

Chapter 4

Global Justice¹

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'Injustice anywhere is a threat to justice everywhere', wrote Dr Martin Luther King, Jr, 45 years ago in April 1963, in a letter from Birmingham Jail. It would be hard to find a more urgent intellectual agenda today than the demands of world justice. But world justice is not an easy subject. Nor is the notion of 'the rule of law', which motivates this research initiative. I think I should begin with a few remarks on the idea of justice in general and that of world justice in particular, as well as on the idea of the rule of law.

It is, I would argue, useful to distinguish between (i) an organisation-focused understanding of justice; and (ii) the basic idea of realised justice. Sometimes justice is conceptualised in terms of certain organisational requirements – some institutions, some regulations, some rules (for example, free speech, free trade or progressive taxation, depending on a particular understanding of the structural demands of justice). This can be fine enough as far as it goes but going beyond institutions and structures, we also have to examine what actually does emerge, influenced by institutions and organisations, but also by other features of the society (such as behaviour modes, social norms and practices, and so on).

In classical Sanskrit, two distinct words – *niti* and *nyaya* – help to differentiate two separate concentrations. Words such as *niti* and *nyaya* have been used in many different senses by different legal theorists in ancient India but one of the main uses of the term *niti* is organisational propriety. In contrast, the term *nyaya* stands for a more comprehensive concept of realised justice. In this line of vision, the role of institutions, important as it is, takes a subsidiary and partial role. For example, the ancient Indian legal theorists talked disparagingly of what they called *matsyanaya*: 'justice in the world of fish' – a society of fish where a big fish can freely devour a small fish. This is outlined as what is to be avoided and it is seen as imperative that the 'justice of fish' cannot invade the world of human beings. So *nyaya* is the subject matter of the kind of society that the social institutions and practical rules should be aimed at, working with other influences. The realisation of justice in the sense of *nyaya* is not just a matter of judging institutions and rules, but of judging the societies themselves. Whatever the propriety of established organisations, if a big fish remains free to devour a small fish, then this is a violation of human justice, no matter to what the causation of that transgression is traced.

In the inclusive perspective of *nyaya*, there is little room for judgments like Ferdinand I's famous 16th century maxim: 'Fiat justitia et pereat mundus' (let justice be done, though the world perish). If the world does perish, there would not be much to admire in this development in the perspective of *nyaya*, even though the austere *niti* leading to this result could be defended with very sophisticated arguments of different kinds. The distinction is important, even when *niti* and *nyaya* complement each other. For example, setting up many more schools for children in educationally deprived countries would be an important *niti*, but what would be celebrated in the perspective of *nyaya* is the achievement that boys and girls are actually educated and have the freedom that comes from that accomplishment. Similarly,

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reforming the counterproductive patent laws for medicine to make urgently needed drugs against preventable diseases affordable by the poor of the world would be an excellent departure in *niti*, but it is the actual overcoming of those diseases (through the combination of cheaper drugs, more-targeted research, better delivery and use, and so on) that would demand inclusion in the vision of *nyaya*.

It is easy to see that the pursuit of world justice would need a great many institutional developments and organisational changes around the globe, but underlying our interest in institutional analysis must be some idea of the overall demands of global justice itself. The distinction between *nyaya* and *niti* is, thus, important for the subject of world justice.

Something similar can, in fact, be said of our understanding of the ‘rule of law’, the basic idea behind our research initiative. The challenge is not confined only to making sure that the laws, as they exist, apply to all and are followed by all, though these demands can be very important too (as Frederick Marrayat put it famously in 1830 in *King’s Own*, ‘there cannot be one law for the rich and another for the poor’). But going beyond that, we must also take on board the need to scrutinise the kind of comprehensive justice (in the sense of *nyaya*) that emerges from practices of the rule of law. As James Heckman, Robert Nelson and William Neukom point out, it is necessary to examine ‘fundamental normative questions as to what defines a good life and what the ultimate ends of a rule of law system might be’ (2007). The subject matter of this volume is, thus, both complex and momentous.

Contemporary political philosophy

We are not, of course, working in an intellectual vacuum, for these subjects have engaged attention over a very long period of time. There are also well-developed bodies of literature on the theory of justice in political philosophy, in jurisprudence and legal philosophy and in welfare economics. That large literature has much relevance to the challenge that this project is attempting to address.

