JURISPRUDENCE

What is Justice?

What is Fairness?

What is Justice?

- Justice is a hard concept to pin down.
- Philosophers have long debated what is **“just”**
- Plato’s *Republic* discusses how do we get a just society and what it entails.
- Aristotle: justice emanates from one’s virtuous character, which is likely influenced by the environment.

Justice as Fairness

- Rawls comes up with a novel idea of justice based on some **assumptions:**
- **Rational and Self-interested:** people are rational and thus want the best for themselves.
- **Social:** people live among others.
- **Mutually advantageous:** People are better off among one another than alone.

How do we get to Justice as Fairness?

- How would we structure society assuming it would benefit us all?
- There’s a problem--- what if we’re biased in our understanding of justice?
- What if we were try to rig the game of “society” in our favor?
- Are we not inclined to write rules of society that benefit us at a cost to others?

Rational Actors

- Given the fact that we assume rationality (**we want what is best for OURSELVES**) our question for justice seems doomed.
- **How?**
- How can we have justice if we're all motivated reasoners? That is, **if we're always trying to mould justice into a concept that benefits us in particular with little care for others?**

Maybe there’s a way…

- What if we abstracted away from our particular circumstance?
- **What?**
- The Original Position
- **How?**
- By abstracting from our current circumstances we can imagine a system/society that a rational person would willingly enter into

Rawl’s Theory of Justice

- Rawl’s imagines a hypothetical situation in which people come together to decide upon the principles of justice, and calls this the **“original position”**
- In the “original position”:
  - All participants are free and equal
  - Each person would negotiate in their own best interests
  - Each person negotiates behind a **“veil of ignorance”**
  - i.e. he/she does not know what position in society he/she will be in when the veil is removed (ignorant regarding gender, wealth, class, race, etc.

Imagine You Know Nothing of Yourself

- Not how tall you are.
- Not your hair color.
- Not how much money you or your parents will make.
- Not how intelligent you will be.

So, what kind of society would you hope to be born into?

If you knew nothing of yourself would you want to live in a society where…

- Very tall or short people could not vote?
- People with brown hair couldn’t drive cars?
- People who wear glasses can’t fly on airplanes?

- Probably not…

Apartheid or Poverty?

- If you didn’t know your ethnicity or race would you want to live in a society **that allowed discrimination based on ethnicity or race?**
- **Probably not…**
- If you didn’t now if you would grow up wealthy or poor what would you prefer society to look like?
- Would you want a one in a billion shot of becoming incredibly wealthy, with high levels of poverty?
- Or, would you want to ensure a baseline of economic prosperity in hopes that you would not be born into grinding poverty?

Rawl’s Theory of Justice

- The original position is similar to the concept of **“you cut, I chose”** when deciding how to share a cake (not knowing which piece you get to ensure a fair split).
- Rawl’s believed that in such a situation the participants would reason conservatively (i.e. would not gamble with their future), and would come up with two principles of justice.

Rawl’s Two Principles of Justice

1. Each person should have as much liberty as possible, as long as others have the same.
2. Social and economic inequalities are permitted, as long as:

