
Justice across Borders

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Major progress has occurred in the theory of justice over the last three or four decades, to a great extent initiated by John Rawls's path-breaking work on "justice as fairness."¹ This has involved the use of the "contractarian" method of analysis used in moral and political philosophy. The contractarian approach has strongly Kantian antecedents, and the works of Immanuel Kant have been deeply influential in analyzing how rational social arrangements and reasonable social behavior can be derived. In the Rawlsian theory of justice the contractarian method has been put to elegant and powerful use.

In the Rawlsian version of this approach, a central concept is that of an "original position"—a hypothetical state of primordial equality in which the persons involved do not yet know who they are going to be. The guiding principles for the basic structure of society are chosen in this state of postulated ignorance, which helps to make the deliberations in the original position disinterested. Indeed, this is how the requirement of "fairness" is incorporated into the analysis of justice. Since the process is taken to be *fair* (people are not guided by their respective vested interests), the rules for the basic structure of the society that are chosen—by this exercise of social contract—are taken to be *just*. Rawls's well-known theory of "justice as fairness" is thus grounded, and this analytical structure is used to derive the implications of justice, thus characterized.

Rawlsian principles of justice include the priority of liberty (the “first principle”), giving precedence to maximal liberty for each person subject to similar liberty for all. The “second principle” deals with other matters, including equity and efficiency in the distribution of opportunities. In particular, it invokes the “difference principle” involving the allocational criterion of “lexicographic maximin” in the space of holdings of “primary goods” (or general-purpose resources) of the different individuals, giving priority to the worst-off people, respectively, in each conglomeration. Questions can be raised about the plausibility of the specific principles of justice that Rawls derives from his general principles of fairness, and it can, in particular, be asked whether the device of the original position must point inescapably to these principles of justice.² Furthermore, the adequacy of Rawlsian focus on primary goods, which makes his “difference principle” resource-oriented rather than freedom-oriented, can also be questioned.³ I am not directly concerned with those specific debates in this essay, though they will have to be examined and reassessed once the basic format of the original position has been subjected to critical scrutiny.

My concentration in this essay is on the more fundamental issue of the composition of the “original position” and also on the viability of the notion as a response to the challenging problems we face.⁴ That question has significant relevance for our understanding of fairness and justice as well as in the derivation of their practical implications. There is substantial room for ambivalence as to who the parties are who are assumed to be undertaking this contract. Are they all the people in the world—is it a global social contract? Or is it a contract that is worked out for each nation or each polity on its own? Does the coverage admit all of humanity—irrespective of nationality and citizenship of the persons involved—or is the “original position” to be limited instead to the citizenry of each nation acting separately? Does each country have an original position of its own?

When Rawls’s book *A Theory of Justice* first appeared, I interpreted the argument to be available for application to all the people taken together. But as subsequent writings of Rawls have made clear, he intends to apply the device to each nation—each people—taken separately. There is an additional exercise in which an international con-

tractual undertaking may be considered for obtaining some guidance regarding national policies toward other nations. But this is clearly a subsequent and subsidiary exercise, following the basic operation of distinct original positions for each nation—or each people—taken separately.

These two different conceptions can be identified, respectively, as “universalist” in a grand and comprehensive sense, and “particularist” in its nation-based orientation. Their respective implications for the scope of the theory of justice may be stated as follows:

Grand universalism: The domain of the exercise of fairness is all people everywhere taken together, and the device of the original position is applied to a hypothetical exercise in the selection of rules and principles of justice for all, seen without distinction of nationality and other classifications.

National particularism: The domain of the exercise of fairness involves each nation taken separately, to which the device of the original position is correspondingly applied, though the relations between the different nations may be influenced by supplementary international negotiations.

Even though the original position is no more than a figment of our constructive imagination, the contrast between these rival conceptions can have far-reaching implications for the way we see global justice. The formulation of the demands of global justice as well as the identification of the agencies charged with meeting these demands are influenced by the choice of the appropriate conception of the original position and the corresponding characterization of the domain of justice as fairness.

Grand Universalism

Even though I am attracted to grand universalism, I shall presently argue that neither of these two conceptions—grand universalism and national particularism—can give us an adequate understanding of the demands of global justice. There is a need for a third conception with an adequate recognition of the plurality of relations

involved across the globe. But let me, first, elaborate briefly on the claims of each of these two classic conceptions.

