it to him, but only fills the place that has been empty.¹¹ "Expletive justice" is Grotius' version of the Aristotelian idea of corrective justice. Aristotle treated "corrective justice" as the justice which rectifies inequalities that arise between those who interact. What Grotius has done is to replace the notion of inequalities by that of the restoration of a perfect right. One man's just act is always to be explained by reference to another's perfect right. In other words, justice is the handmaiden of the perfect rights of others.

We can shed light on Grotius' discussion of the proper and strict sense of justice by providing his interpretation of the Stoic maxim of justice, *suum cuique tribuere*. Given his identification of *suum* with (the object of) a man's "faculty", he can interpret *suum cuique tribuere* as follows: "to abstain from what each man already possesses by his faculty (and restore what you have taken from him to him)", or "to leave each man in the quiet enjoyment of his perfect rights", or "to refrain from harming what each man has by his perfect right".

So far I have concentrated on the formal definition of expletive justice, without discussing its substantive contents. What substance does expletive justice have? The substantive contents of expletive justice change according to the way objects of perfect rights are specified, just as the principle of *suum cuique tribuere* changes its substantive meaning according to the way *suum* is delimited. Grotius holds that certain objects are by nature "a man's own", i. e., the objects of his perfect right. In the state of nature, every man has a perfect right over "his Life, . . . his Limbs, his Reputation, his honour, and his peculiar actions" (2, 17, 2, 1; also, 1, 2, 1, 5). Furthermore, men acquire external objects by occupation, division, etc., and a tacit or explicit compact (*pactum*) among them establishes their property rights in their objects (2, 2, 2, 5). This is how each man can legitimately enlarge his private domain of perfect rights. Thus an account of the origin of property can significantly determine the substantive contents of expletive justice. Given the enlarged domain, expletive justice requires every man to refrain from taking or damaging another man's life, or his limbs, or his

reputation, or his honour, or his peculiar actions, or his property. If anyone violates or invades another man's domain, it constitutes an injury. Then the principle of *alieni abstinentia* no longer applies to the aggressor, and the injured party can use force against him to avert the attack, or to recover what he had lost, or to extract compensation.

The reaction need not be proportionate to the damage caused, and the injured party can even kill the aggressor (2, 1, 3; 2, 1, 6; 2, 1, 11). Grotius agrees with Cicero that men are not always prohibited from using force. Men are only prohibited from using the kind of force which is detrimental to the preservation of society (i. e., the society where its members enjoy their perfect rights) (1, 2, 1, 5). Finally, since men's perfect rights are insecure in the state of nature, they form a society and use the joint force of the society to punish aggressors (1, 2, 1, 5).

As we have discussed Grotius' concept of expletive justice, we shall now proceed to clarify his view of distributive justice. He uses the expression "attributive justice" (*justitia attributrix*) for Aristotle's idea of distributive justice. He regards attributive justice as "justice" in an extended and improper sense. It relates to an imperfect right or "aptitude" (or "worthiness", or "fittingness"). (Grotius treats "aptitude", "worthiness" and "fittingness" as synonymous.) Attributive justice requires that benefits and burdens should be distributed among the members of a community according to each person's "aptitude" (or "worthiness", or "fittingness").

Grotius quotes Xenophon's story of Cyrus, to emphasize that expletive justice should be distinguished from attributive justice (1,

1, 8, 3). The story goes as follows: There were a large boy who had a small coat, and a small boy who had a large coat. Cyrus, who was concerned about fittingness rather than expletive justice, assigned the large coat to the large boy and the small coat to the small boy. But the teacher of Cyrus rightly pointed out to him that justice properly concerns who has a (perfect) right (of ownership), rather than who has an imperfect right or what particular objects fit what particular persons.

Although Grotius' use of Xenophon's story serves to illustrate the distinction between expletive justice and attributive justice, it does not tell us why we should exclude attributive (or distributive) justice from the proper realm of justice. In fact, Grotius does not offer any reasoned argument to show why attributive justice is to be considered an extended or improper sense of justice. However, he assimilates the virtue of attributive justice to other positive virtues. He says that the virtue of attributive justice is "usually the concomitant of such Vertues as are beneficial to others, as mercy, liberality, and State providence [i. e., foresight in matters of government]" (1, 1, 8, 1). To illustrate Grotius' point, we should think of the situation where a man deserves (or has an aptitude to) "liberality", yet nobody treats him with liberality. In this situation, neither he nor anyone else can use force to demand "liberality" from his fellows, though it is morally fitting that he should be treated liberally. Nobody is obliged by force to respect another's aptitude or imperfect right, even if positive morality requires us to respect it. Thus Grotius links attributive (or distributive) justice to legally unenforceable, positive morality. Expletive justice, on the other hand,

is confined to the realm of negative legality where people abstain from hurting each other. The bifurcation of morality and legality lies at the bottom of the distinction between justice proper and "justice" in the extended or improper sense.

