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Separateness and Desert: a Rawlsian Problem

ABSTRACT:

Through a close analysis of a single paragraph of J. Rawls's *A Theory of Justice*, I examine his position on the issue of desert and show how it does not take into account the separateness of persons.

KEYWORDS:

Rawls, justice, fairness, desert, separateness

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My paper will deal with a matter of detail relating to an apparently secondary passage of a text, conversely, much commented and known, even to a text that is considered, rightly, the reference work for most of the debate within political philosophy and ethics since forty years. I am referring to, of course, *A Theory of Justice* by John Rawls (henceforth quoted as *TJ*). The background of Rawls's philosophy will be given largely for granted precisely for these reasons.

If, however, I hope to say something meaningful on a paragraph of *TJ*, it is not just for a philological love of particular, but because I believe that in a work so architecturally structured like that of Rawls, perhaps more than in others, the devil is often in the details.

One of the charges that Rawls addresses to utilitarianism is the famous criticism that it does not take seriously the individuality of any person, because of the monistic principle of preference aggregation, which seems essential to the very idea of a social utilitarianism. Some have inferred from this charge that a general skepticism about principles should be accepted in moral philosophy. While I think that rawlsian accusation against utilitarianism can be widely revolted against Rawls himself, I believe that it would be inappropri-

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ate to reject principles in political philosophy and moral philosophy because principles would be indifferent to particular cases. Our moral and cooperative experience has been made by special cases that need to be traced back to principles to form a meaningful experience and this is the reason why any version of “moral particularism” should be rejected in political and moral philosophy. Principles of justice seem to incorporate the possibility of correcting injustices in particular cases, so to answer to some concerns expressed by particularism, since their first formulation.

It is appropriate to recall the two founding principles of the social contract construction of Rawls, expressed as it is known in the two principles of justice:

«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»¹.

These two principles are lexically ordered—the second principle must be subordinated to the first—and this is consistent both with the idea of Rawls that individuals hold a sense of justice and with the idea that the limits of power should be specifically designed. This means, for example, that a restriction of liberty is only compatible with the preservation of liberty, but not with the extension of social welfare or with more efficient institutions.

Since the two principles shape all social institutions and model a fair social cooperation, the benefit and burdens of cooperation must ultimately be judged also from a founda-

¹ RAWLS 1972, 60.

tional perspective, that is from the perspective of perfect procedural justice. The perfect procedural justice, using Kantian terminology, is the transcendental condition of our critical judgment on any institution and on any action with social significance. It represents, in other words, the condition of possibility of institutions in accordance with the two principles. Of course, we do not live in that *sub specie aeternitatis* world, as Rawls lyrically writes at the end of *TJ*, but it is that perspective that makes possible to critically judge social actions and institutions.

The call to fairness is nothing more than this: calling for corrections in accordance with the two principles. But which kind of call? Since equity has this corrective dimension, common sense thinks that this claim consists of and is based upon some qualities of the subject, in particular, some of his/her moral qualities, which have been violated. Some of these qualities can be grouped under the name of "moral desert". "Moral desert" is an expression with indeterminate holistic meaning. «There is a tendency for common sense to suppose that income and wealth, and the good things in life generally, should be distributed according to moral desert»². Among the good things of life there is, no doubt, being treated with fairness, of course. Immediately after, with a suggestion that Rawls clearly takes from Kant, Rawls writes that «While it is recognized that this ideal can never be fully carried out, it is the appropriate conception of distributive justice, at least as a *prima facie* principle, and society should try to realize it as circumstances permit»³. The Kantian suggestion is that those who act morally, doing what the formality of moral law requires have a rational hope that their acting morally makes them worthy of happiness. «Jus-

² RAWLS 1972, p. 310.

³ RAWLS 1972, p. 310.

tice is happiness according to virtue»⁴, we could say, modulating this Kantian mantra, but this is an ideal, that must be designed against the empirical circumstances. However, these circumstances are the empirical material - the contingency of human and political life - that must be corrected by the transcendental conditions represented by the two principles of justice. Like Kant's categorical imperative, this empirical material is both a necessary condition and a potentially polluting condition. In the categorical imperative, which is the fact of reason, nothing should be sensitive; by means of the principles of justice, by contrast, everything is significant, because it can imperfectly realize what is required by a liberal community structured by the two principles. In both cases, empirical and contingent conditions represent a condition of realization, although not a condition of possibility, which would be to mix inappropriately the empirical with the transcendental.

