These lectures will be devoted to Justice as Fairness, Rawls’s conception of justice, as developed in the revised edition of *A Theory of Justice* (1999, hereafter, in all handouts, TJ) and *Justice as Fairness a Restatement* (2001, hereafter JFR). The purpose of these lectures is to come to an understanding of the fundamental ideas of Rawls’s approach, and how they fit together: the Original Position, Reflective Equilibrium, the Basic Structure, the Difference Principle, Reasonable Overlapping Consensus, the difference between Political Liberalism and Comprehensive Liberalism, etc… We will do this by going back and forth between TJ and the mature statement of the theory in JFR.

In Rawls’s own words in the preface of JFR:

In this work I have two aims. One is to rectify the more serious faults in *A Theory of Justice* that have obscured the main ideas of justice as fairness, as I called the conception of justice presented in that book. Since I still have confidence in those ideas and think the more important difficulties can be met, I have undertaken this reformulation. […] The other aim is to connect into one unified statement the conception of justice presented in *Theory* and the main ideas in my essays beginning with 1974.

JFR is a succinct, revised, statement of the idea of justice as fairness. The book is based on Rawls’s lectures on his own work; in it, he recasts the basic arguments for the two principles central to his conception of justice, responds to common objections, but also corrects what he came to see as mistakes in TJ. It is thus an excellent guide for a close reading of ideas in TJ.

What Rawls considers weaknesses in TJ are of three types: 1. aspects of the formulation and content of the principles of justice, 2. how the argument for those principles should be organized, and 3. that justice as fairness should be understood as a political conception. I shall highlight modifications introduced to correct and repair problems identified in each of these three areas. We will also raise some familiar criticisms levelled at Rawls’s arguments, and envisage how they might be met.

The primary texts for these lectures are chapters 1-3 and 7 of TJ and Parts I-III of JFR. I will make occasional references to Political Liberalism (1993, hereafter PL), and to Rawls’s Collected Papers (1999, hereafter CP).

It is impossible to give a succinct, unbiased, list of secondary literature on Rawls, but an excellent annotated bibliography of works by topic of interest, preceded by a list of Rawls’s own complete works, and books and anthologies on Rawls is to be found in the *Cambridge Companion to Rawls* (ed. Samuel Freeman). Two useful edited collections are the 1975 *Reading Rawls* (ed. Norman Daniels), and the 2003 *Cambridge Companion*. In the former, see in particular articles by Dworkin (*The Original Position*), Hart (*Rawls on Liberty and its Priority*), and Nagel (*Rawls on Justice*), and in the later articles by Scanlon (*Rawls on Justification*) and Scheffler (*Rawls and Utilitarianism*). I will give bibliographical references to particular critical arguments made against Rawls’s views as we proceed.
Role of Political Philosophy and Some Fundamental Ideas

The virtue of justice and its priority

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For that reason justice denies that the loss of freedom for some is made right by a greater good shared by others. (TJ, 1-2)

Thus the role of justice:

- Principles of social justice ... provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation. (TJ, 2)

Two central concerns

1. The fundamental question of political philosophy is: What is the most appropriate conception of justice for specifying the fair terms of social cooperation between citizens regarded as free and equal, and as fully cooperating members of society over a complete life, from one generation to the next? (JFR, 7-8)

2. One task of political philosophy—it's practical role, let's say—is to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered. (JFR, 2)

Contractualism and Utilitarianism

Rawls's ambition is to provide a 'reasonable systematic alternative' (TJ, xi, emphasis added) to utilitarianism.

Thus his contractualism:

What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau and Kant. [T]his theory seems to offer an alternative systematic account of justice that is superior, or so I argue, to the dominant utilitarianism of the tradition. [I]t is this conception, I believe, which best approximates our considered judgments of justice and constitutes the most appropriate moral basis for a democratic society.
Two questions:

1. What type of contract?

   A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all. (Dworkin, ‘The Original Position’, in Daniels, ed. Reading Rawls, p. 18)

   But see emphasis on justification: ‘[E]ach cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification. So understood, justification is addressed to others who disagree with us.’ (JFR, 27) The original position is ‘a thought-experiment for the purpose of public- and self-clarification’. (JFR, 17)

2. What are the main points of departure from utilitarianism?

   - Rawls is appreciative of utilitarianism, of its ambition, and wants to rival it with another systematic theory addressing moral, social and economic facts. ‘One reason [for the predominance of utilitarianism] is that it has been espoused by a long line of brilliant writers who have built up a body of thought truly impressive in its scope and refinement. We sometimes forget that the great utilitarians, Hume and Adam Smith, Bentham and Mill, were social theorists and economists of the first rank; and the moral doctrine they worked out was framed to meet the needs of their wider interests and to fit into a comprehensive scheme.’

