

Questions of Justice

Lecture 5

A bit more on Distributive Justice and
Hypothetical Contracts

1 The Difference Principle (DP)

- *Economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged.*

This principle concerns the distribution of income and wealth. It affirms that the default position is equality, and thus that inequalities are just only where they are of advantage to the ‘least advantaged’ who are disadvantaged by having ‘few natural endowments’ and suffering from ‘bad luck’ (TJ 83).

For most practical purposes we can pick out this group by their relative lack of income and wealth (TJ 84).

Thus for Rawls an important aim of the state is to work towards equality of income and wealth by improving the lot of the worst off.

2 Procedural justice

- As before, Rawls stresses (TJ 267) that this principle is intended to guide procedures for arriving at distributive justice.

‘This account of distributive shares is simply an elaboration of the familiar idea that income and wages will be just once a (workably) competitive price system is properly organised and embedded in a just basic structure. These conditions are sufficient. The distribution that results is a case of background justice on the analogy with the outcome of a fair game’. (TJ 268)

- Thus the DP is not supposed to operate at the ‘micro’ level to interfere with particular transactions. What it does is to motivate background constraints in the ‘basic structure’ which are primarily put into effect through a tax system which transfers wealth from relatively advantaged groups to the least advantaged group.

3 Arguing for the DP - (i) Justice as reciprocity

Rawls appeals, even in TJ (88-90), to reciprocity as a consideration in favour of the DP. What this seems to mean is that because the potential benefits available to the talented depend upon social cooperation, the DP expresses a relation of reciprocal benefit:

on the one hand, the least advantaged agree to support the institutions of distributive justice because they benefit maximally from them despite the resulting inequalities;

on the other hand, the talented, having secured the support of the least advantaged to these institutions, are able to benefit through the labour market that makes it worth their while to keep producing.

In JF (132) Rawls uses a slightly different approach: what is important is that citizens should feel equally valued within the community even if they have different abilities, income and wealth. And then the thought is that the idea of reciprocity captured by the DP secures this kind of political equality in a way in which other less egalitarian principles of distributive justice do not.

One can see the point here: the DP perhaps expresses a kind of social solidarity, which in TJ Rawls describes in terms of ‘fraternity’ (TJ p. 70 - the state as one big family); but one can ask whether that is really a requirement of distributive justice as opposed to being a legitimate political ideal?

4 (ii) Arguing from the OP

The OP argument is that the rational man behind the veil of ignorance would use maximin and that choosing in accordance with maximin leads to the selection of the DP. But this is vulnerable to Harsanyi's objection – that rationality requires maximising expected utility. This objection implies that the OP (as conceived by Rawls) is not a good way of filling out the conception of justice as reciprocity; not that the DP itself is necessarily flawed.

One might include among the primary social goods the good of being a member of a cohesive community in which there is equality of status and, as a result, there are no large inequalities of wealth. If one introduces this thesis into Rawls's OP, so that individuals choosing principles behind the veil of ignorance seek to ensure that they belong to a 'cohesive' society, then the practical distinction between the average utilitarian principle and Rawls's egalitarian DP largely disappears. For a society in which wealth is not reasonably evenly distributed will be one in which average welfare is not maximised.

5 (iii) The intuitive arguments

Rawls's intuitive argument is that since no one deserves their natural abilities, these abilities are to be regarded as a 'social asset' (TJ 92) whose exploitation, in the context of productive cooperative enterprises, should be of value to everyone in the community, and especially the least advantaged.

The leading idea here is an extension of that which informs the principle of fair equality of opportunity: justice as fairness implies that just as citizens should not benefit from the 'social contingencies' of their birth, they should not be rewarded for their natural endowments, since these are also undeserved.

Nonetheless, Rawls holds, strict equality of wealth and income is not appropriate, since the community as a whole, and in particular the least advantaged, will benefit if there are incentives within the distributive system to encourage the talented to contribute their skills to the production of greater wealth.

