

Three Considerations on Rawls' Original Position

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Rawls, in *A Theory of Justice*, aims at distributive justice, which would be applied to the basic structure and institutions in a society. He argues, based on a thought experiment called "The original position," for his theory of justice as fairness. In what follows, first, I will elaborate on "the original position" as an argument for Rawls' theory of justice. Secondly, I will talk about Rawls' ideal methodology. And finally, I shall explain three considerations about Rawls' argument of the original position, to see whether or not this methodologically ideal argument works for justice and fairness in our non-ideal situations?

1-Rawls' original position

Rawls looks for some normative rules, which will entail to distributive justice. He wants to figure out fair social actions by referring to the thought experiment of the original position. That is, first, he imagines a well-ordered society, in which all individuals and things are brought up properly and justly, and then will refer to their social action and reactions in different situations. Then, he takes those results in that ideal situation as normative rules for the seemingly same problem in our non-ideal actual society.

Following a Kantian metathetical framework, he believes in the right actions in social contract theory instead of a pretty utilitarian approach, which only cares about maximizing the expected utility for the whole society. Rawls, believe that justice is a more basic concept than "utility or interest," and is not reduceable to them. He defined justice as fairness in terms of the original positions, which is an ideal situation, which all people intuitively could comprehend that.

Rawls thought experience has at least four conditions:

- Free will: which refers to the free status of the individuals, which are thought in the thought experience. That is, in the well-ordered society no one is compelled to do some action or make some decision.
- Rationality: which refer to the mental statues, which will follow the means-end or instrumental rationality. That is, in the original position, each and all individuals know how to decide in different situations such that satisfy their goals very well.
- Being interest-seeker: That is, each and all individuals and parties in the original position will seek the most interest for themselves. This condition looks very similar to

the utilitarianism approaches, however, the next condition will change the whole story and make Rawls' theory as fairness pretty opposite to the utilitarian theory at work.

- Veil of ignorance: Which is the most important feature of the original position. Rawls, on page section 24 (of *A Theory of Justice*) says:

“The restrictions on particular information in the original position are, then, of fundamental importance. Without them, we would not be able to work out any definite theory of justice at all. We would have to be content with a vague formula stating that justice is what would be agreed to without being able to say much, if anything, about the substance of the agreement itself. The formal constraints of the concept of right, those applying to principles directly, are not sufficient for our purpose. The veil of ignorance makes possible a unanimous choice of a particular conception of justice. Without these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated. Even if theoretically a solution were to exist, we would not, at present anyway, be able to determine it.”

Accordingly, the veil of ignorance is basically a ground for every conception of justice due to the simplicity which is required for such a conception or theory. Rawls says that the only thing which all parties, in the original position, know for certain is that their society is subject to justice and so they have to organize their society such that would guarantee justice and fairness for all individuals of the society. For him knowing the particular facts about every individual make such a general agreement on the fair and just organizations pretty impassible. That is, if the individuals know all the information about their situations in the original positions, then they high probably would treat unfairly and partially about the rules which will affect their situation. So, simplicity is necessary and important for any conception of justice in the original position. Put it in other words, a theory of justice would be possible only if a kind of ambiguity and ignorance is involved. That is,

“Parties do not know:

- The race, ethnicity, gender, age, income, wealth, natural endowments, comprehensive doctrine, etc. of any of the citizens in society, or to which generation in the history of the society these citizens belong.
- The political system of the society its class structure, economic system, or level of economic development.

Parties do know:

- That citizens in a society have different comprehensive doctrines and plans of life; that all citizens have interests in more primary goods.

- That the society is under conditions of moderate scarcity: there is enough to go around, but not enough for everyone to get what they want;
- General facts and common sense about human social life; general conclusions of science (including economics and psychology) that are uncontroversial.” (Wenar, 2017)

According to Rawls, in such situation, all individuals and parties tried to think of the worst situations in the actual world, and then decide about the political and social institutions and structures that will satisfy the requirements of the low-class people, due to the fact that they don't know whether or not they will be in that low class. They try to maximize the minimum level of interest and primary goods of all and low-level people - *maximin* reasoning. This maximization might be relevant to context. (Afroogh 2021)

Actually, applying veil of ignorance, Rawls, wants to keep the social rules and agreements pure and not contaminated by personal interests, inclinations, and desires. He wants to make a fair well order situations, in which all individuals think about the situations of all people fairly and freely. This hypothetical situation will result in a kind of unconditional goodness, which proposed by Kant, because nobody is bound by their subjective desires. All individuals only think of the whole goodness for all individuals and parties in society. Then, this thought experience, Rawls claims that would lead us to these two principles of justice:

First Principle: Each person has the same right to the system of equal basic liberties, which is compatible with the same system for all.

