# **Justice and English Law**

In assessing whether the English legal system assures justice much will depend on the definition of justice used. It may be useful to distinguish between ***substantive*** and ***operational*** justice in order to address this question.

* Substantive justice is achieved when the **outcome** is a just one.
* Operational Justice concerns itself with ensuring that the **process** by which a decision is reached is fair, and applied impartially.

## Substantive justice and the distribution of wealth

Assessing whether the law provides substantive justice depends in turn on the view one takes of what a just society actually is. Certainly, the courts do not advocate the redistribution of wealth in a way that would provide justice, as Rawls would understand it.

However, although private property is protected in the English legal system, there is compulsory redistribution of wealth through *tax* law. Those earning high salaries have to pay more to the state that those earning lower salaries or earning no money at all. Nozick would argue that this is unjust.

Again, on a natural law view of justice, it is arguable that the laws allowing abortion, for example, are unjust because they violate the divinely ordained law of nature. Indeed, it is possible to argue that some questions of substantive justice are essentially political matters. These are dealt with by Parliament, which is the proper forum for deciding what the most just form of society is. As it is the sovereign power of the state, it has the power to shape the law to meet that end.

**Substantive justice or fairness in individual cases**

It is occasionally claimed that the law failed to achieve a just outcome in a particular case. This is also question of substantive justice. To what extent are the courts able to *impose* a fair solution to the conflicting claims of two parties to a trial? Has a fair decision been reached in a particular instance?

There are numerous examples of miscarriages of justice, discussed below, which show that at times the courts have not delivered substantive justice or a fair outcome for the individuals concerned. Arguably, it is inevitable that any system of justice administered by fallible human beings will at times fail to deliver justice in particular circumstances. However, it is also possible to identify instances where the law has developed mechanisms in order to attempt to deliver fair decisions in particular circumstances.

* **Equity**

The development of equity as a distinct form of law from the 13th century aimed to deliver a substantive justice. The law of equity was developed and administered by the Court of Chancery up until the 19th Century. It allowed the Court of Chancery to deliver fair outcomes in cases where the common law had become too rigid and inflexible to deliver substantive justice.

Equity developed principles to fill the gaps in the common law - it has been called a ‘gloss on the common law’ - which are very important for trust law and mortgages, and gave us the remedy of the *injunction*. Since the 19th century, equity is no longer administered in a separate court, but can be applied in *any* civil court.

**Judicial precedent and substantive justice**

The mechanism of judicial precedent provides some scope for the law to be developed, in order to do justice in particular circumstances. As you are aware, the higher courts have the ability to overrule past decisions and thus to modify the law to meet the demands of fairness or substantive justice in the case before them. Fill in the details of the cases below, and decide whether the courts achieved a just outcome.

* ***R v R* (1991)**
* ***Donoghue v Stevenson* (1932)**
* ***Merrit v Merrit* (1971)**
* The development of the law on provocation in the line of cases from ***Bedder v DPP*** to ***Camplin*** and latterly ***Smith***, where certain characteristics of the defendant can be given to the reasonable person when assessing their reaction.
* Also the line of cases from ***R v Duffy*** which said the loss of control must be sudden and temporary to the case of ***Ahluwalia* (1992)** and ***Thornton* (1996)** which allowed for the ‘slow burn’ reaction, characteristic of battered women’s syndrome. Further proposals have recently been made by the Law Commission, which warrant careful consideration!
* **Doctrine of proportionality**

This has been imported from European law, via the development of the European Union and is also used in the jurisprudence of the European Court of Human Rights in interpreting the European Convention on Human Rights. (You should be aware of the importance of this document since its incorporation into UK law via the Human Rights Act 1998).

The concept is used to ensure that individual rights under the Convention are only lawfully interfered with, limited or infringed when it is *necessary* to do so, and only to an *extent* that is necessary to meet the aims of the restriction. It is summed up in the phrase ‘*don’t use a sledgehammer to crack a nut*’.

Its operation can be seen in cases such as ***Dudgeon v UK* (1981)**, where the Northern Irish law criminalising homosexual acts was found to be in violation of Article 8 (the right to privacy). This restriction of the right to privacy was considered to be *disproportionately* severe, when balanced against the need to protect morality generally, as the law was rarely enforced, and there was no evidence that moral standards had been compromised as a result.