   A. They are related to positions open to all under **equality of opportunity**, and

   B. They are for the greatest expected benefit of the **least advantaged** members of society.

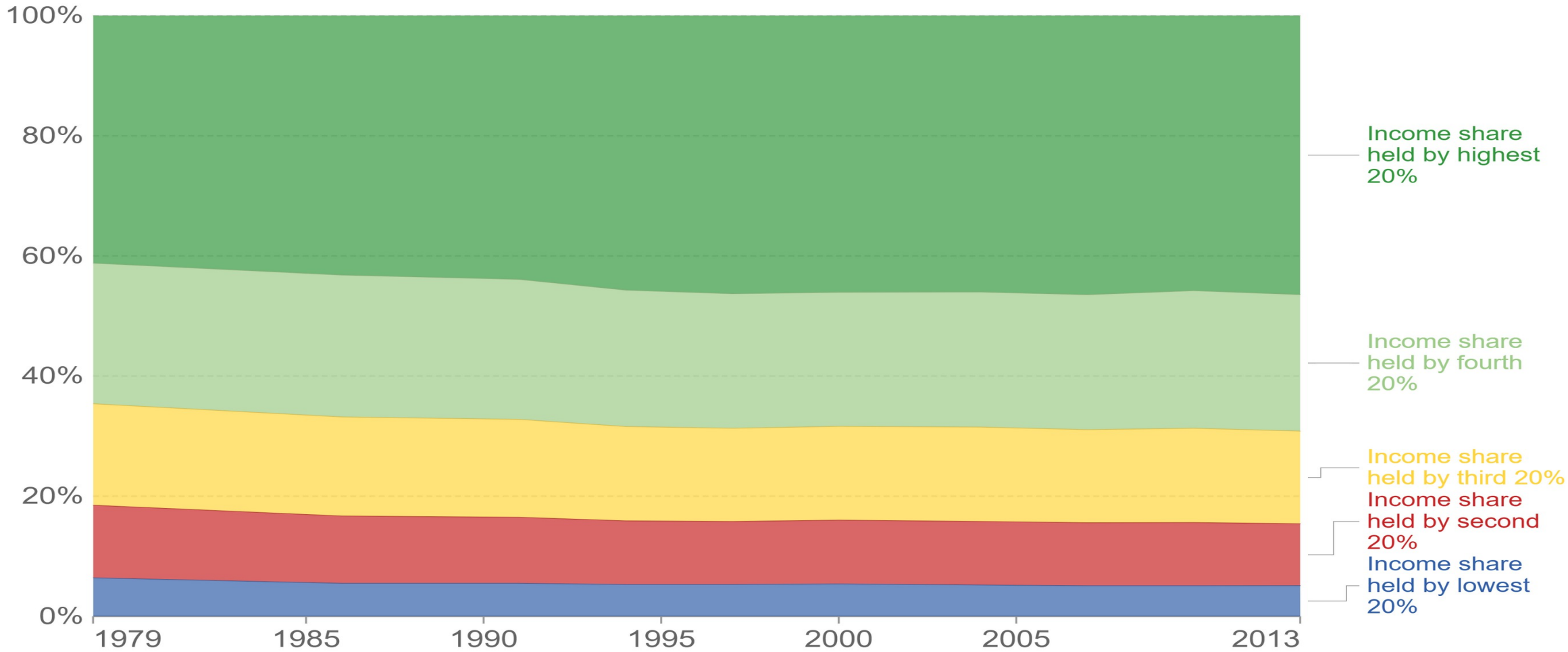
If you were behind a “Veil of Ignorance” what would you want society to look like?

- How equal would society be?
- Perfectly equal?
- Not equal at all?
- Allow natural differences but ensure baseline support?

Income shares by quintile, United States, 1979 to 2013

Our World in Data

Percentage share of income or consumption is the share that accrues to subgroups of population by quintiles. For example, in a country with 100 people, if you rank them by income the share of the lowest quintile corresponds to the sum of incomes of the bottom 20 people, as a proportion of total income in that country.

