Law and Justice

Critically analyse the relationship between law and justice (20)

In order to achieve justice, countries institute a legal system of some sort. However, sometimes those systems are flawed, and therefore, an injustice will occur, such as when innocent people are convicted of crimes they did not commit. The most common example used being the numbers cases.

Justice is an entirely subjective concept, largely depending on political affiliation, and previous experience of the legal system. Similarly to law, there is a vast amount of documentation providing different definitions and different theories of justice.

The Greek philosopher Aristotle was one of the earliest thinkers in relation to justice, and his theories are still influential today. Aristotelian justice is based upon the premise that a just law will allow citizens to fulfil their potential in society, and therefore developed the theory of distributive justice. As opposed to corrective justice, distributive justice is concerned with allocation of assets such as wealth and honour, and achieving proportion. However, Aristotle believed that individuals should receive benefits; however benefits should be given to individuals in proportion to their individual claim. On the other hand, corrective justice is an application of disturbed distributive justice, by a wrongdoing. A judge is supposed to find out what damage has been done, and then attempt to restore equality by both confiscation and compensation.

Similarly, Aquinas believed that laws should serve the "summum bonum" or "common good", and that all laws are derived from a higher order, or a system of natural law, and this natural law is derived from God. Aquinas believed that there are two ways in which laws can be unjust. Firstly, a law, which is contrary to human good in any way, is not a true law at all, yet such laws should still be obeyed if failing to do so could cause social disorder. Secondly, according to Aquinas, a law that goes against God's will, and therefore a breach of the natural law, should be disregarded.

Other, more modern, academics such as Mill and Bentham believed in a utilitarian movement. Utilitarianism is the theory that society should work towards the greatest happiness for the greatest number, regardless of whether some individuals lose out or not. A Utilitarian would assess whether a law was just or not by finding the consequences of the law, and deciding if said law maximised happiness, well-being, or any other desirable effect for the majority. Therefore, a law could be just, even if it created social inequalities.

Furthermore, the American jurist John Rawls published his "Theory of Justice" in 1971. He defined justice as that which prevailed in a just society, and a just society as one to which a group of rational but mutually disinterested people would unanimously choose to belong if such a choice were available. His theory was based upon a hypothesis of what a group of individuals placed in what he named "the original position" would agree upon. Rawls argues that traditional self interest would lead an individual to agree to a set of basic rights and principles which are best for all members of society, since nobody will be willing to disadvantage a section of society if they might find themselves a member of it.

Law, on the other hand, is difficult to define. However, Sir John Salmon defined legal rules as "the body of principles recognised and applied by the state in the administration of justice". In essence, Salmon's sentence embodies the idea of the legal system of any culture or country. All legal systems have the desire to, as in justice, impose rules and fairness. Therefore, law is about the control and direction of society and it's conduct, not only between members of society, but also between the state and it's citizens.

According to John Austin, law is "being a command issue from the superior to the inferior and enforced by sanctions." Whilst this statement is the epitome of the criminal justice system, which is heavily driven by justice, it does not take into consideration the civil system, which whilst based on justice is designed to allow us to do something rather than to forbid us from doing something; marriage, civil partnerships and divorce are all examples of which.

Austin's definition is also inexact due to the new system of judicial review and the European courts; which both allow us to challenge laws made by the state, removing the positions of "inferior" and "superior", and in my opinion, creating an equality between state and citizen.

The English Legal System achieves justice through two main ways; procedural and substantive justice.

Substantive justice is gained through the use of statutes or principles of law. Substantive justice looks at the very substance or content of the law to see whether it creates a just result, and the natural lawyer will question the substance of the law and in very extreme situations will be willing to question the authority of the legal system itself. If this is found to be wanting, he will conclude that either it is not law, or the citizen is not obliged to abide by it.

Since 1999, the law is measured against the Human Rights Act to ensure fairness. This act makes it unlawful for the "public authority" to act in a way which is incompatible with a convention right. However, there is a major flaw because "public authority" does not include Parliament itself or any exercising proceedings in Parliament, leading some to believe that Parliament and it's ministers can disregard the Convention. The act also states that courts have to interpret legislation in a way that is compatible with the convention, meaning that judges have interpreted Acts in an exceedingly wide manner.

A further example of substantive justice is equity, which was developed to enable the courts to do justice where the common law prevented it, by recognising new rights such as the rights of a beneficiary under a trust and new remedies such as the injunction and the order for specific performance. Examples of equity can be found in *Central London Property v High Trees House* in which a landlord sought to renege on an undertaking to accept a reduced rent during WWII. Lord Denning said that when a part to a contract makes a promise to the other, which he knows would be acted on, that he would not enforce his strict legal right; the equitable principle of promissory estoppel makes that promise binding on him.
A further example can be found in *Miller v Jackson,* in which the local cricket ground had been bordered by a number of new houses, and the claimant bought one of them.

On a number of occasions, cricket balls were hit into the claimant's garden, and she sued the cricket ground in nuisance and negligence, claiming actual damage to property and fear of personal injury. The Court of Appeal by a majority said Miller should succeed, and that it was no defence that she had come to the nuisance rather than vice versa. But no injunction should issue because the defendant's activities were socially beneficial and because the claimant had come to the nuisance with her eyes open.

A fourth type of substantive justice is the partial injunction, as seen in *Kennaway v Thompson*. The defendant was sued because they were allowing water sports on Lake Windermere that were causing a nuisance to the claimant. Whilst the courts recognised that the defendant's behaviour was unreasonable, it did also carry a social benefit, and therefore the courts issued a partial injunction, in order to balance the interests of the two parties.