Of course, the difficulty in trying to deliver substantive justice or a fair result in a particular case depends upon on how one interprets and applies the concept of justice. Recent cases on euthanasia illustrate this point. In ***R v Cox* (1992)**, Dr Cox was prosecuted for the mercy killing of an elderly patient who repeatedly asked to die. In ***Pretty v DPP* (2002)**, the House of Lords refused to guarantee that Diane Pretty’s husband would not be prosecuted under the Suicide Act 1961 for assisting her to commit suicide. Whether justice was done in these cases depends in what sense the term is used. Both cases may have been conducted according to procedure, and therefore just, in that the parties were given the opportunity to put their case and the decision was probably made with due care and impartiality.

However, whether substantive justice was done or a fair outcome achieved depends upon the view one takes of how the claims of one individual are to be balanced against the wider interests of society. Many argue that finding in favour of Ms Pretty might put pressure on vulnerable elderly or sick to agree to euthanasia if they feel themselves to be a burden on relatives or the state.

## Operational justice and English law

Operational justice considers whether the laws established by Parliament and the common law are administered and applied in a just manner. This type of justice is related to Aristotle’s notion of corrective justice and Hart’s idea of treating like cases in a like manner. English law will be operationally just if it is seen to treat like cases in a like manner, to allow anyone with a legitimate grievance to come before the court and have their case heard in a fair and impartial way. We will now examine the extent to which the English legal system is able to achieve operational justice.

## Does English law give operational justice?

Again, it will be useful if we examine this question by defining two types of operational justice:

1. **Formal Justice** - this means treating like cases alike.
2. **Procedural Justice** - this means following rules and procedures that try and ensure that a case is dealt with fairly.

A variety of mechanisms exist within the law which aim to ensure formal and procedural justice. We will examine each in turn, but it can be noted that some mechanisms overlap, providing both procedural *and* formal justice:

## Formal justice

It is a fundamental principle of English Law that all are equal before the courts and like cases should be treated alike. This principle is safeguarded in a number of ways:

1. **No-one is above the law**

Not even the government of the day is above the law. This is shown in the process of judicial review, which we will study further at Module 5, and has been visited under the topic Judicial Creativity. This allows the actions of government, usually undertaken by ministers, to be scrutinised before the High Court to ensure they are acting within the law.

For example, the *‘Fares Fair’* case was one of judicial review, in which Bromley Borough Council challenged the lawfulness of the Greater London Council’s decision to use taxpayers’ money to subsidise public transport. However, the government is in a better position than the average litigant when they do lose a case. Think back to the case of ***Burmah Oil Co Ltd v Lord Advocate***, where the Burmah Oil company succeeded in showing that the government were liable for the actions of the military in blowing up their oil refineries in order to prevent them from falling into the hands of the Japanese during World War II. In response, Parliament passed the **War Damages Act 1965** which had*retrospective* changing the law in such a way that the state was absolved of liability, and was not required to pay compensation in that or similar cases!

1. **Access to justice**

Any individual is entitled in theory to bring a case to court. An individual is able to represent themselves as a litigant in person in any court in the country, although most people seek legal representation in the form of a solicitor or a barrister.

However, the notion that the courts are truly open to all depends upon a system of fair legal funding. As Judge James Matthew is reported to have remarked in the 19th century ‘in England, justice is open to all, like the Ritz Hotel’. The courts can only really be genuinely accessible if all parties concerned are able to afford adequate representation.

There is a system of legal aid to provide funding for those who are unable to afford to pay for their own legal advice or representation. (You will need to look at your notes on Module 2 and look again at the recent changes to legal funding). You may remember that the provision for legal aid has been effectively reduced by the **Access to Justice Act 1999**. This restricts the types of cases for which legal aid will be available, and for cases such as personal injury claims and defamation it is been completely replaced by mechanisms such as ‘no win no fee’ arrangements.

1. **Use of lay people**

Arguably, the use of lay people in the legal process is a mechanism to safeguards the delivery of *formal justice*. The theory goes that, if we are judged by our peers, we are more likely to be treated fairly. The use of lay people in the form of magistrates and jurors is much more common in the criminal justice system, where the consequences of losing a case are usually much more serious than in the civil law, not least as an individual’s liberty is at stake. In theory, lay people bring their *common sense* to bear on the justice system and, as they are representative of society as a whole, it is a fair and democratic way to dispense justice.

