

CHAPTER 15

*Justice and the Law: Liberals, Redistribution,
Capitalists and their Critics*

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I INTRODUCTION

This chapter critically examines theories of domestic justice, ie accounts of the proper functions and limits of state action with respect to citizens. Specifically, it focuses on the following questions: May the state punish citizens for behaviour that does not harm others, eg for drug use or gay sex? How should the state use tax money that it has required relatively wealthy citizens to contribute? In particular, should it fund a certain religion, or give money to the poor? Should the state protect a legal right of private individuals to own large corporations and natural resources?

These questions are about the way the state may use legal coercion.¹ So, they take for granted that a state is permissible in the first place, something that anarchists would dispute. These questions also bracket the issue of who should have the power to make law, ie of whether it is preferable for a state's decision-making procedures to be democratic or autocratic. In addition, the questions do not ask how people should be penalised for having broken the law; they concern neither whether the point of punishment should be crime prevention or retribution, nor whether certain types of penalties such as the death penalty are permissible. In sum, the issues of domestic justice addressed in this chapter differ from those of state legitimacy, political power, and criminal justice.

This chapter discusses major theories of domestic justice in the context of South African Constitutional, statutory and case law. It begins by considering when it is permissible for legislators to restrict civil liberty (see part II). Liberals are, roughly, those who hold that it is wrong to punish a person for not conforming to a particular religious or cultural way of life, if she is not harming others. Paternalists and conservatives, in contrast, believe it can be

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¹ This chapter focuses on central issues regarding the proper use of state coercion with respect to citizens, setting aside other issues of domestic justice such as civil restitution and administrative policy.

right to punish a person for living in a way that harms or degrades herself alone. South Africa's Parliament has criminalised prostitution, liquor sales on Sundays and dagga use, actions that few liberals would say should be illegal. However, South African law permits abortion, gambling and homosexual relationships, which many conservatives would criminalise. Is there any deep inconsistency here in South Africa's laws? Should South Africa become more liberal or less?

Then, this essay takes up the issue of the way the law ought to govern the distribution of personal property such as houses, TVs and money (see part III). Is it permissible for the state to force those who have acquired lots of wealth without using force or fraud to give some of it to those with less? Libertarians say that it is not permissible, while redistributivists say that it is. If the latter are correct, are wealthy South Africans giving their fair share, and is the South African state redistributing it in the right way? For instance, should the state finance a basic income grant or provide anti-retroviral drugs to those HIV+ individuals who cannot afford it?

Next, the discussion considers whether the law should protect private property, something that capitalists affirm and socialists deny (see part IV). Despite its socialist disposition before the end of apartheid, the ANC has decisively promoted private ownership of the means of production. Has this been appropriate? Is there a 'third way' between the communism of the East and the capitalism of the West that South Africa should pursue?

The chapter concludes by providing a brief summary of the use of legal coercion in the new South Africa along with questions and readings for further consideration (see part V).

II CIVIL LIBERTY

In this part we address the issue of how much civil liberty citizens should have. What kinds of behaviour are legislators justified in criminalising outside the economic domain? And, setting aside domestic welfare programmes, how should the state use tax money it has used the threat of criminal sanction to collect?

All attractive theories of civil liberty agree that certain behaviours that harm others should be outlawed. Specifically, it is pretty uncontroversial that, assuming that a state should exist, justice requires it to outlaw killing, enslaving, kidnapping, assaulting, hijacking and raping. Most reasonable people agree that the state ought to use tax money to prevent these actions, whether it is by educating people, financing self-defence measures or punishing people for doing them. It is also uncontested that justice permits the state to prevent minors from engaging in self-destructive or otherwise inappropriate behaviour. The controversial issue is whether the state is

entitled to prevent competent adults² from performing actions that do not directly harm other people in the sense of actively preventing them from living as they see fit.

For example, if you gamble at casinos, smoke dagga, have gay sex, engage in prostitution, dye your hair green, publish political propaganda, look at pornography, get an abortion, carry a concealed weapon, refuse to believe in God and listen to satanic music, you are not directly interfering with other people (even if you do all of them). In most cases, these actions can be done behind closed doors. Of course, others might be upset that you are performing such actions, or, in contrast, they might be inclined to perform them because of your example. However, these negative influences on others do not seriously prevent them from pursuing their own visions of the good life: others either are minimally harmed by these influences or can largely avoid them if they choose. The key question, then, is this: can it be right for the state to punish competent adults for performing such actions or to use tax money to discourage them from doing so?

(a) Liberalism

Liberals answer by saying that it would be wrong for the state to seek to prevent citizens from performing actions that do not substantially impair the ability of other people to live as they please. Liberals think that competent adults should have the liberty to engage in actions that might be self-destructive, obscene or degrading, so long as these actions directly affect no one besides those who choose to perform them. If engaging in a certain behaviour is largely consistent with other people doing their own thing, the behaviour should not be punished or otherwise discouraged with public funds.

For example, if one person smokes dagga, this does not mean that others have to do the same or otherwise be prevented from living as they prefer. If so, then liberals would say that it would be unjust for the state to punish someone for smoking it. Liberals would also say that it would be unjust for the state to use forcibly collected tax money to advertise any purported evils of smoking dagga. Of course, those who sell dagga should be required to warn consumers of dangers associated with smoking it; the state must forbid people from, say, taking their children for a motorcycle ride while under the influence of dagga; and private citizens would be permitted to try to educate dagga smokers about why they disapprove of it. However, liberals say that neither citizens nor the state may use coercion to discourage the individual

² Roughly, those who are voting age and are not suffering from mental illness, dementia, or other incapacitating conditions.

from smoking dagga in the privacy of her own home, regardless of whether the community finds it imprudent, offensive or immoral.

Another way to put the liberal view is to say that the state should be 'neutral' when it comes to questions of the best way to live. The state should not take sides by seeking to promote one religious or cultural way of life over others. Instead, it should merely protect people's equal ability to live as they see fit, which means preventing only actions such as killing, kidnapping, battery, stealing and attempts to do such things.

(b) Nonliberalism

Nonliberalism maintains that it is permissible for the state to punish an adult citizen for actions that do not significantly prevent others from living as they see fit. It is not necessarily wrong for the state to criminalise or discourage an activity that substantially affects only the person who performs it. In other words, nonliberalism maintains that the state should try to promote certain ways of life, specifically, those ways of life that are the most justified or seem so to a majority of voters.

There are quite a variety of nonliberal theories. Paternalists believe that the state may seek to prevent citizens from harming themselves, eg by enacting laws requiring use of a seatbelt or using tax money to prevent suicide. Moralists or conservatives hold that the state may seek to reduce behaviour that is irreligious, base, or degrading, eg by adopting statutes against prostitution, abortion or homosexuality (depending on one's moral views). Perfectionists maintain that the state may seek to promote intrinsic goods unrelated to welfare or morality, say, by forbidding the destruction of a rare animal species or by using tax money to sponsor artists. Friends of the offence principle believe that the state may seek to prevent people from offending others, eg by passing laws against burning the national flag or appearing nude in public. Finally, communitarians deem it permissible for the state to encourage actions that accord with social norms or exhibit civic virtues, eg by requiring people to vote or participate in community service.

Since communitarianism is discussed in detail elsewhere in another chapter, and since paternalism and moralism are the most predominant forms of nonliberalism, we largely focus on these two views. So, in this part we address the question of whether it is right for the government to keep adults from harming themselves or to discourage vice, supposing such actions do not directly impair the ability of other citizens to live as they see fit.

(c) The South African context

Liberalism and nonliberalism are matters of degree. There is no country in the world that completely conforms to a liberal principle; every society has

forbidden at least some actions that a liberal would, strictly speaking, permit. However, there are some relatively liberal societies such as the Netherlands, where the state promotes no religion and has legalised euthanasia, prostitution, alcohol and dagga. And there are relatively illiberal societies in which the state restricts people's civil liberty on the basis of religious convictions, for example: Iran (which prohibits people of the opposite sex from dancing), Saudi Arabia (which imposes severe penalties for bringing alcohol into the country), Pakistan (which harshly punishes women for sex outside of marriage), and Afghanistan under the Taliban (which forbade people from listening to music and prevented women from going out in public).

