

# Questions of Justice

Lecture 3:

Constructing the principles of justice

# 1 Top-down vs Bottom-up

One can think of 'justice as reciprocity' as a 'top-down' argument for identifying principles of justice. It specifies a type of procedure for arriving at socially binding rules and holds that any rules arrived at by following a procedure of this type are principles of justice.

This approach can be contrasted with a 'bottom-up' approach, which starts from certain firm convictions ('considered judgments') and seeks to find plausible principles which will capture these convictions – e.g. concerning the injustice of racial discrimination and religious intolerance (p. 17)

(NB: the fact that Rawls's 'considered convictions' concern injustice supports the critical doubt that we do not need to draw on a theory of ideal justice to establish the injustice of unjust situations or relationships).

## 2 Achieving reflective equilibrium

Rawls invokes both approaches (though in fact he gives more attention to the first). He holds that we should aim to secure a 'reflective equilibrium' whereby the results of the two approaches fit together – the top-down appeal to the procedural value of reciprocity should match the bottom-up appeal to our firm convictions concerning particular empirical situations.

Achieving reflective equilibrium is the goal of theoretical reflection (TJ. pp. 42-4).

So, for us, the question is whether Rawls' arguments bring us to a state of 'reflective equilibrium' on questions of justice.

# 3 Comments -

- (i) 'Equilibrium' is another name for coherence; this method of inquiry is one in which we seek to find coherence within our moral beliefs – both our abstract values and our firm convictions. As with any coherentist theory, there is no guarantee of the existence or uniqueness of a suitable set of principles (TJ 43-4).
- (ii) Suppose equilibrium/coherence can be achieved; does this imply truth? (cf. the coherence theory of truth). Rawls thinks not; but he does think it yields 'objectivity'.
- (iii) But what kind of objectivity is this? A theory of justice for all cultures at all times? But the 'considered judgments' which provide part of the input will be different in different cultures, and it's not plausible to hold that all these differences get ironed out by the demands of coherence with abstract value such as reciprocity.

# 4. Justice: critique and construction

In his early papers (JF & JR) Rawls starts by assuming a society in which there are on-going social ‘practices’ – rule-governed activities whose rules characterise the roles, responsibilities, duties and rights of those involved: two examples he gives are the practice of making of promises and the practice of punishment.

Rawls then imagines the members of this society reflecting critically on these practices by identifying some fundamental principles, the principles of ‘justice’, by reference to which these practices can be properly assessed; and it is in this context that he introduces his conception of justice as fairness/reciprocity. So, as he makes clear: these principles are principles to guide the critical appraisal of on-going practices, they are not principles to guide their construction as if from new:

# 5 On-going practices

‘Since these persons are conceived as engaging in their common practices, which are already established, there is no question of our supposing them to come together to deliberate as to how they will set up these practices for the first time.’ (JR p. 200; cf JF 58)

# 6 Rawls's approach in TJ

In TJ Rawls wants to focus on one type of social practice, namely that which defines the 'basic structure' of society. As he makes clear, he is not concerned with the justice or not of social practices generally (such as punishment).

But is it also the case that his approach is essentially one which is intended to promote the critical appraisal of existing political institutions and practices; or does he not think of the approach as one whereby a people might deliberate as to how 'they will set up these practices for the first time' ?

# 7 Critique or Construction?

Rawls says very little explicitly in TJ about existing social and political institutions; and many of the things Rawls says fit with the approach of someone coming to things for the first time, e.g. his emphasis on the ‘initial situation’ (TJ 12) and ‘original position’ (TJ 15); and, later in the book, in his sketch of the ‘four stage sequence’ (TJ 171-5) whereby he envisages his principles of justice being put into practice in a democratic society.

On the other hand, since he is very clear that his theory does not involve any genuine social contract, and the invocation of the ‘original position’ is only supposed to be a way of clarifying one’s thoughts about the requirements of justice, it does seem to follow that all we could hope to get from Rawls’s position is a set of principles apt for the critical appraisal of existing political institutions. So perhaps there is, after all, no great contrast between the critical approach which is to be found in his early papers and the more constructive model of political theory presented in TJ.