     - However two different lines of criticism:

       1. The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals any more than it matters, except indirectly, how one man distributes his satisfaction over time. (TJ, 5)

       2. Utilitarianism ‘mistakes impersonality for impartiality’ (TJ, 166)

The Primary Subject of Justice: the Basic Structure

The basic structure ‘is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time. The political constitution …, the legally recognized forms of property, and the structure of the economy …, as well as the family in some form, all belong to the basic structure.’ (JFR, 10)

1. ‘[I]ts effects are profound and present from the start.’ (TJ, 7); 2. It preserves background justice (JFR, 57)

Question: Does this mean that principles apply only to the basic structure, and not to choices made by individuals within that structure? (Cf. e.g. G. A. Cohen)

Main modifications in JFR (and the revised edition of A Theory of Justice)

1. No maximization of the basic scheme of liberty (in answer to a criticism from Hart)
2. Account of primary goods (a normative conception)
3. Stress on fact that argument for the difference principle does not rely on aversion to uncertainty
4. Move from Comprehensive to Political Liberalism (cf. the fact of reasonable pluralism)

Taken together these modifications introduce a central concern with reasonable agreement.

A footnote: difference between welfare state and Rawls’s just society
The Idea of the Original Position

The Original Position and the Veil of Ignorance

[T]he question arises as to how the fair terms of cooperation are specified. … Justice as fairness hopes to extend the idea of a fair agreement to the basic structure itself. Here we face a serious difficulty […]. The difficulty is this: we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed and not distorted by the particular features and circumstances of the existing basic structure. The original position, with the feature I have called the “veil of ignorance”, specifies this point of view. (JFR, 15)

What are the parties supposed to reach an agreement on?

[The original position makes] the object of agreement the first principles of justice for the basic structure, rather than any form of government, as in Locke. The original position is also more abstract: the agreement must be regarded as both hypothetical and non-historical. (JFR, 16-17)

Some Essential Characteristics:

1. Parties are situated symmetrically; they are in fair initial conditions of equality. (A more abstract state of nature.) Thus the idea of justice as fairness:

[T]he name “justice as fairness” … conveys the idea that the principles of justice are agreed to in an initial situation that is fair. The name does not mean that the concepts of justice and fairness are the same, any more than the phrase “poetry as metaphor” means that the concepts of poetry and metaphor are the same. (TJ, 11)

2. Parties are neither people in our society, nor people in a just society; they are merely the artificial creatures created for purposes of deliberation.

3. Parties are rational: they can rank their ends consistently. But the reasonable conditions imposed on them (see 1. above) constrain them in reaching a rational agreement on principles of justice. Justice as fairness is not a part of the theory of rational choice.

[To say that it is part of the theory of rational choice] would imply that justice as fairness is at bottom Hobbesian (as Hobbes is often interpreted) rather than Kantian.’ (JFR, 82)]

In other words: there is no contract for mutual advantage, but rather hypothetical agreement (constrained by reasonable conditions) on what is just.

What Do Parties Know? What Do They Ignore?

Veil of ignorance

The parties are not allowed to know: 1. the social positions or 2. the particular comprehensive doctrines of the persons they represent. They also do not know 3. these people’s race and ethnic group, sex, or various native endowments.

Question: Why do parties ignore their comprehensive doctrine? (Moral doctrines are not mere preferences or personal tastes.) But consider: Choice under pluralism
What the Parties know

1. Circumstances of justice
   - Objective circumstances
   - Subjective circumstances

Questions: Does this knowledge mean that the contract is, in effect, for mutual advantage? Why should we assume limited altruism?

2. Primary goods

Parties need at least a ‘thin theory of the good’.

Primary goods are social conditions and all purpose means which allow people [a] to develop their moral powers (1. sense of justice and 2. conception of the good), and [b] to form, pursue and revise their determinate conception of the good.

Primary goods include:
   - Basic rights and liberties
   - Opportunities (for the pursuit of different ends); powers and prerogatives
   - Income and wealth (all purpose means to a wide range of ends)
   - Social bases of self respect

Questions: Why this particular list of goods? Is this list fair to all conceptions of the good?

