



Hertie School of Governance - working papers, No. 21, April 2008

**Current Issues in the Politics of Justice:
Economic, Political, and Social**

Claus Offe (Hertie School of Governance)

working papers

Hertie School of Governance – working papers, No. 21, April 2008

**Current Issues in the Politics of Justice:
Economic, Political, and Social**

Claus Offe (Hertie School of Governance)

About the HSoG Working Paper Series

The Working Paper Series of the Hertie School of Governance is intended to provide visibility, internally as well as externally, to the current academic work of core faculty, other teaching staff, and invited visitors to the School. High-quality student papers will also be published in the Series, together with a foreword by the respective instructor or supervisor.

Authors are exclusively responsible for the content of their papers and the views expressed therein. They retain the copyright for their work. Discussion and comments are invited. Working Papers will be made electronically available through the Hertie School of Governance homepage. Contents will be deleted from the homepage when papers are eventually published; once this happens, only name(s) of author(s), title, and place of publication will remain on the list. If the material is being published in a language other than German or English, both the original text and the reference to the publication will be kept on the list.

Claus Offe

Current issues in the politics of justice: Economic, political, and social

*Keynote address, Opening Session, Congress of the International Society for Justice Research,
Humboldt University, Berlin, August 3, 2006*

Questions of justice are typically addressed by two kinds of people: (a) practical philosophers who try derive standards of justice and varieties of their application by compelling deductive reasoning, and (b) empirical social scientists and social psychologists who try to find out, often by the methods of survey research or experimental research designs, which kind of people consider which conditions, decisions, and outcomes as just or unjust and how they respond to justice-related issues and conflicts.

Belonging myself to neither of these two categories of academics, but being a political scientist interested in studying the production, distribution, uses, and control of political and other forms of power, I am all the more honored by the organizers' implied expectation that I might have something useful to say on the subject of your congress. In trying to do so, I will make extensive use of the privilege of a keynote speaker, which I consider to be the privilege of not having to come up with well-founded and systematically derived propositions that are either based upon compelling normative arguments or the analysis of data. Instead, I will suggest to you some questions, conceptual distinctions and speculations that will hopefully be of some use in framing the complexities of justice in a social scientific perspective. I will do so in ten loosely interrelated points.

(1) "Justice" is a ubiquitous qualifier that is being employed in all spheres of social life. The terms "just" and "unjust" occur everywhere in economic, social, and political contexts as a conceptual tool used to qualify desirable and undesirable features of social existence. For instance, young children have been shown to use standards of justice when questions and conflicts are at stake among siblings, between peers, and between parents and children. When my little brother claims to be entitled to monopolize the use of toys that supposedly belong to both of us, that is simply *unfair*; and intense and often passionate conflicts of interests, emotions and moral arguments will develop out of the myriad of situations of this sort. But it is not entirely clear, be it among philosophers or among five year olds, what the *subject* is that *predicates* such as "just" and "unjust" can be predicates *of*. We seem to lack an agreed-upon grammar of justice. What can the X stand for in sentences such as "X is just" or "unjust"?

For instance, can the *weather* be just or unjust? We would probably agree that that is not the case, unless, that is, we believe that someone (such as St. Peter) has *made* the weather. The same seems to apply to genetic defects or bodily handicaps of a person, which can be more damaging than the effects of most injustices but which there is normally no actor to *blame* for, unless, that is, some person's failure to prevent or compensate for the defect. More controversially, perhaps, the question might be asked whether *wages* or other market outcomes, or the social and economic order as a whole, can reasonably be predicated as being just or unjust. Similarly, the question may apply to "conditions" or "institutions". Pursuing this logic of elimination further, we would probably end up with and agree upon the conclusion that "just" and "unjust" are appropriate predicates exclusively of conditions that *can plausibly be thought of as the outcome of social action*. The way social actors act, and the intended outcomes of their action, are thus, or so I wish to suggest, the *only* phenomena that can validly be qualified by justice predicates.