Grand universalism has an ethical stature that draws on its comprehensive coverage and nonsectarian openness. It rivals the universalism of classical utilitarianism and that of a generalized interpretation of the Kantian conception of reasoned ethics. It can speak in the name of the whole of humanity in a way that the separatism of national particularist conceptions would not allow.

And yet grand universalism is hard to adopt in working out the institutional implications of Rawlsian justice as fairness. The explication of fairness through a device like the original position is used, in Rawlsian analysis, to yield principles that should govern the choice of the basic political and social structure for each society considered as a political unit in which the principles of justice find their application. There are great difficulties in trying to apply this mode of reasoning to the whole of humanity, without an adequately comprehensive institutional base that can serve to implement the rules hypothetically arrived at in the original position for the entire world. Obviously, the United Nations cannot play this role (even if the United States were to come round to paying the money it owes to this international organization). Indeed, even the very conception of the United Nations—as its name indicates—is thoroughly dependent on drawing on the basic political and social organizations prevalent in the respective national states.

Particularist Conceptions and the Law of the Peoples

All this may forcefully suggest that we should opt for the tractability and coherence of the particularist—ultimately nationalist—conception of Rawlsian justice. That is, in fact, the direction in which Rawls himself has proceeded, considering separately the application of justice as fairness in each political society, but then supplementing this exercise through linkages between societies and nations by the use of intersocietal norms. We can even work out a different hypothetical exercise—an international “original position”—in which the representatives of the nations contract together and work out what they might reasonably owe to each other—one “people” to another.

How that reasoning should work has recently been explored by Rawls himself in the form of a theory of what he calls the “law of peoples.”⁵ The “peoples”—as collectivities—in distinct political formations consider their concern for each other and the imperatives that follow from such linkages. The principles of justice as fairness can in this way be used to illuminate the relation between these political communities (and not just between individuals, as in the original Rawlsian conception).

It must be noted, however, that in this particularist conception, the demands of global justice—in so far as they emerge—operate primarily through *inter-societal* relations rather than through *person-to-person* relations, which some may see as central to an adequate understanding of the nature and content of global justice. This effectively nation-based characterization of justice identifies the domain of *international* justice, broadly defined, but the basic work of the inter-individual original position is done within each nation, acting separately. The imperatives that follow, despite the limits of the formulation, have far-reaching moral content, which has been analyzed with characteristic lucidity by Rawls.⁶ However, the restrictions of an “international”—as opposed to a more directly “global”—approach set narrow limits to the reach of the Rawlsian “law of peoples.”

How should we take account of the role of direct relations between different peoples across borders whose identities include, *inter alia*, solidarities based on classifications *other than* those of nationality or political unit, such as class, gender, or social convictions? How do we account for professional identities (such as being a doctor or an educator) and the imperatives they generate across frontiers? These concerns, responsibilities, and obligations may not only not be parasitic on national identities and international relations, they may often run in contrary directions to international relations. Even the identity of being a human being—perhaps our most basic identity—may have the effect, when fully seized, of broadening our viewpoint, and the imperatives that we may associate with our shared humanity may not be mediated by our membership of collectivities such as “nations” or “peoples.”

Aside from this basic issue of different identities, our practical interactions across the borders often involve norms and rules that

are not derived *through* relations between nations. This applies powerfully to economic and social relations across borders, with their own conventions and mores. Obviously, when the need for legal enforcement arises, the national laws must still be important in giving force to some of these relations. And yet so much of global commerce, global culture, even global protests (like those on the streets of Seattle, Washington, or Prague) draw on direct relations between human beings—with their own ethics and priorities. These ethics can, of course, be supported or scrutinized or criticized in terms of intergroup relations, but the inter-group relations need not be confined to international relations only. They may involve very many diverse groups, with identities that vary from seeing oneself as a businessman or a worker, as a woman or a man, as being poor (or being committed to the poor) or rich, or as a member of one professional group or another (such as, say, doctors or lawyers). Thus collectivities of many different types may be invoked as bases of commitments and obligations that reach across national borders.