Second Principle: Social and economic inequalities are to arranged so that to satisfy two conditions:

- a. They are attached to offices and positions open to all under conditions of *fair equality of opportunity*;
- b. They are to be to the greatest benefit of the least-advantaged people of society - the *difference principle*.

2-Ideal non vs. non-Ideal theory

For Rawls,

“ideal theory contrasts with non-ideal theory and identifies a limitation in the scope of his theory of justice. Both kinds of theories attempt to identify principles that should regulate basic social institutions for the sake of justice. How do they differ? The first and fundamental difference is that ideal theory assumes "strict compliance", that is, that "(nearly) everyone strictly complies with...the principles of justice" (2001: 13). Non-ideal theory, by contrast, tells us how to deal with non-compliance. It thus "comprises such topics as the theory of punishment, the doctrine of just war, and the justification of the various ways of opposing unjust regimes, ranging from civil disobedience and conscientious objection to militant resistance and revolution" (1999a: 8).” (Estlund, 2012, p 375)

And,

“However, ideal theory has a second feature: it “...assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances" (1999a: 216). The second difference between ideal and non-ideal theory, then, is that the former assumes favorable circumstances.” (Estlund, 2012, p 375)

Rawls proposes his theory of justice in terms of the ideal theory, and his core methodological idea seemingly is that we can use the conclusions and ideas in the abstract or "ideal situations" as a guideline for “non-ideal” or concrete ones. In the ideal situation, all the individuals and parties want to follow the principle of justice, while in the actual world, it is not so; however, we can think of ideal situations just to make sure how is the correct and just dealing in fact, and then we can use those correct ideas in act.

3-Three Considerations

As it is clear, Rawls would figure out the fairness in a well-ordered society in the original position, and then will refer to their social reactions and decision in that ideal situation to prescribe some justice-oriented normative rules for the actual and non-ideal social institution and structures. In what follows, I shall explain three considerations about Rawls’ argument of the original position to see whether or not this methodologically ideal argument works for justice and fairness in our non-ideal situations?

3.1- Consideration on Rawls’ subjective intuition

Rawl’s subjective intuition in the original position is not necessarily inclusive. Rawls argues that we need to consider the action and decisions of different individuals and parties in the original

position. However, to figure out what those decisions are, he didn't use an empirical method to see what such people in a well-ordered society will do. He just discusses transcendently that and argues that such a people definitely will follow the maximin reasoning, which says I (as an agent in the original position) have to maximize the minimum level of goods. He holds that this principle will support his justice theory as fairness.

My consideration is that how Rawls can legitimately ascribe “following the maximin reasoning” to all the individuals in the original position? Yes, Rawls “think” that it would be rational for those agents in the original position to follow it, however, his thinking doesn’t necessarily guarantee those individuals' actions and decisions in the original position. Every person might think differently about the individual's action and decision in the thought experiment of the original position. How can Rawls legitimately generalize his idea and intuition about the individual's decision in the original position to all other people who are supposed to think about this thought experiment?

For example, one person might think that maximin reasoning doesn’t work in the ideal position. One might think that it is not rational to be that cautious, and it might be rational to take some risk. I mean, the veil of ignorance doesn't necessarily lead the agents to follow maximin reasoning, because it might be non-effective enough. Look at the following situations:

	Circumstance		
Decision	C1	C2	C3
D1	-1	8000	12000
D2	-1	7	14
D3	0	6	8

In this situation, the maximum principle says that a rational agent in the original position will do D3, however, it seems that many of the rational agents will take D1. If so, the original position argument will not support Rawl's theory of justice as fairness due to the fact that the agents will follow different decisions and policies.