South Africa sits somewhere in the middle of the spectrum, closer to the liberal end than the nonliberal. The South African Constitution is, on the face of it, quite liberal. Its Bill of Rights grants citizens equal rights to life, security and privacy as well as equal freedoms of religion, belief, expression, demonstration, association, movement and residence.³ These are the civil liberties that liberals prize.

However, as with all legal documents, the Constitution is somewhat vague, admitting of both liberal and nonliberal interpretations in many places. For example, does freedom of religion include the right to use drugs if that is part of one's religion? Does freedom of expression include the right to walk down the street naked? Does the right to life forbid abortion? Does the freedom to choose one's occupation include the right to be a prostitute or run a brothel?

The Constitutional Court has generally read vague clauses in the Constitution in a liberal way. It has been extremely liberal when it comes to matters of sexual orientation. For example, it has declared the criminalisation of consensual sodomy to be unconstitutional, stating: 'The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as . . . a legitimate purpose'⁴ for limiting gay people's equal right to freedom of expression. The Court has also ruled that the state must grant gay life-partners of South Africans the same immigration rights as spouses⁵ and allow gay life-partners to adopt children.⁶ Other particularly liberal judgments include rulings that it is unconstitutional to forbid people from stripping in places where alcohol

³ Republic of South Africa Constitution Act 108 of 1996 (1996 Constitution) chapter 2.

⁴ Section 20A of the Sexual Offences Act of 1957 was nullified in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) par 37.

⁵ Section 25(5) of the Aliens Control Act 96 of 1991 was declared unconstitutional in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

⁶ Sections 17(a)(c) and 20 of the Child Care Act 74 of 1983 were struck down in *Du Toit and Another v Minister for Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

is served⁷ or to prevent Islamic broadcasters from questioning whether the Holocaust took place.⁸

However, there have been some important cases on which the Court has taken a nonliberal stance. The Court has upheld the constitutionality of paternalistic and moralistic statutes prohibiting prostitution and brothels,⁹ barring the use of dagga for religious purposes¹⁰ and forbidding wine sales on Sundays.¹¹ One might wonder whether there is a principled difference between the cases on which the Court has been liberal and those on which it has not. That is an intricate issue, but here are some promising hypotheses: two of the central nonliberal judgments were based on the interim Constitution, which differs from the new Constitution¹²; prostitution and wine sales on Sundays were deemed to make harm to others somewhat likely (even if they did not themselves constitute such harm), whereas gay sex and strip-tease were found to carry no such risk; and the Constitution is less clear on issues of prostitution, drug use and liquor sales than on those related to sexual orientation and freedom of expression, calling for deference to the legislature with respect to the former.

Should the Court have been more liberal or less in its judgments? More broadly, would it have been better to have adopted a Constitution that is more liberal or less so, and which kinds of statutes should Parliament seek to enact? The remainder of this part explores arguments for and against liberalism, paternalism and moralism.

(d) Hinduism, cigarettes and Hugh Masakela

One major argument for liberalism starts from the fact that many nonliberals, at least in South Africa, want citizens to have certain individual rights. For example, few people want the government to promote a certain religion such as Hinduism, to criminalise cigarette smoking, or to force people to listen to the jazz of Hugh Masakela. Many (South African) nonliberals believe that individuals should have the freedoms to choose their own religion; to decide

⁷ Section 160(d) of the Liquor Act 27 of 1989 was recently declared unconstitutional in *Philips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

⁸ Clause 2(a) of the Code of Conduct for Broadcasting Services was declared unconstitutional in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC).

⁹ Sections 2, 3(b)(c), and 20(1)(aA) of the Sexual Offences Act of 1957 were upheld in *Jontani and Others v State* 2002 (6) SA 642 (CC).

¹⁰ Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 was upheld in *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC).

¹¹ Section 90(1) of the Liquor Act 27 of 1989 was upheld in *Lawrence and Others v State and Another* 1997 (4) SA 1176 (CC).

¹² Unlike the 1996 Constitution, the interim Constitution explicitly permits the legislature to restrict economic activity for 'the improvement of the quality of life,' which invites a nonliberal reading. See section 26 of the Republic of South Africa Constitution Act 200 of 1993 (interim Constitution).

whether to smoke cigarettes; and to pick their own music. Liberals ask these nonliberals what, if any, relevant difference there is between these freedoms and the other freedoms the liberal would like to see granted. For instance, if the state should permit people to smoke cigarettes, why not dagga? And if the state should permit people to choose what to put in their ears, why not what they put in other parts of their bodies?

Paternalists and moralists object to the liberal's analogy in different ways. Paternalists maintain that certain self-regarding actions are more harmful than others. Dagga, they might say, is more harmful to the smoker than cigarettes. Moralists object to the analogy by contending that certain actions that do not directly interfere with others are more immoral than others. There is nothing immoral, they might say, about listening to jazz, but something clearly wrong with hiring out one's sexual organs.

Liberals, of course, respond to paternalists by claiming that such actions need not be so harmful. Using dagga in religious ceremonies (ie occasionally) need not be harmful. And many liberals respond to moralists by questioning whether the things they find immoral (eg prostitution, abortion, homosexuality) truly are immoral.

However, since liberals typically want patently imprudent and base actions to be legal, so long as they do not harm others, this response probably will not be enough to support their view. That is, if liberals want suicide to be legal, they must bite the bullet and maintain that the degree of harm one does to oneself is irrelevant. And since a large majority of people are inclined to think that certain victimless activities such as prostitution are immoral, liberals would have a stronger case if they granted this claim but denied that it should entail criminalisation.

(e) Slavery, duelling and sex with animals

At this point, nonliberals often throw their own analogy right back at liberals. Few liberals would really like to see voluntary enslavement, duelling or bestiality legalised. However, these are activities that, strictly speaking, do not directly interfere with the ability of other persons to live as they please. Bestiality does not harm other persons, and both voluntary enslavement and duelling would be consensual, meaning that there would be no 'victims' in the liberal's sense. If such activities should be illegal, even though they do not directly harm other persons, then perhaps lots of other victimless activities should be, too.

Some liberals are willing to bite the bullet and say that the above activities should be legal. More, however, are inclined to find ways to criminalise them without giving up their liberalism. Some extend liberal rights to animals, while others say that it would be too difficult for the state to enforce a slavery contract. Furthermore, it is perhaps open to the liberal to make some

occasional exceptions to her general rule. She can say that some extremely harmful or degrading victimless activities are beyond the pale and should be illegal, but that the large majority of nonliberal laws on the books rule out less than extreme activities and therefore should be nullified.

(f) Utility

So far we have looked at arguments that seek to establish general claims about the proper extent of civil liberty from reflection on particular cases. Now we turn to more principled arguments for liberalism and nonliberalism. The 19th century British philosopher John Stuart Mill is famous for defending liberalism on utilitarian grounds, that is, by claiming that it would make society better off than any nonliberal alternative. He assumes that it is the state's duty to do whatever would most improve the quality of people's lives. Interestingly, he argues that the state would do the best job of bettering lives if it basically left citizens alone to do whatever seemed best to themselves. More specifically, he contends that since competent adults generally know both their own interests and how to satisfy them better than others do, the most interest satisfaction is likely to result if the state punishes people only when they impair the ability of others to live as they deem best.¹³

Paternalists typically object to Mill's argument by denying the claim that adults know what is best for themselves, often invoking cigarette smoking as a counterexample. However, defenders of Mill respond that, even if adults do not recognise that cigarette smoking is imprudent, the costs of trying to force them to quit would be too high. Just imagine the harm that the state would do if it outlawed cigarettes. But paternalists reply that the state need not outlaw cigarettes; using tax money to fund anti-smoking programmes might do the best job of promoting the general welfare.

In addition, nonliberals often invoke considerations of utility to defend their view by pointing to ways in which liberalism makes citizens dissatisfied or unhappy. For instance, paternalists and moralists contend that liberalism erodes social cohesion and community, heightens dislike of government, makes people feel disempowered, results in drug abuse, abets out of wedlock births, and encourages intolerant and fundamentalist movements.