As we have seen above, Grotius sharply contrasts the negative virtue of justice with positive social virtues. This contrast is implicit in Cicero, and becomes quite explicit in the writings of post-Grotian liberal theorists.¹² Like Cicero, Grotius treats justice as the minimal requirement of social life, and distinguishes it from positive social virtues. Expletive justice is the justice which makes social life minimally peaceful. This justice is absolutely necessary, whereas positive virtues like "liberality" and "mercy"—hence, attributive (or distributive) justice—are required for more humane social life.

We have elucidated Grotius' concept of justice by examining his formal definition, its substantive contents, and its relationship to distributive justice. Now we can conclude our discussion by confirming where its narrowness lies. His concept of justice is narrow in at least two respects. First, it is narrow in that it leaves out distributive justice. In Grotius' view, justice is not a matter of dividing the totality of benefits and burdens and determining each man's share according to an independent criterion (e. g., according to his aptitude, worthiness, fittingness, etc.). Justice rather presupposes that each man already has a demarcated domain of perfect rights. Grotius dissolved distributive justice into other positive virtues, and tried to confine justice to the negative legality of abstention and prohibition. Secondly, Grotius' concept of justice is narrow in that it leaves out any positive moral action. Since justice

(or a just act) is one man's abstention from another's perfect right, one can remain just without performing any positive moral act. Acts of charity, generosity, kindness and love are irrelevant to justice. To be just, one only has to avoid hurting another man.

These two features of Grotius' narrow concept get transmitted to his liberal successors, as I shall try to show in a sequel to this paper. At the beginning of this paper, I suggested that there is another aspect in which the classical-liberal concept of justice may be said to be narrow: it is preoccupied with the protection of private property. This preoccupation is, in part, a result of Grotius' negative formulation of the concept of justice. In his formulation, "justice" became the handmaiden of private "rights" (or *suum*). Hence, delimiting the private domain of rights—especially, those over external objects—became the central substantive issue in the subsequent discussions of justice. I shall address this issue when I trace the influence and modifications of Grotius' concept of justice.

NOTES

- 1 In his defence of classical liberalism, F. A. Hayek frequently refers to Hume and Smith (and less frequently, to Locke). He reminds us of the negativity of the classical-liberal concept of corrective justice, and launches a full-scale criticism of the concept of social or distributive justice. F. A. Hayek, *Law, Legislation, and Liberty*, 3 volumes, published in one volume with corrections and revised preface (London: Routledge & Kegan Paul, 1982). See especially, Vol. 2, Chaps. 8 & 9.
- 2 Critics of classical liberalism, as well as moralists, point out that the "justice" of classical liberals is too legalistic and devoid of any positive moral element. See, for instance, Thomas Reid's critical remarks on Hume's concept of justice. In criticizing Hume, Reid appeals to the sense

of positive morality which he takes to be implicit in the very concept of justice: "[J]ustice requires that the children who are unable to labour, and those who, by sickness, are disabled, should have their necessities supplied out of the common stock." *Essays on the Active Powers of the Human Mind*, intro. B. A. Brody (Cambridge, Massachusetts, The M. I. T. Press, 1969), pp. 423f. Also, see Reid's remark (*ibid.*, pp. 425f.) that "justice requires" an equal distribution of bread under the circumstances of extreme scarcity.

- 3 Commentators on Locke frequently—and correctly—point out that he was preoccupied with private property. But we would be mistaken if we believed that he was *exclusively* concerned with private property. It is a well-known fact that he used the word "property" in the *Two Treatises of Government* to encompass one's life and liberty as well as one's external possessions (*ST*, 123, 173). The truth is that Locke was *primarily* concerned with private property. Who was *exclusively* concerned with private property in discussing justice? It is Hume who reduced the role of justice to the protection of private property (or external possessions). See *A Treatise of Human Nature*, III, ii, 2 ("Of the origin of justice and property") *et passim*.
- 4 Barbeyrac states: Grotius "ought to be regarded as the first who broke the Ice" in the systematic treatment of the law of nature. See *An Historical and Critical Account of the SCIENCE of MORALITY* (prefixed to the 4th English edition of Pufendorf's *Of the Law of Nature and Nations*), Sect. XXIX, p. 79. Sidgwick calls Grotius' *De Jure Belli ac Pacis* "the epoch-making work" in his *Outlines of the History of Ethics* (London: Macmillan, 1919), p. 160. Barbeyrac and Sidgwick do not discuss the significance of Grotius' concept of justice. However, Richard Tuck has recently discussed Grotius' concept of rights in detail and touched on his concept of justice. See his *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), Chap. 3. The interpretation of Grotius I provide in this paper does not replace Tuck's. Rather, it seeks to complement his interpretation.
- 5 Cicero, *De Officiis*, Loeb Classical Library (London: William Heinemann, 1975), I, x, p. 33 & I, vii, p. 23.
- 6 Given his informal exposition, it is not easy to find Cicero's rigorous "definition" of justice. But we can infer from his statements the view that the avoidance of harm is the core (rather than the whole) of justice. Let me quote his statements: Justice is the second cardinal virtue concerned "with the conservation of organized society, with rendering to every man his due, and with the faithful discharge of obligations assumed" (*ibid.*, I, v, p. 17). Justice (conjoined with charity, kindness, and generosity) is "the principle by which society and what we may call its 'common bonds' are maintained" (*ibid.*, I, vii, p. 21). "*The first office of justice* is to keep one man from doing harm to another, unless provoked

