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A Kelsenian Critique of Justice as a Subjective Judgment and an Irrational Ideal

Abstract

Scholars have consistently built the ideas of justice on two major camps: the utilitarian and deontological for decades now. The utilitarian camp is populated by the view that an ideal conception of justice should be based on a set of principles, rules and institutions that are instrumental to its achievement. In the modern era, utility was based on the maximization of happiness. The deontological position extols the view that justice is a matter of strict duties that cannot be overruled, even by realizing any desirable goal. The oldest and probably the most widely endorsed understanding of justice focuses on the characteristic of relations among persons. To ensure a balanced reciprocity, techniques were harnessed, such as legal justice. Hans Kelsen extols legal justice, on the ground that it is objective, and berates other accounts of justice which he termed subjective judgments. Previous theorists anchored their findings on the flaws of legal justice. Little attention was given to the nature of justice as an objective virtue just as this work adopts a qualitative research design employing expository and analytical methods to interrogate Kelsen's conceptual underpinnings of justice. It further examined the degree of validity of the various arguments regarding the possibilities of justice as a subjective judgment and irrational ideal. The study discovered that justice is a blueprint, although people's conceptions about what is just vary and even whether it is served in one's everyday life, it is not an irrational ideal.

Keywords: Legal-Justice, Subjectivity, Objectivity, Virtue, Morality, Utilitarianism, Deontologism

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Introduction

The search for justice is a continuous one which dates back to the pre-socratic era. The word 'Justice' is derived from the old French 'jostise' or Latin 'justitia' meaning uprightness or equity. The co-habituation of humans in the society demands commensurable treatment and happiness. Without these, some humans will suffer misery in the hand of others, this is because justice is necessary for mutual co-existence.

Scholars have made several efforts to state what justice connotes with some describing it based on the goal it is to realize. Some describe it in its strict form devoid of any goal (Johnston, 2011). The oldest and probably the most widely endorsed understanding of justice focus on the

characteristic of relations among persons. This understanding is rooted in the concept of reciprocity (Johnston, 2011). Societies, as collections of individuals seeking their own self-interest, require justice to ensure that no one, in the process of satisfying oneself, exposes the other to harm without adequate justification. Evaluations and judgments about justice and fairness can be contrasted with prudential evaluations and judgments. The decision to execute or accept a line of action because it will lead one to an expected destination is backed by prudential judgment and based on objectives that are contingent, whereas evaluations and judgments about fairness are based on standards that human beings construe quite different from the way in which they think about contingent objectives. It is therefore, a general belief that the fundamental standards underpinning judgments about fairness should be shared by everyone (Johnston, 2011). To ensure a balanced reciprocity, the society harnessed techniques which are moral and legal measures.

Moral justice is derived from the expected and welcome behavior of group of members in the community so that by abiding by these behaviors, everyone will be at peace with each other and justice is maintained. The position that moral justice is not specific and objective at all time and in all situations, and cannot serve justice consistently, created an opportunity for other forms of justice. Legal justice is simply and squarely the conception that the established rules made by humans grant justice for all. Hans Kelsen, a twentieth century philosopher stipulates that justice can never be realized because people's conception of justice vary. It is only in law that lasting peace and equality can be consistently maintained. The reciprocity between citizens as guaranteed by law should replace justice which is an irrational ideal that is almost impossible to attain (Rosenbiom, 2025). This work therefore examines Kelsen's position on justice. Its specific aims are to (1) discover whether justice is a subjective judgment (2) assess where legal justice lies, and (3) evaluate legal justice by situating it in human society. This work adopts a qualitative research design. It employs expository and analytical methods to expose conceptual underpinnings of justice, and examine the degree of validity of the various arguments regarding the possibilities of justice as a subjective judgment and irrational ideal.

Justice and Equality

In evaluating the principle of equality which past theories hold in high esteem, Kelsen rejects the position that all men are equal by nature. The principle of equality directed at the authority creating the law, which implies equality in the law, should not be confused with the principle of equality before the law, which is directed at the authorities applying the law to concrete cases. The latter depicts that the law applying organs shall not, in deciding a case, use a procedure not provided for in the law (Kelsen, 2022). It is the principle of legality, of lawfulness, which is immanent in every legal order. It is presented sometimes as justice under the law, but, in truth, it has nothing to do with justice at all. Aristotle's conception of justice as