Note
   - Primary goods are used to define who the least advantaged are.
   - The account of primary goods defines a ‘division of labour’, or ‘division of responsibility’: 1. citizens’ responsibility through the institutions of the basic structure to maintain equal liberties, and fair equality of opportunities, and for providing a fair share of the primary goods for all; 2. within this, individual responsibility to revise ends, etc.

How do the parties proceed? Two Fundamental Comparisons

The parties behind the veil of ignorance are presented with a menu, or list, of principles

First comparison:
The two principles of justice Rawls favours (equal liberties, fair equality of opportunities and the difference principle), and a principle of average utility.

Second comparison:
The two principles of justice Rawls favours, and the same principles, but the principle of average utility substitutes the difference principle. In this second comparison the principle of average utility is applied subject to the constraints of the prior principles: equal liberties and fair equality of opportunity.

The Method of Reflective Equilibrium

- Respective adjustment of considered judgments about justice and principles of justice. (We ‘work from both ends’.) Principles should help reveal a coherence underlying considered judgements.

This adjustment is reached in wide equilibrium, after we have had an opportunity to consider other plausible conceptions (JFR 31). Reflective equilibrium ‘continues indefinitely’ (PL, 97).
Principles of Justice – 1
Basic Liberties and First Comparison

The General Conception

All social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage. (TJ, 54)

Rawls adds:

Injustice, then, is simply inequalities that are not to the benefit of all. (TJ, 54)

The Two Principles

The principles which Rawls considers most appropriate to specify (1) basic rights and liberties and (2) regulate social and economic inequalities in citizens’ prospect over a complete life are the following:

(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle). (JFR, 42-43)

Note

- The first principle is prior to the second, and fair equality of opportunity is prior to the difference principle. Rawls notes that these two principles are preceded by a lexically prior principle requiring that basic needs be met. (JFR, 44)

- The list of liberties is as follows: 1. freedom of thought and liberty of conscience; 2. political liberties (for example, the right to vote and to participate in politics) and freedom of association; 3. the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; 4. the rights and liberties covered by the rule of law. (JFR, 44)

- The list of liberties is not drawn historically, but analytically. These are liberties which provide political and social conditions for the exercise of the two moral powers (i.e.: judging the justice of basic institutions and pursuing one’s own conception of the good).

- Among the basic rights, Rawls adds ‘the right to hold and to have exclusive use of personal property’—but this does not include property of means of production or right of bequest (JFR, 114). ‘Throughout the choice between a private-property economy and socialism is left open[.]’ (TJ, 228)

- Fair equality of opportunity is to be distinguished from mere meritocracy, or formal equality of opportunity.

- Rawls prefers to use ‘difference principle’ over ‘maximin principle’, in order to emphasize the difference with maximin rule for decision under uncertainty.
Revisions: Basic Liberties rather than Basic Liberty

*Compare* the first formulation of principles in the 1971 version of *A Theory of Justice* (p. 60-61)

*First*: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

*Second*: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.

Revisions to the *second* principle are merely stylistic. However the *first* principle is significantly changed. Cf. Hart (‘Rawls on Liberty and its Priority’). Hart notes that the general conception doesn’t refer to maximization of liberty or its extent, and he argues in favour of a list of liberties. Rawls agrees (and adds that no other change is as significant as this revision):

[The] revision brings out that no priority is assigned to liberty as such, as if the exercise of something called ‘liberty’ had a pre- eminent value and were the main, if not the sole, end of political and social justice. (JFR, 44)

First Fundamental Comparison: The Two Principles and Average Utility

1. We start from two contrasting ideas:
   - (1) the idea of society as a fair system of cooperation between citizens regarded as free and equal; (2) the idea of society as a social system organized so as to produce most good over all its members.
   - ‘The tradition of the social contract elaborates the first idea, the utilitarian tradition is a special case of the second.’ (JFR, 96)

The *contrast*: (1) is ‘quite naturally specified so as to include the ideas of equality (the equality of basic rights, liberties, and fair opportunities) and of reciprocity (of which the difference principle is an example’). (2) ‘expresses a maximizing and aggregative principle of political justice’. In (2) the ideas of equality and reciprocity ‘are accounted for only indirectly, as what is thought to be normally necessary to maximize the sum of social welfare’. (JFR, 96)

- The first comparison brings out the advantages of the two principles with respect to equality. (The second will bring out the advantages with respect to solidarity or mutuality.)
- The first comparison (but not the second) uses guidelines of maximin rule for decision under uncertainty.
  *Maximin rule*: this rule tells us to identify the worst outcome of each available alternative, and then to adopt the alternative the worst outcome of which is better than the worst outcome of all the other alternatives.