(2) Another observation and tentative generalization is this: Suppose we were to count the frequencies by which actors refer to their own action - or others refer to their action - as *conforming* to norms of justice *vs.* as *violating* these norms, we would, I suppose, find, when analyzing such everyday discourses, that people much more often *criticize* the actions of others as unjust than expressly *approving* of them or even *praising* them as just. To be sure, members of German governments swear a solemn oath of office that they will "practice justice against everybody", but it is often not operationally clear what they mean by that (or what others understand them as meaning). Much more frequently occurs the complaint about the *violation* of standards of justice. We don't know what justice "is" or "requires". As with the case of negative coalitions *vs.* positive ones, it is much easier to agree on the *violation* of the standards of justice, whatever they may be. It is normally only in defending themselves against charges of unjust action that actors come to state positive conceptions of justice. Similarly, if some individual or collective actor conforms to what justice is supposed to mandate, he or she is not *rewarded* or *commended* for such conformity. Observing the norms of justice is considered a mere *duty* the fulfillment of which is thought, as it were, not to be worth mentioning or worthy of any special praise. (A telling exception is the "alley of the just" and the "hall of the just" in Yad-Vashem, the Holocaust memorial site in Jerusalem.) As a general rule we observe that whenever we invoke standards of justice, we do so much more often in the accusatory mode (pointing at actors and action which fail to comply with what justice demands) than in a laudatory mode.

(3) As I said, the foreseeable and intended consequences of human action is what can be qualified as just or unjust. Note, however, that human action comes in two versions, acts of *commission* and acts of *omission*. This distinction is valid also concerning issues of just and unjust ac-

tion. That is to say, we can commit unjust acts by either (a) *doing* something that we shall *not* do (i. e., violating negative duties, as for instance enumerated in the Ten Commandments: Thou shalt *not* commit adultery, Thou shalt *not* kill, Thou shalt *not* steal, Thou shalt *not* bear false witness, Thou shalt *not* covet etc.) *and*, reciprocally, (b) by *failing* to do something that we are supposed to do if acting in conformity with standards of justice, e. g. the failure to help people in need, in which case we would violate some *positive* duty of just action). In spite of the apparent logical symmetry between negative and positive duties, there is in fact a vast asymmetry between the two. For if negative duties have been violated, it is almost always relatively easy to find out who has done so through acts of commission; the question can be settled, for instance, through methods of criminal justice. The same question is normally immensely more difficult to answer in case positive duties have been violated. For before we can assign an act of unjust omission to an actor, we need to know *which* actor exactly would have been justly required to fulfill a positive duty. Answers to this question are typically controversial, and the violation of justice norms tends thus to be anonymous as to its author. To be sure, if some victim of an accident needs emergency help, it is safe to assume that those who are *present* on the spot are the ones that are called upon to perform a positive duty. In the case of children, it is assumed to be upon the *parents* and other family members to take care of their need. But in most other cases, the question of "who is my brother's keeper?" is not so easy to answer. For to whomever the positive duty of justice is addressed, he can take recourse to either of (at least) two excuses. First, he can argue that the positive duty applies as much to *others* as it does to himself, with the effect (as "everyone else" can also use this excuse) that *nobody in particular* can be blamed for failing to obey to the requirements of justice if in fact *everybody* can be blamed; everybody is waiting for everyone else to perform the duty in question. The other excuse follows the rule of what lawyers call *ultra posse nemo obligetur* -- that is to say: it is *beyond my resources* and capabilities to fulfill the positive duty in question, or I would inflict *unacceptable damage* upon myself if I actually were to perform the duty. Taken together, these two excuses allow for virtually any level of indifference (Bauman) and negligence, i. e. the failure to fulfill positive duties.

Let me illustrate this asymmetry between negative duties and positive duties of justice and its relevance in the contemporary world with reference to two examples. First, the constitutional self-description of the Federal Republic of Germany is that of *Rechtsstaat* (i. e., a state governed by rule-of-law principles). The state stipulates the rights of private citizens and their freedom, and as a consequence each unjust violation of these rights (whether it originates from the state itself or from third parties) can in principle be detected and properly corrected by the methods of civil and criminal justice. The model is the enforcement of standards of justice through the sanctioning of wrongdoing, or unjust acts of commission. But the German state also describes itself

in normative terms (in articles 20 and 28 of the *Grundgesetz*) as a "social" state, i. e. a state that is committed to actively promoting social justice through the active provision and protection of the welfare of its citizens. It is much less certain and a matter of ongoing controversy in constitutional jurisprudence of what the state, as represented by the government and the legislature, *must do* in order to satisfy this positive duty of providing for citizens' welfare. As soon as justice requires action rather than restraint and inaction, its standards become fuzzy and intensely contested.