Even though the inspiration for contemporary works on justice goes back to classic contributions of the stalwarts of the European Enlightenment, for example, the contributions of Jean-Jacques Rousseau, Immanuel Kant, Jeremy Bentham and Thomas Jefferson, the modern discipline of the theory of justice has been most strongly influenced by the writings of John Rawls, whose path-breaking book, *A Theory of Justice*,³ has set the stage for much of the present-day animation in the theory of justice. Even those of our leading contemporary political philosophers, such as Ronald Dworkin, Thomas Nagel, Robert Nozick and Thomas Scanlon (to name a few), who have proposed rather different ways of dealing with issues identified by Rawls in his famous contribution, have tended to a great extent to see the requirements of a theory of justice in basically Rawlsian coordinates. John Rawls is clearly the dominant influence in the contemporary philosophy of justice.

I must admit that I too have, until fairly recently, tended to agree on the centrality of the Rawlsian perspective on justice, seeking departures mainly in the form of different answers to essentially Rawlsian inquiries. I now believe that this is a serious mistake, despite the profundity of Rawls’s ideas and the debt that we owe to him.⁴ It is, I believe, quite useful to examine why the scepticism of the Rawlsian basic framework may be justified, and why there is an urgent need for foundational departures from the prevailing theories of justice in contemporary political philosophy. These departures are necessary for the theory of justice in general, but they are particularly important for addressing the challenges of world justice.

Rawlsian theory of justice as fairness

The starting point of Rawls’s formulation of the theory of justice is his insistence that the idea of justice – and the institutions needed for it – should be based on the demands of a more foundational concept than justice, namely fairness. It is on the foundations of fairness (as characterised by Rawls) that the Rawlsian principles of justice are developed. Fairness involves a demand to avoid bias in our assessments and in particular the need to escape being influenced by our respective vested interests or personal advantages. It is, in this sense, a demand for impartiality. Rawls’s explication of the demands of impartiality makes use of an imaginary device, which he calls the ‘original position’. The original

³ John Rawls, *Theory of Justice* (Belknap Press of Harvard University Press, 1971).

⁴ The outline of a very different approach to the theory of justice is the subject matter of my book, *The Idea of Justice* (2009).

position is a postulated situation of primordial equality, when the parties involved have no knowledge of their respective personal identities *within* the group as a whole. They have to choose, under this devised 'veil of ignorance', what exact rules should govern the society they are, as it were, 'establishing'. The influence of individual vested interest or personal gain is 'kept out' through the insistence that the deliberations on the choice of rules occur under ignorance of each person of his or her own personal interests and particular desires. This is how Rawls gets to his principles of justice.

Rawls's principles of justice, thus chosen, are aimed at the selection of the basic institutional structure of the society. He characterises in the following way the exact principles that he expects would emerge in the 'original position', with a priority for the first principle over the second, in the case of any conflict.

'(1) 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) Social and economic inequalities must satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.⁵

It will be readily seen that the principles of justice, which are aimed at setting up 'just institutions', take the form of specifying organisational requirements mainly in the sense of *miti*, rather than judging the societies as a whole, in the sense of *nyaya*. That, as will emerge, is indeed a problem, but I must also emphasise that despite this rather limited focus, Rawls does also provide plentiful discussion of the kind of just society we might hope to see as emerging from these appropriate institutional choices.

More substantively, it can be seen that the principles of justice identified by Rawls include the priority of liberty (the 'first principle') giving precedence to maximal liberty for each person subject to similar liberty for all. Other issues of institutional choice are taken up through a compound set of requirements that are combined in the 'second principle', but the 'priority of liberty' comes first.

Among the important features of this set of principles for just institutions is the special role that Rawls gives to the claims of personal liberty. This is given priority over the demands of the second principle related to the equality of certain general opportunities and to the need for equity in the distribution of other general-purpose resources.

The first part of the second principle is concerned with the institutional requirement of making sure that public opportunities are open to all, without anyone being excluded or handicapped on grounds of, say, race, ethnicity, caste or religion. The second part of the second principle (called the 'Difference Principle') is concerned with distributive equity as well as overall efficiency and it takes the form of making the worst off members of the society as well-off as possible.

Rawls' analysis of equity in the distribution of resources is done through an index of what Rawls calls 'primary goods', which are general-purpose means to achieve a variety of ends (whatever resources would be generally helpful in getting what people would want, varied as they might be). Rawls sees primary goods as including such things as 'rights, liberties and opportunities, income and wealth, and the social bases of self-respect'⁶.

Some questions

Rawlsian theory of justice has been a major constructive force in political philosophy, welfare economics and legal theory. Even though I must argue for the need for several radical departures from the Rawlsian understanding of the theory of justice, I must also emphasise how much our thinking on justice has benefited from Rawls's constructive work – both affirmatively and dialectically. Also, there are elements of Rawls's theory that, I would argue, cannot be anything but central to any plausible theory of justice. For example, I would strongly support Rawls's chosen starting point, to wit, the need to consider the demands of fairness as a prelude to the scrutiny of justice. Even though I shall presently suggest that the particular way Rawls proceeds to characterise fairness has several difficulties, I concur with his general belief that some exacting demands of impartiality must be incorporated in the foundations of justice.