Plural Affiliations

We need a different conception of global justice that is neither as ambitious and uninstitutionalized as the grand universalism of *one* comprehensive “original position” encompassing the whole world (despite its obvious ethical interest and possible relevance at the level of some very general principles), nor as separatist and restrictive as national particularism (even when supplemented by international relations). The starting point of an alternative approach, drawing on plural affiliations, can be the recognition of the fact that we all have multiple identities, and that each of these identities can yield concerns and demands that can significantly supplement, or seriously compete with, other concerns and demands arising from other identities. The implications of this approach for the theory of justice can be stated as follows:

Plural affiliation: The exercise of fairness can be applied to different groups (including, but not uniquely, the nations), and

the respective demands related to our multiple identities can all be taken seriously (there may be different ways in which their conflicting claims are ultimately resolved).

The exercise of “fairness,” which can be illustrated with the device of the original position, need not look for a unique application. The original position is a rich way of characterizing the discipline of reciprocity and within-group universalization, and it can be used to provide insights and inspirations for different group identities and affiliations. Nor is it entirely necessary, to benefit from Rawls’s foundational characterization of fairness, to work out an elaborate system—as in Rawls’s own theory—through a detailed specification of a stage-by-stage emergence of basic structures, legislation, and administration. The device of the original position can be employed in less grand, less unique, and less fully structured forms, without giving complete priority to one canonical formulation involving national particularism.

For example, a doctor could well ask what kind of commitments she may have in a community of doctors and patients, where the parties involved do not necessarily belong to the same nation. It is well to remember that the Hippocratic oath was not mediated—explicitly or by implication—by any national or international contract. Similarly, a feminist activist could well consider what her commitments should be to address the special deprivation of women in general—not necessarily only in her own country. There may well be conflicting demands arising from different identities and affiliations, and these respective demands cannot all be victorious. The exercise of assessing the relative strength of divergent demands arising from competing affiliations is not trivial, but it would beg a very large question if we were to deny our multiple identities and affiliations just to avoid having to face this problem. The alternative of subjugating all affiliations to one overarching identity—that of membership of a national polity—misses the force and far-reaching relevance of the diverse relations that operate between persons. The political conception of a person as a citizen of a nation—important as it is—cannot override all other conceptions and the behavioral consequences of other forms of group association.⁷

Contractarianism versus the Impartial Spectator

Pursuing the idea of plural affiliation is both possible and important within the general contractarian approach involving different groups and plural pluralities. But one might still ask whether this is the most sensible way of going about incorporating the demands of justice and of impersonality in these relations? Is the original position the right framework?

Here I want to suggest a possible departure, which can be seen, to some extent, as a move from Immanuel Kant to Adam Smith. Like Kant, Smith was convinced of the need for impersonality in ethical reasoning in working out the demands of justice, but he invoked a different notion—that of the “impartial spectator”—to do this job rather than using the contractarian method.⁸

Although Smith argued that “the general rules of morality” were “ultimately founded upon experience of what, in particular instances, our moral faculties, our natural sense of merit and propriety, approve, or disapprove of,” he emphasized the importance of moral reasoning in an adequately broad framework. Indeed, he argued that it is “from reason . . . we are very properly said to derive all those general maxims and ideas.” Smith went on to emphasize the role of reasoning in the process of systematizing our ideas of what is or is not acceptable, drawing on observations “in a great variety of particular cases” of “what pleases or displeases our moral faculties, what these approve or disapprove of,” and using reasoned induction to “establish those general rules.”⁹

The process of reasoning can draw on a variety of devices to bring out our reflected moral judgments. A crucially important device Adam Smith used in this context was that of the “impartial spectator.” We are asked to imagine how a spectator who is not directly involved in the competing claims, and who is impartial, may view a situation of conflict, or more generally a situation in which there are both some congruence and some conflict of interest. The demand now is to work out how they would look to an outsider who disinterestedly seeks a just solution. It should be obvious that this too—like the contractarian model (such as that of the Rawlsian original position)—involves impersonality and decisions based on suppress-

ing the diverting influence of vested interests. But in contrast with the contractarian approach, the impartial spectator is not himself or herself a party to the contract. Smith's model of the impartial spectator relates to that of the Kantian-Rawlsian contractarian model in much the same way a model of *arbitration* relates to that of *negotiation*.

Limitations of the Contractarian Approach: An Illustration

It is interesting that the fair-arbitration model of the impartial spectator has a reach that the fair-negotiation oriented model of the original position lacks. Consider, for example, the ethics of population policy. The basic problem for the mode of reasoning involving the original position arises from the incoherence of trying to include in the original position all the affected parties where some people would be present in one society if one decision were taken about population, who would never exist if a different decision were to be taken. People who would not be born under some social arrangement cannot be seen to be evaluating that arrangement—a “non-being” cannot assess a society from the position of never having existed (even though there would have been such a person had history been different).