The existence of jury equity is a practical expression of the influence of lay people in the justice system. Look up the facts of ***R v Ponting* (1985)**, ***R v Owen*** and ***R v Blythe***, all of which are good examples of the operation of jury equity, and where the jury chose to ignore the law and acquit the defendants in the *interest of fairness*.

However, the use of lay people in the judicial system is not without its problems. The fact that the majority of magistrates are between 45-65 and middle-class illustrates that they are not as representative as they need to be, if the aim of trial by one’s peers is to be achieved.

Also, it is far from clear whether they achieve the aim of treating like cases alike: as a survey by ***Liberty*** found, a defendant was twice as likely to be sent to prison for certain offences in Greater Manchester than in Merseyside. Furthermore, as deliberations in the jury-room must remain secret under the **Contempt of Court Act**, it is not always clear whether the jury made their decision for the right reasons, or whether they decided not on the merits of the case but on the colour of the defendant’s skin or even, in extreme cases, by contacting the spirit world. (See the case of ***R v Young*** and the ouija board).

1. **The concept of certainty**

In order to treat like cases alike it is important that it is certain what the law is on a particular topic. Certainty depends upon consistency. The rules regarding *judicial precedent* show that a high premium is placed on consistency and certainty.

However, there are occasions when the common law develops in a way that undermines certainty. For example, the **Practice Statement 1966** allows the House of Lords to overrule its own previous decisions when it appears right to do so, which can lead to uncertainty. Also, given the *declaratory theory of the common law* there are occasions, such as the case of ***R v R* (1991)** where an act which is lawful at the time it is performed becomes unlawful retrospectively.

1. **The rules of natural justice**

There are two rules of natural justice:

* no-one should be a judge in their own cause
* each side has a right to be heard

We shall examine the first of these, which aims to ensure formal justice by ensuring all cases are treated alike on their merits and are not treated differently simply because the judge has an interest in the case. Essentially this tries to ensure the impartiality of the judge.

An example of this is ***Re Pinochet* (1999)** where a majority judgment was held to be invalid because Lord Hoffman, sitting, had been a director of Amnesty International. Amnesty had provided arguments to the court in favour of allowing Pinochet to be put on trial for crimes against humanity.

You will remember from Module 2 that there are a number of safeguards that try and ensure the independence of the judiciary:

* ***Sirros v Moore*** shows that the Judiciary cannot be sued for negligence
* security of tenure
* payment from the consolidated fund

However, it is not always clear how far the English legal system provides a truly independent judiciary.

For example:

* Professor Griffiths would point to cases such as *Fares Fair*, ***Liveridge v Andersen* (1942)**, Lord Denning’s comments in the case of the appeal of the *Birmingham 6* to show that the social background of the members of the judiciary can lead them to be ‘more executive-minded than the executive’.
* The position of the Lord Chancellor in relation to the separation of powers is questionable: e.g. the Cash for Wigs scandal.

The second rule of natural justice tries to ensure procedural justice. This is a rule that both sides have the right to be heard in a legal dispute. It is manifest in a number of procedural rules, such as the right of a defendant to cross-examine prosecution witnesses or the right to bring witnesses to support the defence case.

As a general rule, the more serious the penalty the greater the opportunity given to the defendant to call witnesses etc to support their case. In such cases, the defendant is also allowed more time to prepare their case.

In ***R v Thames Magistrates Court ex parte Polemis* (1974)** a Greek sea captain was convicted for polluting a London dock. The conviction was quashed because, as the summons for the charge was delivered at 10:30 and the trial was heard at 4pm on the same day, the court held that natural justice could not have been served, as the Captain had not been given enough time to prepare his case, especially as he spoke very little English.

1. **Admissibility of evidence**

The rules relating to the admissibility of evidence are also designed to safeguard the interests of procedural justice. Under the rules in **PACE** **1984** the judge has the discretion to exclude evidence which has been unlawfully or improperly obtained. If evidence has been obtained in this manner it may be grounds for an acquittal.