It obviously requires some careful social science to ascertain whether liberalism or a certain nonliberal policy would best promote the general welfare. Since the argument from utility provides a somewhat shaky foundation for liberalism, most liberals have sought something more firm.

(g) Dignity

The most influential argument for liberalism appeals to the principle that the state must treat the dignity of persons with respect. Normal adult citizens are

¹³ J S Mill *On Liberty* (1859) especially part 4.

thought to have a dignity in that they are free, rational and equal beings. They all have to the same requisite degree the ability to deliberate and reason, a special capacity that animals and other beings on earth lack. Now, many liberals maintain that treating this capacity for autonomy with respect requires the state merely to enforce equal rights to live as one pleases.

Nonliberals sometimes reject the principle of respect, or, more often, claim that respect is not as important as other values (especially that value of human life, in the context of the abortion debate). Other times, nonliberals accept the importance of respect but question whether it is true that it requires the state to be neutral among competing conceptions of the good life. Why think that treating persons as having a dignity forbids the state from using punishment and taxes to help citizens live the most happy and virtuous lives they can?

John Rawls, the most influential political philosopher of the 20th century, seeks to answer this question. In the course of his career, Rawls proffered many different reasons for thinking that respect for the dignity of persons requires the state not to favour one way of life over others. One of his most cited and lasting rationales is the idea that it would be disrespectful to force someone to do something that she could reasonably view not to be worth doing.¹⁴ Suppose you and your spouse disagree about which book to buy with your joint funds. It would be disrespectful of you to go out and buy your preferred book without consulting your spouse, presumably since you would be making your spouse conform to a choice with which he or she reasonably disagrees. Likewise, it would be disrespectful for the state to force citizens to live in a certain way that they would be reasonable to reject. And, according to Rawls, all religious and cultural conceptions of the good life are reasonably rejectable. There is no firm or uncontroversial way to decide between, say, being a hedonist or an ascetic, an atheist or a theist, a vegetarian or a carnivore. Hence, the state would be unjust to thrust any one of these ways of life on its citizens, whether by using their tax money to promote conformity with it or by punishing them for nonconformity.

There are three key objections nonliberals make to this rationale. First, many people believe that some conceptions of the good life would in fact be unreasonable to reject. For example, is it so controversial that a life filled with addiction, pain and loneliness is worse than one with autonomy, pleasure and love?

Second, it is not clear that liberal principles would themselves be unreasonable to reject. For instance, people reasonably disagree about policies aimed at preventing murder. There seems to be substantial controversy about exactly how a state should implement such policies, as well as fair

¹⁴ J Rawls *Political Liberalism* (1993) 10, 37, 154 and elsewhere.

debate about whether a state (as opposed to some other form of government) should implement them at all. Hence, liberalism might also fail to pass Rawls's test of respectful state action.

Third, it might in fact not be respectful to make others conform to policies with which they reasonably disagree, at least in those cases where doing so would promote their autonomy overall. For example, consider someone who presently wants to commit suicide, not because of depression or any mental illness, but because he believes that his religion prescribes it. Perhaps it would not be disrespectful of the state to prevent him from killing himself, at least if it did so because it suspected that he would later be grateful that it had stopped him.

There is much discussion in the literature about whether Rawls's rationale is sound, whether there is some other promising reason to think that respect for people's dignity favours liberalism, and whether respect might even require a kind of nonliberal state that coerces people in the short-term so that their autonomy is maximised in the long-term. As we see in the next part, this debate has implications for issues of economic justice.

III PERSONAL PROPERTY

How should the law regulate the distribution of goods such as vehicles, houses, electronics, healthcare and the money used to obtain them?¹⁵ It is useful to divide the major answers between libertarian accounts and redistributive views. The difference between these theories turns on whether they deem it permissible for the state to force wealthy citizens to give goods to poorer ones, when the wealthy initially acquired these goods without coercion or deception. All plausible theories of personal property say that, if someone acquired wealth by using force or fraud, then she should not be legally entitled to keep it and the state should make her give it back to its rightful owner (at least within a certain time-frame). So, there is no pressing debate about whether, say, the land reform mandated by South Africa's Constitution is just.¹⁶ The genuine controversy arises in those cases where people have become rich without stealing or cheating.

To see this issue, consider a slightly modified example for which Robert Nozick is famous.¹⁷ Suppose that one million South Africans want to see

¹⁵ This question is distinct from the question addressed below in part IV about whether private ownership of the means of production is permissible. Capitalists argue that individuals should be allowed to amass so much wealth as to become the owners of large business and natural resources, something socialists deny. Although the debate about how to distribute personal property has implications for the debate about whether private property is permissible, we address them only in the next part of this chapter.

¹⁶ 1996 Constitution, section 25.

¹⁷ CFR Nozick *Anarchy, State, and Utopia* (1974) 160–62.

Mandoza put on a concert. Mandoza agrees to play for his fans across the country, but only if they give him R20. Supposing one million South Africans have each given Mandoza R20 in exchange for attendance at one of his shows, he has now earned an astonishing R20 million. Notice that Mandoza did not harm anyone to obtain his wealth. All he did was make free and informed contracts with others to perform a service. Now, supposing that these one million South Africans also did not harm anyone when they acquired the R20 they subsequently gave to Mandoza, here is the key question: is Mandoza entitled to keep the entire R20 million? Or is the state entitled to take some of it away from him in order to help the poor, disabled and unemployed?

(a) Libertarianism

Libertarians answer that Mandoza may rightfully keep all the money that people have freely decided to give him (so long as these people initially acquired their money without using coercion or deception). Libertarians claim that it would be wrong for the state to take away the money that Mandoza has acquired, at least for the purpose of helping others who are less wealthy.¹⁸ A person should be legally permitted to own any wealth that others have voluntarily given him, whether it was for money, for a service, or for nothing.

Libertarians also think that if a person makes something out of unowned matter, he is entitled to keep it. For example, if you are on an unowned piece of land and create a thatch hut, the hut is yours and it would be wrong of anyone to give it to others against your will. Many libertarians believe that it would be wrong of you not to share your hut with others who would otherwise freeze at night, but all believe that it would also be wrong of anyone to *make* you share your hut.

In sum, for libertarians, state taxation of goods acquired through free gift, exchange or labour is impermissible when done for the sake of redistribution. Libertarians hold that it would be right for the state to make you give up your wealth if and only if you have voluntarily taken on the responsibility to give it up.¹⁹ For example, if you have promised to share your hut or have actively prevented others from building their own huts (by, say, hoarding all the thatch or setting their huts on fire), then libertarians think that your hut could be permissibly confiscated. Similar remarks go for the Mandoza case above; if he has signed a contract to give some of his concert earnings to

¹⁸ There is some debate among libertarians about whether the state may tax the rich for purposes of domestic justice and national defence. There are some, 'anarcho-libertarians,' who deny that a state should exist at all and who think that all services the state currently performs should instead be offered by private firms on a market.

¹⁹ Or if the wealth had been illegitimately acquired in the first place.

clarity, or has chosen to make a baby, then (and only in such cases) the state would be allowed to make him contribute to take care of others. But if a person has not freely assumed an obligation to help others, then it would be unjust for the state to force him to do so.

(b) Redistributivism

Redistributive theorists maintain that the state may force those with possessions acquired through free gift, exchange or labour to contribute some of them to others with less. Even if Mandoza has received money without using coercion and deception, and even if you have built a hut without harming others, redistributive theorists hold that it can be right for the state to take away some of these goods for the sake of helping those who are poorer. Your promise or other voluntary assumption of responsibility to aid others is not necessary for the state to permissibly redistribute wealth that you have acquired.