Justice should represent, according to common sense, the realization of some desert, or at least should be sensitive to the recognition of individual desert. The goods should be distributed according to the Aristotelian principle of "to each his own": this seems to be the appropriate conception, *prima facie* and intuitively, of the realization of justice in our imperfect world, as far as at least it can be in accordance with the circumstances, always inadequate, of an empirical life. What does Rawls think of all this?

«Now justice as fairness rejects this conception. Such a principle would not be chosen in the original position. There seems to be no way of defining the requisite criterion in that situation. Moreover, the notion of distribution according to virtue fails to distinguish between moral desert

⁴ RAWLS 1972, p. 310.

and legitimate expectations»⁵.

Does Rawls mean that the application of the principle of giving “to each his own” is impossible? On the one hand, the answer seems to be positive, because «the notion of distribution according to virtue fails to distinguish between moral desert and legitimate expectations»⁶. Indeed, we do not expect that a judicial decision or a general political decision is structured by the amount of virtue of the subject who the decision is addressed to. Such procedure would be appropriate, for example, in a caste system society, but not in a society worried to outline some general and/or initial conditions of opportunity(constrained by insurance terms of choice, for example). A distribution of justice according to virtue then would violate the conditions of fairness. However, it remains true that

«it is true that as persons and groups take part in just arrangements, they acquire claims on one another defined by the publicly recognized rules. Having done various things encouraged by the existing arrangements, they now have certain rights, and just distributive shares honor these claims»⁷.

This is what normally happens in optimal situations of mutual cooperation. These situations are formalized in games that involve an indefinite number of moves(after all, with a statement, subsequently corrected, but that remains highly significant, Rawls has described the theory of justice as a part, perhaps the most significant, of the theory of games) and the strategy to adopt is ultimately the one suggested by

⁵ RAWLS 1972, 310-311.

⁶ RAWLS 1972, 311.

⁷ RAWLS 1972, 260.

R. Axelrod⁸, a simple *tit for tat*: start cooperating and 1) keep on cooperating if the other has cooperated; or 2) defeat if the other has defeated, There are both formal and empirical demonstrations that this strategy brings about the greatest net balance in situations where the number of moves is indefinite (but not in games of just one move, or where the number of moves is known. In the first case the greatest net balance is produced defeating and in the second case, if the other one has cooperated in all the previous moves, you should defect at the last move).

The fact that «having done various things encouraged by the existing arrangements, they now have certain rights, and just distributive shares honor these claims»⁹, recognizes what might be considered a social truism: if you are going to cooperate, then you are reasonably waiting for a symmetrical cooperative behavior from your partner. He/she is not going to defeat and he/she will work together with you. Your expectations are legitimate in the sense that «a just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions»¹⁰. This last step is crucial. When are your expectations not just yours but your legitimate expectations? Surely not when you are considered from the point of view of the virtues that you are able to exhibit and play in social cooperation. These expectations are recognized as such in certain circumstances in which you act, but this does not imply that we have to refer to some minimal ontology that is attached to you and from which we must derive a kind of duty to satisfy certain expectations because they are yours. Your expectations are legitimate, because they are in accor-

⁸ AXELROD 1984.

⁹ RAWLS 1972, 260.

¹⁰ RAWLS 1972, 260.

dance to what is asked by just social institutions. These social institutions are the structure that makes valuable what you are entitled to. But these entitlements have no existence before the implementation of just social structures. Namely, you are not the repository of any claims before there are just social structures that speak about them and recognize them in their own terms.

There is a clear kinship between this way of arguing and what is theorized in the political philosophy of Hobbes and, in particular, in his *Leviathan*. Not surprisingly, Hobbes does not distinguish between civil society and state, but rather identifies them, since there is neither society nor system of law nor moral law outside the system of the state. I think that in this paragraph Rawls makes a move in pure Hobbesian style, arguing that the social institutions are the structure that make valuable what you are entitled to. If this is true, then one must surely wonder about the mysterious absence of the name of Hobbes from the initial list of authors cited, when Rawls quietly proclaims that his intention «is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, Kant» (Hobbes is quoted in note 4 in the same page: «For all of its greatness, Hobbes's *Leviathan* raises special problems»)¹¹. But is this minimalism in Rawls's contractualism really convincing? I think it is not, because what you are within there visited social contract by Rawls is summarized in a set of negative conditions. These negative conditions are the fact that as selfish decision maker, i.e. its economic version, the free rider, is not provided amongst the decision makers who can legitimately be chosen as the actors of social cooperation. For choosing to be a free rider you must be in pos-

¹¹ RAWLS 1972, 11.

session of spatial-temporally extended psychophysical unity, which makes your own autobiography and is not available for any other definite description. In a nutshell, you must have a proper name, which is excluded by the formal conditions of the original position.