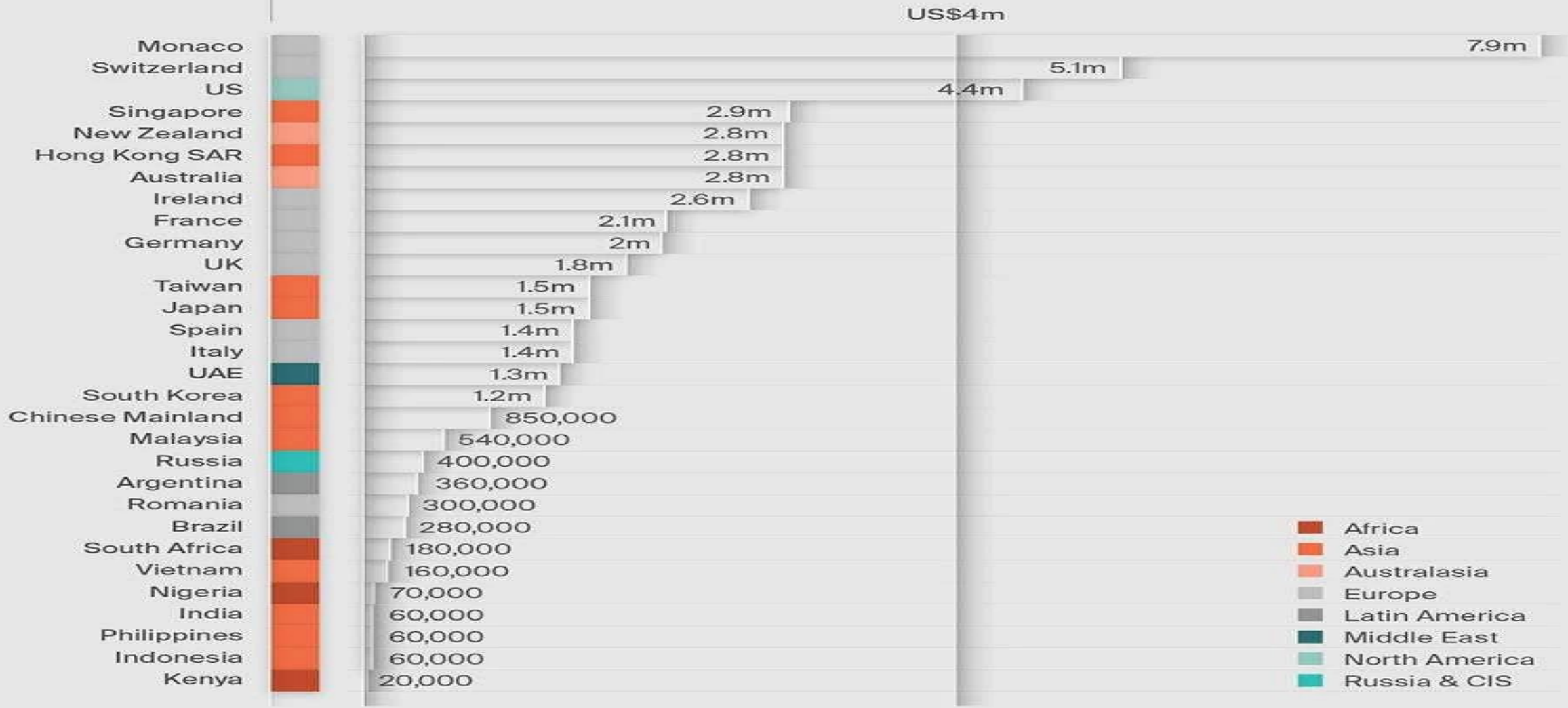


Source: World Bank Poverty and Equity database

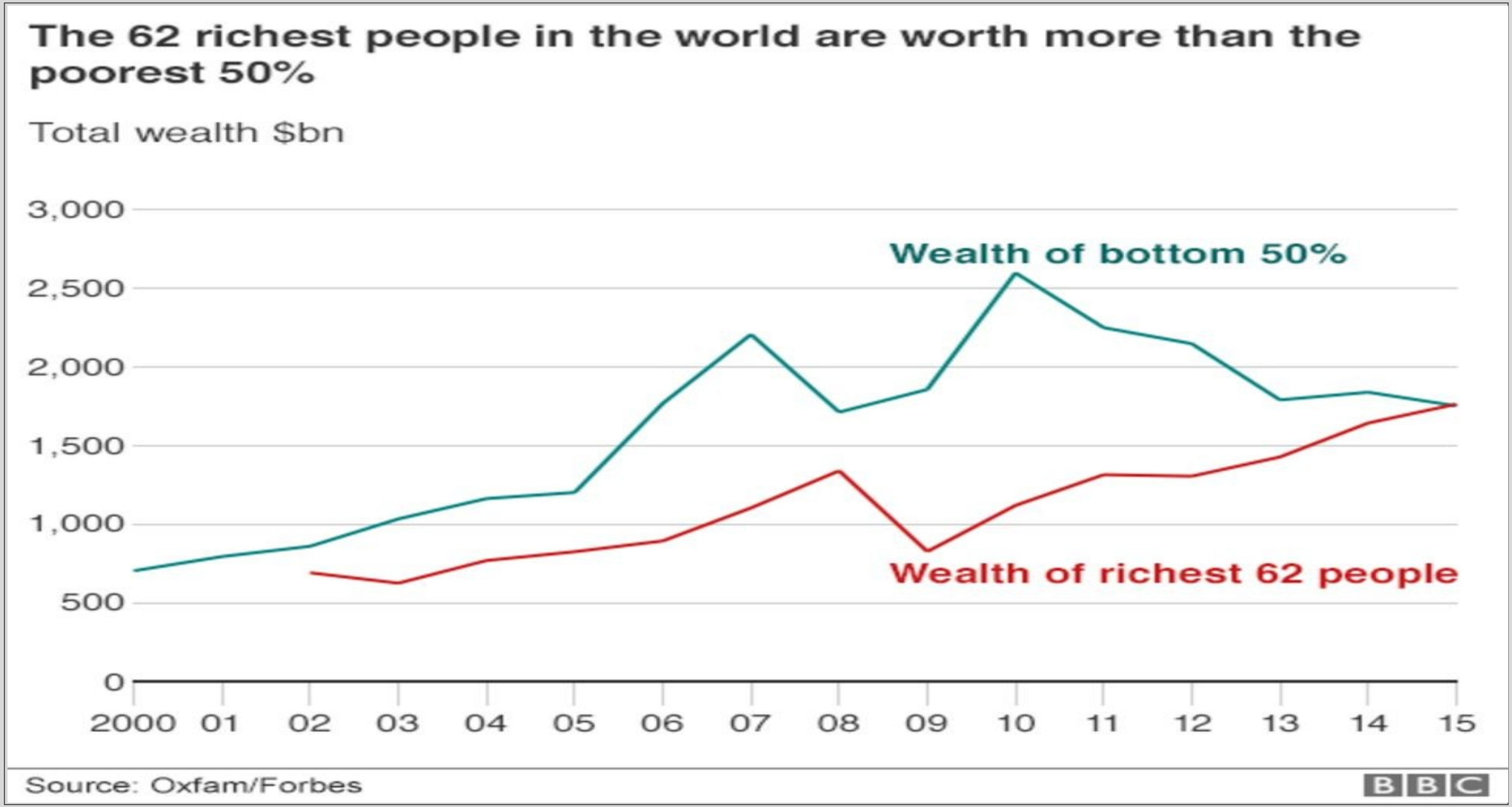
OurWorldInData.org/income-inequality/ • CC BY