The other illustration pertains to global society. It has been estimated that in the course of the 20th century the number of deaths per year that resulted from military action (leaving aside here the issue of just *vs.* unjust wars) amounted to 1.1 million worldwide, with the peaks of course occurring during the two world wars. These are clearly acts of commission, be they justifiable or not. At the same time, however, it is estimated that in today's world the number of deaths per year that must be attributed to acts of *omission*, namely the failure to act upon easily preventable or inexpensively curable diseases, amount to no less than 14 million per year. (Pogge) Yet given the kind of excuses I have mentioned (pointing to others and invoking the *ultra posse* clause), acts of omission cannot be easily assigned to, let alone accepted by, particular actors as their unjust modes of action. It is my intuition (not more) that justice problems of the second kind have gained in relevance and urgency over justice problems of the first kind. *Failing* to act justly is the greater challenge for politics and social organization compared to the (certainly non-negligible) problems of unjust modes of positive action.

If that is right, the problem of justice translates into a problem of states and supranational organization. What states do (or at least *can* do, provided they are endowed with adequate "state capacity") is to tackle the problem of indifference and negligence in either of two ways. First, they can *collectivize* the fulfillment of positive duties, for instance through taxation and thus the extraction of the financial means that are needed in order to comply with positive duties. In this way, the temptations of negligence and indifference can be neutralized. Alternatively and cumulatively, they can assign the duty to take care of issues of positive justice to particular actors who are then charged with a positive duty, as art. 6 of the German constitution assigns to parents the duty to care for their children. Other laws assign the positive duty of caring for the health and safety of employees at work to employers. Still other laws, both national and supranational, stipulate environmental standards and standards of consumer protection that manufacturers must obey to through activities prescribed to them by law. But either of these mechanisms of enforcing positive duties are entirely contingent upon the actual policy-making capacity and enforcement capacity of state actors, or, to put it inversely, upon the power of social actors to *obstruct* or

interfere with the state's capacity to enforce the compliance with positive duties through either of these two methods.

(4) A particularly contested issue in the contemporary social-scientific debates on justice has to do with the *time* dimension of justice. These debates focus upon two issues. One of them is concerned with the *forward*-looking perspective. Here, the key question is what we, as members of the present generation, must do (or must refrain from doing) in order to do justice to the rights of future generations. At issue in these debates is the problem of conservation, sustainability, and intergenerational justice. The quintessential injustice here is seen to be rooted in attitudes and ensuing practices of shortsightedness, collective future-discounting or, even worse, deliberate acts of *apres moi la deluge* and the ensuing practice of "pulling the ladder up behind us". No doubt that many of the things we do or fail to do today will have (often predictable) long term temporal externalities upon the conditions and well-being of future generations, with the secular issues of man-induced climate change and the exhaustion of fossil sources of energy being only the most obvious ones. One of the problems with this debate, however, is that we lack a metric by which the taking and giving in inter-generational relations can be assessed. Furthermore, we might ask why, as the generation of our parents has failed to perform these alleged duties of forward-looking justice against *us*, the presently alive, how can the moral burden be legitimately be imposed upon us to be concerned (beyond the duties of parenthood, that is) about the well-being of future generations. And even if we accept that duty, how can we make sure that future generations will be equally concerned about *their* future generations? We simply do not know of any institutional method of representing the not-yet-born and their interests in the current process of policy making. How much restraint in resource utilization (or, for that matter, how much restraint concerning the financing of the state budget through debt) is equivalent to what coming generations will, after all, inherit from the present one in the form of the investments the latter have made in physical infrastructure and other civilizational achievements?

The other intensely debated issue of intertemporal justice is *backward*-looking. As today's world is full of new political regimes, mostly of a nature that is described (with varying degrees of justification) as "liberal democratic", the questions of *transitional* justice, or "retroactive justice" has gained a paramount role in contemporary justice debates, both in politics and in academic controversies. The residues of the old and defunct regime are part of the present condition of new democracies, be it in the form of personal *recollections* of suffering and wrongdoing, be it in the form of collective *memories*, or be it in the form of the findings of *historical research* and evidence produced in court trials. Yet it has been conclusively demonstrated (Elster) that the present past cannot be dealt with in ways that are unquestionably consistent with all of the normative

premises and standards of justice of the new regime, such as the rule-of-law principle of non-retroactivity ("*nullum crimen sine lege*"). Thus either we "draw a thick line" and perhaps even burn the files - in which case the new regime can be rightly accused of complicity with the perpetrators of the old by granting them *de facto* wholesale amnesty. Or, at the other extreme, the perpetrators of the old regime are punished according to the standards of justice of the new one, in which case the accused have some seemingly justified complaint that the new regime arbitrarily violates its own normative premises of rule of law and non-retroactivity, which it can also be accused of doing if it exceptionally and illegally resorts to forms of "political" and "administrative" justice, as opposed to "legal" justice. The result is a double bind: whatever you do, you can be blamed for acting unjustly.