5 John Rawls, *Political Liberalism* (Columbia University Press, 1993), 291.

6 See n 3 above at 60-65.

The discipline of comparison

I proceed now to a number of critical issues that are problematic in the Rawlsian framework. The first question is extremely simple but, I would argue, rather far-reaching: ‘what do we want from a theory of justice?’ In his analysis of justice, Rawls takes the principal task of a theory of justice to be aimed at identifying the ‘just society’. This leads to what can be called a ‘transcendental’ approach to justice that focuses on identifying perfectly just societal arrangements, rather than offering a way of comparing not entirely just societies against each other (the kind of societies we might actually encounter in the world – to decide on what we should actually do). The transcendental approach goes back at least to the writings of Thomas Hobbes and to his insistence that we cannot talk about justice without invoking a sovereign state, since we cannot fulfil the exacting requirements of a perfectly just society without the help of unimpeded sovereignty. So this is in line with a transcendental approach (focusing on the unsurpassably just), but there were, in fact, many other approaches in political philosophy that emerged during the Enlightenment that did not take the transcendental route (for example, those proposed by Adam Smith, Condorcet, Mary Wollstonecraft, William Godwin, Jeremy Bentham, or James Mill).⁷

However, in Rawls’ work, and in the theories that have followed his identification of the requirements of a theory of justice, attention of modern political philosophy has tended to be relentlessly focused on addressing the transcendental question (and quite often *only* that question). In contrast, what can be called a ‘comparative’ approach would have concentrated instead on ranking alternative societal arrangements (whether some arrangement is ‘less just’ or ‘more just’ than another, so that we get guidance on what to do), rather than focusing exclusively – or at all – on the identification of a fully just society. Modern social choice theory takes a robustly comparative approach.⁸ I shall call this ‘the comparison question’.

Room for disagreement

The second question concerns the type of agreement that can be reasonably expected to emerge from public reasoning under conditions of fairness (in Rawls’s case through his device of the ‘original position’). Can we really expect that everyone in the original position would proceed to accept some one specific set of rules – principles of justice – as the only way to go? Is it sensible to assume that all our disagreements really arise from our respective vested interests (so that once they are taken out of action, we would all come to exactly the same conclusion)? Could it be that some of our differences are linked with basically different conceptions of justice, focusing on different grounds of justice? I shall call this the ‘room for disagreement question’.

Individual interest, social parochialism and open impartiality

The third issue concerns Rawls’ way of characterising the demands of fairness. How do we specify these demands so that evaluation of justice and the choice of principles of justice, under those conditions, guarantees the necessary impartiality? The issue of impartiality relates both to eliminating the influence of vested interest across the board, and also to eradicating the impact of local parochialism – an issue of some importance not only for global justice, but also for local or national justice in a global world. Rawls keeps his exercise of fairness confined to the limits of each polity on its own, that is, roughly speaking, separately for each nation state. While fairness in the treatment of all the persons in a nation (or ‘a people’, as Rawls calls that collectivity) is pursued by Rawls through vigorous elimination of individual vested interests, others who do not belong to this nation or people do not come into consideration in the same way at all.

That is problem enough, but there is in addition a second problem as well. The exclusive focus on eliminating the influence of individual vested interest, as opposed to that of community-based

⁷ The emergence of alternative approaches is discussed in my book, see n 4 above.

⁸ Social choice theory, in its modern form, has been pioneered by Kenneth Arrow (1951); see also Amartya Sen *Collective Choice and Social Welfare* (Holden-Day 1970). The analytical priority of the comparative can also be seen in the early formulations of social choice theory in the 18th century, particularly by Marquis de Condorcet (see Marquis de Condorcet, *Essai Sur L'application De L'analyse Á La Pluralité Des Voix* [1785] (Chelsea Publishing Co, 1972, facsimile reprint of original published in Paris by the Imprimerie Royale).

parochialism, makes the pursuit of impartiality and fairness in the Rawlsian framework that much more limited. I shall call this ‘the impartiality question’.

Freedoms and capabilities

Fourthly, since Rawls concentrates on a person’s holding of ‘primary goods’ (like income, wealth, etc) to judge the overall advantage that he or she enjoys compared with others, there is some serious overlooking of the fact that different persons, for reasons of personal characteristics or environmental influence, can have widely varying ‘conversion’ opportunities of external objects (like income and wealth) to their respective capabilities – what they can or cannot actually do. A person with a proneness to illness, or living in an epidemiologically challenged environment, may get far less out of a given amount of income than another who is not similarly afflicted.

