

Phil 115, June 14, 2007
The equality and priority of the basic liberties

- What does Rawls mean by the “equality and priority of the basic liberties,” which his first principle is supposed to embody?
- What is Rawls’s argument for the first principle and its priority.

The restriction of liberty: unequal and equal restriction

In §32, Rawls distinguishes, at least by example, between the *regulation* and *restriction* of a liberty.

- Rules of order, which require each speaker to wait his turn, are only a regulation of freedom of speech. Rules of order would be necessary in almost any social conditions for the equal exercise of freedom of speech.
- A law banning discussion of Islam, by contrast, restricts freedom of speech. It isn’t necessary for the equal exercise of freedom of speech.

There are two kinds of restriction on liberty.

- First, there is (what I will call) “equal restriction.” In equal restriction, one type of liberty is restricted *equally*, that is, in such a way that *everyone* has less extensive liberty of that type.
- Equal restriction is justified only if “the representative citizen finds this a gain for his freedom on balance.”
- Second, there is “unequal restriction.” In unequal restriction, one type of liberty may be restricted *unequally*, that is, in such a way that *only some* people have less extensive liberty of that type, whereas *other* people have more extensive liberty of that type.
- Unequal restriction is justified only if *those with the lesser liberty* find a gain for their freedom on balance.

In both cases, restrictions on liberty can only be justified for liberty, not for other values.

Hart’s first criticism: “How is this supposed to work, exactly?”

- First, how are we to define “a gain for his freedom on balance”? After all, it isn’t as though we can appeal to some common metric of the “quantity” of freedom when deciding whether to restrict one kind of liberty for the sake another kind of liberty.
- Second, who is the “representative citizen”? Won’t different citizens have *different* preferences for *different* kinds of liberties?

Restricting liberty for social and economic development:

There is, it seems, a third kind of restriction of liberty, besides equal and unequal restriction, that may be justified in Rawls’s system. We might call this *restriction for the future*.

- Rawls notes that in some historical conditions, the (equal or unequal) restriction of some liberties may be necessary in order “to transform a less fortunate society into one in which all the basic liberties can be fully enjoyed” (218).
- We are not restricting one liberty now in order that other liberties are better protected now.

- Instead, we are restricting one liberty now for the sake of *economic and social development* now.
- However, the economic and social development must be geared toward making the “effective exercise” of the presently restricted liberties possible. We are restricting liberty here and now for the sake of liberty *in the future*.
- Restriction for the future is prohibited by the *special* conception.
- But it is not prohibited by the *general* conception, in which the first principle does not take strict priority over the second. The general conception comes into play precisely when conditions are so bad that the liberties cannot be effectively exercised.

Restricting liberty of conscience for public order and security:

- In §34, Rawls notes that equal liberty, e.g., of conscience can be restricted in the common interest of public order and security. The maintenance of public order is “a necessary condition for everyone’s achieving his ends whatever they are... and for fulfilling his interpretation of his moral and religious obligations” (187).
- Furthermore, Rawls raises the bar quite high. This restriction is justified *only* when it is *clear* to *all* reasonable citizens that it is *necessary* for public order. The judgment that the public order is in danger must not be based on any particular worldview. And it must be a judgment that the threat is not “merely possible or in certain cases even probable, but reasonably certain or imminent” (187).

The political liberties and democracy:

When applied to the political process, the principle of equal liberty implies equal participation: “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” (194).

Within Rawls’s system there are two possible arguments for majority rule.

- First, majority rule provides equal political liberty. Indeed, the most extensive political liberty is established by bare majority rule.
- Second, majority rule is more likely than other methods of decision-making to lead to just and effective legislation. The political process is a case of *imperfect* procedural justice. We have an independent criterion of just legislation. Just legislation is legislation that ensures equal liberty.

The second kind of argument might *also* be given for *restrictions* on majority rule: such as checks and balances, and judicial review.

- If limitations on majority rule are more likely to lead to legislation that protects the other basic liberties, then that is a permissible ground for limiting majority rule. We restrict political liberties for other liberties (and perhaps even for the ongoing preservation of political liberties themselves).

Why should majority rule be expected to lead to just legislation?

- Rawls thinks that we should not think of voting as a way to aggregate preferences, a way to strike a balance between conflicting private interests. We must not think of voting as a kind of market mechanism that mutually accommodates various personal desires.