(5) Let me come to address one (limited) relationship between *truth* and justice. My *alma mater*, the Free University of Berlin, uses a logo that links the three concepts of *Veritas*, *Justitia*, *Libertas*. Focusing on the link that supposedly exists between just the first two of these three concepts, it is clear that violating the standard of truth and truthfulness can be (and often is) a most elementary violation of justice. For instance, such violation is an offense against the ninth (according to one of the several modes of counting) Commandment, which reads: "Thou shalt not bear false witness against thy neighbor." Lies, false accusations, covering up relevant evidence, and selective and thus distorted use of the truth are standard injustices that can severely and utterly unjustly hurt the legitimate interests and integrity of an opponent. Thus *not to lie* is one of the most elementary negative duties. It corresponds to the equally elementary positive duty of *keeping contracts*, i. e. of *making* actively true what has been promised. Yet clearly not all standards of justice derive from the norm of truthfulness. Take, for instance, the justice norm of *non-discrimination*, which is much contested in a recent German legislation. It stipulates the negative duty of refraining from the use of "irrelevant" differences of a racist, sexist, ageist, tribal, nepotistic or other sort in allocating advantages or damages to other people. The corresponding positive duty is the justice norm of *solidarity*, i. e. the norm that stipulates the norm of sympathizing with, or taking an active interest in, the rights and well-being of other people, be they in some way "similar" to the agent or not.

(6) To come briefly to the three varieties of justice as announced in the title of my talk - economic, political, social - let me start with economic justice. Economic justice is the most elusive of all. It can refer to the negative duty of governments to refrain from interfering with property rights and from anything that hinders the economic system of capitalist market society from achieving what is called its "potential output", i. e., hitting upon rather than remaining below the Pareto line. Yet the actual achievement of this potential output, or growth maximization, may

well interfere with justice standards of distributional equity or environmental sustainability. A more activist interpretation of economic justice would be the positive duty of governments to provide for the full utilization of labor power (also known as "full employment"), both in quantitative and in qualitative terms. The obsession of proponents of economic growth with efficiency and competitive advantage (as well as the control of corruption and the curbing of informal economic activities) tends to overlook the vast inefficiencies of a society that renders more and more of its members literally economically superfluous. This second standard of economic justice, however, can well violate through its paternalist and authoritarian practice of "activation" a third kind of justice claims that pertain to people's autonomy and self-determination. These three conceptions of economic justice - call them market liberal, social democratic, and left-libertarian - are evidently so divergent that a reasonably consistent standard of economic justice seems to be extremely hard to come by. As long as this is the case and the very term of economic justice is essentially contested, a second order requirement of justice might be that proponents of all three of them (and possibly further ones) enjoy the effective opportunity to make their voices and normative arguments heard. At issue in such a debate is the question: What *mix* of growth, full employment, and economic autonomy is called for as a standard of "economic justice" in a given situation? At this meta level, economic justice would consist in the provision of a consequential and open-ended deliberation on the operational meaning of "economic justice" and its requirements. But such deliberation seems to be precluded in an economic order of "market fundamentalism" that "imprisons" politics (as Charles E. Lindblom has argued) and effectively silences both genuine social democratic and left-libertarian inputs to the debate.

(7) *Political* justice is a similarly ambiguous concept, although there is no conceivably valid argument around any more that could possibly put into doubt such elementary 18. century insights that (a) everyone who is supposed to obey the law must have an equal role in *making* the law (i. e., the *democratic* component of political justice) and (b) the making of laws must be *constrained* by procedural and substantive principles that limit the reach of popular sovereignty (the *liberal* component of political justice). Yet given these two largely uncontested parameters, the issue remains whether the state's capacity to impact upon economic and social conditions, its *governing capacity*, must be further constrained according to the second or expanded according to the first of these two fundamentals of political justice. Again, this question is today not being answered by controversial public deliberation, but its answer is determined by the impact of fiscal crises and predominant concerns with international competitiveness. If positive duties are part of any notion of justice, and if, as I have suggested before, such positive duties can only be effectuated through state action, any decline of governing capacity as advocated by market liberals will debilitate the state as the only conceivable effective guarantor of the collective perfor-

mance of positive duties. Demolishing state capacity in accordance with market-liberal precepts is to unjustly favor those who can afford to live, as it were, on negative duties of justice alone, as they do not depend upon anyone performing positive duties.