Rawls does talk about the eventual emergence of special provisions for ‘special needs’ (for example, for the blind or for those who are otherwise clearly disabled) at a later phase – the ‘legislative phase’ – of his multi-stage story of Rawlsian justice. This is good rectification as far as it goes, but (i) these corrections occur (if they do) only after the basic institutional structure has been set up through the Rawlsian ‘principles of justice’ (which are not influenced by such ‘special needs’); and (ii) even at a later stage, when special note is taken of ‘special needs’, there is no attempt to come to terms with the pervasive variations in conversion opportunities between any two different persons.

Transcendental versus the comparative

The transcendental and comparative approaches are quite distinct, and neither approach, in general, subsumes the other.⁹ This is unfortunate for the transcendental approach, since no matter what other characteristics a theory of justice might sensibly have, it must also, for use in practical reasoning, help us to address comparative assessments of justice, such as: how can we make a country, or the world, less unjust? The pursuit of justice in the world can never take the form of jumping in one go to some perfectly just society. Despite that, the Rawlsian framework, and nearly all the theories of justice in contemporary political philosophy, are exclusively devoted to identifying ‘the perfectly just’ rather than being concerned in any direct way with comparative assessments.

The intellectual interest in, and practical relevance of, comparative questions about justice are hard to deny. Investigation of different ways of advancing justice in a society (or in the world), or of reducing manifest injustices that may exist, demands comparative judgments about justice, for which the identification of fully just social arrangements is neither necessary nor sufficient. To illustrate the contrast involved, it may well turn out that in a comparative perspective, the introduction of social policies that eliminate widespread hunger (or remove rampant illiteracy) is widely seen as a manifest advancement of justice. But the implementation of such policies would still leave the societies involved far away from the transcendental – or unsurpassable – requirements of a fully just society (since transcendence would have many other demands regarding equal liberties, distributional equity, and so on).

To take another example, instituting a system of health insurance in the US that does not leave tens of millions of Americans without any guarantee of medical attention at all may be judged to be an advancement of justice, but such an institutional change would not turn the US into a ‘just society’ since there would remain a thousand other transgressions to remedy. Some non-transcendental articulation is clearly needed.

But, it can be asked, do we not need a transcendental pure theory to have an intellectually adequate theory of comparative assessment of justice? There seems to be fairly widespread belief among many of the practitioners of Rawlsian and other transcendental theories of justice that comparative questions can be answered only with the help of a transcendental identification of a perfectly just society. It is, however, not at all easy to see why this should be the case. Indeed, the two exercises are quite distinct and neither need throw much light on the other. You cannot get anything like the richness of a comparative approach from identifying a transcendental possibility. For example, you may firmly

9 Amartya Sen, ‘What Do We Want from a Theory of Justice?’ (2006) *Journal of Philosophy*, 103: 215-38.

conclude that Leonardo da Vinci is the best painter ever in the world, but it won't tell you how to rank Picasso against Braque. Conversely, you could not necessarily get the unsurpassable (or the transcendental) alternative from the totality of our comparative judgments. We may be able to make a great many pairwise comparisons, but not quite all. We may be able to rank, say, Picasso against Braque or Dali, and make many other such judgments, and yet we may fail to identify the 'very best' or the 'absolutely right' choice, because of an inability to rank some pairs of alternatives, say Picasso against Van Gogh (if the two are competing for the top position).

This is not to reduce in any way the importance of the inspiration that Rawls' transcendental theory has provided in drawing general attention to many issues of practical importance, such as the critical role of social institutions, the special status of personal liberty, or the centrality of poverty removal as a social concern. And yet if we want to use that theory not just for inspiration but for guidance in making judgments about the enhancement of justice through institutional reform or behavioural transformation, we would not, alas, get any specific comparative implications from the identification of a transcendental alternative.¹⁰

Disengagement from world justice in transcendental theories

It is not hard to see that world justice demands many reforms and many new institutions and practices. But the mere identification of the 'perfectly just society' would not tell us much about what to do to pursue the advance of justice in the world in which we live. Indeed, the concentration on the transcendental approach has had, I would argue, a seriously negative effect on practical discussion of justice in general and global justice in particular. We can think of many changes that would manifestly advance world justice as we see it, without getting us to 'the perfectly just world'. However, that kind of discussion would appear to be just 'loose talk' to those who are persuaded by the Hobbesian–Rawlsian claim that justice is about the perfectly just society, and that we need a fully sovereign state to apply the principles of justice with its extensive institutional requirements, which is a consequence of taking questions of justice to be exclusively issues of transcendental justice.