Redistributive theorists disagree among themselves about precisely *what* the state ought to distribute and *how*. In terms of what should be distributed, redistributivists have different views about whether the state should transfer money to the poor or whether it should use money it has taken from the rich to buy certain goods that it then passes on. Positions on civil liberty here affect those on personal property. Specifically, a liberal who happens to be a redistributivist about personal property wants the state to distribute resources to the poor. 'Resources' here has a technical meaning; they are those things that are generally useful for achieving ends. For example, food, healthcare, education and money are things that a person can use to pursue many different goals. Liberals would prefer that the state distribute resources to the poor since doing so would not restrict their ability to choose among various ways of life. A nonliberal, in contrast, might want the state to distribute certain things that would be useful only for pursuing a particular way of life. For example, a religious conservative could want the state to use money it has taken from the rich to purchase Bibles for the lower classes. A paternalist might prefer to see the state use this money to distribute condoms free of charge or to run anti-smoking advertisements.

To simplify discussion, let us stipulate that resources, particularly monetary ones, are what redistributivists would like to see allocated. Liberals of course hold this view, and even those nonliberals who want specific goods distributed typically want some money to be distributed as well. This stipulation is therefore not unfair to the disputing parties.

Supposing, then, that redistributivists believe that money taken from the wealthy should be transferred to those who are poorer, there is the further issue of exactly how the money should be transferred. Meritocrats think that money should be roughly proportionate to what people have contributed to

society. Effort theorists think that it should be roughly proportionate to how hard people have worked. Egalitarians say that money should be distributed more or less equally among people (perhaps regardless of whether they have contributed to society or worked hard). Followers of Rawls, or those who believe in the 'difference principle,' believe that money should be distributed unequally if that would make the worst-off group in society more prosperous than it would be under an equal distribution.²⁰ Utilitarians (or perfectionists) believe that money should be distributed in whatever way maximises well-being (or excellence) in people's lives. Unconditional income theorists think that all people should receive a basic income grant sufficient to live a decent life but that they may earn more than this on the market if they choose. Finally, social democrats or welfare statists believe that the market should determine the amount of money people receive, but that there should be a 'safety-net' in the form of free emergency healthcare, unemployment benefits, and means-tested grants for the poor and disabled.

Some of these theories might overlap in their application. It might be, for instance, that the difference principle is coextensive with unconditional income theory. That is, citizens in the lowest economic class might be better off than citizens would be without economic classes if and only if all citizens receive a basic income grant. For this to be so, the distribution of wealth in an egalitarian society would have to provide citizens less money than would be provided in an unconditional income society to citizens who lived on nothing but a basic income grant. If, as many economists suggest, an equal distribution of wealth would not provide strong incentives for people to be productive, it could be that an egalitarian society would have much fewer goods to distribute than would be available in a society with an unequal distribution of wealth and a basic income grant. Obviously, it is difficult to ascertain exactly what the implications of various distributions of wealth would be. For this reason, and since it seems possible that the theories will prescribe different things in practice, we should keep the theories distinct.

(c) The South African context

South Africa is clearly a welfare state or social democracy. Wealth in the first instance is distributed by the market and inheritance. However, the state collects taxes from people who have done well in three main areas. First, the state taxes property owners; the more expensive one's house, flat or farm, the higher one's rates. Second, the state taxes income earners, whether they receive money from work, interest, dividends or capital gains. Here, too, the more one earns, the higher one's tax, so that, past a certain point, those in

²⁰ And that the proper unequal distribution is the one that makes the worst-off group in society as prosperous as possible.

the highest tax bracket pay 40 per cent of their income to the state.²¹ Third, the state taxes consumers at a flat rate of 14 per cent VAT, and also places extra taxes on cigarettes, alcohol and petrol.²² The state then uses these funds that it has collected from people with means to support a variety of domestic programmes for those who cannot afford necessities. In fact, unlike most Constitutions throughout the world, South Africa's Bill of Rights explicitly requires the state progressively to realise social rights to housing, healthcare, food, water, welfare, and education.²³ Almost 50 per cent of the state's budget goes to such social services.²⁴

Some might argue that South Africa's tax and spend policies do not obviously indicate a social democratic approach. In particular, some might deem these policies to be consistent with libertarianism. After all, many of the people who are wealthy in South Africa became so as a result of coercion used during the apartheid era. Perhaps taxing the rich is simply making them give back what is not rightly theirs, something the libertarian upholds.

The trouble with this argument is that South Africa's taxes do not uniquely target those who acquired their wealth through coercive means. Property rates and income taxes, for example, also affect blacks who have become rich since the transition to democracy. In addition, the Constitution plainly requires the state to fund social programmes apart from those required to redress past injustice, and the Constitutional Court has given effect to these requirements.²⁵

The debate between libertarians and redistributivists is frankly not much of a live issue in contemporary South Africa. Although many corporations and wealthy individuals no doubt believe that taxes are too high, nearly everyone seems to agree that some redistributive taxation (beyond rectifying apartheid injustice) is appropriate. Of more interest to South Africans is the precise form that redistribution ought to take. Are the rich paying their fair share, and is the state using the funds in the right way? Specifically, should there be a basic income grant and access to anti-retrovirals for anyone who is HIV+?

Although these questions are at the forefront of political debate here, and we address them below, we must address libertarianism, for two reasons. First

²¹ South African Revenue Service 'Tax Pocket Guide 2003/2004' (2003) (<http://www.sars.gov.za/it/brochures/2003/2003-Budget-Pocket-Guide.pdf>).

²² These are 'regressive' taxes, i.e. are not ones that are particularly redistributive. Since all consumers pay the same rate, it is a greater burden on the poor than on the rich. However, one could argue that the more you buy, the more money you must have relative to others who buy less, and that the more you buy, the greater will be your tax in absolute terms.

²³ 1996 Constitution, chapter 2.

²⁴ *South Africa Yearbook 2002-3* (2003) 242 (<http://www.geis.gov.za/docs/publications/yearbook/ch10.pdf>).

²⁵ Two key cases are *Government of the Republic of South Africa and Others v Irene Grootboom and Others* 2001 (1) SA 46 (CC); and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC). Cf *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

off, it of intrinsic philosophical interest to know why it is permissible (if it is) to force someone to help others, if he has not assumed responsibility to help them. At an international level, it would be nice to have something principled to say to multinational pharmaceutical companies which ask, 'Why should we be forced to give drugs to diseased South Africans for free or at a reduced cost, when we invented the drugs and did not cause their illness?' Second, if you know why it is appropriate for the state to take wealth away from the haves, then you probably can ascertain not only how much the state should take from them, but also how it should distribute the wealth to the have-nots. In the rest of this section, therefore, we address the debate between libertarians and their redistributive adversaries.

(d) Liberalism

One influential argument for libertarianism draws an analogy between civil liberty and economic liberty. If you think that the state should not enforce a particular form of sexuality in people's bedrooms, then, so the argument goes, you must think that the state should not enforce a specific kind of clarity in corporate boardrooms. The liberal believes that it is unjust for the state to make someone adopt a certain way of life that others want her to adopt, if she is not harming anyone else. The libertarian says that, by analogy, it is unjust for the state to make someone contribute money that others want her to contribute, if she has not harmed anyone else. In short, the claim is that a liberal must also be a libertarian, on pain of inconsistency.

Of course, one might object to this argument by rejecting liberalism. You might hold paternalism or moralism, and so not be moved by the analogy between liberalism and libertarianism. However, many people are inclined to be liberals and to be redistributivists as well. Is this consistent, and, if so, how can it be?

John Rawls can be seen as having made it his life's work to answer this question. His strategy involves articulating precisely why liberalism is attractive and contending that this rationale fails to support libertarianism. Here is one important execution of this strategy from Rawls's work. He maintains that people are for maximising certain civil liberties and against forcing people to conform to a certain way of life because they prize the ability to make decisions for themselves.²⁶ Liberals might agree that certain ways of life are imprudent, offensive or degrading, but they more highly value having

²⁶ J Rawls *A Theory of Justice* (1971), and note 14 above. Rawls is well-known for employing a hypothetical social contract theory to argue for liberalism and against libertarianism. According to Rawls, just principles are those that would be rationally agreed to by parties who had to live under them. Rawls specifies the reasoning by which parties would evaluate principles of justice in terms of seeking to satisfy interests in developing their abilities to deliberate and pursue a way of life of their choice. It is these interests that do the fundamental moral work in Rawls's argumentation.

resources that enable people to choose their own ways of life. These resources include certain liberties, i.e. the freedoms to associate, learn, experiment and express oneself without punishment or the threat of it. Now, Rawls maintains that a highest-order interest in the capacity to live autonomously does not support libertarianism, since wealth is another resource that one needs a lot of in order to carry out a lifeplan of one's choosing. Poverty greatly inhibits someone from living as she pleases. Hence, according to Rawls, valuing freedom of choice supports not only liberalism, but also a redistribution of money from the rich to the poor (in accordance with the difference principle).