My main consideration here addresses Rawl’s subjective, intuitive method in the original position. He just refers to his own transcendental idea and intuition and then will generalize it to all the possible agents in the original position, irrespective of the experimental data, or some other alternatives at works.

3.2- Two considerations on “Legitimacy”

Rawls, in section 53 (*A Theory of Justice*), talks about “the duty to comply with an unjust law.” He states:

“the principles of justice (in lexical order) belong to ideal theory (§39). The persons in the original position assume that the principles they acknowledge, what-ever they are, will be strictly complied with and followed by everyone. When we ask whether and under what circumstances unjust arrangements are to be tolerated, we are faced with a different sort of question. We must ascertain how the ideal conception of justice applies, if indeed it applies at all, to cases where rather than having to make adjustments to natural limitations, we are confronted with injustice. The discussion of these problems belongs to the partial compliance part of non-ideal theory.”

Accordingly, he holds that the situations and circumstances are different in ideal and non-ideal context, and so we need to make flexible rules such that they fit with the non-ideal context. So, Rawls states that we have to allow some limited unjust law in the non-ideal context. He says:

“We must consider the question why, in a situation of near justice anyway, we normally have a duty to comply with unjust, and not simply with just, laws.”

Rawls’ argument is based on the majority principle. He states (in section 53 of *A Theory of Justice*) that

“The constitution is regarded as a just but imperfect procedure framed as far as the circumstances permit to insure a just outcome. It is imperfect because there is no feasible political process which guarantees that the laws enacted in accordance with it will be just. In political affairs perfect procedural justice cannot be achieved. Moreover, the constitutional process must rely, to a large degree, on some form of voting. Nevertheless, our natural duty to uphold just institutions binds us to comply with unjust laws and policies, or at least not to oppose them by illegal means as long as they do not exceed certain limits of injustice. Being required to support a just constitution, we must go along with one of its essential principles, that of majority rule. In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution. Given men as they are, there are many occasions when this duty will come into play.”

That is, the most important thing here is to support the authority of the whole just constitutional structure, and to do that, we need to support all rules so far it will be changed through a new procedural decision. We can not help undermine or violate the rules, only because we think there are some unjust rules in it. He proposes the concept of “civil disobedience” to deal with such unjust laws; however, he emphasized that it doesn’t equal to undermining the whole system. Put it in other words, as Rawls himself do in the “political liberalism,” his solution is based on the concept of legitimacy. That is,

“Thus, legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done. It is also institutional, though there is, of course, an essential connection with justice.” (Rawls, *Political Liberalism*, lecture IX, #5)

and

“it may not be very just, or hardly so, and similarly for its laws and policies. Laws passed by solid majorities are counted legitimate, even though many protests and correctly judge them unjust or otherwise wrong.” (Rawls, *Political Liberalism*, lecture IX, #5)

Accordingly, for Rawls, legitimacy is more effective than justice, and so we can apply the legitimate yet unjust laws on our non-ideal societies. He also adds

“A legitimate procedure gives rise to legitimate laws and policies made in accordance with it, and legitimate procedures may be customary, long-established, and accepted as such. Neither the procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. ... Legitimacy allows an undetermined range of injustice that justice might not permit.” (Rawls, *Political Liberalism*, lecture IX, #5)

And he states:

“While the idea of legitimacy is clearly related to justice, it is noteworthy that its special role in democratic institutions (noted briefly in §2) is to authorize an appropriate procedure for making decisions when the conflicts and disagreements in political life make unanimity impossible or rarely to be expected.” (Rawls, *Political Liberalism*, lecture IX, #5)

So, as it is clear from these passages, Rawls allows having some unjust laws to some extent because it is the only way that we can protect the authority of our legal institution and the whole structure, which is the main supporter of justice in a society.

By proposing the concept of "legitimacy," Rawls wants to fill out the gap between ideal and non-ideal situations. He will provide a solution to keep the authority of the justice institution in our actual non-ideal societies. However, I believe that the gap between ideal and non-ideal context can not be filled out only by invoking the concept of legitimacy. (Afroogh 2019,2020) I mean, there are some other problems with Rawls' method of taking the ideal theories as some criteria or norm-making entities for non-ideal societies. In what follows, I will elaborate on two of them.