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equality is nothing but the logical law of contradiction with reference to the application of a general positive law to particular cases. Karl Marx's conception of equality, which demands equal share of products among workers, is an unequal right. It does not consider differences in capacity for work. Natural aptitude should be considered in determining what equality entails. The definition of justice as giving to everyone his due is ambiguous. The question of what is everyone's due will have to be determined by a social-positive order (Kelsen, 2022). Kant's golden rule which states that, do unto others as you would have them do unto you, is portrayed as a perfect definition of justice, but it is based on a false illusion. The golden rule, as maintained by Kelsen, did not set up how one should behave, and what should be the penalty of one who violates this rule. It also failed to stipulate the actions to be tolerated, performed or prohibited. By being silent in wide range of actions, the golden rule indirectly tolerates them. An instance is lying as those who lie may not care that others lie to them. Indirectly, all persons should lie to one another since it is tolerable. This behavior may lead to the abolition of law and morality if it assumes the literal meaning (Kelsen, 2022). The golden rule, for Kelsen, must establish an objective criterion to maintain a just state. The answer to how one should behave and the penalty for violating the rule is given by an established social other; which in other words depicts one to 'behave in conformity with the general norm of the social order.'

Justice and Law

A just social order is impossible if individuals have variant desires, and some are considered at the expense of others. Justice is defined differently based on different ethical conviction. The answers to what justice imply, by people of different ethical background, are relative judgments of value. With regards to this, Kelsen postulates that:

> Every system of morals and its central idea of justice is a social phenomenon, the product of a society and is subjective and relative in nature... that many people agree in their judgment is not a proof that these judgments are correct in its objective sense. The criterion of justice, like the criterion of truth, is not dependent on the regular judgment about reality or judgment of value (Kelsen, 1971 p. 8).

From the above quotation, Kelsen maintains that what is regarded as just may not be the correct or best decision. An instance is the blood revenge or retaliation formally accepted as the best way to ensure justice. Such practice is being changed in modern times. Despite the variant conceptions of justice, agreement on value judgment is possible, and positive system of value is generated from mutual influences of individual exercise upon one another within a particular group. This does not in any way connote that the dictates of law must make reference to morality because it is part of morals (Kelsen, 2002).

The longing for justice is the longing for happiness, and this makes justice a social virtue which is guaranteed by a social order. Justice, from this perspective, is not an

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individual happiness because each person has what makes him happy, which may not be the same with other individuals. Since there exists conflict of interests among individuals, it is impossible to prove that only the one and not the other solution is just. If social peace is to be attained, a compromise solution as the ultimate end and just one will has to be reached. But the justice of peace is not an absolute justice, but a relative one (Kelsen, 2002). On this footing, Kelsen argues that absolute justice is an irrational ideal, and the claim by the natural law school that it can determine in objective way what is just is a lie. He postulates that from the point of view of science and a quest for truth, such a method is completely worthless. Those who consider the doctrine as useful, should make use of it as a useful lie (Kelsen, 2022).

The value judgment present in the science of law are two kinds, with one referring to the behavior of subjects considered as lawful or unlawful, and the one referring to the law itself or the activities of the legislators considered as just or unjust. The legislator who function in one's law-creating capacity is presumed to create just laws. If he applies the law, his behavior qualifies as lawful or unlawful just like the behavior of the subjects of the law (Kelsen, 2022). The statement that a legal order or a particular legal institution is just or unjust simply depicts that the institution in question corresponds or does not correspond to a norm whose validity is presupposed by the person making the statement. Justice is not synonymous with truth. It is primarily something that can be possibly attained, but not a necessary quality of a Legal order regulating the mutual relations of men. It is secondarily a man's virtue in so far as a man's action conforms to a social order that is termed just (Kelsen, 2022).

Juristic value judgment can be tested objectively by facts but the judgment of justice cannot be tested objectively. Kelsen maintains that a science of law has no room for them. Legal norm is the standard of value since its existence and content is determined objectively by verifiable facts (Toteff, 2025). The pure theory of law cannot answer whether positive law is just or unjust neither can it answer what constitutes justice. Justice and law, from this dimension, must be considered as two different concepts. If the idea of justice has any function at all, it is to be a model for making good law, and a criterion for distinguishing good from bad law (Kelsen, 2022). The concept of good as well as justice will lose their meaning if positive law is always just and if law is identified with justice (Kelsen, 1967). Also, if there is objectively recognizable justice, there will be no positive law, and hence no state and it will be irrelevant to coerce people to be happy. The legal order presents what is real and possible, and not the correct law. The legal order reaches a compromise to secure peace and possibly realize justice, and to guarantee peace, the positive social order authorizes certain individuals to use force under certain conditions (Kelsen, 2000). The positive law changes the concept of justice by withdrawing the problem of justice from the realm of subjective judgment of value and establishes it on a secure ground of a given social order. Justice through this

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measure attains legality (Kelsen, 2002). That a positive law is just will not be directed to its content rather to its application; it is just to apply it to all cases and not some. Only in the sense of legality can the concept of justice enter into the science of law. "It is an inveterate prejudice of the natural lawyer which, in total misapprehension of the special nature of positivism, repeatedly sounds the reproach of formalism against the scientific treatment of positive law (Kelsen, 1973 p. 31)." He argues that the question who is competent to decide whether a positive law is or is not in conformity with the objective law presents two answers: the legislator and the judge. Kelsen further opines that "justice is that social order under whose protection the search for truth can prosper (Kelsen, 1971 p. 24)."