6 Comments on this 'intuitive argument'

- (a) The thought that the natural abilities of the citizens are 'a social asset to be used for the common advantage' (TJ 92) is deeply unattractive. Even when one has set aside the unintended implication of social ownership, it suggests a kind of alienation which separates a person from his/her abilities. That kind of separation is perhaps appropriate in the case of 'the social contingencies of birth' – but it cannot be carried out in respect of one's natural abilities.
- (b) Rawls' argument does not acknowledge the voluntary effort required to transform 'natural abilities' into socially valuable skills. Since this effort is voluntary, it is not unfair that one should be able to benefit from it. Rawls might object that the capacity for making this kind of voluntary transformation of oneself is itself just another natural ability for which one does not deserve to be rewarded. The reply to this is that someone who acquires socially valuable skills does not seek a reward merely from their possession of these skills, and it does not seem unfair if they benefit as a result of their *use* of them.

7 Individual desert and 'entitlement'

A fundamental issue here is whether it is unfair if those who are naturally 'gifted', talented etc. benefit because other people prefer to pay more for their services than for the efforts of those who are less talented (cf Nozick and the case of Wilt Chamberlain; we can think of famous footballers etc.). Such people are lucky, no doubt; and they do not deserve their good luck. But if others freely choose to pay to watch/hear/employ them etc. and they benefit as a result – why is that unfair? Does one have to 'deserve' the benefits one enjoys? Is it the state's business to try to neutralise the effects of good and bad luck in the distribution of abilities?

Rawls says that once we recognise that no one deserves their natural abilities 'we are led to the difference principle' (*TJ* 87). But this is not correct. What does follow is that there is no immediate injustice if the state uses the tax system to redistribute wealth in order to benefit those who are not naturally talented. But it does not follow that the principle of this redistribution should be the DP rather than, say, a utilitarian principle.

8 Problems for the DP in practice

What is the test, at macro level, for the DP? – In particular what income differentials are legitimate?

Rawls maintains that ‘income and wages will be just once a (workably) competitive price system is properly organised and embedded in a just basic system’ (*TJ* 304: 268). Hence differences in wages will reflect ‘features of jobs that are significant on either the demand or the supply side of the market, or both’, such as ‘Experience and training, natural ability and special know-how’ (*TJ* 305: 269); but if the system is in other respects just, then these differences will also be just. Indeed, the situation is for Rawls a paradigmatic case of pure procedural justice (*TJ* 304: 267).

The anxiety to which this account gives rise is that it dissipates Rawls’s initial egalitarian presumption by permitting those with scarce skills to bargain hard for disproportionately large salaries. Rawls will reply that within a just ‘well-ordered’ society people will not be motivated to press their claims in this way: for they should be assumed to be committed to realising the ideal of constructing a society in which any systematic income differential from which one benefits oneself is only a means of bringing greater benefits to others, especially the most deprived section of society (*JF* 64, 76-7).

But it is one thing to point to an egalitarian ideal; and another thing to spell out the requirements of justice. Somewhere around here Rawls’s presumption that the requirements of justice are to be fixed by considering an ideally well-ordered society is coming under pressure – the just society need not be ideal.

9 Alternative approaches to distributive justice - (i) Nozick

In his famous challenge to Rawls, Robert Nozick argued that the way in which the DP seeks to direct the distribution of wealth and income conflicts with the fact that wealth and income are personal property which it is not society's legitimate business to redistribute in order to achieve a particular pattern of distribution. Personal property is a personal 'entitlement' over which society has no legitimate claim without the consent of the property-holder.

Rawls's reply is that personal entitlements arise only within a just system of property rights (*JF* 72-3) and that there is nothing improper about a system which uses taxation to constrain property holdings in order to achieve a just distribution of wealth and income (*JF* 51-2). The only way in which such interference would be illegitimate is if the property rights in question were to derive from a basic liberty to acquire property.

Rawls, however, denies that there is any such basic liberty (*JF* 114). Hence Rawls agrees with Nozick that personal property is primarily a matter of personal entitlements arrived at through a process of exchange and gift. But whereas Nozick grounds these entitlements on an obscure process of natural appropriation which gives rise to natural property rights, Rawls holds that they can only be grounded within a system of just institutions:

10 Rawls on entitlement

“Thus when just economic arrangements exist, the claims of individuals are properly settled by reference to the rules and precepts (with their respective weights) which these practices take as relevant. As we have seen, it is incorrect to say that just distributive shares reward individuals according to their moral worth. But what we can say is that, in the traditional phrase, a just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself.” (TJ 275-6)

Thus, for Rawls, individual entitlements arise *within* a just social scheme which includes an antecedent commitment to the DP; whereas for Nozick there is no such antecedent principle of distributive justice.