Flying high

The level of net wealth needed to join the top 1% in selected countries and territories (US$)



Source: Knight Frank Wealth Sizing Model


The 62 richest people in the world are worth more than the poorest 50%
Total wealth $bn
3,000
2,500
2,000
1,500
1,000
500
0
Wealth of bottom 50%
Wealth of richest 62 people
2000
01
02
03
04
05
06
07
08
09
10
11
12
13
14
15
Source: Oxfam/Forbes
BBC

As Far as Your Abilities Take You?

- Society should only be as equal as is “natural”. The most talented rise to the top!
- Sounds like meritocracy, right?
- What about **moral luck?** Within certain limits people can’t control how athletic, intelligent, artistic or wealthy they’ll become. These are often factors completely outside of our control.
- **Should these advantages play into how one is treated in society?**
- **Do people who are born with more ability have an advantage when it comes to living in society?**
- **Are those born with more money given an advantage?**

Equal Opportunity?

- People have the ability to rise or fall based on their own abilities and work ethic.
- Sounds great, right?
- Well, what if you were born with low abilities? Disabled? What if the amount of money your parents make gives you an advantage that you pass down to your children?
- **Do people who have less money or ability deserve a less prosperous and happy life?**
- Or are these factors arbitrary when determining ones worth?

Liberal Democracy?

- People are born with different abilities and acquired wealth benefits to descendants. This means we are subject to a **“moral lottery”** when it comes to our wealth and abilities.
- Should we leave our place in society up to a moral lottery? Or is there a better way?

The Original Position:

Liberty

The most liberty such that ALL have access to it (e.g. no murder as it would deprive others of liberty)

Equality

Inequality is permissible only to the extent that it benefits ALL (e.g. high levels of wealth may lead to higher investment than a more equal allotment)

Rawl’s Theory of Justice

1. Liberty: This refers to particular political and personal freedoms.
2. (b): the “difference principle”:

When there are different possible economic outcomes with different unequal distributions, the one that provides the greatest outcome for the least advantaged would be preferred:

	Group A	Group B	Group C	Group D
Option 1	60	55	50	45
Option 2 (maximin)	**130**	**95**	**75**	**60**
Option 3	180	90	60	55