For example, consider a case in which there would be a million people if one decision were taken and a million and a half people if another population policy were to be pursued. Do the extra half a million people participate in the original position in deciding on which society to choose, including which population decision to take? Suppose we presume that they should be involved. If that is the case and if, it so happens, that the decision that emerges is to have the restrictive population policy, then these people would simply not be brought into existence, and it would then not be obvious what status to accord these people who allegedly participated in the original position without actually existing. On the other hand, if they are not to be included in the original position and the decision to emerge is that the more expansive population policy is to be followed, then this additional half a million people would actually exist, but would not have participated in the deliberations in the original

position. Indeed, since the deliberations are held together as an integral whole, their fate and their future would be decided without their participation. In either formulation, therefore, the original position is quite incapable of dealing with such issues as the population problem, and an as-if contract between the affected parties is, thus, not possible.

The same difficulty applies to other uses of the contractarian approach. Consider, for example, the powerful approach that Thomas Scanlon has explored as a discipline of moral reasoning. He sees the contractarian requirement as a matter of selecting general rules “which no one can reasonably reject as a basis for informed, unforced general agreement.”¹⁰ The problem, in this case, lies in identifying the potential “rejecters” (*who* are to be accorded the standing of being able to “reasonably reject”?). People who would never exist if a particular substantive arrangement were selected cannot be invoked as rejecting (or refusing to reject) rules that yield that arrangement. Indeed, the difficulty is endemic in the contractarian approach that is now so dominant in contemporary moral philosophy. Since the contractarian method requires the congruence of the set of judges and the set of lives that are being judged, it is fundamentally ill-suited for helping us resolve any problem that deals with a varying set of participants. But it is hard to think of any substantial economic or social decision that will not have an influence—direct or indirect—on the size or composition of the population.

Can Adam Smith’s model of the impartial spectator deal with the population problem? Would it not be subject to the same difficulty as the contractarian reasoning? The answer is no. The impartial spectator is impartial between the parties (or would-be parties), but is not required to do her observing—not to mention negotiation—in the form of *being* each of the parties, as in the contractarian method. There is, therefore, no similar problem in this mode of reasoning as it would apply in the contractarian approach. The impartial spectator can place herself in different situations (without having to be present in any of them), and thus the problem of varying participants does not cripple the Smithian approach.

There are, thus, real advantages in taking a leaf from Adam Smith’s book, rather than Immanuel Kant’s, and I hope I am not being influ-

enced by the fact that I am primarily an economist and only secondarily a philosopher. The reach of the impartial spectator model is larger, at least in this respect. This is an issue that is quite important in dealing with plural affiliations, since there too the groups would be to some extent ambiguously defined. Also the same person can easily belong to different groups, for example as a citizen of a nation, on the one hand, and as a feminist activist, on the other. Both roles may be important in different contexts, and the person involved can invoke the more permissive model of impersonality both to help in the analysis of justice within each group and also to assess possibly competing loyalties to which individuals are subject as members of two different groups.

Institutions and Multiplicity of Agencies

Leaving aside these issues of philosophical formulations, the important question that needs major emphasis in understanding global justice is the presence of different groups and different associations, with their respective delineations of “borders.” Many of the associations are informal, and include loyalties related to one’s identity, say, as a worker, or as a peasant, or as a person with liberal convictions (or conservative ones), or as a woman (or as a feminist), and so on. These associations have significance in the understanding of justice across borders that must not be submerged in the allegedly canonical grouping of individuals as members of particular nations and citizenry.

There are also many associations that are formal and organizationally structured. A great many agencies can influence global arrangements and consequences. Some of them are clearly “national” in form, including domestic policies of particular states, and also international relations (contracts, agreements, exchanges, etc.) between states, operating *through* the national governments. Other cross-border relations and actions, however, often involve units of economic operation quite different from national states, such as firms and businesses, social groups and political organizations, non-governmental organizations (NGOs), and so on, which may operate locally as well as beyond national frontiers. Transnational firms

constitute a special case of this. There are also international organizations, which may have been set up directly by the individual states acting together (such as the League of Nations or the United Nations), or indirectly by an already constituted international organization (such as the ILO, UNICEF, or UNDP). Once formed, these institutions acquire a certain measure of independence from the day-to-day control of the individual national governments.