11 - (ii) Utilitarianism

Think here of ‘mixed conceptions’: i.e. Rawls’s 1st principle of justice + FEO, but with the DP replaced by a utilitarian principle – *namely that the rules and institutions which regulate the distribution of wealth and income within a society should maximise the average welfare of members of the society* (see alternative B3 on TJ p. 107)

Rawls’s objection is that utilitarianism fails the test of reciprocity since it does not protect the claims of the most deprived from being set aside in favour of greater benefits to other, better off, social groups (*TJ* §29 – esp. pp. 155-6).

But this argument is disputable: utilitarians will argue that given the diminishing marginal utility of wealth, the goal of maximising average welfare will direct a society to prioritise improvements in the situation of the most deprived. And when one considers the detail of Rawls’s proposed policies for implementing his difference principle, as sketched above, it is hard to see anything incompatible with the implications of an enlightened utilitarianism.

12 ‘Welfare state capitalism’

In his later writings (*JF* 127ff.; and see preface to the revised edition of *TJ* xiv-xv)) Rawls argues that utilitarianism is liable to favour ‘welfare state capitalism’ as compared with the kind of ‘property owning democracy’ he favours (he later remarks that it was ‘a serious fault’ of *TJ* that it failed to emphasize this contrast; see *JF* 139 note 5).

Welfare-state capitalism permits ‘very large inequalities in the ownership of real property ... so that control of the economy and much of political life rests in few hands’; hence although ‘welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to regulate economic and social inequalities is not recognised’ (*JF* 138).

13 Property-owning democracy

- For Rawls, in a property-owning democracy, the aim is not simply to assist those who need help, but to disperse wealth and capital in order to ‘put all citizens in a position to manage their own affairs on a footing of a suitable degree of social and economic equality’ (*JF* 139).
- Thus: ‘basic institutions must from the outset put in the hands of citizens generally, and not only of a few, the productive means to be fully cooperating members of society. The emphasis falls on the steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest, on fair equality of opportunity secured by provisions for education and training...’ (*TJ* xv)
- This is clearly a more egalitarian ideal than that of ‘welfare-state capitalism’.

14 The social exclusion problem

Rawls ends with the hope that in a system of this latter kind, the problem of social exclusion, or the ‘underclass’ as he calls it, will be addressed insofar as it can be: ‘Under these conditions we hope that an underclass will not exist; or, if there is a small such class, that it is the result of social conditions we do not know how to change, or perhaps cannot even identify or understand. When society faces this impasse, it has at least taken seriously the idea of itself as a fair system of co-operation between its citizens as free and equal.’ (*JF* 140)

Thus Rawls’s later complaint against utilitarianism is that it fails to promote the ideals of property-owning democracy, as opposed to welfare-state capitalism. Utilitarians such as Mill might reply that once utilitarianism is understood as prescribing the advancement not of ‘the greatest happiness of the greatest number’ but ‘the permanent interest of man as a progressive being’, then there are sound utilitarian grounds for addressing the social exclusion problem and favouring Rawls’s ideal ‘property-owning democracy’.

15 A Pluralist account of ‘distributive justice’

Let’s assemble some initial ‘considered judgments’:

- (i) Equal citizenship and equality of opportunity are fundamental political values which need to be protected from erosion by major inequalities in wealth.
- (ii) Natural resources (land, minerals etc.) are a communal resource and should be managed as a communal benefit. There are decisive benefits in a system of long-term property rights, including rights of bequest etc. – but the tax system should be set up to make the system as a whole work for the long term benefit of all
- (iii) There is a positive duty of beneficence to provide the conditions for a decent life for those who cannot support themselves – i.e. children, the old, the disabled and their carers.
- (iv) There is a positive duty of solidarity with others to enable those who are capable of living an independent, self-supporting, life to do so – typically through help with finding employment.
- (v) Public goods should be supplied through a tax system
- (vi) It is not unfair that those who provide goods/services that others wish to purchase should benefit as a result

- (vii) Rawls’s conception of a ‘property-owning democracy’ in which all citizens are in a position to manage their own affairs on a footing of a reasonable degree of social and economic equality is an attractive ideal.