3.2.1 The consideration of *Excusable* hard cases

I believe that knowing about “ideal” situations and principles helps us in having a better understanding of **justice** in non-ideal situations; however, I am not sure it helps us in having a better understanding of **unjustice** in non-ideal situations. That is, a common ideal opinion may help us in recognizing justice and just people even in non-ideal and actual situations in our everyday life; However, recognizing unjust people, or ascribing “being unjust” to ordinary people in non-ideal situations, based on the opinions in ideal situations doesn’t look fair or rational.

In the ideal situation, one of the parties and individuals violate the other ones' rights. They are treated with each other respectfully and equally. However, in the non-ideal situations, where some people violate your rights, is it rational to expect you to don’t do the same and still keep their rights preserved? Imagine a case (in a close possible world) that your neighbor will violate your rules as long as you don’t violate his right. That is, he stops violating your right only if you violate his right at least one time per month. If so, it seems that you have no choice to protect your right exempt violating his rights one time per month just to preserve your personal rights. Or, in other cases, imagine a poor girl, Sara, who steal just to provide the medicine for her sick mother. I am not sure that it is legitimate to say that Sara, who steals in the actual non-ideal situation, is a *necessarily* unjust person. She might do that because she was in a very bad financial situation, and so she is considered **excusable**. I mean, there are hard cases in the actual world, in which we can not relay to justice vs. injustice dichotomy. There are some situations, in the non-ideal world, which are neither just nor unjust. They are **excusable** hard cases.

I use “**excusable**” to refer to the cases, which are not included in Rawls’s legitimate rules. Because, according to Rawls, legitimate rules include *unjust* rules, which we have to follow only to keep the authorities of the whole system. However, the *excusable* cases, which I am talking about, are not “unjust” cases. They are neither just nor unjust. They are some hard cases, which belong to the non-ideal world. It is not surprising that Rawls methodology doesn't lead us to the concept of “excusable,” case, because it is primarily dependent on the ideal situations, and comes out of it, which lacks these hard and complicated cases.

3.2.2 The problem of the veil of ignorance

For Rawls, the veil of ignorance doesn't remove our judgmental faculty and doesn't negatively affect our evaluation ability. It only:

“prevents us from shaping our moral view to accord with our own particular attachments and interests. We do not look at the social order from our situation but take up a point of view that everyone can adopt on an equal footing.” (Section 78, A Theory of Justice)

It is pretty understandable that veil of ignorance helps the agents in the non-ideal situation to thing fairly and justly. That is, if the individuals know all the information about their situations in the original positions, then they high probably would treat unfairly and partially

about the rules which will affect their situation. So, simplicity is necessary and important for any conception of justice in the original position.

Put it in other words, a theory of justice would be possible only if a kind of ambiguity and ignorance is involved. It is the advantage of the veil of ignorance for justice. However, I am not sure that veil of ignorance doesn't undermine our judgment faculty, as Rawls claims. The veil of ignorance seemingly has a negative effect on our information about non-ideal and actual worlds, and it simply undermines our realistic judgments. It seems to me that it is clear that when you consider all the individuals at the same status in ideal world, then you even can not imagine some complicated situations and hard cases, in the non-ideal world, in which we face many controversial justice/unjustice problems. For example, as Rawls indicates, empathy plays an important role in justice, and we now that a major kind of empathy is cognitive empathy, which refers to our ability to understand other people's minds, and feelings in different hard and complicated situations (Stueber, 2019.) It is pretty plausible to think that veil of ignorance, by ignoring many of the subjective information about certain individuals and parties, would negatively affect our epistemic empathy factually. So, I believe that veil of ignorance had some disadvantages for any theory of justice as well.

4. Conclusion

To sum it up, I believe that Rawls methodology to apply some ideal theories on our non-ideal actual society, gives us definitely a better understanding of justice in the world; however, I am not sure that his arguments of the original position, which use such idealist method, can give us a plausible result for all hard and complicated cases. I have observed three major considerations, which I believe leads us to think about some revisions or solutions.

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