Libertarians object to Rawls by saying that a proper valuation of the capacity to choose one's life would mean not *forcing* someone to give away money that she acquired without harming anyone. They complain that adopting a redistributive view would not truly honour people's ability to make decisions for themselves; for it would degrade the autonomy of the rich by making them 'slaves' of the poor. The debate at this point is whether libertarianism or redistributivism better respects the dignity of persons.

(e) Dignity

Much of the contemporary debate between libertarians and redistributivists appeals to competing conceptions of human dignity. For libertarians, treating persons with respect basically means not interfering with them unless they have interfered with others. Libertarians find it degrading to force people who have done nothing to harm others to go out of their way to help them (assuming they have not voluntarily assumed an obligation to help). Libertarians readily contend that it would be nice and decent if people voluntarily decided to help each other, and perhaps even immoral if they did not. However, they find it demeaning for the state to *make* them do so. A more respectful treatment, they contend, would involve the state merely asking them to help their fellow citizens or pointing out that they have good moral reasons to do so.

Perhaps the most forceful argument in support of the libertarian's conception of dignity is an analogy between forced labour and redistributive income tax. Forced labour involves making someone work for little or no pay. It would clearly be disrespectful to put a gun to someone's head and make him give you a haircut for nothing, even if you badly need a haircut. Libertarians maintain that the state is doing something similar to workers when it taxes their income. If the worker does not pay his tax, he is threatened with criminal sanctions, which is analogous to putting a gun to his head. And the state is basically making the worker labour for nothing in return, just like making someone give you a haircut for no money. If the worker is taxed at 33 per cent, then a substantial amount of his labour over the course of a year (if

not 33 per cent) is done for the sake of others. He receives no compensation for that work; the state takes it and then gives it to others who are poorer than the worker.

It is worth thinking about what differences there might be between forced labour and redistributive income tax. That is one strategy that redistributivists have employed to question the libertarian's conception of respect for the dignity of persons. Another strategy has been to present and defend their own conceptions, three of which are mentioned here.

Sometimes redistributivists say that since people equally have a dignity that warrants respect, they must be given an equal allocation of money. An unequal share of society's wealth would signify that those who have less money are themselves worth less than those who have more (perhaps unless an unequal share would provide those with the least amount of money more than they would have under an equal distribution). This is obviously an argument for egalitarianism (or the difference principle).

Other times redistributivists argue that treating people with respect means basing shares on factors that they can largely control. It would clearly be degrading to give some people more wealth than others because of their race, something they cannot influence. By analogy, it would be degrading to let some people have more wealth than others because they happened to be born to wealthy parents, lucky on the stock market or blessed with a face that advertisers find useful to plaster on billboards. These are morally arbitrary conditions over which individuals have relatively little control. Instead, wealth should be allocated according to how much sacrifice people have made at work, a factor over which they have substantial control (setting aside worries about unemployment). This is an argument for the effort theory, which might well prescribe paying miners more than MPs.

Still other times redistributivists maintain that treating persons with respect requires one to help them in emergency situations, at least when one can do so at little cost to oneself. If people have a dignity, then one has a duty to go out of one's way to some small degree to rescue them. For example, if you saw a child drowning in a lake, and if you could save her without threatening your own life or limb, you would be morally required to save her (even if it meant getting your clothes wet). Such a duty is binding on both citizens and states. And so it is appropriate for states to tax very wealthy citizens in order to help poorer ones avoid death and disability. This is an argument for the welfare state, one that provides anti-retrovirals to HIV+ citizens.

Whether respect requires libertarianism or some kind of redistributive theory is still quite contested terrain in the philosophical literature. There are arguments for libertarianism and for redistributivism that have not been canvassed here, but underlying many of them is the basic principle that the

state must treat its citizens as free and equal persons or as having a dignity that must not be degraded. Some arguments that do not turn on respect, however, are appeals to utility or excellence, considerations that we now address in a related context of economic justice.

IV PRIVATE PROPERTY

The previous part posed the questions of what kinds of personal property should be distributed and how. This part deals with a different but related economic question about private property: to whom do the means of production rightly belong? The means of production are the non-human materials that are primarily responsible for a country's economic output, and so principally consist of large businesses, major natural resources and substantial infrastructure. The question about private property, in the South Africa context, is this: who should be permitted to legally own Telkom, Engen, Nedcor, game animals, mealie plants, gold mines, phone cables, power lines and railways?

The means of production are distinct from the goods of consumption, e.g. cars, TVs, money and other possessions, the distribution of which we addressed in the previous part. Views about personal property, as well as those about civil liberty, can have important implications for accounts of private property, as we discuss below.

(a) Capitalism

Capitalists maintain that individuals should be allowed to legally own at least a majority of the means of production. They say that, by law, most of a country's major economic assets should be owned by private firms, the primary aim of which is to maximise profit for investors. These private firms should seek to promote profit for shareholders by hiring workers on a labour market; using workers' labour-power to make goods or perform services; and then selling these goods or services on a consumer market. If citizens interfere with this production process, then capitalists contend that the state should punish them for theft, trespass or vandalism.

Capitalists differ over which individuals should have ownership rights. Most capitalists believe in 'globalisation,' and so few believe that only private citizens of a country may be allowed to own means of production located in that country. Instead, capitalists typically hold that foreigners should be legally allowed to own natural resources and large companies that exist in another land.

In addition, capitalists dispute among themselves about exactly how much of a country's means of production should be privatised. There are some who believe that all the means of production should be privately owned, but they

are a tiny minority. Think about what it would be like if private individuals owned the roads and citizens had to pay someone each time they used a certain street. It would be possible for individuals to own roads, but the hassle of conducting exchanges would be too great. In other cases, it is simply too difficult for individuals to take possession of particular goods, eg private firms cannot own parts of the air. Most capitalists therefore think that some small part of the means of production should be owned not by private firms but by public institutions.

(b) Socialism

Public ownership is the defining mark of socialism, the alternative to capitalism. Socialists maintain that only the community as a whole may legally own most large businesses, substantial natural resources and important infrastructure. On this view, a majority of the means of production should be the property of public institutions, the primary aim of which is to orient the economy so that it satisfies certain socially defined criteria (such as, say, realising an equal distribution of wealth).

All socialists agree that the public should legally own most of the means of production, but they disagree over whether the public should directly control it. Planning socialists believe that a public body should have the authority to immediately determine the production process, while market socialists deny this. It might sound contradictory to speak of 'market socialism,' but, as we will see, this is a perfectly consistent view. Since planned socialism is more familiar, let us discuss it first.

Planning socialists believe that a certain public institution, which has formulated a goal for the economy, should directly control the means of production. Planning socialists fall into two different camps, those who advocate authoritarian central planning and those who prescribe democratic self-management. Authoritarian central planning is often called 'communism' these days, and it has existed in the former Soviet Union, China and North Korea. Under this scheme, the means of production are directly controlled by a elite group of coordinators that, by means of a bureaucratic chain of command, enforces its plan of what to produce, how to produce it and how to distribute the things produced. Typically, the leaders of a political party decide ahead of time what to make, who is going to make it and who is going to receive it. It then makes citizens follow its economic plan.