Selfishness is not, therefore, excluded from the initial conditions of choice as a generator of logical and practical paradoxes. That the so-called prisoner's dilemma can be interpreted as the stigmata of irrationality that mark the selfish acts is something that Rawls is not interested to stress. Selfishness is not irrationality: it is simply the possibility for the agent to refer to his/her own name. For this reason, proper names should be excluded from the initial conditions of choice, those that generate at least *sub specie aeternitatis*, perfect procedural justice. Procedural justice is not perfect utopia. It would be a radical equivocation to understand it in this way. Rather, it is a transcendental condition of our own ability to build and test the right. It is both a condition of possibility of what our experience lists under the name of cooperation and a basis for judging of our empirical cooperation.

The concept of moral value and the concept of legitimate moral expectations are derived and are not primitive concepts, since

«The essential point is that the concept of moral worth does not provide a first principle of distributive justice. This is because it cannot be introduced until after the principles of justice and of natural duty and obligation have been acknowledged. Once these principles are on hand, moral worth can be defined as having a sense of justice»¹².

So, what can you, the person that you are, rightly claim

¹² RAWLS 1972, 260.

from the point of view of justice as fairness? Nothing, because to do so you should always start by saying “I”, fill the blank line with your first and last name, start a letter saying “I, myself”. You are the one that must sign and not another person. The same vicarious decisions, simply refer to the possibility that, if you could, you would take yourself decisions which someone else is taking for your own good.

Since «the virtues can be characterized as desires or tendencies to act upon the corresponding principles»¹³, they refer specifically to your autobiography. Your own autobiography is, indeed, the only text where there is something like your desires and tendencies and where your proper name acquires its actual sense. The inclinations and desires are part of what you are and part of what you have become. Even if you believe that the quotation of Pindar, «you become what you are», is a good description of you – maybe because you subscribe some perfectionist ethics – you still need to learn it, which means that there was a time that you should be able to remember when you were not what they are now. «So the concept of moral value is secondary to those of law and justice and has no substantive role in the determination of distributive shares»¹⁴. In short: right has precedence over good, which is a concept too broadly inclusive and ambiguous, liable to abuses based on dubious *sui generis* knowledge. «The case is analogous to the relationship between substantive rules of property and the laws on theft and robbery»¹⁵. To say that the good is prior to the right and that it coincides with fairness and equity, it would be like claiming that the crimes and violations of rights are prior to the institutions that account them for and provide

¹³ RAWLS 1972, 313.

¹⁴ RAWLS 1972, 313.

¹⁵ RAWLS 1972, 313.

them for, or it would like to say that the shaping of cooperation under the idea of perfect procedural justice is designed to reward merit and moral virtue. But the institution of property is not made to punish the thieves; it results from reasons that are independent of the contingent possibility of retribution and punishment. This is really a contingency, because it is empirical, but not in the same way in which the empirical material fills the transcendental, while the transcendental keeps on representing the condition of possibility of the empirical. On the contrary, the idea of procedural justice would be the perfect condition of inability to reward virtue and moral merit.

It could be objected that all observations are, in some way, softened by others that appear in the same places, which would support a position, so to speak, more adherent to our condition. Consider, for example, the apparent truism stated by Rawls: «In a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements»¹⁶. Nothing less unproblematic, it seems. But even this sentence is not so innocent. Rawls is arguing that if you deserve something it is because you are inside an adequate order, that of a well-ordered society. Were there not a well-ordered society—and, perhaps, *any* society— your desert would have not any chance of being recognized, and one can say that it would not even exist.

The fact is, indeed, that your personal acquisitions, your claims, a proper ascription of your own deserts make sense only within a scheme that is not your product. In a certain way, you, as a citizen of a society properly adequate with the concept of well-ordered society, are the product. For «The legitimate expectations that arise are the other side, so

¹⁶ RAWLS 1972, 313.

to speak, of the principle of fairness and the natural duty of justice»¹⁷, your expectations are designed on justice as fairness. «For in the way that one has a duty to uphold just arrangements, and an obligation to do one's part when one has accepted a position in them, so a person who has complied with the scheme and done his share has a right to be treated accordingly by others»¹⁸. But the acceptance of a particular social asset is less a voluntary act, than the product of your insurance rationality, the most important part of the theory of justice. When you join a just social asset you recognize what is already in you, and this is precisely your being entitled to citizenship within a well-ordered society.