Consider the strongly argued dismissal of the relevance of 'the idea of global justice' by one of the leading contemporary philosophers, Thomas Nagel. His argument draws on his understanding that there are extensive institutional demands to think cogently about justice which cannot be met at the global level at this time. As Nagel puts it, 'It seems to me very difficult to resist Hobbes's claim about the relation between justice and sovereignty' and 'if Hobbes is right, the idea of global justice without a world government is a chimera'.¹¹ In the global context, Nagel concentrates, therefore, on clarifying other demands, distinguishable from the demands of justice, such as 'minimal humanitarian morality'.¹²

In the Rawlsian approach too, the application of a theory of justice requires an extensive cluster of institutions that determines the basic structure of a fully just society. Not surprisingly, Rawls actually abandons his own principles of justice when it comes to the assessment of how to go about thinking about global justice. In a later contribution, *The Law of Peoples*, Rawls invokes a 'second original position' with a fair negotiation involving representatives of different polities – or different 'peoples' as Rawls call them – who serve as parties under this second veil of ignorance.¹³ However, Rawls does not try to derive principles of justice that might emanate from this second original position, and concentrates instead on certain general principles of humanitarian behaviour.

Thus, the theory of justice, as formulated in this transcendental approach, reduces many of the most relevant issues of justice in the world as being simply inadmissible when they would seem to be most strongly needed. This is a pity: when people across the world agitate to get more global justice, they are not clamouring for some kind of 'minimal humanitarianism'.

¹⁰ The mathematical 'disconnect' here is discussed more fully in Sen 2006, n 9 above.

¹¹ Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs*, 115.

¹² *Ibid.*, 130-133, 146-147.

¹³ John Rawls, *The Law of Peoples* (Harvard University Press 1999).

Incomplete orderings and the use of comparative judgments

Am I overstressing the dichotomy between the transcendental and the comparative? The former may be neither necessary nor sufficient for the other, but should not a sequence of pairwise comparisons invariably lead us to the very best? That presumption has some appeal, since the superlative might indeed appear to be the natural end point of a robust comparative. But this is, in fact, a non sequitur. It is only with a 'well-ordered' ranking (for example, a complete and transitive ordering over a finite set) that we can be sure that pairwise comparisons must ultimately identify a 'best' alternative.

We must, therefore, ask: 'how complete should the assessment be, for it to be a systematic discipline of evaluation?' In what can be called a 'totalist' approach that characterises the standard theories of justice (including Rawls's), incompleteness tends to appear as a failure, or at least as a sign of the unfinished nature of the exercise. Indeed, the survival of incompleteness is sometimes seen as a defect of a theory of justice, which calls into question the positive assertions that such a theory makes. In fact, however, a theory of justice that makes systematic room for incompleteness allows one to arrive at possibly quite strong judgments (for example, about the injustice of continuing famines in a world of prosperity, or of persistently grotesque subjugation of women), without having to find highly differentiated assessment of every political and social arrangement in comparison with every other arrangement (for example, addressing such questions as: 'is a top income tax rate of 39 per cent more just or less just than a top rate of 38 per cent?')

I have discussed elsewhere why a systematic and disciplined theory of normative evaluation, including assessment of social justice, need not take a 'totalist' form.¹⁴ Incompleteness may be of the lasting kind for several different reasons, including unbridgeable gaps in information and judgmental unresolvability involving disparate considerations that cannot be entirely eliminated, even with full information. For example, it may be hard to resolve the overall balance of the comparative claims of equity considerations, when different considerations conflict in subtle ways. And yet, despite such durable ambiguity, we may still be able to agree readily that there is a clear social injustice involved in the persistence of endemic hunger or exclusion from medical access, which calls for remedying for the *advancement* of justice (or reduction of injustice), even after taking note of the costs involved. Similarly, we may acknowledge the possibility that liberties of different persons may, to some extent, conflict with each other (so that any fine-tuning of the demands of equal liberty may be hard to work out), and yet strongly agree that torturing people in custody would be an unjust violation of liberty, and such policies demand immediate rectification.

There is a further consideration that may work powerfully in the direction of making political room for incompleteness of judgments about social justice, even if it were the case that every person had a complete ordering over the possible social arrangements. Since a theory of justice invokes agreement between different parties (for example, in the 'original position' in the Rawlsian framework), incompleteness can also arise from the possibility that different persons may continue to have some differences, even after agreeing on a lot of the comparative judgments. Even after vested interests and personal gains have been somehow 'taken out' of consideration through such devices as the 'veil of ignorance', there may remain possibly conflicting views on social priorities, for example, in weighing the claims of need over entitlement to the fruits of one's labour.