Post-Kelsenian Conception of Justice

Kelsen's successors made several reactions with regards to Kelsen's paradigm shift from the previous conceptions of justice to his legal conception of the just or right action. Kelsen denied justice an objective status meaning the objectivity of justice could only be fathomable as legal justice and as that which was prescribed by the legal norm. In his *The Law in Quest of itself*, Lon Fuller (2012) criticizes Kelsen's idea of justice as an irrational ideal. He stipulates that the positivists stance on justice is traced to their insistence on a sharp distinction between what is - law - and what out to be - Morality. The natural law theorists deny a rigid separation of them. The positivists consult the rules of law and pay less attention to the fundamental rules of justice. For a lawyer preparing a case, he chooses a point of anchorage from the law, for his argument. A question remains whether he finds it in rules of law or in the purposes for which rules were established; will he argue the rights of his client's case or base his argument on the footing of elementary conceptions of justice. In his *Positivism and Fidelity to Law*, Fuller argues that it is in everyday life and in time of troubles that we need clarity about the obligation of fidelity to law. He further argues that "if all the positivists' school has to offer in such times is the observation that, however you may choose to define law, it is always something different from morals, its teachings are not of much use to us (2000 p. 76)."

In his *Concept of Law*, H.L.A Hart (2012) berates the opinion that morality is a subjective judgment. He stipulates that the development of law has been influenced by both conventional morality, ideas of particular social group, enlightened criticism by individuals which has been accepted. The rules of morality and justice, in this scenario, forms part of legal rules and remain legally objective. He argues that it does not follow that legal validity must be based on morality or justice. There are certain rules of conduct which any social organization must contain if it is to be viable. These rules, in Harts conceptual schemes, constitute a common element in the law and conventional morality of all societies. These rules are universally recognized principles of conduct which are based in elementary truths concerning human beings, their natural environment and aims. These, for Hart, are the minimum content of natural law (Hart, 2012). These minimum content are derived

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from the fact that some humans are vulnerable to others; hence the need for approximate equality, limited altruism and understanding. These minimum content of natural law remains objective and must form part of legal rules.

In his *A Theory of Justice*, John Rawls (2009) denies the position that justice is an irrational ideal. He portrays justice as the first virtue of social institutions. A society is well ordered when it is effectively regulated by a public conception of justice. Justice, in this light, connotes the practicable aspect of spelt out rules. That a rule of an institution exists must presuppose the participation of everyone concerned with the rules. Rawls argues that the inevitable vagueness of laws in general and the wide scope allowed for their interpretation encourages arbitrariness in reaching decisions which only an allegiance to justice can allay (Rawls, 2009).

In his *Taking Rights Seriously*, Ronald Dworkin includes both legal rules and legal principles (rules of morality) as part of law. He criticizes the position that law should be independent of morality. A general theory of legislation must be normative and conceptual (Dworkin, 2014). While the normative part provides a theory of legislation, adjudication and compliance, the conceptual part considers other subjects that do not fall within the normative part. In his *Law's Empire*, Dworkin maintains that people stand to gain or lose more by one judge's nod than whatever they could gain in their lives. A moral injury is caused when an innocent person is convicted of a crime while the guilty is acquitted, and when this verdict of the judge becomes the law. Dworkin draws a distinction between two senses of the law: the physical document with words printed on it and the very words of congressmen or members of the parliament when they voted to enact the document (Dworkin, 2024). Judges need to construct the real statute from the text in the statute books. Both legal rules and moral rules, from this perspective, are objective.

In his Natural Law and Natural Rights, John Finnis (2011) rejects the conception that moral rules are subjective. He argues that Kelsen misconceived the natural law theory. Finnis argues that natural law theorists do not accept only moral validity and reject whatever they consider as unjust. The principles of natural law, in Finnis' conceptual schemes, entail two significant facts:

> There is a set of basic principles which indicate the basic forms of human flourishing as good to be pursued and realized; the good is in one way or the other used by everyone who considers what to do, however unsound his conclusions, secondly, between ways of acting, there are morally right or morally wrong acts; which entails that there is a set of basic methodological requirement of practical reasonableness with which one can distinguish sound from unsound practical thinking (Finnis 2011 p. 23).

Natural law principles justify the exercise of authority in community ensuring that authority exercise is in line with the label of the rule of law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of

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promoting a common good. The claim of the law having supreme authority, in Finnis' conceptual schemes, would have no plausibility unless the subjects have reasons to think that compliance with the law and its officials would not expose them to assaults and depredations of their enemies (Finnis, 2011). The authority of law depends on the securing of justice. Justice becomes an objective judgment of actions through which law is accessed.