In ***R v Miller* (1992)**, the defendant’s conviction for murder was quashed when it emerged the police had used *overbearing and oppressive interview techniques* which lead to a confession which was later retracted. The defendant had a mental age of 11 and had denied being at the scene of the crime 300 times before finally confessing that he might have been there at but could not remember.

However, the courts equally have the discretion to admit evidence that had been obtained unfairly, and sometimes *do* allow such evidence to support a conviction.

For example, in the case of ***Jeffrey v Black* (1978)**, a student had been arrested for stealing a sandwich, and officers searched his flat unlawfully and found drugs. The High Court ruled that this evidence should be admitted.

1. **Appeals**

The existence of the appeal courts attempts to ensure that miscarriages of operational justice can be rectified. The **Criminal Appeals Act 1995** enables the Court of Appeal to allow an appeal if the conviction is seen as *unsafe*. This is *not* quite the same thing as saying that the defendant is innocent. There have a number of high profile miscarriages of justice in recent years, among them the cases of the Birmingham 6 and Stephen Downing. Obviously, this is evidence to the fact that the legal system does not always deliver justice. However, it has been pointed out that many of the recent miscarriages of justice originally took place *before* the reforms to policing, introduced by PACE in 1984.

**Substantive**

* Distribution of wealth
* Equity
* Judicial precedent
* Proportionality
* Provocation

**Procedural**

* No one is above the law
* Access to justice
* Lay people
* Certainty
* Natural justice
* Admissibility of evidence
* Appeals

**Discuss the meaning of justice. Critically analyse the extent to which the law is successful in achieving justice, and discuss the difficulties which it faces in seeking to do so. (30 marks + 5 marks for AO3)**

(A) Discussion of the different possible meanings ‘of justice,’ for example, justice in terms of basic fairness, equality of treatment, distinction between different aspects of justice, for example, distributive/corrective, substantive/procedural, or formal/concrete justice etc. For a sound answer, there should be some treatment of the important philosophical theories of justice eg utilitarianism, Rawls, etc. Use of case law/examples.

(B) Analysis of the extent to which law does or does not, achieve justice in the context of the discussion in (A)

Analysis of relevant rules of the substantive law and/or aspects of the legal system eg aspects of justice in relation to procedure, evidence, natural justice, treatment of suspects, methods of correcting injustice etc.

The concept of justice is considered to be a fundamental objective of the English legal system. Yet this concept proves very difficult to define. At first glance, one could categorise justice as ‘fairness’. However, ‘justice’ is much more ambivalent. Lord Lloyd defined justice as ‘the means of a man in order to attain a good life’ and some theories have emerged through this struggle to define justice.

The greek philosopher Aristotle said that justice was down to a sense of proportionality and that comparative merit should be taken into account. Aristotle’s theory is in touch with the natural law theory that a sentence should be proportionate to the crime. It could be said that the current law system incorporates Aristotle’s theory through section 18 and section 20 Grievous Bodily Harm (GBH). To be guilty of section 20, one must either be ‘reckless’ or ‘intend’ some harm, in some cases this poses a possible 5 year sentence. In great contrast to this is section 18, where a defendant must have ‘intended’ really serious harm and this has the possible prospect of a life sentence. It seems that the law here has understood the differences in how blameworthy a defendant is therefore shows that the current system acknowledges that if there cannot be proportionality comparative merit is the next best thing.

In great contrast to this is the utilitarianism view promoted by Jeremy Bentham. This view suggests that justice is the ‘greatest amount of happiness for the largest amount of people’. At first glance, this seems democratic however it does pose some moral dilemmas.

An example of this is the torture of members of ALQUAEDA (by the Americans at Guantanamo bay) the utilitarianism view would suggest this is moral as it is benefiting a large amount of people e.g. saving a bomb from exploding in a city, however, it does not consider the individual – the person being tortured. Therefore this view is not necessarily a good definition of justice due to its ethical implications.

Another striking theory is that of the Marxists, founded by Karl Marx in 1818. The Marxists believe that the state is dominated by a single (capitalist) ruling class who rule by economic power and ensure continuous exploitation of the proletariat (working class). Therefore they believe current society is unjust. The Marxists ideal definition of justice would be ‘from each according to his ability, to each according to his needs’ a society where everyone collectively runs everything and has what they need.