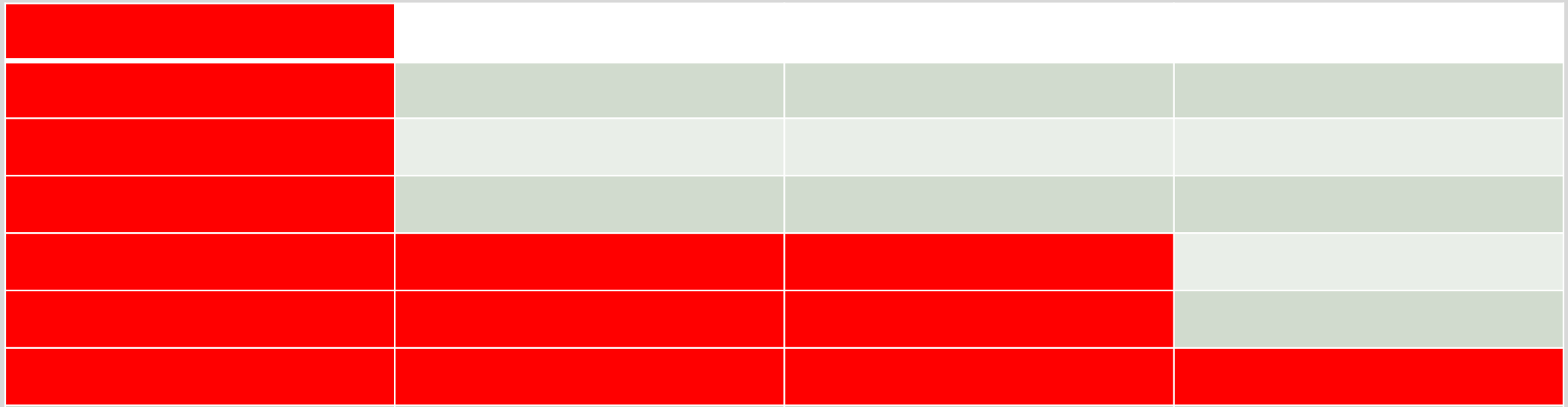
Rawl’s Theory of Justice

- Assume you are behind the “veil of ignorance” (you do not know if you are part of Group A, B, C, or D):
  - If you were a risk-taker, you would choose option 3 (there is the possibility of the highest gain- 180)
  - If you insist upon equality, you would choose option 1 (the least unequal distribution)
  - But, Rawls think that people would choose, freely and equally, in their own best interests, to prefer option 2 (maximising their worst possible outcome- group D).
  - This is sometimes call the “difference principle” or the “maximin principle.”

Which Country Would You Choose to Live in Behind the “Veil of Ignorance”?

Country 1		**Country 2**		**Country 3**		**Country 4 (Rawls)**	
Upper Class	$1 million	Upper Class	$300,000	Upper Class	$15,000	**Upper Class**	**$400,000**
Middle Class	$100,000	Middle Class	$200,000	Middle Class	$15,000	**Middle Class**	**$80,000**
Lower Class	$10,000	Lower Class	$5,000	Lower Class	$15,000	**Lower Class**	**$30,000**

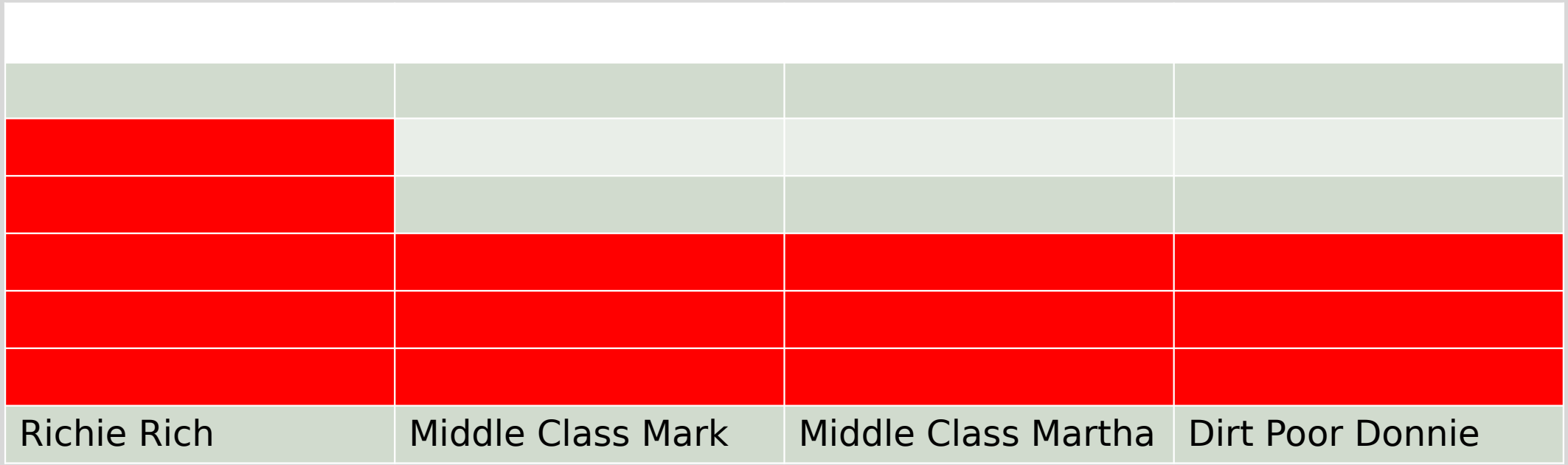
Totally Free Market: Vast Inequality of Wealth



Government Enforced Total Equality (Communism)

Richie Rich	Middle Class Mark	Middle Class Martha	Dirt Poor Donnie

Rawl’s Distribution Principle



Criticisms

- The original position is too unrealistic and abstract: our desires for a just society are related to who we are so our position in society (including class, wealth, etc.) cannot be ignored.
- The belief that participants in the original position would choose conservatively can be challenged (some people could be risk-takers)
- Even if Rawls' principles are perfectly applied, financial transfers (Nozick) show how this could change to an alternative distribution in which the least advantaged might have less, and still be just. Justice in Transfer.