Room for disagreement: an illustration

Conflicts of distributive principles that are hard to eradicate can be illustrated with an example. The illustration is concerned with the problem of deciding which of three children should get the flute (about which they are quarrelling) – you have to adjudicate between these different claims. Child A claims it on the ground that she is the only one of the three who knows how to play the flute (the others don't deny this). If that is all you knew, the case for giving it to the first child would be strong.

However, child B expresses his claim to the flute on the ground that he is the only one among the three who is so poor that he has no toy of his own, and that the flute will give him something to play

14 Amartya Sen, 'Consequential Evaluation and Practical Reason' (2000) *Journal of Philosophy*, 97: 477-502; see also Sen 1970, n 8 above; Sen, 'Maximization and the Act of Choice' (1997) *Econometrica*, 65: 745-79; Sen, 'The Possibility of Social Choice' (1999) *American Economic Review*, 89: 349-78; Sen, 'Incompleteness and Reasoned Choice' (2004) *Synthese*, 140: 43-60.

with (the other two concede that they are much richer and well-supplied with engaging amenities). If you had only heard child B and none of the others, the case for giving it to child B would be strong.

Child C, on the other hand, argues that she has been working for many months to make the flute with her own labour (the others confirm this), and just when she had finished her work, she complains, 'these Johnnies came along trying to snatch the flute away from me'. You might have given it to child C if her statement is all you had heard.

However, having heard all three you do have a problem. Theorists of different persuasions – utilitarian or egalitarian or libertarian – may believe that a just resolution can be readily spotted here, though, alas, they would respectively see totally different resolutions as being 'obviously right'.

The main point to note in the present context is that the different resolutions all have serious arguments in support of them, and we may not be able to identify, without some arbitrariness, one of the alternative arguments as being the only one that must invariably prevail. Different impartial judges may take different views in this decisional problem (unrelated to their respective vested interest or hope of personal gain). And the problem of choice in this case is ultimately one of priorities in the principles of justice, so that the decisional dilemma reflects a deeper problem of conflict of unrejectable principles that would need to be accommodated.

And yet in many particular cases, there will be no decisional dilemma to resolve, even when none of the underlying reasons is summarily rejected. It may turn out that the child who has made the flute is also the poorest, or the only one who knows how to play the flute. Or it might be the case that child B's deprivation is so extreme, and his dependence on something to play with so important for a plausible life, that the poverty-based argument might come to dominate the judgement of justice. There could be what can be called 'circumscribed congruence' despite the varying weights that different impartial judges apply to the conflicting considerations.

Rawls has shown, rather convincingly in my view, why liberty has a special place that cannot be ignored when comparing the claims of liberty against other considerations, including the avoidance of inequality and poverty. Rawls went on to argue for giving total priority to liberty in *all* cases. It is much easier to be persuaded that such a priority would be quite right when the violations of personal liberty happen to be extremely serious, whereas issues of economic inequality are not at all matters of life and death. And yet when the transgressions against liberty are rather marginal, and the inequalities involved can cause extremely tragic deprivations, then, as Herbert Hart, the Oxford legal philosopher, argued in a famous critique of Rawls, the case for giving invariable priority to liberty would be hard to defend.¹⁵ In his later writings, Rawls was willing to make some concessions to Hart's argument,¹⁶ and yet his theory makes that very hard to do.

Open impartiality and global public discussion

I turn now to the third issue, the impartiality question. The role of impartiality in the evaluation of social judgments and societal arrangements is well recognised in moral and political philosophy. There is, however, a basic distinction between two quite different ways of invoking impartiality. With what I would call 'closed impartiality', the procedure of making impartial judgments invokes only the members of a given society or nation. The Rawlsian method of 'justice as fairness' uses the device of an 'original contract' between the citizens of a given polity. No outsider is involved in such a contractarian procedure, or is a party to the original contract (either directly, or through representatives). For the members of the focal group, the 'veil of ignorance' requires them to be ignorant of their respective identity *within* the focal group, and this can be an effective procedure for overcoming individual partialities within the focal group.

However, even under the veil of ignorance, a person does know that he or she belongs to the focal group, and is not someone outside it – indeed he or she could be anyone in that particular group – and there is no insistence at all that perspectives from outside the focal group be invoked. As a device of structured political analysis, the procedure is not geared to addressing the need to overcome group prejudices or parochialism.

