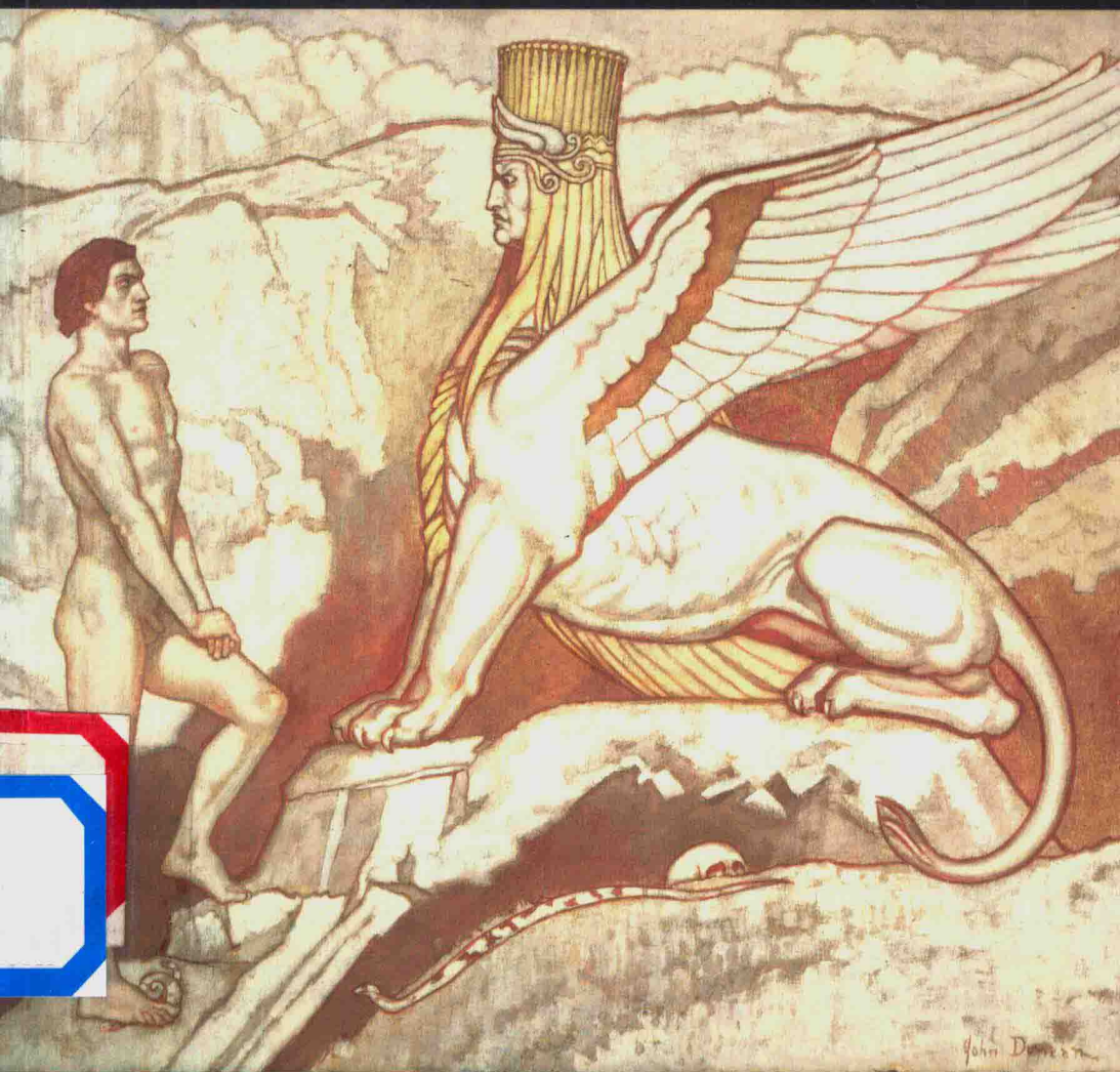


Imperfection and Impartiality

Marcel Wissenburg



Imperfection and impartiality

A liberal theory of social justice

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For Masja and Martin

Acknowledgements

Long ago, this book began life as a PhD thesis. It was then called *Justice from a distance* (Wissenburg 1994). Over the years, both contents and title changed repeatedly, in the last two years of its recomposition (1996–8) mostly in reaction to another book I was writing at the time, *Green liberalism* (Wissenburg 1998). Particularly in Chapters 7 and 8, I discuss themes that I have also discussed in the latter book; despite minor differences in the wording, the substance of both chapters is, I believe, now consistent with the ideas expressed in *Green liberalism*.