# 8 Procedural justice

- In TJ Rawls says that his argument for the principles of justice is a case of ‘pure procedural justice’ (p. 104: cf. p. 118). What does this mean?
- He distinguishes three cases:
  - Perfect procedural justice
  - Imperfect procedural justice
  - Pure procedural justice

# 9 Perfect Procedural Justice

(i) criterion for just outcome which is independent of procedure for arriving at it

Plus

(ii) a procedure which is guaranteed to arrive at it.

e.g. Cake division: I cut and you choose

# 10 Imperfect Procedural Justice

- (i) a criterion for a just outcome which is independent of the procedure for arriving at it  
but
- (ii) no procedure which is guaranteed to arrive at it.

e.g. criminal trial

# 11 Pure Procedural Justice

(i) no criterion for just outcome which is independent of a procedure for arriving at it

but

(ii) a procedure which is supposed to arrive at a just outcome.

e.g. gambling, donation, situations where there is 'fair equality of opportunity

# 12 Pure Procedural Justice in TJ

This concept of ‘pure procedural justice’ has three applications in Rawls’ theory:

- (i) the top-down argument from the Original Position to the basic principles of justice
- (ii) the further specification of these principles through constitutional, legislative and judicial procedures (TJ §31)
- (iii) the final application of the fully specified principles in ordinary life – e.g. exchanges within a market (TJ §§47-8)

# 13 Procedural Justice and the Original Position

- Justice as reciprocity is the thesis that the basic principles of justice are to be identified as the outcome of a procedure for arriving at social agreements which exemplifies the value of reciprocity.
- This general ‘proceduralist’ approach is worked out in detail by Rawls in terms of the device of choices made in an imagined ‘original position’ (OP), which is the equivalent for him of the imagined state of nature’ in traditional social contract theory.

# 14 Reciprocity and the OP

- In *Justice as Fairness* Rawls says that the OP is ‘a device of representation’ (JF 17) which ‘models’ the arguments which parties can put forward for principles of justice by capturing ‘the fair conditions under which the representatives of citizens, viewed solely as free and equal citizens, are to agree to the fair terms of cooperation whereby the basic structure is to be regulated’ (JF 17).

But it is important to separate this general thesis of justice as reciprocity from the application of this thesis via the device of imagining choice made under the conditions of the OP.

# 15. The argument from the OP

We are to suppose 'rational persons' making a choice of principles under 'reasonable constraints' - i.e.

- (i) avoidance of prejudice and arbitrary bias, caused either by attachment to one's historical background or by one's future goals
- (ii) equality in the sense that all parties in the original position have the same rights when selecting the principles.

# 16 The Veil of Ignorance (VI)

Rawls' (hypothetical) technique for satisfying these constraints is the 'veil of ignorance':

No one should know their natural talents or their social circumstances, because this cannot be a consideration that is relevant to arguments for principles of justice. 'One excludes knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices. In this way the veil of ignorance is arrived at in a natural way.' (TJ p. 17)

- The veil of ignorance is also to exclude knowledge of one's own particular 'plan of life', and thus one's specific goods. Hence the veil of ignorance also ensures equality.

# 17 Is there still an idealised contract?

Problem: - all differences between people are 'bleached out':

To begin with, it is clear that since the differences between the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, 'we can view the agreement in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached.' (TJ 120)

- Doesn't this imply that the conception of agreement or contract between parties has been undermined?

# 18 What's implied by 'rationality' ( 'rational persons' )

- (i) Knowledge of 'primary goods'
- (ii) Unlimited knowledge of ahistorical general psychological and sociological truths, including of 'the circumstances of justice' (TJ 119)
- (iii) The parties are 'mutually disinterested' (TJ 125), including absence of envy - so
  - 'the persons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be.' (TJ p. 125)

# 19 Primary Goods

For Rawls, ‘primary goods’ are things which enable people to live together in such a way that they are able to meet their basic needs and to have a chance of a fulfilling life.

These primary goods are ‘social’, and not ‘natural’ (p. 54). It’s not that Rawls denies that there are natural goods: rather he holds that since a theory of justice provides principles for social cooperation, it must deal primarily with social goods – goods that are dependent upon social cooperation.

For Rawls, the primary social goods are:

rights, opportunities, income, wealth, self-respect.

## 20 An odd list!

- (i) Why not – e.g. friendship, family life (both social)? Or solidarity – the value of belonging to a society with which one identifies.
- (ii) Which rights and opportunities? Or is it just the status of being someone who has rights and opportunities?
- (iii) Should wealth be included at all ? Presumably it is there as a means to the satisfaction of basic needs (food, shelter, warmth, clothing etc.)
- (iv) Why not, e.g. health or education, which are certainly affected by social conditions.
- (v) Why is self-respect here? Is it intrinsically social? As we shall see later, it turns out to be important for Rawls's theory; but it is nonetheless an odd addition to this list.