The legal system also uses principles of law, such as transferred malice (R v Latimer), the defences, causation, the coincidence of Actus Reus and Mens Rea (Fagan v MPC, R v Thabo Meli), the institution of duty of care and omission to act (R v Pittwood for example), and also the principle of oblique intention.

Further to substantive law, the court also uses procedural justice, or formal justice.

Formal justice looks at the mechanism by which decisions are made, goods and services allocated and so on. The positivists will look to the process by which law is made, and if this has been complied with no matter the content of the rules, they are to be obeyed and applied.

Procedural justice requires a legal system to provide rules, principles and machinery for due application of the law to all persons without fear or favour. It is formal in that it should be applied equally to all and so upholds the rule of law and it is procedural in that rules or procedures have to be followed to prove culpability.

The rule of law is one of the cornerstones of democratic state and in those with written constitutions (which we do not have) it is guaranteed. Hence government excesses could be found not only illegal but unconstitutional as the constitution is treated as a higher form of law by which the actions of the government and other are measured.

The rule states that "no man is above the law" and the government itself is subject to law and is required to conduct its activities in accordance with established principles of law rather than arbitrary or discretionary means. However, this does not coincide with the doctrine of sovereignty of Parliament.

The other rule states there should be an absence of arbitrary power. If an MP, local authority or public body is found to have exceeded their power the court may declare such an action ultra vires. This ruling has been used in *Congreve v Home Office*. The government announced a substantial rise in the cost of the TV license, and several bought their licenses before the changes came into effect. The Home Secretary then tried to used his discretionary powers to cancel the new licenses but the court of appeal said to do so would be unlawful. Parliament has given them that power in

order that he could prevent the improper use of broadcasting equipment, not so he could penalise those who were acting lawfully.

There are also two theories of natural justice that are applied in the English Legal System, those being no man should be a judge in his own cause, and both sides have a right to be heard.

Natural justice requires that judges, magistrates and juries must not be biased or appear to be biased. This principle can be seen in *Re Pinochet* where the House of Lords initially rules that Pinochet's position as former head of state did not confer immunity from extradition proceedings based on allegations by a third country of torture and other violations of human rights. It later came to light that one of the judges had been a director of the charity Amnesty International that had been involved in the proceedings and he had not declared his potential interest. The Law Lords said "it is a fundamental principle that a man must not be a judge in his own cause".

The principle of both sides having the right to be heard states that both sides should have a reasonable chance of putting its case and testing the other sides of the evidence. In *R v Thames Magistrates Court ex parte Polemis* the defendant was served with a summons for the same day, meaning he could not prepare a defence. The appeal judge stated that the conviction was unfair, because the right to a fair trial includes adequate time to take legal advice and to prepare a defence, which had not been given in this case.

The appeals system itself is an example of formal justice, because of the way it is structured. If a person is found guilty (or liable) in the courts, there is a structured route of appeals, which include their own courts (the court of appeal, the house of lords). However, the right to appeal is not automatic, as the defendant must prove that there was a procedural inaccuracy or if new evidence has arisen. "Miscarriages of justice" in criminal cases are seen in the media if they occur, and only recently the case of *R v Downing* was a prime example of a miscarriage of justice where the defendant had spent 28 years in jail, primarily because he would not show remorse for the crime he allegedly committed. He was convicted of the murder of a typist who was murdered in Bakewell, he was only 17 and he had been arrested after discovering her body in a cemetery where he worked as a gravedigger. When Downing was convicted he had a mental age of roughly 11. His conviction was declared unsafe, yet it took 28 years to reach the consideration even though there were considerable doubts in the original trial.

As a result of the Police and Criminal evidence act, there should be fewer convictions being declared unsafe, but even still, the fact that convictions are still declared unsafe still justify the need for an appeal process where a person may be denied their liberty.

In the criminal justice system some of the fundamentals of the system are the presumption of innocence, the use of juries in trial in the Crown Court, the prosecution having to prove the defendant guilty beyond reasonable doubt, the right of a defendant to remain silent during questioning and trial, and the direction of the judge in order to ensure the rules of evidence are followed. Yet there are various famous cases where miscarriages of justice have occurred, such as the numbers cases,

R v Ward, Stephen Kiszko where, in all of these cases, the police fabricated evidence and false confessions were obtained as a result of duress. It has been suggested that PACE has fought those miscarriages, yet the Prevention of Terrorism Act excludes many of the safeguards for suspects held under the Act.

Michael Mansfield QC suggests that out accusatorial system should be replaced up to the point of trial with an inquisitorial system to ensure the investigation by the police was properly conducted and supervised by a Judge, as in France. Above all, the fundamental principle of the presumption of innocence and the right to silence should operate to ensure a fair trial. Failings will always occur, but an independent review body should rectify these.

This independent review body is the Criminal Cases Review Commission. The CCRC is the independent public body set up to investigate possible miscarriages of justice in England, Wales and Northern Ireland. The Commission assesses whether convictions or sentences should be referred to a court of appeal. This body ensures that we maintain the aim of achieving justice by assessing any case brought to them to see whether a possible miscarriage of justice has occurred.

In conclusion, the relationship between law and justice is not a perfect one, but it is much better than those in other countries. The legal system in England does still contain flaws, such as miscarriages of justice or perverse verdicts (*R v Owen*) but there are systems in place in order to ensure that any miscarriage of justice that does happen is rectified as soon as is possible, and also there are systems in order to prevent them happening in the first place.