2. Given these considerations, parties behind the veil of ignorance reason as follows:
   - Parties assume that citizens have, among other interests, an interest in the fulfilment of their religious, philosophical and moral conceptions.
   - The two principles protect the basic rights and liberties *and* provide an adequate complement of the primary goods to exercise and enjoy those freedoms.
   - *Therefore*: to agree to the principle of average utility would jeopardize those rights and liberties without sufficient reason. The parties cannot take risks by permitting a lesser liberty of conscience, say, for minority conceptions of the good.
   - Furthermore, the basic liberties protect fundamental interests that have a special significance; *thus the priority of the first principle over the second.*
Principles of Justice – 2
Fair Equality of Opportunities
Difference Principle and Second Comparison

Fair Equality of Opportunity (FEO)

This is a difficult and not altogether clear idea; its role is perhaps best gathered from why it is introduced: namely, to correct the defect of formal equality of opportunity—careers open to talent—[.]. To this end, fair equality of opportunity is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. (JFR, 43)

1. Difference between two ideas of equality of opportunity, and reason for priority of FEO:

[T]he reasons for requiring open positions are not solely, or even primarily, those of efficiency. [...] It may be possible to improve everyone’s situation by assigning certain powers and benefits to positions despite the fact that certain groups are excluded from them. [...] But the principle of open position [...] expresses the conviction that if some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated even though they benefited from the greater efforts of those who were allowed to hold them. (TJ, 73)

Comment. Importance and priority of social bases of self-respect. (Scanlon, ‘The diversity of objections to inequality’, in The Difficulty of Tolerance, restates the second principle thus: ‘economic inequalities are unjust if they give rise to unacceptable stigmatization of some as inferior’.)

2. FEO not a constitutional essential (JFR, 47)

3. FEO is required in terms of background procedural justice.

Meaning of the word background in this expression? Example of draft rule in professional sport.

For example, background institutions must work to keep property and wealth evenly shared over time to preserve the fair value of the political liberties and fair equality of opportunity over generations. [...] The kind of limits and provisos that in Locke’s view apply to separate transactions of individuals and associations in the state of nature are not stringent enough to ensure that fair background conditions are maintained. (JFR, 51-53)

Problem: Family and equality of opportunities. See TJ, 64, 267, 447-48 and JFR 163, footnote 44

Difference Principle: its meaning

The principle: Social and economic inequalities are to be to the greatest benefit of the least-advantaged members of society.

Worth of liberty: ‘The difference principle, in maximizing the index available to the least advantaged, maximizes the worth to them of the equal liberties enjoyed by all.’ (JFR, 149)

Social cooperation as a premiss: ‘Social cooperation, we assume, is always productive, and without cooperation there would be nothing produced and so nothing to distribute.’ (JFR, 61; see also TJ, section 79, especially note 4).
Difference Principle in Reflective Equilibrium: Clarifications, Objections, Counterexamples

1. What kind of inequalities do benefit the least well-off?
2. Are inequalities bad or arbitrary?
3. Is the Difference Principle premised on a conception of native endowments as common assets?
4. Is the Difference Principle premised on the parties being irrationally risk averse?
5. Are social and economic inequalities allowed if and only if they benefit the least well-off? Consider two cases: (a) everyone at the same level; (b) some at this level – others better off.

6. An example by Parfit (Reasons and Persons):

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7. How strict is the principle? Consider two cases: (a) The least well off benefit very little after a point, the most advantaged group benefits very much and (b) The least well off lose very little after a point, the more advantaged group gains very much. (JFR, 67)

8. Do numbers not count? Consider the case of a trade off between (a) severe hardship for a few who are very poor and deprived and (b) preventing less severe but still substantial hardship for a large number who are better off but still struggling for subsistence. (cf. Nagel, ‘Equality’).

9. Is the Difference Principle not sensitive to (a) individual responsibility? and (b) individual handicaps? (Cohen, Dworkin and Daniels)

10. Would society be more egalitarian if principles were to apply beyond the Basic Structure? Do individuals have too much of a prerogative to depart from equality? (Cohen)

Second Fundamental Comparison: Two Principles vs Constrained Utility

Question: are Rawls’s two principles preferable to the principle of average utility subject to the constraints of the prior principles: equal liberties and fair equality of opportunity? In particular: Isn’t a social minimum understood as the idea of meeting basic human needs essential for a decent life, combined with the constrained principle of average utility a genuine alternative?