Everyone who was involved in the making of *Green liberalism* was also indirectly involved in the creation of *Imperfection and impartiality* – in particular my sponsor for the last three and a half years, the Foundation for Law and Government (REOB), which is part of the Netherlands Organization for Scientific Research (NWO), and the members of the Department of Political Science, now part of the School of Public Affairs, at the University of Nijmegen. In addition, I owe thanks for their ideas, guidance, help, suggestions, advice, support or absence of obstruction to a few dozen people who read parts of this manuscript itself. I hope I have not forgotten anyone if I mention Mark Bovens, Ad van Deemen, Andrew Dobson, Rob Gilsing, Bob Goodin, Steven Hartkamp, Bob Lieshout, Grahame Lock, Cor van Montfort, Paul Nieuwenburg, Ewout Ossewold, Carmelita Parisius, Larry Temkin, Marin Terpstra, Albert Weale and countless participants in numerous conferences and workshops. One conference in particular has exerted a lasting influence on this book: the one on Human Rights fifty years after the creation of the United Nations in Sintra, Portugal, funded by the Friedrich Naumann Stiftung of the German Freie Demokratische Partei in 1994. Although they may not have realized it, João Bettencourt da Câmara, Luis Bustamente, Raul Campusano, Goh Cheng Teik, Ehud Ben Ezer, Sabira Faquirá, Elsa Kelly, Ewa Matuszewska, Mahmut Ongoren, Kunga Tsering, Juan Urioste and others there completely restored my faith in the human capacity for impartiality. I am especially indebted to Brian Barry for his very careful and friendly comments on the one-but-final version of this book, and to Caroline Wintersgill and

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Marcel Wissenburg
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Part I

1

Introduction

Book, chapter and verse

One reason why we live in states and societies is that there is no escape. We are born into them, we do not choose them or create them. Rather, they design us and our desires, needs, habits and customs; our own contribution as individuals to their make-up is usually negligible. We are in chains from the very first moment of our existence – even though by nature we may be free.¹ Only collective action can change state and society. We also live in chains because it is the only alternative to a state of universal warfare, as Thomas Hobbes believed, or to a state of universal fear and insecurity, as less pessimistic contract theorists argued. We are not angels and we do not as a rule expect our fellow humans to be angels; we need them in chains to protect ourselves, and we chain ourselves to chain them. Yet the bare existence of a state is not enough to warrant its preservation. In places like Afghanistan, Sudan, Somalia, Rwanda, parts of the former USSR and former Yugoslavia, state institutions totally disintegrated even when the state seemed omnipresent.

Our individual chances of having a life worth living depend on the existence of protective and, as such, necessarily oppressive institutions, but institutions also depend on us. To exist and function, the institutions that make up states and societies require our active support; to give this support we need good reasons, and one among many good reasons is thought to be justice. To paraphrase Augustine, it is justice that makes the difference between the state and a band of robbers; it is justice that legitimizes institutions. And justice happens to be the subject of this book. It is not my intention to claim, let alone prove, that justice is all that counts. A society needs many other virtues to provide a haven for our wandering souls and even then it is not necessarily a safe and comfortable place to be. Justice is a necessary, not a sufficient condition for a life worth living, yet even in the very limited sense in which I shall interpret justice it makes a fundamental difference.

INTRODUCTION

This book deals with *distributive social justice*, more specifically with the recent version of the eternal debate in political, social and legal philosophy about the two questions central to this problem: how should we distribute the benefits and burdens, the joys and bores, of society, and why should we accept these distribution rules? Both are traditional questions in political philosophy, but, assuming that political philosophy is not, they are also very practical. A society cannot function without some support from its members, or at the very least without the absence of resistance on their side. The perception of distributive injustice in the societies of which we are members and citizens frequently leads to such resistance. Tax evasion, for instance, need not always be inspired by pure egoism. Sometimes, as in the United Kingdom during the Poll Tax times or in the Italy of the *Mani Pulite* (clean hands) campaign, a refusal to pay is legitimized as a form of resistance against a government that misuses its legitimate share of the social product, that unfairly redistributes it, or that burdens taxpayers in an unfair way. On occasion, the legitimacy of taxing itself is denied by objectors who feel that the money is theirs and no one else's to spend. Tax evasion is still a relatively innocent example; there is not a day when the papers do not report violent struggles in societies near and far over the proper distribution of power, freedom, opportunity, welfare, or plain food.