Like authoritarian central planners, friends of democratic self-management maintain that production should be planned in advance. However, unlike the former, the latter maintain that this plan should be formulated by a majority of citizens. According to this theory, the means of production should be directly controlled by democratic bodies that decide in advance what to produce, how to produce it and how to distribute the things

produced. These democratic bodies could be either representative, in the form of an elected legislature, or participatory, with unions of workers and consumers. Another difference between central planning and self-management is that most friends of the latter believe that the state should not seriously restrict the individual's liberty when seeking to realise its economic plan. For example, whereas central planning might force someone to take a particular job if that would help to produce a certain good, self-management would not. Democratic self-management is the kind of socialism that Karl Marx favoured and that he in fact called 'communism.' It has never existed in the modern era (or at least not for very long²⁷), but its greater respect for individual autonomy and collective self-rule makes it more attractive to most than authoritarian central planning.

Market socialism is another type of socialism that has never existed in any thorough-going way, but that might constitute an appealing alternative to the 'communism' of the East and perhaps to the capitalism of the West, too. On this view, the means of production should be directly controlled by firms, which firms should be legally owned by public bodies. As with planned socialism, there are democratic and autocratic versions; however, most market socialists believe that democratic bodies should exclusively own the firms. These firms should seek profits for the community by hiring workers on a labour market; using their labour-power to make goods and services; and then selling these goods and services on a consumer market. Such a system is different from planning socialism, in that decisions about what to produce, how to produce it and how to distribute it are not made collectively and beforehand by any public institution such as a political party or Parliament. Instead, such decisions are principally made by individual citizens and firms in a marketplace.²⁸ If consumers happen to buy a lot of a certain good, then some businesses, if they choose, will hire workers to produce more of the good which they will sell in order to make a profit. This might sound capitalist, but it is not. The system is decidedly socialist, for the means of production are owned by the public and any profits made by firms would ultimately belong to the community as a whole, not to private investors.

(c) The South African context

South Africa clearly has a capitalist economy; private investors own and control most of the means of production. The Tripartite Alliance between

²⁷ Some say that it existed briefly during the Spanish Civil War in the 1930s.

²⁸ An element of planning would remain under market socialism in that public institutions would likely fix interest rates in accordance with certain socially defined criteria. If, for instance, Parliament decided that it would be preferable to have mass transit rather than private vehicles, it might offer cheaper loans to those businesses willing to sell buses than to those wanting to sell cars.

the Congress of South African Trade Unions (COSATU), the South African Communist Party (SACP), and the African National Congress (ANC) initially sought a socialist economy. However, the more power that the ANC has secured, the more it has defended capitalism.

Just before the transition to democracy, the ANC was still nominally open to the possibility of socialism. The Reconstruction and Development Programme of 1994, which served as an election manifesto for the ANC, explicitly leaves open the possibility of public ownership of the means of production.²⁹ However, soon after securing political power, the ANC cleanly broke away from the socialist disposition of the SACP and COSATU to become capitalist in orientation. Two early policy documents from 1996 record the shift. An internal ANC discussion paper, 'The State and Social Transformation,' says that the ANC does not seek to abolish the distinction between economic classes who own the means of production and who do not.³⁰ Instead, it says that the party intends to harness private capital for democratic, non-racist and redistributive purposes. And the government's official GEAR policy states that the most promising way to alleviate poverty is by increasing economic growth in the private sector, not by, say, socialising the means of production or enacting public works programmes.³¹

Not only has the ANC refrained from socialising companies that had been privately owned, but it has also gone a step farther and privatised many that had been publicly owned. In 1999, the Johannesburg City Council introduced the iGoli 2002 plan.³² The centrepiece of this policy amounts to something close to market socialism, in which the government exclusively owns shares of independently operated firms that seek to promote profits or to run as much as possible on a corporate model.³³ For example, utilities were created in the domains of electricity, water and waste management. However, a small part of the iGoli 2002 plan (about five percent) involves selling off businesses to private investors. Specifically, Metro Gas, the Johannesburg Stadium and the Rand Airport have been sold.

Much more substantial privatisation was soon to come and on a national scale. In 2000 the Department of Public Enterprises released a document

²⁹ African National Congress 'Reconstruction and Development Programme' (1994) (<http://www.polity.org.za/html/govdocs/rdp/rdpall.html>).

³⁰ African National Congress 'The State and Social Transformation' (1996) (<http://www.anc.org.za/ancdocs/policy/s&st.html>).

³¹ Department of Finance 'Growth, Employment, and Redistribution' (1996) (<http://www.treasury.gov.za/documents/gear/all.pdf>).

³² Greater Johannesburg Metropolitan Council *iGoli 2002: Making Greater Johannesburg Work* (2000). For a book-length review of iGoli 2002 and its critics from the government's perspective, see City of Johannesburg Council *Johannesburg: An African City in Change* (2001).

³³ Here is the central difference between iGoli 2002 and market socialism. Under the former, multiple firms bid for a contract with government, with the government ultimately selecting only one firm to provide the service. Under the latter, multiple firms would provide a service on a market, with firms kept viable largely by consumer choices.

indicating that the four largest state owned firms, responsible for over 90 per cent of assets and income, would be sold off either entirely to investors on a stock exchange or partially to private firms.³⁴ For example, 30 per cent of Denel was sold to BAE Systems, a private British company, and 30 per cent of Telkom was sold to SBC, a private firm in the United States.

There has been rancorous debate and even occasional strife in South Africa over the government's decision to support capitalism and to privatise firms previously owned by the state. The Anti-Privatisation Forum (APF), comprised of certain workers' unions, political groups, and NGOs, has organised demonstrations against privatisation and for socialism.³⁵ Has the ANC been correct to uphold private property, or has the APF been right? To help us answer this question, we should examine major arguments for and against capitalism.

(d) Efficiency

There are two major arguments for capitalism. The first argument is that capitalism is more efficient than socialism. Capitalist economies produce more and better goods at a cheaper cost than do socialist ones, or so the historical record suggests. Although capitalism is sometimes portrayed as inimical to the interests of the poor, the present argument maintains that the opposite is true. If one is concerned to raise the standard of living of the worst-off, then states ought to adopt capitalist policies, for they best facilitate economic growth. It is this rationale that motivates the ANC and redistributivist theorists such as (many) utilitarians and friends of the difference principle.

Socialists object to this argument in two ways. First, they often argue that capitalism is not as efficient as it might seem. It includes unemployment as a structural feature. Those who own a business have the right to fire workers, at least if useful for keeping profits healthy, as it often is. In addition, critics maintain that, even if capitalism produces more goods, the poorest in society do not necessarily obtain them. After all, a business owner is interested in making a profit for himself, and since the poor do not have much money to spend, he is unlikely to sell many goods to them.

Capitalists typically respond to this objection by contending that state taxation can allay these defects. Although unemployment will be recurrent in a capitalist economy, the state could use tax money to provide benefits to those who cannot find work. For instance, the South African government

³⁴ Department of Public Enterprises 'An Accelerated Agenda Towards the Restructuring of State Owned Enterprises: Policy Framework' (2000) (<http://www.polity.org.za/html/govdocs/policy/soe/policyframework01.htm>).

³⁵ <http://www.apf.org.za>.

recently set up an unemployment insurance fund (UIF).³⁶ Both employers and employees are legally required to contribute to the fund, on which employees can draw later if employers dismiss them. Furthermore, it is open to the state to provide basic necessities to those who cannot buy them on their own. As we saw in the previous part, the South African state taxes business profits and uses the money to provide food, emergency medical care and other goods to those who cannot afford them.

Socialists reply at this point that, since the state would have to tax business owners in order to fund welfare programmes, they will naturally resist such measures. There unfortunately is not the space to consider the extent to which this empirical claim is true (but it is worth noting that business owners would presumably resist socialism even more than a capitalist welfare state). We must now turn to the second major way that socialists object to the argument that capitalism is most efficient.

Specifically, socialists contend that socialism in the future could be more efficient than it has been in the past. Most socialists grant that the socialist societies that have existed so far have been relatively inefficient. However, they maintain that the reason for this has to do with their autocratic nature. The former Soviet Union, China and North Korea have all been dictatorships. Perhaps it was the top-down decision-making, and not the socialism, that has been responsible for the inability of these countries to feed their own people, let alone provide a decent standard of living to them. In addition to the internal hindrance of authoritarianism, there have also been external impediments. For example, the arms race with capitalist countries meant that socialist countries could not spend much on domestic programmes. Also, the mere existence of global markets tends to cause a 'brain-drain,' that is, to lure talented citizens away from socialist countries with the incentive of higher wages. Maybe socialism would be more efficient if it were globalised.