Reminder: In this second comparison the maximin rule doesn’t apply.

Answer. 1. It is possible that the two principles are not very far apart in practice, and 2. ‘The least advantaged will not experience their condition as so miserable, or their needs so unmet, that they reject society’s conception of justice and are ready to resort to violence to improve their condition’ But 3. it might not sufficient to ensure that ‘the least advantaged feel that they are a part of political society’. (JFR, 127)

Two forms of exclusion (JFR, 128) 1. ‘[W]e become sullen and resentful, and we are ready as the occasion arises to take violent action in protest against our condition’ 2. ‘[W]e grow distant from political society and retreat into our social world. We feel left out; and withdrawn and cynical, we cannot affirm the principles of justice […]. Though we are not hostile or rebellious, those principles are not ours and fail to engage our moral sensibility.

Hence Rawls’s opposition to a capitalist welfare state (which can be argued for on the basis of prudence alone, for it eliminates causes of unrest).
Conclusion

Justice as Fairness: a Political Doctrine

Justice as Fairness Restated

We saw Rawls’s defense of the main aspects of TJ, and in particular the type of justification offered, the original position, and the principles (equal basic liberties, fair equality of opportunity, difference principle).

The main modifications we saw so far fall into two categories:

1. Aspects of the formulation and content of the principles of justice. In particular:
   
   (a) First principle: what is guaranteed is a fully adequate scheme of equal basic liberties; there is no maximization of liberty as such.
   
   (b) Second principle: the stress is now put on the fact that the argument for the difference principle does not use guidelines of maximin rule for decision under uncertainty.
   
   Both modifications address, and rule out, interpretations which made principles seem implausible.

2. How the arguments for the principles is organized is now under the form of two comparisons, both of which are with utilitarianism (unconstrained and constrained utilitarianism).

More generally we saw that emphasis is put on a reasonable conception of what we owe to others through political institutions, rather than on rational decision under uncertainty.

The centrality of reasonableness leads us to the final and third type of modification: the move from comprehensive to political liberalism.

Move from Comprehensive to Political Liberalism

1. Consider two criticisms of knowledge parties have behind the veil of ignorance:

   – The original position] may not be fair. […] The suppression of knowledge required to achieve unanimity is not equally fair to all the parties, because the primary goods are not equally valuable in pursuit of all conceptions of the good. […] The model contains a strong individualistic bias … [G]iven that many conceptions of the good do not fit into the individualistic pattern, how can this be described as a fair choice situation for principles of justice? (Nagel ‘Rawls on Justice’)

   – The argument in Theory of Justice, with its assumption of individual life plans, shows nothing more decisive than that Kantian people, preferring to live in a Kantian society, would choose Kantian principles of justice. (Scheffler, ‘Moral independence and the original position’)

   (Contrast: communitarians.)

2. Some facts known by the parties:

   (c) Fact of pluralism

   (d) Fact of reasonable pluralism

   (e) Fact of oppression
3. Strategy:

The problem is possible unfairness to people holding different comprehensive doctrines.

(Contrast: questions of multiculturalism.)

Several moves:

1. Difference between fairness to conceptions of the good and fairness to people holding different conceptions of the good
2. Possibility of a reasonable overlapping consensus
3. Specificity of the political (neither a community of faith nor a free association)
4. From 1, 2 and 3: distinction between political liberalism (PL) and comprehensive liberalism (CL)

Examples: education, gender roles

4. Questions

- Is PL a theory for which equal respect for persons ‘entails treating their ideas with respect even if we privately find them extremely silly’ (Brian Barry)?
- Isn’t there ‘little reason to reject valid or true principles, the implementation of which may actually be of benefit to all, just because a small sector of the population cannot be convinced of this fact’ (Raz)?
- What is the difference between political status quo (which might be unjust) and reasonable overlapping consensus? (Principles have to be justifiable)
- Do principles of PL apply in the private sphere?
- What are unreasonable doctrines?

5. Conclusion: an egalitarian move

Return to second comparison, and in it to justification for the difference principle.

Rawls’s justice as fairness directs our attention to those who do worse in society, and it is committed to finding principles that allow each person to be a member of society, rather than to be simply ‘caught in it’. This commitment is reinforced by the move from CL to PL.

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