Birth Lottery

What do we deserve?

- Think about where you're currently at in life. How much of that is affected by where you were born, who gave birth to you, what class you were born into, whether or not your personal talents lined up with the economy, etc.

- Rawls claims that most of these things are the result of pure luck. At birth, we don't deserve the family, culture, economic class, and so on that we're born into. Yet, all of these things drastically affect our opportunities in life. Rawls claims that this is a failure of our society. We need to account for random luck, and make sure everyone has a fair chance at a good life.

Examples

- People born into poor economic classes have less of a chance of obtaining an education.
  - Not enough money to afford to make it to university. Worse grade school education than others because of less funding, etc.
- People born with natural talents not suited for the current economic market.
  - For example, an extremely talented painter with no other natural talents vs. an individual with a natural talent for accounting.

What do we do about it?

- If all of this is pure luck, and we agree that pure luck should not affect opportunities in life, then what are we supposed to do to correct for it?
- Some might think this requires massive redistribution from the rich to the poor, but this isn’t necessary and may have other bad consequences.
- Rawls is not saying that everyone should be given equal goods. He is claiming that everyone should have an EQUAL OPPORTUNITY.
- This will include such things as equality in education so that a child does not suffer unequal life chances due to the school system they were born into. This may require some wealth redistribution to fund the suffering school system.

The Original Position

- The problem: in any institution with social cooperation, some citizens are going to exercise coercive political power over other citizens. Given that we are all fundamentally equal, how can this be legitimate?
- We have to find principles that all reasonable people would agree to in a completely fair bargaining situation.
- If there are such principles, then they legitimize the use of coercive political power because every reasonable person could agree to these terms. In other words, if we all agree on some basic rules, then any use of power that stems from these rules is legitimate.

The Original Position: The Veil of Ignorance

- How do we bargain?
- We eliminate all influence of power and bias.
- Imagine you are coming to the table to bargain with other members o society over how to structure the state. You are still worried about yourself so you are going to bargain so as to secure the best outcome for yourself. However, you are missing a lot of personal information. You don’t know your race, ethnicity, culture, social class, natural talents, era in history, etc.

The Veil of Ignorance (cont.)

- In other words, there is a sort of veil that keeps you from knowing your particular position you will occupy in society. When we're done bargaining, the veil will be lifted and you'll know your position, but the terms of the agreement will already be set.
- Given that you don't know which position you'll take yet you remain self-interested, what basic principles would you agree on to regulate your society?
- This rules out much of the power found in regular bargaining to make sure that everyone has fair say in the outcome.

Examples

- **This would rule out principles such as the following:**
- Might makes right
- Only those in the upper class can hold political office
- Only men can be Prime Minister
- There can be absolutely no welfare

So what would we agree to?

- **The First Principle of Justice**
- Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
- These basic liberties are to be secured in the constitution of the state. Some basic rights (primary goods) would be liberty of conscience, right to vote, right to hold public office, freedom of speech, etc.
- This principle takes priority over the second principle. In other words, we cannot trade any of our liberties for some other goods. We first secure these rights equally for everyone.
- We would accept this principle because no one would be willing to gamble with these rights that secure your political liberty and most basic freedoms.

The Second Principle of Justice

- Social and economic inequalities are to satisfy two conditions:
- They are to be attached to offices and positions open to all under conditions of fair equality of opportunity.
- They are to be to the greatest benefit of the least-advantaged members of society (the difference principle)
- In other words, when some gain more political power this has to be under conditions where anyone in society has an equal opportunity to hold that office.
- The second part rules out a situation in which the rich get richer and the poor get poorer. In other words, any inequality that allows the people at the top to gain must also increase the situation of the least well off.

John Rawls: Justice as Fairness

- Harvard University, Professor of Philosophy;
- 1971 A Theory of Justice

Two Principles of Justice:

1) First, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all;
2) Second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage (especially for the least advantaged), and provided the positions and offices to which they attach, or from which they may be gained, are open to all.

Rawls is arguing for his two principles of justice from what he calls **behind the veil of ignorance** and in **the original position.**

What does all this mean?