(8) Last, the issues of *social justice*: justice issues of distribution of income and security. Again, there are three versions (cf. David Miller): (a) *rights* based universalist (e. g., services of public school system, but also the currently widely discussed basic income and basic capital schemes, cf. Ackerman and Alstott); (b) *desert* based (most pension systems including NIT schemes) and (c) *need* based (social assistance and welfare, private charity). Given these three logics of social protection, the basic policy question is this: Whose and which kinds of needs must be processed through which of these three logics of social justice? There are two conflicting observable trends of policy change: (a) from need-based (e.g., AFDC) to desert based kinds of provision ("activation", labor force mobilization) and (b) from need *and* desert based to patterns of "social citizenship". (Note the recent amazing proposal by (former) anti-welfare state ultras like Charles Murray, writing for the American Enterprise Institute.)

(9) Any answer to issues of social justice will have *costs* and ensuing incentive effects that need to be factored in in terms of sustainability of social justice policies. Any pursuit of justice is "costly" in its consequences, and hinting to these expenses will typically undermine the commitment to justice of those who must bear the costs. A point in case is the consequentialist obsession with "welfare dependency", as allegedly caused by social assistance programs, or competitive disadvantage caused by increases in the non-wage costs of labor, disincentives caused by social security arrangements for individuals' propensities for labor market participation and saving. These well-known repercussions raise the question of "How much justice can we afford?" if we want justice to be a politically *sustainable* practice. Answering this question may involve assigning priority to fighting *some* kind of injustice (e. g. the unequal access of people to basic health and education services) and neglecting or compromising, at least for the time being and in view of unbearably costly consequences, prevailing political injustices (such as the denial of freedom of opinion and freedom of association). Yet how can we justify focusing on one set of ("affordable") justice issues while designating others as "unaffordable" (at least for the time being). (Take the example of Cuba with its unique accomplishments in the areas of health, education and environmental protection and its otherwise deplorable human rights record.) Such hierarchization of specific justice issues along the axis of economic and political affordability may open itself to the objection of lacking justification in terms of justice. Note that the costs involved in the practice of justice can be both of an strictly economic nature (the "equity vs. effi-

ciency" trade-off, cf. Okun) and of a political nature (ultimately affecting the stability of the political order if people start to "take the law into their own hands", cf. Michael Kohlhaas).

(10) "Bounded justice" (cf. Volker Schmidt): All solutions to problems of social, political and economic justice are *impure* solutions, and all pure solutions are likely to backfire to the effect of making them unsustainable or/and intensely contested. Just as in the case of rationality where it can be shown that it becomes irrational to push rationality beyond a certain threshold (Herbert Simon and the notion of "bounded rationality"), so it is also the case with justice that must be "bounded" in order to be sustainable. Any particular practice of justice through actors' observance of negative and positive duties is bound to clash not only with adverse consequences (of its economic and political costliness), but also with conflicting notions of justice. Hence a maxim that suggests itself due to these considerations is something like this: "Use justice arguments prudently and sparingly!" Any demand that "full" justice be done according to some notion of justice provokes objections from proponents of other notions of justice. The controversy over unisex pensions and insurance rates is a case in point. Gendered rates differentiation appears fully justified from the point of view of desert and equivalence (given the female patterns of health and life expectancy), while it appears sexist and discriminatory from another point of view. Again, inconsistent, muddled, compromised, and impure solutions may be the only way out of such dilemmas, a condition which suggests that, like in the case of "bounded" rationality, the pursuit of justice must not be maximized but pragmatically optimized. If "full" justice is not achieved, that is not an anomaly, but something that is to be expected. Perhaps it is the ultimate accomplishment of justice to achieve the realization of conditions which allow all sides concerned to relate to the remaining deficiencies in an attitude of "So be it!"

HSoG Publishing

Schlossplatz 1
10178 Berlin · Germany

Tel. 030 - 21 23 12 -100

Fax 030 - 21 23 12 -999

publishing@hertie-school.org