Capitalists respond to this second objection by arguing that socialism (not the lack of democracy or other contingent factors) has indeed been the culprit in socialist societies. Capitalists often say that capitalism is inherently more efficient than socialism because of two conditions. First, capitalism is said to do a much better job of handling information. It would be quite difficult for a public institution to be able to settle in advance what people need or want, what is available, who is willing to provide it, when it can be provided and so on. For instance, how could a planning body know ahead of time how many bananas or jeans to produce in a given year? Second, it is maintained that capitalism provides the right mix of positive and negative incentives for people to be productive. There is a large carrot in that people have the opportunity to own enormous amounts of wealth, and there is a

³⁶ Unemployment Insurance Act 63 of 2001.

large stick in that people could be fired or lose their business if they are not sufficiently productive.

Planning socialists argue that people do not typically need the reward of enormous wealth and the penalty of unemployment in order to be productive. They also maintain that planning bodies could do a sufficiently good job of processing the information needed to run an economy. Market socialists, in contrast, usually say that a planned system neither could handle the information nor provide the right incentives, but that a market socialist system could. These are empirical claims that we cannot thoroughly evaluate here. We must instead turn to the second major argument for capitalism.

(e) Libertarianism

The second major argument says that, even if market socialism were as efficient as capitalism, it would still be morally objectionable. The reason is that, from the perspective of the libertarian (see part III), socialism wrongly deprives citizens of the opportunity to engage in a production process that causes no harm to others. Basically, libertarianism entails capitalism; if you hold libertarianism about the distribution of personal property, then you must hold that private property is permissible. The libertarian believes the state should protect your right to obtain so much wealth as to own a company, so long as you do not use force or fraud.

Recall the Mandoza case from part III. Imagine that Mandoza uses the R20 million he has earned putting on concerts to buy a company. Suppose that he hires musicians, makes compact disks, sells them to consumers for a price, earns a handsome profit and uses his profit to expand his company. The libertarian says that Mandoza should be allowed to become a large business owner, for in doing so Mandoza has not interfered with anyone's life. It is true that other recording companies might not be faring as well as his on the market, but he is not wronging them. His competitors are floundering (and perhaps even going out of business) because consumers are choosing to buy from him instead of them, which is surely fair. He is neither lying to nor stealing from anyone. In fact, he is providing jobs to workers and products to consumers. Since he is harming no one, the libertarian says that it would be unjust for the state to restrict his freedom to participate in labour and consumer markets. A socialist would want the state to confiscate Mandoza's company and make it public property, which would, so the argument goes, unjustly 'forbid capitalist acts between consenting adults.'³⁷

Before evaluating this argument, it is important to see that capitalism does not entail libertarianism. If you believe in capitalism, then you do not necessarily have to believe in libertarianism. It is consistent to think that

³⁷ Nozick (note 17 above) 163.

capitalism would be a proper system of production and that libertarianism would be an improper distribution of wealth. Instead, you might think that the state should let a business owner keep his business but should tax his profits in order to help others who have not been as successful on the market. It is possible, then, for capitalists to be in favour of redistribution to the poor; this, after all, is the ANC's position.

Now, how can socialists object to the libertarian argument for capitalism? The argument, in a nutshell, is that since libertarianism is correct, and since libertarianism requires capitalism, capitalism is correct. It is true that libertarianism requires capitalism (and that socialism requires redistributivism). Hence, socialists must object to the argument by rejecting libertarianism. To do this, sometimes socialists appeal to analogous considerations that nonliberals invoke against liberals, contending that whether a citizen is harming others should not be the sole criterion of whether the state may coerce her (see part II). Other times, socialists contend that libertarianism would be disrespectful since it could mean a serious lack of freedom for the poor (see part III). Another kind of objection is to claim that, contrary to initial appearances, being a large business owner does in fact harm other people in morally significant ways. As we will now see, this claim serves to question not merely the libertarian argument for capitalism, but also capitalism itself.

(f) Democracy

One central argument against capitalism and for socialism appeals to the idea that capitalism harms people by violating their rights to democratic control over the central aspects of their lives. Private property prevents workers from collectively managing their working conditions according to majority rule. Just as a dictator unjustly interferes with his citizens by not letting them decide the laws for their society, so a business owner unjustly interferes with his employees by not letting them determine the nature of their work. Think about what is involved when you agree to take on a job at a firm. The business owner, or his manager, is legally entitled to tell you what to do for at least eight hours a day. Some socialists call this 'wage-slavery' and find it to be a degrading kind of power relationship that is not qualitatively different from prostitution.

Besides getting bossed around by a given owner, socialists often say that workers are harmed in getting exploited by owners as a group. In a capitalist society, the large majority of citizens have no choice but to work for some business owner or other, lest they starve or otherwise be very poor. Employers as a class can therefore take unfair advantage of employees, for example, by keeping wages low.

In addition to impairing the economic control of workers, socialists

maintain that private property undermines the political control of citizens. When individuals amass large amounts of property, they tend to have a disproportionate and therefore unfair opportunity to influence political decisions. Some of the less conspiratorial mechanisms of influence are these: politicians often need substantial campaign funds to run for election, which they can most easily get from the wealthy; states will generally act in the interests of financial institutions, lest they withhold the credit on which states are dependent; politicians will tend to promote economic expansion, not only because this increases their tax base, but also because the populace is less likely to vote them out; the rich own the media and are thus able to determine political agendas. In these ways, permitting individuals to own large businesses and substantial natural resources weakens a state's democracy, or so socialists say.

Capitalists respond to the argument from economic and political democracy in a myriad of ways, but one appealing way is to maintain that state intervention can counteract any undemocratic tendencies. To address concerns about exploitation and a lack of control over the workplace, the state could support unions by, say, forbidding 'yellow-dog contracts' (in which employers make employees agree not to unionise) and promoting 'closed-shops' (where employers must hire unionised employees). It could also finance a basic income grant that would give prospective workers greater bargaining power when negotiating job contracts; their choice would then not be to take a job they do not like or go hungry. The state could, in addition, facilitate worker control by providing cheap loans to economic co-operatives, in which employees band together to buy the majority of their company's shares. And to deal with worries about media and financial corporations having a greater ability to determine political decisions than average citizens, the state could enact laws forbidding private campaign contributions and requiring the media to broadcast a spectrum of viewpoints. To be sure, these policies would require business owners to contribute tax money and other resources for ends that are not in their (short-term) interests, something they might be loathe to do. However, the point is that the full-blown abolition of capitalism may not be necessary to have sufficiently robust democracy on the job and in the state.

(g) Perfectionism

A second important argument against capitalism and for socialism appeals to the idea that a socialist state would help people to lead better lives. There are three parts to this argument: a certain account of what it is to live a genuinely human life, the claim that it is possible only under socialism, and a certain nonliberal view (see part II) that the state should promote a genuinely human life in the economic domain. We spell out these claims in turn.

First, then, some socialists believe that the most valuable aspects of a human being are her abilities to be creative, loving and autonomous. They prize the capacities to make and appreciate culture, to form intimate, expressive bonds with others and to live a life of one's choosing, traits that animals do not share with us. Now, a properly human life is one in which these capacities are developed. It would be 'inhuman,' so the argument goes, to make a human being leave her abilities for creativity, love and autonomy undeveloped for the sake of seeing that she is fed, bathed and mildly amused.³⁸

And this, so the second part of the argument goes, is what capitalism must do and socialism need not do. Capitalism requires a long working day in order to maximise the capitalist's profit. During work relatively few labourers are particularly self-directed, loving or artistic (they find their work 'alienating'), and after work they have little time and funds to do much beyond eat, clean and watch TV. Life for workers under a capitalist system therefore is inhuman in the sense that their uniquely human capacities are stunted. In a socialist system, by contrast, workers could democratically decide to reorganise their workplace so that it better develops their capacities for creativity, love and autonomy. Or workers could decide to substantially shorten the work day and then develop these capacities in their leisure time.