John Rawls: Justice as Fairness

- Rawls is creating a hypothetical thought experiment whereby you imagine yourself devoid of all identifiable characteristics: sex, religion, age, abilities, etc. from behind what he calls a **veil of ignorance**.
- Rawls social contract theory (in the manner of Hobbes and Rousseau (State of Nature)) is a thought experiment meant to focus on the development of a liberal constitutional order.
- The **original position** leads, Rawls believes, inevitably to his two principles of justice under conditions considered both reasonable and fair
- Basic pre-conditions for democracy (primary goods) are available: freedom of expression, demonstration, association, and voting.
- The point is to reach agreement on reasonable and fair principles for all in a liberal constitutional democracy.
- The basic principles to govern a society.
- Differences between people is morally arbitrary. He is not concerned with Nature vs. Nurture. He doesn’t care. From the standpoint of justice we are concerned with maximizing the benefits for the person at the bottom.

John Rawls Justice as Fairness

- Attempts to provide an alternative to utilitarianism (Mill and Bentham)
- Utilitarianism was the dominant political philosophy of the 19th and 20th century.
- The greatest good for the greatest number: **“a just society organizes its institutions, norms and laws so as to achieve the greatest good for the greatest number.”**
- What is the problem with utilitarianism?
- Rawls thought that utilitarianism did not properly account for the problem of basic rights.
- The question: how do we organize the basic structure of society?
- How should institutions, laws, organizations be organized?
- Justice is the first virtue of social institutions. Laws and institutions should be abolished if they are unjust.
- **“The principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.”**

The General Conception of Justice

“All social values- liberty and opportunity, income and wealth, and the bases of self-respect- are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage”

The Ones Who Walk Away from Omelas (1973)

Ursula Le Guin

- In the city of Omelas everyone is happy, everyone lives in harmony, and the city is at peace.
- However, hidden in a basement in the town **an innocent child** is being horribly tortured day-and-night.
- The city's constant state of serenity and splendour requires that a single unfortunate child be kept in perpetual filth, darkness and misery. The child is helpless: anything kind, small or big, will turn Omelas from a utopia to a dystopia.
- This torture is what gives the city its prosperity and happiness.
- If the torture stops, the city would go into decline, unhappiness would increase and the city itself would eventually collapse.
- Millions of people benefit from the suffering of one. **Is this acceptable for a utilitarian?**
- **How could a moral person allow such injustice to continue merely for the happiness of the majority?**
- **How do you balance the greatest good for the greatest number against injustice for the one or the few?**
- **If what brings happiness for the many causes suffering for the how can this be justified? Can it be justified?**

The Original Position

- Behind the **“Veil of Ignorance”:**

“Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.”

The Rational Individualist

- Rawls assumes a “rational individualist”, which minimises gambling and risk taking.
- **Is everyone, however, risk averse?**
- Rawls believes a rational individualist would “maximize the minimum.”
- **How would you divide a cake prior to knowing which slice you would receive?**
- Rawls believes a rational individual would **NOT** chose utilitarian principles:

“It seems unlikely that persons who view themselves as equals would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others.

Rawls rejects libertarianism for similar reasons:

“Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view? “

Are our natural talents and birth rights morally arbitrary? Why or why not?

Equality of Opportunity or Equality of Outcome

- Does equality of opportunity solve the problem of moral arbitrariness?
- What about equality of outcome?
- Should we redistribute wealth? Communism: from each according to his ability to each according to his needs.
- The **Difference Principle (Maxamin- Welfare Economics/Distributive Justice):**

"The higher expectations of those better situated are just **if and only if** they work as part of a scheme which improves the expectations of the least advantaged members of society."

Justice as Fairness
Two Principles (Lexical Order- the 1st has Primacy Over the 2nd)

1. First Principle (Liberties): each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

2. Second Principle (Opportunities): Social and economic inequalities are to be arranged so that they are both:

    a) (Income and Wealth) To the greatest benefit of the **least advantaged (maximize the minimum share– the Difference Principle (Distributive Justice))**

    b) Attached to offices and positions open to all under conditions of **fair equality of opportunity**

- The first principle has absolute priority over the second– this means that there cannot be a trade-off of liberty for the sake of distribution or economic development.
- The parties in the social contract tradition treat each other in fairness, as reasonable risk averting persons

Basic Liberties

“Political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the rule of law.”

- For Rawls these are basic preconditions before the two principles of justice can be established.