In addition, another theory is that of John Rawls. Rawls created the imaginary position, the ‘original position’. He said that if society was under a ‘veil of ignorance’ which made us naive to our current places in society (our economic, social, political, intelligence strengths, etc) that we would make the rules of society fairly. Therefore, Rawls concluded that we do not, or never can live in a ‘just’ society due to the fact that we are not under this ‘veil’ and already have our social status and places in society.

These theories therefore, provide tools for analysis on whether the current law is successful in achieving justice. It must be noted that it may depend on which theory the individual subscribes to, to what they perceive as just.

Formal justice, also referred to as procedural justice, requires equality of treatment in accordance to the classification laid down by rules. Formal justice then, requires adherence to the natural law theory and its principles. The natural law theory is based upon two principles. Firstly that everyone has the right to a fair trial. An example of this is Glynn v Keele University where the student was expelled without warning and therefore had not time to trialled and could make no legal representations. Therefore the court decided this was unjust and called for a retrial.

The second principle is that judges must not be, or appear to bias. This was shown in R v Bingham where it was found that the justice (Bingham) had said that his principle in such matters is to believe the evidence of the police officer which was found to be completely bias and in breach of the natural law theory, he was charged. In this sense, as the law applies by formal justice, it achieves justice.

Another example of where the law does achieve justice is through the jury system. The jury system, it could be argued, can be both praised and criticised in terms of justice. On the one hand it provides Vs with a broad spectrum of society which avoids mass prejudice and gives the verdict of a ‘reasonable man’. An example of this is R v Ponting where although public interest was not a defence, the jury acquitted the defendant (a controversially just decision). On the other hand, it could be said that the jury should not act as a representative of society or fairness, especially where the decision is not unanimous and is made merely by flipping a coin. I would suggest that the benefits of the jury are greater than its flaws in the English lega system’s strive for justice. An area of law which has been recently modified to create justice in the law is in the defences for murder.

The law on provocation has recently been changed from the ‘Homicide act 1957’ to the ‘Coroners and Justice act’ 2009. It was deemed that the old law on provocation was unfair on women who are less likely to be able to rely on the strict interpretation of the defence. The new law attempted to better this which made ‘battered women syndrome’ provocation. For example in R v Ahluwalia it was found that the syndrome did cause a loss of control. Also, the introduction of the ‘qualifying trigger’ which must either be ‘extremely grave’ or have caused the defendant to have a ‘justifiable sense of being wronged’. The introduction of this ensured that not trivial things are classed as provocation, such as a baby crying in R v Doughty which was accepted in the old law.

Therefore, the change in this law can viewed as just as it allows the less blameworthy defendant to receive a more suitable sentence – therefore this relates to Aristotle’s theory of proportionality.

However, there are times where areas of the law are seen as unjust. An example of this is in negligence under psychiatric harm. The law distinguished two types of victim: primary who must be either physically harmed or at risk of physical injury and secondary victims which lack the proximity of primary victims. It has been said that the strict ‘Alcock’ mechanisms put in place due to the law’s fear of ‘opening up the floodgates’ are unfair on these victims. An example of this is some of the victims in the Hillsborough case (Alcock v Chief Constable of West Yorkshire). One victim in particular who witnessed the event and he was at the grounds, knowing his daughters were involved. This case failed, however cases such as page v smith involving a road accident, where the victim succeeded merely for being a primary victim are allowed. This may be seen as unjust and it could be suggest that if the law removed the alcock mechanisms and replaced them with some type of proximity, then it would achieve justice in this area of the law.

Some theories of justice can be seen as being successful in substantive law such as the criminal law against murder, which all theorists would regard as fair. However, the **difficulties** in achieving justice become more prevalent when the issue is **contentious**. For example even though R v Cocker (1989), murdered his wife,: she had been terminally ill and in much pain. The trial judge denied him the partial defence of provocation, leaving the jury with little alternative other than to convict him of murder. In such circumstances a life sentence may seem a disproportionate punishment. Theorists such as Bentham might argue C should not be guilty of murder as it achieved the greatest happiness for society (less cost for all society) but this killing would not follow the process of natural justice, where a courts impartial judgment on this right to die issue would have allowed a more public, objective and fairer approach as seen in the case of Re A, conjoined twins. However the courts have persistently denied people like Cocker and his wife a method to objectively assess assisted suicides even though from a procedural justice point of view the law does allow a process to be followed. The difficulty arises in cases like this when the procedures and substantive law are clearly against the principles of significant number of individuals’ views. Justice could be achieved procedurally if parliament would legislate effectively in this area but clearly until this happens individuals like Cocker will decide on what is just and then leave the justice system to pick up the pieces, a situation where justice is not just difficult to achieve but ultimately impossible.