16 An intuitionist conclusion?

What is then implied by these considerations?

A pluralist system which includes some ‘social minimum’ welfare provision and a provision to enable employment, training etc.; it also includes a clear-minded determination that the community as a whole should benefit from its natural resources, a tax system which raises revenue for public goods and also constrains large accumulations of wealth which threaten political equality.

Equally, given the many differences between people, especially their abilities and aspirations, and the things we are prepared to pay for, it seems a mistake to aim positively at achieving material equality, as opposed to aiming to limit inequalities which threaten social cohesion and other political values. The market will quickly upset any initial equal distribution, and where transfers are freely made (no coercion or deceit) there is no reason to think the resulting inequalities are unfair. Nonetheless the goal of sustaining a ‘property-owning democracy’ is one that the state should aim at.

I don’t see how all these considerations can be fitted under a single overarching principle of distributive justice – Rawls’s DP, utilitarian, Nozickian ‘entitlement’, Cohen’s luck egalitarianism, or any other. It’s clearer to acknowledge that there is a plurality of requirements which it is the business of political authorities to balance against each other.

Much actual politics aims to achieve this.

17 Postscript

Actual vs hypothetical

- Compare
 - (i) 'A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out Clearly we cannot say that a particular state of affairs is just because it could have been reached by following a fair procedure A fair procedure translates its fairness to the outcome only when it is actually carried out.' (TJ 75)
 - (ii) 'The original position is defined in such a way that it is a status quo in which any agreements reached are fair. Thus justice as fairness is able to use the idea of pure procedural justice from the beginning. It is clear then that the original position is a purely hypothetical situation.' (TJ 104)

18 The actual is also hypothetical

- These passages seem to imply that Rawls's principles can only have the status of principles of justice only for the envisaged hypothetical situation in which it is envisaged that they are actually chosen; yet the intended conclusion is that they are principles of justice for us here now. But how does justice in that hypothetical possible world determine justice for us in the actual world?
- The only way of dealing with this problem is, in effect, to embrace the conclusion and accept that justice, and morality in general, are concepts whose application in the actual world depends upon their application in possible worlds in which the requirements of reciprocity are fulfilled.

19 How so? – Kantian constructivism

- In TJ (p. 16) Rawls says that the aim of his account of the hypothetical original position ‘is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves.’ In other words we hold that justice in the actual world makes reference to what would be agreed in the simplified hypothetical world in which reciprocity is realised.
- How can this be? In TJ Rawls does not, I think, fully appreciate this problem. But in his 1980 Dewey lectures ‘Kantian Constructivism in Moral Theory’ he does offer a solution to it – ‘Kantian moral constructivism’.

20 Rawls's constructivism

- Rawls's constructivism is the view that because justice and morality in general capture the requirements of living within a society of rational persons who recognise each other as free and equal, the requirements of justice for us, here and now, are to be thought of as 'constructed' in the sense that they are rationally determined by the implications of a hypothetical construction:

'Apart from the procedure of constructing these principles, there are no reasons of justice. Put in another way, whether certain facts are to count as reasons of justice and what their relative force is to be can be ascertained only on the basis of the principles that result from the construction.'
(*'Kantian Constructivism in Moral Theory'* CP 351)

- Should we accept this?

Only if we believe that reason alone suffices to determine the requirements of justice/morality

Harsanyi's objection shows that this position is not easy to maintain.

- What alternatives are there?

I prefer the strategy suggested in 'Justice as Fairness', whereby we just accept the existence of normative practices that have evolved within the context of human social existence; and that the quasi-contractual account of justice is primarily used to model the way in which complaints concerning these practices are managed.

- A two-component conception of morality?

On this alternative approach, morality is not 'constructed' on the basis of reason; however, the morality of existing practices is always liable to be criticised, and thus modified (or 'reconstructed'), in the light of rational considerations.