

Liberty and Equality of Opportunity

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The Structure of the Argument

In his 1999 preface, Rawls says:

If I were writing *A Theory of Justice* now, there are two things I would handle differently. One concerns how to present the argument from the original position (see Chapter III) for the two principles of justice (see Chapter II). It would have been better to present it in terms of two comparisons. In the first parties would decide between the two principles of justice, taken as a unit, and the principle of (average) utility as the sole principle of justice. In the second comparison, the parties would decide between the two principles of justice and those same principles but for one important change: the principle of (average) utility is substituted for the difference principle. (The two principles after this substitution I called a mixed conception, and here it is understood that the principle of utility is to be applied subject to the constraints of the prior principles: the principle of the equal liberties and the principle of fair equality of opportunity.) Using these two comparisons has the merit of separating the arguments for the equal basic liberties and their priority from the arguments for the difference principle itself. The arguments for the equal basic liberties are at first glance much stronger, as those for the difference principle involve a more delicate balance of considerations. The primary aim of justice as fairness is achieved once it is clear that the two principles would be adopted in the first comparison, or even in a third comparison in which the mixed conception of the second comparison is adopted rather than the principle of utility. I continue to think the difference principle important and would still make the case for it, taking for granted (as in the second comparison) an institutional background that satisfies the two preceding principles. But it is better to recognize that this case is less evident and is unlikely ever to have the force of the argument for the two prior principles. (1999: xiv)

The two steps are:

1. utility vs. equal liberty + equal opportunity + difference principle;
2. equal liberty + equal opportunity + utility (= mixed conception) vs. equal liberty + equal opportunity + difference principle;

The second step is in §49. Here we are only concerned with the first.

The formal requirements of generality and universality rule out the different forms of egoistic principles. The three other conditions -publicity, ordering, finality -are used to argue for the two principles of justice.

The first part of the argument, that the two principles would be preferred over any principle of utility, is in two steps:

1. that the principle of average utility would be preferred over the classical principle of (total) utility;
2. that the two principles would be preferred over the principle of average utility.

Ad 1. The only relevant difference brought about by averaging is that utility is summed in proportion to the fraction of society occupying the relevant position. This is preferable because it is irrational for people to accept to lose out if they themselves do not gain anything (because the population just becomes bigger).

Ad 2. To do their averaging, utilitarians have to know the probability to end up in a given position within society: under the veil of ignorance, they do not have that knowledge, nor do they have justification to assume that all positions are equally probable. The second problem is that utilitarians behind the veil of ignorance will be asked to sum the utility their choices have for others applying the criteria for utility possessed by these others:

...the individual is thought to choose as if he has no aims at all which he counts as his own. He takes a chance on being any one of a number of persons complete with each individual's system of ends, abilities, and social position. (1999: 150)

In their state of ignorance, they can only calculate *their* expected utility if they identify it with whatever is the utility of the people occupying the relevant positions:

It is crucial to note that this reasoning presupposes a particular conception of the person. The parties are conceived as having no definite highest-order interests or fundamental ends by reference to which they decide what sorts of persons they care to be. They have, as it were, no determinate character of will. They are, we might say, bare-persons: as settled by certain comparison rules, they are equally prepared to accept as defining their good whatever evaluations these rules assign to the realization of their, or anyone else's, final ends, even if these evaluations conflict with those required by their existing fundamental interests. But we have assumed that the parties do have a determinate character and will, even though the specific nature of their system of ends is unknown to them. They are, so to speak, determinate-persons: they have certain highest-order interests and fundamental ends by reference to which they would decide the kind of life and subordinate aims that are acceptable to them. It is these interests and ends, whatever they are, which they must try to protect. Since they know that the basic liberties covered by the first principle will secure these interests, they must acknowledge the two principles of justice rather than the principle of utility. (1999: 152)

The Positive Arguments

Based on the formal requirements that the choice of principles in the original position must be public and final, Rawls gives two positive arguments for his principles of justice.

The argument from the strains of commitment. Our choices have to be final, and we know that; that they are final means that we must commit to them, whatever happens. The choice matters, because it governs our life prospects. Our knowledge of human psychology must allow us to predict that we would be able to 'stick to' our decision even in the case of getting assigned the worst position in the social structure. The two principles of justice respect this risk-aversion that it is rational to have in the original position, the utility principles do not:

...if we make an agreement, we have to accept the result; and so to give an undertaking in good faith, we must not only intend to honor it but with reason believe that we can do so. Thus the contract condition excludes a certain kind of randomizing. One cannot agree to a

principle if there is a real possibility that it has any outcome that one will not be able to accept. (1999: 159)

The argument from self-compatibility. Because conceptions of justice embody a certain self-image of the humans the society of which they govern, they can be evaluated with respect to the question whether knowledge of such self-images (guaranteed by the publicity constraint) makes their successful implementation less or more probable: the Rawlsian conception is in this sense self-supporting, the utilitarian conception self-undermining.

The Rawlsian conception is self-supporting because it is in every single member's of society self-interest:

When the two principles are satisfied, each person's basic liberties are secured and there is a sense defined by the difference principle in which everyone is benefited by social cooperation. (1999: 154)

Comment. This seems implausible to me: the "sense defined..." is the sense in which we evaluate self-interest as what is in the interest of people *in the original position*, that is under the veil of ignorance. But how is this *self*-interest, given that we are not (and never were) in the original position?

