

The Basic
Structure
as Subject¹

§ 1. First Subject of Justice

An essential feature of the contractarian conception of justice is that the basic structure of society is the first subject of justice. The contract view begins by trying to work out a theory of justice for this special but plainly very important case; and the conception of justice that results has a certain regulative primacy with re-

1. This essay is a considerable revision of a paper with the same title presented at the meetings of the American Philosophical Association (Pacific Division) at Portland, Oregon in March 1977 and reprinted in the *American Philosophical Quarterly* 14 (April 1977). Sections 2 and 3 are new. I am indebted to Joshua Cohen, Joshua Rabinowitz, T. M. Scanlon, and Quentin Skinner for valuable discussions on the topic of this paper. To Burton Dreben I am grateful for many improvements; and to Thomas Hill and Hugo Bedau for their instructive comments.

spect to the principles and standards appropriate for other cases. The basic structure is understood as the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation. Thus the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family, all belong to the basic structure. The initial objective of the theory is to find a conception, the first principles of which provide reasonable guidelines for the classical and familiar questions of social justice in connection with this complex of institutions. These questions define the data, so to speak, for which the theory seeks an account. There is no attempt to formulate first principles that apply equally to all subjects. Rather, on this view, a theory must develop principles for the relevant subjects step by step in some appropriate sequence.

In this essay I should like to discuss why the basic structure is taken as the first subject of justice. Of course, it is perfectly legitimate to restrict the initial inquiry to the basic structure. We must begin somewhere, and this starting point may turn out to be justified by how well the theory that results hangs together. But there should be a more illuminating answer than this; and moreover one that draws upon the special features of the basic structure in contrast with other social arrangements, and connects these features with the characteristic role and content of the principles of justice themselves. I hope to give an answer that does precisely this.²

Now a social contract is a hypothetical agreement a) between all rather than some members of society, and it is b) between them as members of society (as citizens) and not as individuals who hold some particular position or role within it. In the Kant-

2. In *Theory* the basic structure was regarded as the primary subject and discussion focused on this case. See pp. 7ff. But the reasons for this choice of subject and its consequences were not sufficiently explained. Here I want to make good this lack.

ian form of this doctrine, which I shall call "justice as fairness," c) the parties are thought of as free and equal moral persons, and d) the content of the agreement is the first principles that are to regulate the basic structure. We take as given a short list of conceptions of justice found in the tradition of moral philosophy and then ask which of these conceptions the parties would agree to when the alternatives are thus restricted. Assuming that we have a clear enough idea of the circumstances necessary to insure that any agreement reached is fair, the content of justice for the basic structure can be ascertained, or at least approximated, by the principles that would be adopted. (Of course, this presupposes the reasonableness of the tradition of moral philosophy; but where else can we start?) Thus pure procedural justice is invoked at the highest level: the fairness of the circumstances transfers to fairness of the principles acknowledged.

I shall suggest the following: first, that once we think of the parties to a social contract as free and equal (and rational) moral persons, then there are strong reasons for taking the basic structure as the primary subject (4–5). Second, that in view of the distinctive features of this structure, the initial agreement, and the conditions under which it is made, must be understood in a special way that distinguishes this agreement from all others (6–7); and third, doing this allows a Kantian view to take account of the profoundly social nature of human relationships. And finally, that while a large element of pure procedural justice transfers to the principles of justice, these principles must nevertheless embody an ideal form for the basic structure in the light of which ongoing institutional processes are to be constrained and the accumulated results of individual transactions continually adjusted (9).

~~§ 2. Unity by Appropriate Sequence~~

Before taking up ~~these~~ points, I should like to remark that starting with the basic structure ~~and then developing other prin-~~

is from deliberate violations of these principles, or from error and ignorance of what they require and the like.

Finally, and most relevant for our purposes here, a great variety of associations and modes of cooperation may form depending upon what individuals actually do and what agreements are reached. No special theory is needed to cover these transactions and joint activities: the requisite theory is already provided by the principles of justice in acquisition and transfer, suitably interpreted in the light of certain provisos. All forms of legitimate social cooperation are, then, the handiwork of individuals who voluntarily consent to them; there are no powers or rights lawfully exercised by associations, including the state, that are not rights already possessed by each individual acting alone in the initial just state of nature.