15 H L A Hart, 'Rawls on Liberty and Its Priority' (1973) *Univ. of Chicago Law Review*, 40: 534-55.

16 John Rawls *Political Liberalism* (Columbia Univ. Press 1993).

In contrast, in the case of ‘open impartiality’, the procedure of making impartial judgments can (and in some cases, must) invoke judgments, *inter alia*, from outside the focal group. For example, in Adam Smith’s use of the device of ‘the impartial spectator’, the requirement of impartiality requires the invoking of disinterested judgments of ‘any fair and impartial spectator’, not necessarily (indeed sometimes ideally not) belonging to the focal group.¹⁷

Adam Smith was particularly concerned about avoiding the grip of parochialism in jurisprudence and moral and political reasoning. In a chapter entitled ‘Of the Influence of Custom and Fashion upon the Sentiments of Moral Approbation and Disapprobation’, Smith gives various examples of how discussions confined within a given society can be incarcerated within a seriously narrow understanding:

‘... the murder of new-born infants was a practice allowed of in almost all the states of Greece, even among the polite and civilized Athenians; and whenever the circumstances of the parent rendered it inconvenient to bring up the child, to abandon it to hunger, or to wild beasts, was regarded without blame or censure... Uninterrupted custom had by this time so thoroughly authorized the practice, that not only the loose maxims of the world tolerated this barbarous prerogative, but even the doctrine of philosophers, which ought to have been more just and accurate, was led away by the established custom, and upon this, as upon many other occasions, instead of censuring, supported the horrible abuse, by far-fetched considerations of public utility. Aristotle talks of it as of what the magistrates ought upon many occasions to encourage. Plato is of the same opinion, and, with all that love of mankind which seems to animate all his writings, no where marks this practice with disapprobation.’

(*Ibid.*: V.2.15, 210)

Adam Smith’s insistence that we must ‘*inter alia*’ view our sentiments from ‘a certain distance from us’ is, thus, motivated by the object of scrutinising not only the influence of vested interest, but also the impact of entrenched tradition and custom. While Smith’s example of infanticide remains sadly relevant in some societies even today, many of his other examples have relevance to other contemporary societies. This applies, for example, to Smith’s insistence that ‘the eyes of the rest of mankind’ must be invoked to understand whether ‘a punishment appears equitable’.¹⁸ Scrutiny from a ‘distance’ may be useful for practices as different as the stoning of adulterous women in the Taliban’s Afghanistan, selective abortion of female fetuses in China, Korea and parts of South Asia,¹⁹ and plentiful use of capital punishment in China, Singapore, or for that matter in parts of the US (with or without the opportunity for celebratory public jubilation).

While we are not likely to have a global state or a global democracy any time soon, Smith’s emphasis on the use of the impartial spectator has immediate implications for the role of global public discussion in the contemporary world, to arrive at some important comparative judgments. Global dialogue, which I believe is central for world justice, comes today not only through institutions like the UN or the World Trade Organisation (WTO), but much more broadly through the media, through political agitations, through the committed work of citizens’ organisations and many NGOs, and through social work that draws not only on national identities but also on other commonalities, like trade union movements, cooperative operations, or feminist activities.

Primary goods versus capabilities

I turn, finally, to the capability question. In comparing the relative advantage of two persons in applying the Difference Principle of Rawls, we are directed by Rawls to proceed on the basis of the holdings of primary goods the two persons respectively have. But he focuses on command over general-purpose resources, rather than actual ability of the person to do this or be that. In a series of contributions, the Rawlsian approach of focusing on primary goods has been fairly extensively challenged in recent

17 Adam Smith, *The Theory of Moral Sentiments* (Clarendon Press 1976).

18 Adam Smith, *Lectures on Jurisprudence*, R L Meek, D D Raphael and P G Stein (eds) (Clarendon Press 1978; reprinted Liberty Press 1982), 104.

19 See, for example, Amartya Sen, ‘The Many Faces of Gender Inequality’ (2001) *The New Republic*, 17 September 2001.

years by the alternative perspective of what is called the 'capability approach'.²⁰ In that line of vision, a central role is given to the person's actual ability to do the different things he or she has reason to value. These attainments in human living (like being well nourished, avoiding premature mortality, taking part in the life of the community, and so on) are called human functionings. We have to concentrate on those functionings that we value and have reason to value, and the focus is specifically on a person's capability to achieve particular combinations of valued functionings. All the achievable combinations of functionings are called a person's capability set, and it is on this that the capability approach concentrates.

Through this elementary procedure, the capability approach focuses on human life and not just on some detached objects of convenience, such as incomes or commodities that a person may possess, which are often assumed to be the main criteria of human success. Since the income-orientated approach is quite standard in economics in particular, the capability approach proposes a change – a serious departure – away from concentrating on the *means* of living, to the *actual opportunities* of living.