Finally, the argument maintains that one proper purpose of the state is to promote a certain way of life and to do so in the economic realm. Specifically, this is a perfectionist version of nonliberalism, which says that, rather than be neutral among views of the good life, a just state must take sides and change the production process so that it promotes a genuinely human life.

This perfectionist argument is one of Karl Marx's central rationales for socialism.³⁹ There are three basic ways that capitalists object to Marx's argument, corresponding to each of its three major premises. First, capitalists often question Marx's view of a human's most valuable characteristics. For instance, some think that self-reliance, responsibility and initiative are traits that are highly appealing (and that capitalism would foster them better than would socialism).

Second, capitalists object by saying that it is possible for human excellence, as understood by Marx, to flourish under capitalism. In some European countries the workweek has been reduced to 35 hours, and in most of them

³⁸ This might sound like the argument from dignity, but it is somewhat different. The argument from dignity says that the state must treat citizens with respect, whereas the argument from perfection says that the state must help citizens to cultivate their valuable traits. The dignity argument says that the state must honour people's autonomy, whereas the perfection argument says that the state must help people excel by promoting not only autonomy but also creativity and love in their lives.

³⁹ See especially K Marx *Economic and Philosophic Manuscripts* in R Tucker (ed) *The Marx-Engels Reader* (1978).

labourers have six to eight weeks of paid vacation a year. Perhaps the trend could continue and working time could be reduced still further. Or maybe a capitalist system can produce the sorts of jobs that are expressive of a person's individuality and receptive to her creativity. In fact, such jobs could be expected to enhance productivity. And if they did not, then those workers who care so much about finding their work fulfilling could choose to receive less money for such work (which is more or less what university professors do).

Socialists respond that the market, especially a globalised one, cannot allow capitalists significantly to reduce the workweek or make jobs much more rewarding. A capitalist cannot increase her profits if she lets her workers work less; the more they produce, the more she can sell and the more profit she can make. And if she does not increase her profits, then she cannot invest in new technologies. If she does not invest in new technologies, her competitors will. If her competitors invest in new technologies, they will produce better products at a cheaper cost and hence sell more to consumers. And if her competitors sell more to consumers, her business will eventually collapse. In short, a capitalist's business must grow or die, and growth requires a long workweek.

One might think that if a law were passed in a given country requiring the workweek to be shortened, then no firm could gain any advantage relative to other firms. However, socialists claim that globalisation puts paid to this idea. If capitalists in one country gave their workers a break, those in another might not, thereby acquiring a competitive advantage. Socialists contend that this is happening at the moment, with many European countries currently scaling back the benefits their workers receive in order to remain competitive with countries that are less generous to their workers.

Finally, some capitalists object to Marx's argument by denying perfectionism and instead appealing to the liberal principle that the state must remain neutral among competing ways of life (at least in the economic domain). Since arguments for and against liberalism have already been canvassed (see part II), we do not address them here.

V CONCLUSION

Bringing together the three issues in domestic justice that we have explored, we may say that South Africa's laws are (fairly) liberal, (substantially) redistributive, and (thoroughly) capitalist. It has not been the aim of this chapter to make any conclusive judgments about whether these laws are just or not. Instead, the goal has been to enable the reader to view the new South Africa in light of philosophical theories of justice and to understand their major pros and cons. Perhaps the reader can come to some firm conclusions by reflecting on the questions and readings below.

QUESTIONS

- (1) Suppose that a law punished people for advocating hatred based on race, ethnicity or gender, even when such advocacy would not incite violence. Could a liberal approve of such a law? Why or why not? Should such a law be enacted?
- (2) Conservatives and paternalists sometimes argue that, e.g. a law forbidding competent adults from using drugs is permissible because it is necessary to prevent children from using drugs, a goal that even liberals typically believe the state may pursue. What do you think of this argument for nonliberalism?
- (3) Liberalism on the face of it permits people not only to have sex with animals, but to be cruel to them as well. Sometimes liberals try to avoid this implication by granting liberal rights to animals. What might such a legal system involve? Would it be attractive?
- (4) Utilitarianism says that the state ought to adopt those policies that will best promote the general welfare. Which distribution of personal property do you think would satisfy the utilitarian criterion?
- (5) What, if any, relevant difference is there between forced labour and redistributive income tax?
- (6) Suppose that worker A and worker B are both qualified for their jobs as clerks. Imagine that A and B both put in the same amount of time and effort on the job, but that A happens to produce somewhat more output because she is naturally able to type faster than B. Egalitarians and effort theorists claim that justice requires A and B to get paid the same, since the difference in productivity between A and B is a result of something over which they do not have substantial control. How might one question this argument?
- (7) Why does libertarianism entail capitalism but capitalism does not entail libertarianism? Why does socialism entail redistributivism but redistributivism does not entail socialism?
- (8) What do you think is the strongest objection the capitalist can make to Marx's perfectionist argument for socialism?

FURTHER READING**Defences of Liberalism**

- R Dworkin *Sovereign Virtue* (2000).
- R Dworkin *A Matter of Principle* (1985).
- J Feinberg *The Moral Limits of Criminal Law, Volumes 1–4* (1987–90).
- W Kymlicka *Multicultural Citizenship* (1995).
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- C Larmore *Patterns of Moral Complexity* (1987).
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- J Rawls *A Theory of Justice* (1971).

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- P Devlin *The Enforcement of Morals* (1965).
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- G Sher *Beyond Neutrality* (1997).
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- D Gauthier *Morals by Agreement* (1986).
- L Lomasky *Persons, Rights, and the Moral Community* (1987).
- J Narveson *The Libertarian Idea* (1988).
- R Nozick *Anarchy, State, and Utopia* (1974).

Defences of Redistributivism (see also Defences of Socialism)

- R Dworkin *Sovereign Virtue* (2000).
- T Nagel *Equality and Partiality* (1991).
- K Nielsen *Equality and Liberty* (1986).
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Defences of Capitalism (see also Defences of Libertarianism)

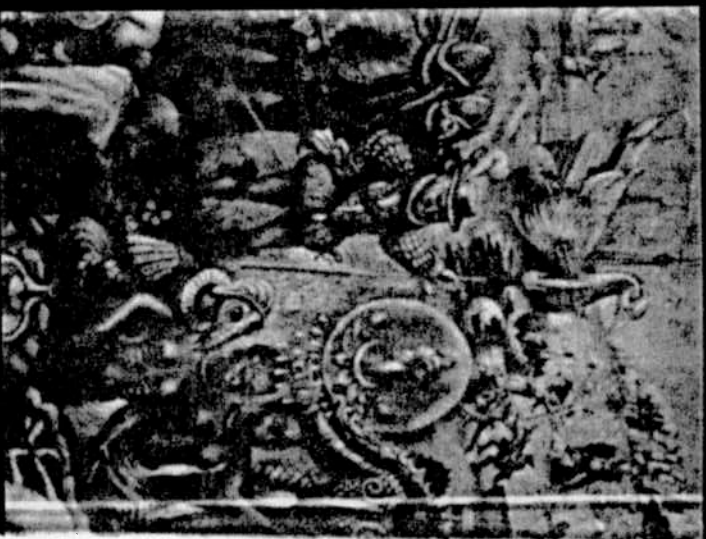
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- P van Parijs *Real Freedom for All* (1995).

Defences of Socialism

- M Albert *Parecon: Life After Capitalism* (2003).
- M Albert and R Halnel *Looking Forward* (1990).
- GA Cohen *Self-Ownership, Freedom, and Equality* (1995).
- GA Cohen *History, Labour, and Freedom* (1989).
- J Roemer *A Future for Socialism* (1994).

Jurisprudence is a comprehensive treatment of the subject by many of the leading legal theorists in South Africa. Each of the major schools of jurisprudence, as well as a number of the major issues in jurisprudence, are discussed in a sophisticated yet accessible style. Each of the schools is assessed for its relevance to South Africa and South African law.

Further, *Jurisprudence* provides the reader with an introduction that contains a meta-theoretical approach and set of tools for systematically evaluating the many and various theoretical claims found within the book and in the subject more generally.




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