Questions

1. Would these principles be your two principles of justice?

2. What kind of constitutional order would you create in the original position behind the veil of ignorance?

3. If you didn’t know what gender, race, or whether you’d be born disabled, or your religion, or ethnicity, then what kind of constitutional structures would you chose to develop?

Exit Exam (2021) Part IV Miscellaneous Law Courses

Section IV: Essay-Type Questions (25 marks)

John Rawls, in his book entitled “A Theory of Justice” provided one of the most complete arguments for the theory of justice. Write a brief essay on John Rawls Theory of Justice (12.5 marks)

Justice and Minority Rights
Will Kymlicka

The challenge of multiculturalism is to accommodate national and ethnic differences in a stable and morally defensible way:

“In the Canadian experience, it has not been enough to protect only universal individual rights. Here, the constitution and ordinary laws also protect other rights accorded to individuals as members of certain communities. This accommodation of both types of rights makes our constitution unique and reflects the Canadian value of equality that accommodates difference. The fact that community rights exist alongside individual rights goes to the very heart of what Canada is all about.”

Self-Government Rights

- The right of national groups to self-determination is given (limited) recognition in international law.
- UN Charter: “all peoples have the right to self-determination.”
- Federalism: the boundaries of federal subunits can be drawn so that national minorities form majorities in those federal subunits.
- Quebec: 80 percent Francophone has considerable jurisdiction over education, language, culture, and immigration policy. All important for the survival of the minority culture.
- Challenges between centralization and decentralization.
- Majority of 20th and 21st century conflicts have been intra-state; largely ethnic conflicts.
- Ethiopian “ethnic-federalism. Article 39 of the FDRE 1995 Constitution.

Polyethnic Rights

- Immigrant groups challenged assimilationist laws and policies.
- “Politics be separated from nationality as it was already separated from religion.
- Intended to help ethnic groups and religious minorities express their cultural particularity and pride without fear of marginalization- economic or political- in the dominant society.
- Usually intended to promote integration rather than self-government.

Can you name any polyethnic rights? How are they different than self-government rights?

Special Representation Rights

- Ensuring adequate political representation for members of disadvantaged or marginalized groups.
- Often defended as a response to some systemic disadvantage or barrier in the political process.
- A sort of political affirmative action. Society should seek to remove the oppression and disadvantage, thereby eliminating the need for these rights.
- Also connected to self-government rights as a minority groups ability to self-govern is also connected to its political representation.

What are the justifications for these rights?

The Equality Argument

- What is a fair way to recognize languages, draw boundaries, and distribute power?
- We should aim at ensuring that all national groups have the opportunity to maintain themselves as a distinct culture.
- Group differentiated self-government rights compensate for unequal circumstances, which puts the members of minority cultures at a systemic disadvantage.
- True equality requires not identical treatment but rather differential treatment in order to accommodate differential needs.

The Role of Historical Agreements

- Group differentiated rights are often the result of historical agreements, e.g. treaty rights, agreements between peoples to form a federation.
- Which citizens should be governed by which states?
- How did the Canadian government acquire ***legitimate*** authority to govern Quebecois?
- The way in which national minorities were incorporated often gives rise to group differentiated rights.
- If incorporation was voluntary, through federation, for example, then these rights may be spelled out constitutionally.
- If incorporation was involuntary, through colonization, for example, then self-determination is possible through international law and the terms of the federation can be renegotiated.
- What are the terms in which two or more peoples decided to become ***“partners.”***
- Historical and equality arguments must work together for justice.

Rawls Revisited

- How and why should a liberal theory of justice accommodate such rights?
- Our capacity to form and revise a conception of the good is intimately tied to our membership in a societal culture, since the context of individual choice is the range of options passed down to us by our culture.
- Deciding how to lead our lives is a matter of exploring the possibilities made available by our culture.
- Kymlicka does not believe we can make any decision behind Rawl's ***Veil of Ignorance***.
- Claims that justice requires removing or compensating for undeserved "morally arbitrary" disadvantages, particularly if these are ***"profound, pervasive and present from birth."***
- These group rights claims are just as profound and morally arbitrary a disadvantage as the inequalities of race and class.

Questions for Discussion

1. Can you relate the process of making the FDRE Constitution with Rawl's original position?
2. Examine how and where the two principles of justice are incorporated within the FDRE Constutution?
3. Why do you think Rawls failed to include group specific rights within the first principle? Do you think his theory of justice becomes complete with group specific rights?
4. How does the FDRE Constitution accommodate group specific rights? Apply and analyze the historical argument to the history of state formation in Ethiopia.
5. According to Rawls, what is fairness?