One noteworthy feature of this doctrine is that the state is just like any other private association. The state comes about in the same way as other associations and its formation in the perfectly as-if just historical process is governed by the same principles.⁷ Of course, the state serves certain characteristic purposes, but this is true of associations generally. Moreover, the relation of individuals to the state (the legitimate minimal state) is just like their relation with any private corporation with which they have made an agreement. Thus political allegiance is interpreted as a private contractual obligation with, so to speak, a large and successful monopolistic firm: namely, the locally dominant protection agency. There is in general no uniform public law that applies equally to all persons, but rather a network of private agreements; this network represents the procedures the domi-

7. I distinguish here and elsewhere below between an as-if historical and an as-if nonhistorical process (or procedure). In both cases the process is hypothetical in the sense that the process has not actually occurred, or may not have occurred. But as-if historical processes can occur: they are not thought to be excluded by fundamental social laws or natural facts. Thus on the libertarian view, if everyone were to follow the principles of justice in acquisition and transfer, and they can follow them, then the as-if historical process leading to the formation of the state would be realized. By contrast, an as-if nonhistorical process, for example, the procedure leading up to the agreement in the original position, cannot take place. See below §6.

nant protection agency (the state) has agreed to use with its clients, as it were, and these procedures may differ from client to client depending on the bargain each was in a position to make with the dominant agency. No one can be compelled to enter into such an agreement and everyone always has the option of becoming an independent: we have the choice of being one of the state's clients, just as we do in the case of other associations. While the libertarian view makes important use of the notion of agreement, it is not a *social* contract theory at all; for a social contract theory envisages the original compact as establishing a system of common public law which defines and regulates political authority and applies to everyone as citizen. Both political authority and citizenship are to be understood through the conception of the social contract itself. By viewing the state as a private association the libertarian doctrine rejects the fundamental ideas of the contract theory, and so quite naturally it has no place for a special theory of justice for the basic structure.

By way of concluding these preliminary matters, the point of noting these differences with libertarian and utilitarian doctrines is to clarify by illustration and contrast the peculiar features of justice as fairness with its emphasis on the basic structure. Similar contrasts hold in regard to perfectionism and intuitionism and other familiar moral views. The problem here is to show why the basic structure has a special role and why it is reasonable to seek special principles to regulate it.

§ 4. The Importance of Background Justice

I shall begin by noting several considerations that might lead us to regard the basic structure as the first subject of justice, at least when we proceed within the framework of a Kantian social contract theory.

The first consideration is this: suppose we begin with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at and fully honored.

Straightaway we need an account of when agreements are free and the social circumstances under which they are reached are fair. In addition, while these conditions may be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold. The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transactions may look when viewed by themselves.

We recognize this fact when we say, for example, that the distribution resulting from voluntary market transactions (even if all the ideal conditions for competitive efficiency obtain) is not, in general, fair unless the antecedent distribution of income and wealth, as well as the structure of the system of markets, is fair. The existing wealth must have been properly acquired and all must have had fair opportunities to earn income, to learn wanted skills, and so on. Again, the conditions necessary for background justice can be undermined, even though nobody acts unfairly or is aware of how the overall result of many separate exchanges affects the opportunities of others. There are no feasible rules that it is practicable to require economic agents to follow in their day-to-day transactions that can prevent these undesirable consequences. These consequences are often so far in the future, or so indirect, that the attempt to forestall them by restrictive rules that apply to individuals would be an excessive if not an impossible burden.

There are four points to emphasize in these familiar observations: first, we cannot tell by looking only at the conduct of individuals and associations in the immediate (or local) circumstances whether, from a social point of view, agreements reached are just or fair. For this assessment depends importantly on the

features of the basic structure, on whether it succeeds in maintaining background justice. Thus whether wage agreements are fair rests, for example, on the nature of the labor market: excess market power must be prevented and fair bargaining power should obtain between employers and employees. But in addition, fairness depends on underlying social conditions, such as fair opportunity, extending backward in time and well beyond any limited view.

Second, fair background conditions may exist at one time and be gradually undermined even though no one acts unfairly when their conduct is judged by the rules that apply to transactions within the appropriately circumscribed local situation. The fact that everyone with reason believes that they are acting fairly and scrupulously honoring the norms governing agreements is not sufficient to preserve background justice. This is an important though obvious point: when our social world is pervaded by duplicity and deceit we are tempted to think that law and government are necessary only because of the propensity of individuals to act unfairly. But, to the contrary, the tendency is rather for background justice to be eroded even when individuals act fairly: the overall result of separate and independent transactions is away from and not toward background justice. We might say: in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity. Therefore, we require special institutions to preserve background justice, and a special conception of justice to define how these institutions are to be set up.