In his *Law as a Leap of Faith*, John Gardner (2012) berates the thesis that moral rules are subjective judgments. He stipulates that just as the natural law theorist may portray God as goodness personified, a Kelsenian resolves that law is rightness institutionalized. He argues that even the discretion which officials of law enjoy opens the way for selective faith in law, and this depicts introducing subjectivism even in legal rules. Just as the label 'legal positivism' denotes legal thought in relation to empirical fact, legal positivism when used in philosophical debates, generates a different meaning because it seeks the truth of propositions rather than what is stated. Gardner argues that legal positivism is not a whole theory of law's nature rather, it is a thesis about legal validity. In dealing with the full gamut of human decision, both sourced-based and merit-based norms are equally essential, at least, sometimes. Law's inner morality adds extra-moral objectives and imperatives for legal norms to live up to, like avoiding the infliction of suffering, not deceiving its addresses (Gardner, 2012); not purposely manipulating the law to one's advantage, and so on.

Evaluation

Kelsen effort's at presenting an account of justice that is legally recognized is commendable. His rationale towards legal justice is to ensure the recognition of what is generally accepted as right or wrong, just or unjust and good or bad. But subjecting justice to subjective judgment and an irrational ideal is way out of line. Even the search for an objective and recognized rules of justice which gave rise to legal rule is the yearn for justice. Kelsen's affirmation that justice and law are not one and the same, and that law and truth are different concepts, is only another way of affirming that legal justice may or may not grant justice even though it is a recognized means of granting justice. Justice is a rational ideal sought especially when things go wrong.

Kelsen presents the legal norm as an alternative of justice on the footing that the ideal is unattainable. He admits that legal justice, occasionally, may not serve the truth but may pass the validity test as long as it receives legal backing. The positive law remains a means to an end and if the means cannot guarantee the end, it remains a lacuna on the part of the means. One does not scrape the end because the means cannot reach its destination.

Furthermore, Kelsen appears to use the terms 'justice' and 'the just' interchangeably in the manner that create a grave misinterpretation of both of them. The just may conjoin with justice as an ideal virtue, and may not, especially if what is considered just is not just, in the real sense of the word. The just may not be what people think it is, and justice is not the definition given

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by diverse people. It is that ideal everyone looks up to. Kelsen's interchangeable usage of them, made him portray justice as a subjective value and an irrational ideal. He derived this from the premise that there exist conflicts of interests which make it impossible to prove that one thing, and not the other, is just by appeal to rational cognition (Kelsen 2006). This conception of justice is faulty. That different people have different desires do not entail that humans will encounter the difficulty of knowing what desire is just or not. A man who wants to be rich and desires to use a human being to acquire wealth has an unjust desire. We do not need a social order to express a disdain for such actions neither is it impossible to prove that it is unjust to use someone else's life to acquire wealth.

Kelsen's postulates that the concept of the good and justice will lose their meaning if positive law is always just. This position appears right when taken at face level but a deeper scrutiny of that statement reveals that the concept of the good and justice will realize more value if the law established by humans, for the society's common good, is always just. The law is not synonymous with the behaviour of criminals it is to judge, but remains an order on which their behaviour are regulated. If the law is unjust, then it implies that there is no template for judging crimes.

Dworkin observes that one legal mistake could ruin lives of citizens. Legal justice relies on legislators and judges to make legal decisions. Judges exercise discretion in courts which form part of the law. This discretion, which is the subjective judgment of the judge, enters the law and becomes recognized as an objective judgment. Justice considers these legal activities and raises concern about how they actually defend the society's interest. It is not an irrational ideal

Edwards Phil (2025) observes that Kelsen's attempt to present a uniquely scientific theory capable of guaranteeing justice encounters difficulty especially in the face of international law where, Kelsen admits, only a primitive legal order is possible among nation states. There are no objective law binding states rather, individual states employ reprisals or war to get justice.

Kelsen's conception that justice is a social order under which the search for truth can prosper (Kelsen 2022), is superfluous. Reducing justice to a social order is outrageous. Even if a particular social order is just, one cannot give it the status of justice. There may be future lapses in the social order since humans sometimes err. Justice remains an ideal which is sought regardless of whether it is served in one's everyday life.

Conclusion

Justice remains a blueprint to assess actions, even though our conceptions about what is just may vary partly because of our desires, customs and locations, justice remains unchanging. This explains why what was formally practiced could be changed. It is not because law was enacted to its effect but because humans deliberated on such actions and expressed their will, through law's creation, to its effect. The yearning for justice is the yearning for peace, security

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and order. That people have a misconception of it does not reduce it to an irrational ideal.

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