

Questions of Justice

Lecture 6

The Priority of Liberty

1 The First Principle and The Priority of Liberty

Rawls states his first principle in TJ as follows:

- 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. (TJ 220)

In PL he modifies this principle as follows:

- Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all. (PL 291)

2 Hart's criticisms

- Why the change?

Because of Hart's criticisms (cf. Hart's paper in the coursepack), whose force Rawls acknowledged (cf. TJ xii).

- Take the first principle as stated in TJ:
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.
- Hart's criticisms:
 - (i) Is Rawls concerned with 'Liberty' or 'liberties'? (Despite the statement of the first principle above, Rawls also writes of securing 'the most extensive liberty compatible with a like liberty for all' - TJ 56)
 - (ii) Does 'most extensive' imply more liberties? If so, why? e.g. why surrender greater material benefit for more liberties?
 - (iii) Indeed: why does the protection of liberty/liberties take priority over other political goals – e.g. greater levels of welfare.
 - (iv) How are 'basic' liberties to be identified?

3 Rawls's changes

In PL, Rawls

- (i) makes it clear that he is concerned with 'liberties' – particular basic freedoms;
- (ii) makes it clear that his goal is not a 'maximising' one at all: all he wants is a 'fully adequate scheme'
- In the light of these points Rawls now addresses (iii) and (iv):
 - .. the scheme of basic liberties is not drawn up so as to maximise anything, and, in particular, not the development and exercise of the moral powers. Rather, these liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers in what I shall call "the two fundamental cases".

4 'The two fundamental cases'

- (i) One fundamental case is connected with the capacity for 'a conception of the good' and concerns the application of the principles of deliberative reason in guiding our conduct over a complete life. Liberty of conscience and freedom of association come in here. (PL p. 332)
- (ii) The other case is connected with the capacity for a sense of justice and concerns the application of the principles of justice to the basic structure of society and its social policies. The political liberties and freedom of thought are discussed later under this heading.

5 Rawls's 'basic liberties'

So: what we are given is a brief list of 'basic' liberties –

- political liberties, i.e. rights as a citizen to participate
- freedom of thought (including speech)
- liberty of conscience (including religious and philosophical belief)
- freedom of association

to which Rawls adds – almost as an afterthought – ‘The remaining (and supporting) basic liberties – the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law – can be connected to the two fundamental cases by noting that they are necessary if the preceding basic liberties are to be properly guaranteed’. (PL 335)

There is no great disagreement here with TJ (see ch. IV). But there is a difference in the argument.

6 The priority of liberty in TJ

- One of the oddities of TJ is that Rawls gives very little attention to the content of the first principle and to the grounds for its priority. There are two significant discussions – a brief one in §26 (in ch. 3), and then in §82 (the final chapter of the book)!
- §26 sketches an argument from the OP

7 OP argument (TJ pp. 131-2)

- In the OP, behind the veil of ignorance, the parties know that they have certain fundamental concerns, and that they will want to be able to revise these fundamental concerns in the light of discussion and activities with others.
- The basic liberties should enable them to pursue these fundamental concerns and to revise them (as long as they do not thereby interfere with similar commitments by others)
- So they will entrench protection for these basic liberties by placing them in their fundamental principle of justice, which takes priority over all others.
- For Rawls this priority represents the commitment of the parties in the OP to reciprocity, the recognition of each other and equal and free

8 Comments on this

- (i) It is not obvious that the basic 'political' liberties are clearly affirmed by this line of thought
- (ii) Is it clear that the OP argument supports the priority of protecting equal basic liberties over maximising material wealth?
- (iii) It is notable that in order to deal with (ii) that Rawls first brings in 'maximin' as a rule for social choice: the thought is that greater material benefits would not compensate for an oppressive government which did not enable one to live in accordance with one's fundamental beliefs (e.g. one's religious faith) (TJ 133). And one could argue that maximin also deals with the point of (i): it is the fear that one's 'place in society is decided by a malevolent opponent' (TJ 133) which motivates the importance given to entrenching political liberties.
- Are we persuaded by this argument? (The case of China?)

9 The 'strains of commitment'

- In §29 Rawls introduces a further, related, consideration: the principles of justice that are practised within a society should not place an excessive 'strain' on the commitment of members of the society.
- This consideration connects with the thought that a just society will be 'stable' (see later this term)
- Then the argument is that without the protection of basic liberties provided by the first principle there is reason to worry that those whose fundamental interests are not protected by the society will feel that their commitment to the society is undermined.

10 Utilitarianism and the First Principle

- In the new preface to TJ (p. xiv) Rawls emphasises this first principle of justice, affirming that the priority of liberty, marks out his fundamental disagreement with utilitarianism.
- Is this right?

11 The simple thought -

Utilitarianism will always permit the general good to override individual rights.

By contrast: ‘deontological’ theories give priority to ‘the right’ (i.e. respect for fundamental rights, typically negative) over the ‘the good’ (i.e. maximising the general good, however specified).

12 Utilitarian reply (cf. Mill *Utilitarianism* ch.5)

The simple thought fails to take into account two key aspects of the utilitarian position -

- (i) that the most important good to be maximised is not ‘happiness’ conceived as pleasure but ‘the permanent interest of man as a progressive being’;
- (ii) the fact that the requirements of justice are to be defined by reference to a set of publicly administered rules, and not by some private act-utilitarian calculation.

Thus, given (ii), we are to think in terms of rules for public institutions which aim (given (i)) to maximise the ‘enlightened’ interests of the public as a whole. And once the matter is approached in this way, Mill and others say, we can readily provide a utilitarian justification for a system of rights/liberties of the kind envisaged by Rawls.