by wrong; and the next is to lead men to use common possessions for the common interests, private property for their own" (*ibid.*, I, vii, p. 23; emphasis added). The "fundamental principles of justice" are "first, that no harm be done to anyone; second, that the common interests be conserved" (*ibid.*, I, x, p. 33). "This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice" (*De Finibus*, Loeb Classical Library, V, xxiii, 65). I have not been able to find a passage where Cicero actually identifies "*suum cuique tribuere*" with the no-harm principle. He seems to assimilate one to the other without establishing strict identity.

7 Grotius does not take the trouble to elaborate the distinction between perfect and imperfect rights. But Pufendorf clarifies the distinction in his works; for instance, in *De Jure Naturae et Gentium* (1, 1, 19; 1, 7, 7; and 1, 7, 11). Hutcheson takes over the distinction from Pufendorf, and transmits it to Adam Smith. Smith's illustration of an imperfect right helps us understand what sort of "right" it is. He says that "a beggar is an object of our charity and may be said to have a right to demand it" in "a metaphoricall [sic] sense". See *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael & P. G. Stein (Indianapolis: Liberty Classics, 1982), Report of 1762-3: i, 15. It is *morally fitting* that a beggar receives charitable treatment.

8 John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), pp. 206f.

9 It is not entirely clear how Grotius related each man's faculty (or perfect rights) to a law. My view is that he separated one from the other without establishing an intelligible connection. The bifurcation of rights (*jus*) and a law (*lex*) is a prominent feature of Hobbes' political philosophy, and this feature is shared (though in a less obvious way) by Pufendorf and Locke. For this, see Finnis' work (cited above), pp. 207f. I treat Grotius' view as a part of the 17th-century trend to separate subjective rights from an intersubjective norm. In *De Jure Naturae et Gentium*, Pufendorf notes that Grotius defined *lex* in terms of "that which is right", and ascribes to him the view that the "law of nature does not create right but merely points out a right already existing" (1, 6, 4). Pufendorf's interpretation reinforces my view, though the difficulty with his interpretation is that Grotius defined a law in terms of what is right (or *id quod rectum est*) rather than a right (or *jus*).

For the history of subjective rights (assimilated to dispositional powers), see Richard Tuck, *op. cit.* A French nominalist named Jean Gerson, he reports, is the first theorist to formulate the following view about *jus*: "*jus* is a dispositional *facultas* or power, appropriate to someone and in accordance with the dictates of right reason" (*ibid.*, p. 25). Grotius is an intellectual descendant of Gerson.

10 Consider Grotius' statement that "faculty" includes "power" (*potestas*)—

power over oneself (*libertas*) or power over others (*De Jure Belli ac Pacis*, 1, 1, 5).

11 See Pufendorf, *De Jure Naturae et Gentium*, 1, 7, 11.

12 I say that the contrast is “implicit” in Cicero, because he does *not* sharply *oppose* “justice” to positive virtues like “charity”, “kindness”, “generosity” and “liberality”. He certainly distinguishes “justice” from the second type of virtues. But he is inclined to see the two virtues as closely *connected* to support social life. See *De Officiis*, I, vii, pp. 21f. where Cicero says that the principle by which we maintain common bonds is two-fold, “justice . . . and, close akin to justice, charity, which may also be called kindness or generosity”. In *De Finibus*, he says: “connected with it [justice] are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind” (V, xxiii, 65).

*Notes on the English translations of Latin works

(1) Grotius, *De Jure Belli ac Pacis Libri Tres*.

All quotations are from William Evats’ English translation, *Three Books treating of the Rights of War and Peace*, 2nd ed. (London: Printed by M. W. for Thomas Basset . . . Ralph Smith, 1682).

(2) Pufendorf, *De Jure Naturae et Gentium Libri Octo*.

All quotations are from the English translation by C. H. Oldfather and W. A. Oldfather (Oxford: Oxford University Press, 1934).