With procedural justice clearly there are systems in place such as trial by jury that seek to ensure the rules of natural justice such as justice must seen to be done allow for the clearest and most objective approach to deciding on guilt in criminal cases, for example the three retrials of Sion Jenkins for the alleged murder of his step daughter finally allowed him a not guilty verdict. However, **procedures can sometimes lead to difficulties in lacking flexibility** and allowing for the public mood to influence outcomes with devastating injustices. For example Peter Sutcliffe was denied being able to run the defence of DR even though there was evidence of a medical condition that may have influenced his killings. Or the Birmingham Six that were found guilty due to gross abuse by the police of the interrogation of the D’s and the public pressure to convict due to the bombings. To address these clear weaknesses in procedures a more corrective justice approach has been introduced, for example in 1997 of the Criminal Cases Review Commission (CCRC) was established to review cases of injustice with success in cases like the Jill Dando murder and the review of the George guilty verdict. This has allowed procedural and corrective justice to achieve a more balanced approach in criminal law but injustices still remain and clearly justice will continue to be difficult to achieve in the highest profile cases, e.g. juries doing their own research on the internet.

A final difficulty with justice is the subjective nature as to **how society of the time views this emotive issue**. If you look at the law through the eyes of Plato, looking for justice in the form of harmony between the different groups in society, you may well be disappointed at the conflict between the legislature and the judiciary. Alternatively, if you look at the law through the eyes of Marx, you will probably be very unhappy at the way society’s benefits have been distributed, and at how the law is used to enforce inequalities. Or, if you put yourself in the position of Robert Nozick, you will be disappointed to observe how much the social justice model promoted by Rawls has influenced policy makers since World War II. Rawls would be happy with the huge development of the law on legal aid for those who can’t afford justice whereas Aristotle would regard merit as the most important issue in deciding such state aid in cases. The welfare state would be something that Rawls would also feel was a just system but interestingly Marx may actually agree with the Conservatives and Nozick to some extent in that the system can only achieve justice if it based on contribution, not just need. So the difficulty in finding justice is one of contemporary thinking though on a range of core issues such as human rights to a fair trial and the most serious offences such as murder there is a large degree of agreement across theorists. But in areas of wealth distribution, property acquisition and even the right to certain types of education justice varies dependent on such issues as the economy (It’s easier to agree with Rawls when a lot of the population is affluent), whether society believes in individual rights (the right of a convicted murderer to stay in a safe country like the UK rather than risk death in his own country) and the rise and fall of various belief systems (Aquinas would probably not agree that legalising gay marriage is a just law). So clearly achieving justice in issues other than those that form the most basic rights and obligations of a pluralist society is possible, but not for all the population, some might argue that our current system is one increasingly aimed at justice for minorities at the expense of the majority.

It is clearly possible to define justice but it is not always a definition that the layperson would understand or even agree with. With a more diverse and pluralistic society and a society currently suffering from severe economic upheavals the difficulty is trying to maintain a meaning of justice across all areas of law that doesn’t venture into the extremes of the past (Nazi utilitarianism) whilst still protecting individuals from prejudice. The ideal approach would be to have unifying theory of justice to measure all laws by. Though it may be impossible to always achieve justice in all laws I would suggest that a system that is continually asking the question as to what is justice is the only way society can ever hope to achieve a just legal system, it is the journey that will never end.

**Commentary for Ben’s response**

PC A = Sound

PC B = Clear

Marks = 27

AO3 = 4

27 + 4 = 31/35

This candidate has provided a very accurate discussion of several theories of justice and this has been supported by relevant illustrations. The candidate has included some very good examples of whether justice is or is not achieved in the law, but does not directly address the ‘difficulties’ aspect of the question.