- Instead, we should think of voting as a way of deliberating about the public good. If we expect voters to decide in this way, then “[t]he outcome of the vote give an estimate of what is most in line with the conception of justice” (314). “[W]e normally assume that an ideally conducted discussion among many persons is more likely to arrive at the correct conclusion (by a vote if necessary) than the deliberations of any one of them by himself.”
- Why should this be so? “The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments. At least in the course of time, the effects of common deliberation seem bound to improve matters” (315).

The worth of liberty:

Rawls distinguishes sharply between the *extent* of liberty and the *worth* of liberty.

- If one is not able to take advantage of one’s rights and opportunities, because of poverty, ignorance, or disability, this affects the *worth* of one’s liberty, but not the *extent* of one’s liberty.
- Justice as fairness does not require the *worth* of liberty to be *equal*.
- Instead, the difference principle: The worth of liberty would be even less, if it were equal.
- But one exception: political liberty. The worth of political liberty must be strictly equal.
- The reason is that the political process has, so to speak, limited space. If I run my campaign ads round the clock, then I *reduce* your influence on political decisions.

The argument for freedom of conscience:

The parties realize that, for all they know, they may believe they have absolute, nonnegotiable moral or religious obligations. They must ensure that if they have these obligations, they have the liberty to honor them, to act as they believe they are obligated to act. To select a principle of unequal liberty would be to gamble that one was in the privileged group, with more than its fair share of liberty.

Clearly, this argument is related to the “maximin” argument. Equal freedom of conscience provides a satisfactory minimum as far as religious observance is concerned, and there is little reason to try for anything more. This does not depend on strong empirical assumptions about the structure of preferences. All it depends on is the nature of religious faith.

The argument is bolstered by the strains of commitment. The parties cannot make an agreement if there is a chance that they won’t be able to live up to it. If they turn out to be religious, and if they turn out to be in the minority, could they really expect to live up to an agreement on unequal freedom?

Rawls claims that this argument generalizes to the other basic liberties. Will it?

The argument for the priority of liberty:

In the first edition, Rawls writes:

“Now the basis for the priority of liberty is roughly as follows: as the conditions of civilization improve, the marginal significance for our good of further economic and social advantages diminishes relative to the interests of liberty, which become stronger as the conditions for the exercise of the equal freedoms are more fully realized” (542).

Rawls continues:

“To be sure, it is not the case that when the priority of liberty holds, all material wants are satisfied. Rather these desires are not so compelling as to make it rational for the persons in the original position to agree to satisfy them by accepting a less than equal freedom” (543).

In other words, once we reach a certain threshold, we care so much more about freedom, that we refuse to trade off *any* part of our freedom for *any* material gain, no matter how great it might be.

A utilitarian criticism of the argument for the priority of liberty:

If liberty is as important as Rawls claims, then utilitarianism will, in practice, see that it is protected.

Rawls replies:

- First, “it seems that the parties would prefer to secure their liberties straightaway rather than have them depend upon what may be uncertain and speculative actuarial calculations” (138–139).
- Second, “there is a real advantage in persons’ announcing to one another once and for all that even though theoretical computations of utility always happen to favor the equal liberties (assuming that this is indeed the case here), they do not wish that things had been different” (139).
- Third, the two principles offer clearer and more reliable guidance than utilitarianism.

Hart’s second criticism, of the argument for the priority of liberty:

- First, the empirical assumption seems implausible. Do we actually care so much more about freedom than other goods?
- Second, even supposing that this assumption is true, the parties in the original position aren’t supposed to know it.

Rawls’s first reply to Hart’s second criticism, the second moral power:

While the parties do not know their particular preferences, they do know that they can be fully participating members of a fair system of cooperation.

This means that they know that they have at least *two moral powers*.

- First, the *ability to honor fair terms of cooperation*. This means their having a *capacity for a sense of justice*.
- Second, *an interest in cooperation*.
 - (a) a determinate *conception* of the good, and
 - (b) a *capacity* for a conception of the good: a capacity to form, revise, and rationally pursue a set of final aims and attachments.

Consider, first, the *determinate conception of the good*.

- Many conceptions of the good imply nonnegotiable obligations.

- From the standpoint of someone with such a conception of the good, it simply makes no sense for him to jeopardize his ability to comply with these obligations for a possible increase in status or economic benefit. “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” (182).