# 21 'The circumstances of justice'

- Rawls (like Hume) thinks that questions of justice arise only in certain circumstances –
  - (a) there is not such an unlimited abundance of goods that social cooperation is not needed to assure a good life; (cf. Marx)
  - (b) there is not a desperate deficit of resources which implies that cooperation is no use in providing a significant improvement in one's situation.

## 22 What's the choice ?

A choice of principles for the 'basic structure' – i.e. for the basic distribution of rights and liberties, plus for distribution of basic material goods, income and wealth. These principles are to be general, universal, public and ordered (TJ 115)

The choice of these principles is to be 'final' (TJ 116-7) – i.e. not revised once the veil of ignorance is lifted. Although choice of principles is to be 'deductive', Rawls agrees that there's no deduction of his principles from the circumstances of the original position (TJ 106). Instead, a finite list of alternatives is offered (TJ 107), and the situation in the OP is supposed to provide a basis for selection from this list.

Rawls' basic thesis is that his two principles of justice are the product of self-interested choice behind a veil of ignorance.

# 23 The Principles of Justice

- First Principle:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

- Second Principle

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least disadvantaged, consistent with the just savings principle (DP), and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity (FEO).

# 24 Priority rules

- First Priority rule

The principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty.

- Second Priority rule

The second principle of justice is lexically prior to the principle of efficiency; and fair opportunity (FEO) is prior to the difference principle (DP).

## 25 Complications -

- (i) Sometimes Rawls reverses the order of DP (2(a)) and FEO (2(b)) – see p. 107, where 2(a) is FEO and 2(b) is DP. Since (see Second Priority rule) FEO has priority over DP, this is a better way of ordering his principles.
- (ii) There is an important requirement which is prior to the First Principle, namely satisfaction of ‘essential needs’ and attainment of ‘requisite material means’ (TJ p. 476). These should be available where there are ‘favourable circumstances’. Just what this implies is unclear; but we can think of it as the

Zero Principle: Each person has the material means to satisfy their essential needs (*Justice as Fairness* p. 44 note 7)

## 26 Is the argument from the OP a mistake?

Rawls's idea was that by combining the veil of ignorance with the assumption of self-interested rationality he could induce the rational choice of principles which promote anyone's interests. This was a clever idea, but a source of unease about it is that it undermines the aim of presenting the principles of justice as the agreed outcome of a procedure which respects the value of reciprocity, since reciprocity and self-interest are in conflict.

# 27 Harsanyi's objection.

- The conflict here is well illustrated by John Harsanyi's famous objection to Rawls.
- Harsanyi argued that the distributive principle which is the rational choice for a self-interested person behind the veil of ignorance is the utilitarian principle that goods such as wealth should be distributed in such a way as to give each person the best chance of maximising their welfare.
- This conclusion, however, is not that which Rawls wanted to reach: his second principle of justice (2(a) DP) implies that wealth should be distributed in a way which is most beneficial to the least advantaged members of society, and Rawls argues that this principle is preferable to Harsanyi's utilitarian principle precisely because it affirms the value of reciprocity within society (*TJ* 102: 88).

## 28 Rawls's reply

Harsanyi's conclusion seems to be implied by Rawls's own original position argument because the emphasis there on rational self-interest implies that the test for principles is that of maximising expected utility.

Rawls rejects this conclusion on the grounds that the rational strategy to be adopted in the original position is the 'maximin' strategy of minimising the risk of faring badly; for, he argues, when a reflective person make his choice of principles he has to allow for the possibility that he is designing 'a society in which his enemy is to assign him his place' (*TJ* 152: 133).

## 29 Rational underdetermination

- A weaker form of the objection: maybe Rawls's maximin rule as a principle for rational choice in the OP is defensible – but so is Harsanyi's rule that a rational agent would maximise their expected utility (which implies the utilitarian distributive principle).
- Hence the appeal to principles for rational choice in the OP underdetermines the selection of principles for distributive justice; in which case the introduction of the OP provides no *argument* for Rawls's favoured principle. On one interpretation of rational choice (maximin) you get the result Rawls wants; on another interpretation (maximise expected utility) you get a different result.

## 30 Footnote on the significance of Harsanyi's objection

I take it that Harsanyi's objection is primarily an objection to Rawls's OP argument for his principles of justice.

It is not a decisive objection to Rawls's difference principle;

nor even to Rawls's proceduralist conception of justice as reciprocity.