13 How to settle this debate?

- (i) There is no reason to reject the utilitarian defence of a system of individual rights.
- (ii) But ask: does the utilitarian's system have quite the content of Rawls' system?

Hard cases:

- (i) Criminal procedure – how important is it not to convict the innocent as opposed to permitting the guilty to escape punishment?
- (ii) Security – how important is it to protect the public from threats as opposed to preserving the principle that citizens should not be detained without trial? (cf. Belmarsh case)
- (iii) Freedom of speech – how important is it to defend an unqualified right, as opposed to qualifying it when publication causes outrage and public disorder (cf. Rushdie & *Satanic verses*)

14 The priority of liberty in TJ

In TJ §82 (the final chapter! nb. the text here is substantially changed in the revised edition) Rawls finally presents

‘the mains grounds for the priority of liberty’ (p. 474).

In part these grounds turn out to be the considerations we have already encountered - that

- (i) we should be allowed to participate along with others in institutions, such as religious institutions, which give us a sense of our own personal identity and value;
- (ii) equally, we need to be able to take part in the political processes whereby the rules of our own community are made and changed (TJ 476).

15 Self-respect

But what is new here is the emphasis on self-respect:

‘The basis for self-respect in a just society is not then one’s income share but the publicly affirmed distribution of fundamental rights and liberties.’ (TJ p. 477)

and he continues

‘In a well-ordered society then self-respect is secured by the public affirmation of the status of equal citizenship for all: the distribution of material means is left to take care of itself in accordance with pure procedural justice regulated by just background institutions which narrow the range of inequalities so that excisable envy does not arise’ (TJ 478)

16 What is the importance of self-respect?

For Rawls, self-respect is the most important 'primary good', indeed the most important personal good (we will come back to this later in the term).

It comprises: 'a person's sense of his own value, his secure conviction that his conception of his good, his plan for life, is worth carrying out' and 'a confidence in one's ability, so far as it is within one's power, to fulfil one's intentions'. (TJ 386)

So in the absence of self-respect:

'we feel our plans of little value' and 'we cannot pursue them with pleasure or take delight in their execution'. Indeed 'without it nothing may seem worth doing.... All desire and activity becomes empty and vain, and we sink into apathy and cynicism'. (TJ 386)

Hence: 'the parties in OP would wish to avoid at almost any cost the social conditions that undermine self-respect'.

Given the thesis that 'the basis for self-respect in a just society is ... the publicly affirmed distribution of fundamental rights and liberties', we get a further ground for the priority of liberty

17 Over now to *Political Liberalism*

In PL Rawls argues in a different way, acknowledging that there was a ‘gap’ in his account, which consists of the grounds in the OP for the priority of liberty - ‘To fill this gap I shall introduce a certain conception of the person together with a companion conception of social cooperation’ (PL p. 299)

These conceptions are then further specified as resting on ‘two powers of moral personality’ (PL 301-2), the core constituents of Rawls’s ‘moral psychology’:

- (a) the capacity for a conception of the good (and thus to be rational),
- (b) the capacity for a sense of right and justice (the capacity to honour fair terms of cooperation and thus to be reasonable) (PL 302).

18 Having a conception of the good

- Rawls takes it that the capacity for a conception of the good motivates the priority for the liberty of conscience and freedom of association (pp. 312-4).
- It seems to me that these liberties should be combined with rights such as the right to privacy and family life which are also integral to one's sense of one's own identity; but Rawls nowhere mentions this familiar line of thought.

19 Having a sense of justice

The capacity for a ‘sense of justice’, which Rawls takes to be the rationale for the priority given to public political liberties, including freedom of thought and speech, is introduced in *A Theory of Justice* in the course of a subtle account of development of moral sensibility. He argues that our sense of justice is the result of a kind of reciprocity:

Because we recognize that <other persons> wish us well, we care for their well-being in return. Thus we acquire attachments to persons and institutions according to how we perceive our good to be affected by them. The basic idea is one of reciprocity, a tendency to answer in kind. Now this tendency is a deep psychological fact. Without it our nature would be very difficult and fruitful social cooperation fragile if not impossible. (*TJ* 494-5: 433).

20 Comments on this

- This emphasis on moral psychology, the conception of a 'person' with these two moral powers, is associated with a reframing of the OP argument in terms of identifying 'fair terms for social cooperation' among such persons.
- Rawls does not think of it as radically overturning his previous arguments for the first principle, including the appeal to self-respect (PL 318-20).
- But the role here of 'the sense of justice' is rather different from that which it plays in TJ. The assumption that persons have this antecedent commitment to engage with each other in determining the rules of the basic social and political institutions of their society enables Rawls to argue much more directly here for the importance of entrenching political liberties.

21 The equal worth of liberty

- An important further element of PL is the emphasis here on ‘fair value’ (PL p. 327):
- To explain: this guarantee means that the worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions (e.g. by reasonable access to the press and other media).

22 The 'zero' principle

- Rawls is here addressing a complaint raised by N. Daniels (see 'Equal Liberty and Unequal worth of Liberty' in ed. Daniels *Reading Rawls*), that rights are no use unless one is able to make use of them, e.g. by paying for legal help or gaining access to the media. So equal liberties imply equal 'worth' of liberty, and thus adequate means to make use of the rights and liberties covered by the first principle of justice. Arguably this means that the first principle already implies a reasonably egalitarian distribution of income and wealth (Rawls hints at this in TJ pp. 198-9)
- In his later writings this implication is spelled out more explicitly: thus in *Justice as Fairness* (2001), he remarks:
- This principle <i.e. the first principle of justice> may be preceded by a lexically prior principle requiring that basic needs be met, at least insofar as their being met is a necessary condition for citizens to understand and to be able fruitfully to exercise the basic rights and liberties. (*JF* 44 note 7)