Next, consider the *capacity to have a conception of the good*.

- First, the capacity has value as a *means to one’s good*. One exercises the capacity in rationally pursuing one’s final ends and articulating one’s conception of the good. But it is also exercised in forming another conception or in revising the one we have. “There is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision” (313).
- Second, the capacity is a *constituent of one’s good*. We may want not simply to have the most rational way of life for us, but also to understand why it is most rational for us, to appreciate the case for it, and to endorse it reflectively.

The parties have a “highest-order interest in how their other interests, including even their fundamental ones, are shaped and regulated by social institutions. The parties conceive of themselves as free persons who can revise and alter their final ends and who give priority to preserving their liberty in this respect” (475).

“Thus the persons in the original position are moved by a certain hierarchy of interests. They must first secure their highest-order interest and fundamental aims (only the general form of which is known to them), and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place” (476).

Rawls’s second reply to Hart’s second criticism, the self-respect argument:

Self-respect is one of the most important primary goods. Without it, we will lack the confidence to pursue our conceptions of the good.

- Self-respect depends on certain social conditions, what Rawls calls the “social bases of self-respect.” If everyone else treats you as inferior, it will be all but impossible to have confidence in yourself. “Unless we feel that our endeavors are respected by [others], it is difficult, if not impossible for us to maintain the conviction that our ends are worth advancing” (156).
- Self-respect is affected, in particular, by the principles of justice that are publicly recognized in a society. The condition of publicity—namely, that everyone will know what the conception of justice is—plays a pivotal role. And one reason for choosing certain principles over others is that their public recognition would give greater support to individuals’ self-respect.

The first principle is the principle of equal liberty, which requires equality in liberty. The second is the difference principle, which allows inequality in other goods. Our question is whether either should take priority and if so, which.

- Suppose that institutions give the *difference principle* priority over equal liberty. Then it would be as though those institutions were announcing, “What *really* matters is the

distribution of economic goods. What's *really* important is what job you have and how much you make.”

- Since the difference principle permits some people to have more prestigious jobs than others and some to make more than others, this announcement would, in effect, say that some people were inferior to others. And this in turn would undermine their self-respect.
- Suppose instead that, as Rawls wants, institutions give equal liberty priority over the difference principle. Then it is as though those institutions announce, “What really matters is your citizenship: your right to make up your own mind, to express your opinions, to influence political decisions, etc.”
- Since the principle of equal liberty gives everyone *equal* citizenship, this announcement does not say that some are inferior to others. This priority rule does not undermine self-respect; it supports it.

Rawls's reply to Hart's first criticism:

Rawls concedes that we need more structure to guide our mutual accommodation of the various types of liberty. We focus on “the social conditions essential for the adequate development and the full and informed exercise of the two moral powers in the two fundamental cases” (332).

“[A] liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral powers in one (or both) of the two fundamental cases” (335).

- *The first fundamental case:* The exercise of a sense of justice in “the application of the principles of justice to the basic structure of society and its social policies” (332). This includes the political liberties: participation, political speech and freedom of the press, and freedom of assembly.
- *The second fundamental case:* The exercise of a capacity for a conception of the good in “the application of principles of deliberative reason in guiding our conduct over a complete life.” This includes liberty of conscience and freedom of association.

In §§10–12, Rawls gives an example: free political speech. What does free political speech require? We consider the exercise of the first moral power in the first fundamental case.

- (i) There is no crime of seditious libel (343).
- (ii) There are no prior restraints on freedom of the press
- (iii) The full protection of advocacy of “political doctrines an essential part of which the necessity of revolution, or the use of unlawful force and the incitement thereto as a means of political change” (343).

At some point, of course, such speech may be restricted for the public order. At what point? “first, that the substantive evils which the legislature seeks to prevent must be of a highly special kind, namely, the loss of freedom of thought itself, or of other basic liberties, including here the fair value of the political liberties; and second, that there must be no alternative way to prevent these evils than the restriction of free speech.” (356).

Rawls believes that political speech may also be regulated in order to preserve the equal worth of the political liberties, e.g., campaign finance reform. Note that these regulations: (1) involve no restrictions on content, (2) involve no undue burdens on any particular political group, and (3) are rationally designed to achieve the equal worth of the political liberties.