It is not hard to see the reasoning underlying the understanding that the departure in favour of capability can make a significant – and constructive – difference. For example, if a person has a high income but is also very prone to persistent illness (for inherited, acquired or environmental reasons), then the person need not necessarily be seen as being very well off, on the mere ground that their income is high. Certainly, they have more of one of the means of living well (that is, a lot of income), but they have difficulty in translating that into good living (that is, living in a way that they have reason to value) because of the adversities of illness and physical handicap. We have to look instead at the extent to which she can actually achieve, if they so choose, to be healthy and well, and to do various things they would value doing.

To understand that the *means* of satisfactory human living are not themselves the *ends* of good living helps to bring about a momentous extension of the reach of the evaluative exercise, especially for world justice. And the use of the capability perspective helps to pursue these extensions.

It is important to emphasise that the focus of the capability approach is not just on what a person actually ends up doing, but also on what he or she is in fact capable of doing, whether or not he or she chooses to make use of that opportunity. For example, in terms of being undernourished, a famine-stricken victim may be just as deprived of food and nourishment as a person who voluntarily fasts, for political or religious reasons (despite having the ability to buy and eat plenty of food). Their manifest undernutrition may be much the same, but the capability of the well-off person who chooses to fast to be actually well-nourished (if they were to choose to go that way, instead) is much larger than that of the person who starves involuntarily because of poverty and destitution. The idea of capability is, thus, orientated towards freedoms and opportunities (to wit, the capability to live the kinds of lives that people have reason to value), rather than being concerned only with the one particular life that the person chooses to live.

World justice and the rule of law

The focus of this chapter has been on linking the understanding of justice to the nature of the society and the kind of opportunities and freedoms that people actually have, not just to institutions and practices (that too, but not just that). In this sense my concentration has been on *nyaya*, rather than only on *niti*. Terrible things happen in the world in which we live – from illiteracy and starvation to torture and violence. They arise from a variety of causes, which demand investigation, but the ultimate test of success is not whether the rules or institutions we can dream up are plausible, but what opportunities, what real capabilities people actually have in the world in which they live, based on all the influences that work on society.

To conclude, I have argued against giving the theory of justice a transcendental form, concerned only with characterising 'the just society'. We have reason to try to address as many questions of

²⁰ See, for example, Amartya Sen, *Commodities and Capabilities* (North-Holland 1985); and M C Nussbaum and A Sen, *The Quality of Life* (Clarendon Press 1993). There is a huge literature and extensive active research engagement on this and related subjects in many different countries in the world, with regular meetings organised by the Human Development and Capability Association (HDCA).

comparative assessment as we can. Agreement on many major issues of world justice can emerge even when there are other matters in which we continue to differ and disagree. When Adam Smith and Condorcet argued for the abolition of slavery, or for free public education for all, including for women, they were not claiming that these changes would make the world perfectly 'just', but only *more just* in an identifiable way, than the world they saw around them. A comparative perspective that makes use of incomplete rankings (with the discipline of using partial orders that modern social choice theory has extensively explored) has much more to offer to the understanding of the demands of world justice (strictly, removal of world injustice) than the transcendental approach of Hobbes and Rawls, which is forced to abstain from judgments of world justice to concentrate on the fluffy characteristics of 'minimal humanitarianism'.

I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states – never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned more than two centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorisation of justice to the artificially imposed limits of nation states. This is not only because (as I earlier quoted Martin Luther King as saying) 'injustice anywhere is a threat to justice everywhere' (though that is hugely important as well). But in addition we have to be aware how our interest in others across the world has been growing, along with our growing contacts and increasing communication.

Already in the 1770s, David Hume noted the importance of increased intercourse in expanding the reach of our sense of justice. He had put the issue thus:

'... again suppose that several distinct societies maintain a kind of intercourse for mutual convenience and advantage, the boundaries of justice still grow larger, in proportion to the largeness of men's views, and the force of their mutual connexions. History, experience, reason sufficiently instruct us in this natural progress of human sentiments, and in the gradual enlargement of our regards to justice, in proportion as we become acquainted with the extensive utility of that virtue.'²¹

The search for world justice is a central challenge in the world today not merely because our lives are interconnected, but also because the very presence of our interconnections makes us inescapably interested in and involved with each other. The 'natural progress of human sentiments' and 'the gradual enlargement of our regards to justice', which David Hume saw in the 1770s, did not come to an end in the 18th century.

21 David Hume, *An Enquiry Concerning the Principles of Morals* (2nd edn, Open Court Publishing Company, 1966), 25.