The preceding observation assumes, thirdly, that there are no feasible and practicable rules that it is sensible to impose on individuals that can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be too complex, or require too much information to be correctly applied; nor should they enjoin individuals to engage in bargaining with many widely scattered third parties, since this would impose excessive transaction costs. The

rules applying to agreements are, after all, practical and public directives, and not mathematical functions which may be as complicated as one can imagine. Thus any sensible scheme of rules will not exceed the capacity of individuals to grasp and follow them with sufficient ease, nor will it burden citizens with requirements of knowledge and foresight that they cannot normally meet. Individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and transform present tendencies. All of this is evident enough if we consider the cumulative effects of the purchase and sale of landed property and its transmission by bequest over generations. It is obviously not sensible to impose on parents (as heads of families) the duty to adjust their own bequests to what they estimate the effects of the totality of actual bequests will be on the next generation, much less beyond.

Thus, fourth and finally, we arrive at the idea of a division of labor between two kinds of social rules, and the different institutional forms in which these rules are realized. The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property. This structure also enforces through the legal system another set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on). The rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality. They are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints.

To conclude: we start with the basic structure and try to see how this structure itself should make the adjustments necessary to preserve background justice. What we look for, in effect, is an institutional division of labor between the basic structure and the

rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.

§ 5. How the Basic Structure Affects Individuals

Further reflections also point to the special role of the basic structure. So far we have seen that certain background conditions are necessary if transactions between individuals are to be fair: these conditions characterize the objective situation of individuals vis-à-vis one another. But what about the character and interests of individuals themselves? These are not fixed or given. A theory of justice must take into account how the aims and aspirations of people are formed; and doing this belong to the wider framework of thought in the light of which a conception of justice is to be explained.

Now everyone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are. The social structure also limits people's ambitions and hopes in different ways; for they will with reason view themselves in part according to their position in it and take account of the means and opportunities they can realistically expect. So an economic regime, say, is not only an institutional scheme for satisfying existing desires and aspirations but a way of fashioning desires and aspirations in the future. More generally, the basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good.

Again, we cannot view the talents and abilities of individuals as fixed natural gifts. To be sure, even as realized there is presumably a significant genetic component. However, these abili-

ties and talents cannot come to fruition apart from social conditions, and as realized they always take but one of many possible forms. Developed natural capacities are always a selection, a small selection at that, from the possibilities that might have been attained. In addition, an ability is not, for example, a computer in the head with a definite measurable capacity unaffected by social circumstances. Among the elements affecting the realization of natural capacities are social attitudes of encouragement and support and the institutions concerned with their training and use. Thus even a potential ability at any given time is not something unaffected by existing social forms and particular contingencies over the course of life up to that moment. So not only our final ends and hopes for ourselves but also our realized abilities and talents reflect, to a large degree, our personal history, opportunities, and social position. There is no way of knowing what we might have been had these things been different.

Finally, the preceding considerations must be viewed together with the fact that the basic structure most likely permits significant social and economic inequalities in the life prospects of citizens depending on their social origins, their realized natural endowments, and the chance opportunities and accidents that have shaped their personal history. Such inequalities, we may assume, are inevitable, or else necessary or highly advantageous in maintaining effective social cooperation. Presumably there are various reasons for this, among which the need for incentives is but one.

The nature of inequalities in life prospects can be clarified by contrasting them with other inequalities. Thus imagine a university in which there are three ranks of faculty and everyone stays in each rank the same length of time and receives the same salary. Then while there are inequalities of rank and salary at any given time, there is no inequality in life prospects between faculty members. The same may be true when members of an association adopt a rotation scheme for filling certain more highly privileged or rewarded positions, perhaps because they involve

taking greater responsibility. If the scheme is designed so that, barring accidents, death, and the like, all serve the same time in these positions, there are again no inequalities in life prospects.

What the theory of justice must regulate is the inequalities in life prospects between citizens that arise from social starting positions, natural advantages, and historical contingencies. Even if these inequalities are not in some cases very great, their effect may be great enough so that over time they have significant cumulative consequences. The Kantian form of the contract doctrine focuses on these inequalities in the basic structure in the conviction that these inequalities are the most fundamental ones: once suitable principles are found to govern them and the requisite institutions are established, the problem of how to regulate other inequalities can be much more easily resolved.

§ 6. Initial Agreement as Hypothetical and Nonhistorical

In justice as fairness the institutions of the basic structure are just provided they satisfy the principles that free and equal moral persons, in a situation that is fair between them, would adopt for the purpose of regulating that structure. The main two principles read as follows: a) Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all. b) Social and economic inequalities are permissible provided that they are i) to the greatest expected benefit of the least advantaged; and ii) attached to positions and offices open to all under conditions of fair equality of opportunity.⁸

Let us consider how the special role of the basic structure affects the conditions of the initial agreement and necessitates that this agreement be understood as hypothetical and nonhistorical. Now by assumption the basic structure is the all-inclusive

8. These principles are discussed in *Theory*, §§11–13, and elsewhere. A summary statement, including the principle of just savings and priority rules, is given on pp. 302f.