Before anything else is said, the reader should have some idea of what is meant by a distribution problem. Imagine eight persons trying to divide one pie of which they all want a quarter. There are four types of solution to this problem. One is to take the parameters of the problem as given and ask who should get what, and why. This is the pure distributive approach. The other three types of solution are what I call (following Goodin 1984) supply-side solutions: one could simply exclude at least four persons, one could change the preferences of at least four persons, or one could bake a second pie. Supply-side solutions are not necessarily illegitimate or immoral – quite the contrary – but they do not solve the distribution question. They only displace the problem. A supply-side strategy creates other distributive questions: who and how many should be excluded, and why? Whose preferences should be changed, in which direction, and why? Why should all eight get a quarter of a pie – do they equally deserve it, need it or have a title to it? The pure distribution problem, then, is that of distributing benefits or burdens without changing the parameters: one pie and eight people claiming a quarter of it. Within these limits, the theorist of distributive justice tries to find morally acceptable rules for the division of the social pie.

This book is, furthermore, concerned mainly with the quest for an *impartial* theory of distributive justice. The idea of justice is intrinsically related to that of impartiality: it has to do with giving and receiving what is in some way objectively due, not with what parties subjectively prefer. Moreover, a standard for justice, a criterion for what is objectively due, cannot – as I shall argue in more detail later – be justified with an appeal to a higher, substantive moral truth. There is no ultimate source for moral justification, and if there were it would, in our world of moral pluralism, be irrelevant. The best we can do is try to

formulate impartial standards, standards that are compatible with every reasonable moral code, every reasonable view of the good life. This means that we do not just want distribution rules to be *applied* impartially – what Brian Barry (Barry 1995: 11) called first order impartiality. We also want second order impartiality: we want the rules themselves to be impartial, that is, whether some situation should be seen as beneficial or undesirable should be determined impartially, the way in which it is to be treated should be determined impartially, and the rules for these two judgements should be chosen under conditions of impartiality. As a matter of fact, Barry observed that we often care less about first than about second order impartiality. We want to be partial to our friends in need, yet we do want to justify this behaviour with an appeal to a shared, if possible impartial, higher standard.

It probably has not escaped anyone's attention that we live in a morally divided world. We do not agree on what is good or the Good, few of us even have more than an inkling of our own private view of the Good, and those who do or think they do usually find that others cannot be rationally persuaded to share their views, unless one considers the sword an intelligent argument. In absence of a universal consensus on the good, and in an attempt to avoid the opposite position of universal cynicism and self-interest, moral and political theorists beginning with John Rawls (Rawls 1971) have discussed a third approach that might offer a way out: the idea of a reflective equilibrium. Basically, this means that one tries to imagine circumstances under which we could assess moral issues impartially, and at the same time convince our imperfect selves with their self-interest and theories of the good that these circumstances reflect reasonable, universally acceptable conditions for moral judgements. It is this attempt to strike a balance between impartiality and imperfection that gives this book its shape: in Part II, I develop a new version of the impartial judgement machinery, in Part III I apply it to the question of distributive social justice – and in the next two sections, I shall try to summarize both parts without giving away to much of the argument. I would not want readers to feel that they bought a book but only needed the first 20 pages.

Finally, the debate to which I just referred focuses on the idea and content of a *liberal* theory of social justice, which the theorists involved identify implicitly, and some outsiders like Ewald (Ewald 1986: 550–52) explicitly, with distributive justice. The notion of impartiality regarding the individual's conception of a good life is central to this liberal understanding of justice. It has found its classical expression in John Bordley Rawls's *A Theory of Justice* (1971), the book that set the agenda for the ensuing debate and for my own small contribution to it. The issues I discuss are familiar: how should goods and freedoms be distributed over a society, and why should we accept the distribution rules? For very simple and quite frustrating logistical reasons (time, space and money), I have not been able to deal separately with the issue that immediately follows the formulation and defence of principles of justice: what should people do, or refrain from doing, to protect and support (their principles of) justice? Nevertheless I try to rise to the

occasion where the occasion arises, in particular when discussing communitarian justice (justice within the community) in Chapters 3 and 10.