But then is there any distinction between the possession of a valid entitlement for something and desert? To explain this distinction, that is its «familiar although non moral sense»¹⁹, Rawls elaborates an example. Imagine you have been watching a football match between two teams. After the match, we think that team A, which have lost the game, however, deserved to win. «Here one does not mean that the victors are not entitled to claim the championship, or whatever spoils go to the winner»²⁰. The losing team has performed the entire repertoire of sporting activities required by the degree of excellence in the sport and if it lost because of contingencies, it remains worthy of winning. But from the standpoint of a valid entitlement to claim the premium charged by the team that instead won the race, the loser cannot claim anything, even if it deserves to win or even if it actually lost. I think that the example of Rawls is, once again, enlightening and extremely interesting both for what he explicitly says and for

¹⁷ RAWLS 1972, 313.

¹⁸ RAWLS 1972, 313.

¹⁹ RAWLS 1972, 314.

²⁰ RAWLS 1972, 314.

what he suggests. Similarly to the example of sport, even the best legal and economic structure – designed, obviously, as a tournament and not as a single race – will never lead to optimal results in any case. In a fair match and in a fair society, you would probably have to win, since you got the right entitlements together with the right abilities. However, you lost by the tournament rules without violating the right entitlement of anybody. What can you really complain of? Bad luck, perhaps? But bad luck cannot of course be attributed to a fair social asset. Fair social assets could be implemented to correct and compensate for situations brought about by bad luck, but the motivation to implement them is not the asymptotic approximation to fairness, but rather important reasons for the relative stability of the social cooperation. So, you have no reason to complain in the very terms of the social agreement that, at least from the transcendental point of view, you would have signed.

You could say that this is scant consolation. Maybe you could even go further and adapt to Rawls the savage irony that Hume threw on the social contract doctrine in the essay on the original contract and his nihilistic conclusion. In Hume's opinion it is better not to speculate too much about the origin of the governments that we consider legitimate. We could have some unpleasant surprises, since most of the existing governments originate from violence, oppression, deceit. As Nozick would say, a good entitlement can be legitimized only by a historical point of view. The problem is that nobody is able to put in place mechanisms that should switch back to the dawn of human history. So, the only claim is that you may advance in terms of what you are living, of your social order if just (if the social asset you are living in is not coherent with justice as fairness, then we are going into a completely different matter).

«No doubt some may still contend that distributive shares

should match moral worth at least to the extent that this is feasible. They may believe that unless those who are better off have superior moral character, their having greater advantages is an affront to our sense of justice»²¹.

But when you had made such objection you would have put yourself outside the sphere of justice as fairness, because you would have esteem as relevant for justice precisely considerations regarding the proper name which are completely irrelevant in the construction and design of just social arrangements. Thus, «Even when things transpire in the best way, there is still no tendency for distribution and virtue to coincide»²². You might think that this concerns only distributive justice, but, even leaving aside the formidable question of retribution of desert, Rawls suggests that it would lead us to a strongly restricted vision of justice as fairness. On the contrary, as a matter of fact, «In a well-ordered society there would be no need for the penal law except insofar as the assurance problem made it necessary»²³. So what in the end can you meaningfully claim from the perspective of perfect procedural justice? Actually nothing, since there would be no wrong to be corrected, there would be no social positions to compensate – the unequal position in society is simply motivated by the fact of attracting talent to professional positions where they are most needed –. Fairness has been already built into the original position from the outset. It, therefore, makes no sense to make critical demands after the contractualistic move, which has been designed precisely to avoid them. Or rather, it would be meaningful only if you will remember that life socially, cooperatively, conflictually you are living

²¹ RAWLS 1972, 314.

²² RAWLS 1972, 314.

²³ RAWLS 1972, 315.

in the transcendental perspective of justice as fairness implies the still modest, but unredeemable, transcendental of your psycho-physical units, of your biography, of your “I think”, as we might say if we wanted to force the Kantian expression. That is: it would be meaningful, only if you think that your own name at all times keeps, beyond your narcissism, your equivocal frustration of being just the person you are, an importance that the social modeling wants to deny. So, the conclusion that, in my view, should be drawn from this discussion is that the rawlsian critique of utilitarianism – not taking seriously into account the real separateness of person – should be fully ascribed to his theoretical construction too.

References

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