The utilitarian conception is self-undermining because it not only demands great sacrifices, also of the already worst-off, but does so in a way that leads them themselves (by the publicity constraint) to consider their life-plans worth being carried out:

If the parties accept the utility criterion, they will lack the support to their self-respect provided by the public commitment of others to arrange inequalities to everyone's advantage and to guarantee the basic liberties for all. In a public utilitarian society men, particularly the least advantaged, will find it more difficult to be confident of their own worth. (1999: 158)

To the parties in the original position, it maximises their expected utility to not choose utilitarianism, but rather to choose the Rawlsian principles instead.

The Analysis of Utilitarianism

If utilitarianism is wrong, why did such great minds defend it?

The utilitarian method to determine the just principles of a society is to ask which principles an ideally rational and impartial spectator possessing all relevant knowledge would choose. The key assumption is that the impartial spectator is a perfectly sympathetic being, i.e. someone who, to the highest possible degree, reproduces in his experience the satisfactions and pleasures which she recognizes to be felt by others.

The impartial spectator aggregates all pleasures into one consciousness:

In the classical conception one chooses as if one will for certain live through the experiences of each individual, *seriatim* as Lewis says, and then sum up the result. The idea of taking a chance on which person one will turn out to be does not arise. (1999: 165)

This conception, however, rests on the mistaken assumption that the desires the satisfaction of which creates pleasure do not conflict.

The Priority of Liberty

The lexicographical precedence of the first principle (same liberties) over the second and of the first part of the second principle (equality of opportunity) over the second (the difference principle) can be illustrated by imagining the creation of a just society to proceed in stages, from the original position to a constitutional convention (equal liberty), then to legislation (difference principle), to the interpretation of legal rules by judges and administrators.

Liberties play two roles in Rawls' theory: they are to be guaranteed, to the maximum extent possible and equally for all citizens, by the constitutional convention, and they are themselves, according to the worth they have, primary goods to be distributed by legislation according to the difference principle:

Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. (1999: 179)

Arguments in favour of the claim that in the original position people would choose to guarantee a certain equal liberty (from certain limitations, to do certain things) will depend on the liberty in question. They will choose, e.g., to guarantee equal liberty of conscience because they do not know their religious or moral views but take them seriously enough to want to have them:

Now it seems that equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. (1999: 181)

This is an instance of a more general pattern which applies to all basic liberties:

...the initial agreement on the principle of equal liberty is final. An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests. Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty. It seems possible to consent to an unequal liberty only if there is a threat of coercion which it is unwise to resist from the standpoint of liberty itself. For example, the situation may be one in which a person's religion or his moral view will be tolerated provided that he does not protest, whereas claiming an equal liberty will bring greater repression that cannot be effectively opposed. But from the perspective of the original position there is no way of ascertaining the relative strength of various doctrines and so these considerations do not arise. The veil of ignorance leads to an agreement on the principle of equal liberty; and the strength of religious and moral obligations as men interpret them seems to require that

the two principles be put in serial order, at least when applied to freedom of conscience. (1999: 182)

By the same token, religious beliefs are subsumed under the individual conceptions of the good of which we abstract when considering the original position:

...from the standpoint of the original position, no particular interpretation of religious truth can be acknowledged as binding upon citizens generally; nor can it be agreed that there should be one authority with the right to settle questions of theological doctrine. Each person must insist upon an equal right to decide what his religious obligations are. He cannot give up this right to another person or institutional authority. (1999: 191)

The Same Fair Chances for All

When it comes to the establishment of the constitution, equalities of liberties translates into the so-called “principle of participation”:

It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone’s advantage, they are to be worked out from the viewpoint of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently men’s prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is practicable. (1999: 194–195)

Rawls characterises equality of opportunity as a liberal principle:

The thought here is that positions are to be not only open in a formal sense, but that all should have a fair chance to attain them. Offhand it is not clear what is meant, but we might say that those with similar abilities and skills should have similar life chances. More specifically, assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. (1999: 63)

Rawls captures equality of opportunity by the requirement that a basic social structure must contain only offices and positions of power ‘open to all’. This is much less than most people ordinarily understand by “equality of opportunity”. Whatever else than just openness is understood by “equality” (e.g.: that people have a realistic chance of securing the good, that special compensation is made for handicaps, that diversity counts etc. etc.), most people mean by “opportunity”, not just the possession of official or status functions.

The rule of law is directly justified by the equality of liberties, without recourse to their worth (which would fall under the remit of the difference principle):

Liberty, as I have said, is a complex of rights and duties defined by institutions. The various liberties specify things that we may choose to do, if we wish, and in regard to which, when

the nature of the liberty makes it appropriate, others have a duty not to interfere.²³ But if the precept of no crime without a law is violated, say by statutes, being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise. [...] The principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty. To be confident in the possession and exercise of these freedoms, the citizens of a well-ordered society will normally want the rule of law maintained. (1999: 210–211)

References

Rawls, John, 1999. *A Theory of Justice*. Cambridge, Massachusetts: Belknap Press.