Although this is a book about political theory, written by a political theorist, it is not relevant only to the initiated, the theorists of social justice. It may be as interesting as the whole debate on justice itself is to political philosophers on the one hand, and to economists, jurists, political scientists, sociologists and social psychologists on the other. Some, particularly continental, philosophers, sometimes complain about a lack of philosophical rigour in the debate. I think this is a misunderstanding, but even if it were not, such a deficiency should be seen as an invitation to join in rather than as an excuse for expressing disapproval. I hope to come some way towards opening the debate to these less interested philosophers by exposing the philosophical foundations of the debate where this is expedient, and by linking its political themes to traditional and new philosophical questions. Empirical social scientists often voice a diametrically opposed complaint: the debate would be too theoretical, too abstract, and unrealistic. I can do little about this – just two things. In the first place, I can and do claim that the debate, like any other debate, empirical or not, should be judged on its own terms, terms that I hope to elucidate. The justice debate in political theory should not be understood first and foremost as a contribution to progress in empirical sciences. It is a debate about the just society, interpreting the world from its own point of view. Secondly, although I cannot elude the trait that gives political theory a bad name to some (i.e., its being theoretical), by invoking more of the far from transparent conditions of the so-called real world, I at least want to raise its relevance for the reflection on the moral foundations of modern states and societies, whether they be liberal democratic or not. Which, by the way, makes this book worthwhile for anyone who is interested in the wellbeing of his or her society.

Impartiality

A central assumption of mainstream (a.k.a. liberal) social justice theory is that rules or principles of justice can be accepted as morally valid only if they are both impartial and chosen under conditions of impartiality. This means that liberal theorists of justice are interested in two distinct questions: (1) how is an impartial choice of principles of justice possible? and (2) what should these principles be?

I shall answer these questions in the same order, the first in Part II and the second in Part III, for three reasons. First, it seems to be the logical thing to do: one cannot justify principles without first knowing what justification requires. Secondly, the role of an impartial justification procedure is not necessarily limited only to that of justifying principles of distributive social justice. Even though this book and liberal theorists in general are focused on that particular issue, a reflective equilibrium between impartiality and imperfection may serve to support other

moral principles as well: principles of non-distributive justice (e.g. criminal and commercial justice), principles of non-social justice (e.g. in the family or community, between societies, species or generations) and moral principles other than those of justice (e.g. self-government, benevolence, friendship). Being a separate issue, the theory of impartiality deserves separate treatment.

A last reason to split this book in parts is aesthetical: in texts, I prefer the straight line to the crooked. The more popular alternatives to a foundations first, implications later strategy are Rawls's (first the basics of the theory, then abstract implications, then an extended theory, more implications, more refinements, and so on) and Barry's (a bit of theory, some implications, the next bit of theory in response to gaps in the first bit, new implications, and so on). Although they make the heavy element, the moral theory part, more digestible, they increase the risk that parts of a text are taken out of their context and understood as representative of a complete theory of justice. Many readers of Rawls, for instance, are unaware of the difference between his general and special conception of justice, of the amendments made to his two principles, or of the ins and outs of his four-stage sequence of original positions for the application of these principles. Selective reading may also create the impression that a theorist considers the theory to be complete and finished, indubitable, uncriticizable and impossible to improve on – as if it ever can be. I hope that my choice to follow a straight line instead makes it easier to distinguish between necessary assumptions and axioms on the one hand and valid implications on the other. This is not to say that the straight line does not have its own disadvantages. One quite unfortunate result is that Part II of this book may seem to offer little justice theory and Part III little about the impartial foundations of justice theory (although the latter part could, in principle, be read without prior knowledge of Part II). This Introduction is written to serve the potentially bewildered as a guide, a mental map of the book's main topics and theses.

Above, I briefly discussed the current debate on the premises and content of an impartial liberal theory of distributive social justice. Chapter 2 will deal in more detail with this debate, with the themes upon which it centres, with the specific definition of social justice that participants in it use, and, to top it all off, with a few words on the vocabulary of justice theorists. On the one hand, this chapter helps to distinguish justice from other virtues, distributive justice from other basic forms of justice, social justice from other virtues of society, and the liberal approach to social justice from two alternative traditions, the Christian and socialist schools. On the other hand, it describes the liberal approach as one aimed at defining a neutral or impartial distributive social structure, one that tries to offer maximum opportunity for the development and realization of individual plans of life and theories of the good, while at the same time promoting typically liberal and allegedly 'self-evident' social ideals.

The remainder of Part II discusses justification procedures and in particular the possibility of defining and defending an Archimedean point (in John Rawls's terminology, or archpoint in mine), that is, a universally valid procedure for designing