Still other institutions involve the working of nongovernmental, nonprofit entities that operate across borders—organizing relief, providing immunization, arranging education and training, supporting local associations, fostering public discussion, and a whole host of other activities. Actions can also come from individuals in direct relation to each other in the form of communication, argumentation, and advocacy that can influence social, political, and economic actions (even when the contacts are not as high profile as, say, Bertrand Russell’s writing to John Kennedy and Nikita Krushchev on the nuclear confrontations of the cold war).

The demands of justice—and that of fairness—can be investigated in several distinct though interrelated ways, invoking various groups that cut across national boundaries. These groups need not be as universally grand as the collectivity of “all” the people in the world nor as specific and constrained as national states. Many policy issues cannot be reasonably addressed in either of these two extremist formats. Individuals live and operate in a world of institutions, many of which operate across borders.¹¹

Concluding Remarks

Let me end with some general remarks. First, I have argued that justice across borders must not be seen merely as “international justice”—as the issue is often formulated. Even though that is the way mainstream ethical thinking (led by Kantian-Rawlsian contractarian analysis) has gone, that line of reasoning is fundamentally defective. It is normatively unsatisfactory, since not all of our ethical commitments and obligations are mediated through relations between nations. A feminist activist in America who wants to help, say, to remedy some features of female disadvantage in Africa or Asia, draws

on a sense of identity that goes well beyond the sympathies of one nation for the predicament of another. A person can see herself as an Italian, as a woman, as an agnostic, as a doctor, and so on; there is no contradiction in this richer understanding of a person's identity.

Second, the international contractarian line of reasoning is also institutionally obtuse in taking little note of the variety of institutions (such as markets, religious groupings, political organizations, etc.). These institutions operate through affiliations that may be quite different from national groupings, and they certainly can influence relations between people across borders. Indeed, many NGOs—Médecins sans Frontières, OXFAM, Amnesty International, Human Rights Watch, and others—explicitly focus on affiliations and associations that cut across national boundaries.

Third, turning to somewhat more general theory, the contractarian line of reasoning is inherently defective in dealing with variable groups and cannot deal at all adequately with some standard problems of ethical and political decision *even* for a given society. The difficulty it has in dealing with population policy—or any decision that influences the size or the composition of the population—illustrates its limited reach.

Fourth, if we shift our philosophical focus from Immanuel Kant's influential line of thinking to that of the more neglected theories of his contemporary, Adam Smith, we get a model of reasoning that is better able to cope with these problems of variable and varying groups. The discipline of the "impartial spectator" has much to offer to this range of ethical issues, and this applies also to justice across borders.

Finally, it is very important to note that "grand universalism" is not the only alternative to "national particularism." The noninstitutional and utopian nature of grand universalism is sometimes invoked to provide an alleged justification of the nationally particularist line of thinking, based on the false presumption that national particularism would be the only alternative left if grand universalism were taken to be unduly demanding. This is not the case.

I have argued in favor of a line of reasoning that is geared to the existence of multiple institutions and the presence of plural

identities in the way we see ourselves. This makes it impossible to resolve all problems of justice by one all-encompassing original position (as under grand universalism), or even by two sets of overarching original positions—one within each nation and another among the representatives of all nations (as in the combination of national particularism and the “law of peoples”). The coexistence of many affiliations and diverse identities is a central feature of the world in which we live and cannot be ignored in exploring the demands of global justice. Each of our plural associations entails some general concerns about justice across borders as well as within those respective borders. The borders are defined differently for different groups, and our reasoning about justice has to reflect that reality.

Requirements of global justice offer guidance in diverse voices and sometimes in conflicting directions. Although we cannot escape the need for critical scrutiny of the respective demands, this is not a reason for expecting to find one canonical superdevice that will readily resolve all the diversities of obligations that relate to our various affiliations, identities, and priorities. The oversimplification that must be particularly avoided is to identify global justice with international justice. The reach and relevance of the former can far exceed those of the latter.

Acknowledgments

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Notes

1. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); *Political Liberalism* (New York: Columbia University Press, 1993); *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).
2. My own combination of admiration and scepticism of the particular Rawlsian formula can be found in my book, *Collective Choice and Social Welfare* (San Francisco: Holden-Day, 1970; republished, Amsterdam: North-Holland, 1997). I was in fact responding to Rawls's papers that preceded his book, which explains how my response could have been published before Rawls's own book.