Analyse & Kritik 02/2013 (© Lucius & Lucius, Stuttgart) S. xx–xx

Ivo Wallimann-Helmer

Not Losing Major Liberal and Rawlsian Insights

Comment on Gavin Kerr

Abstract: In this comment I challenge Kerr's claim that a coherent expression of a 'liberalism of freedom' needs an extended first Rawlsian principle of justice incorporating the principle of fair equality of opportunity for two reasons. First, such an extended first principle leads to illiberal consequences by narrowing down the scope of individual responsibility for choice and effort way too much. Second, such an extended first principle misses a main Rawlsian insight, namely that in a theory of justice the principle securing basic liberties and the principle of fair equality of opportunity serve different purposes.

A coherent and powerful expression of a 'liberalism of freedom' needs not only the institutional regime of property-owning democracy (POD) dispersing wealth and capital as widely as possible, but also an extended first Rawlsian principle of justice. An extended first principle of justice not only incorporates the classical civil and political rights and liberties such as freedom of thought, liberty of conscience, the political liberties and freedom of association but also the principle of fair equality of opportunity (FEO) (**11**). These are, as I see it, the main claims of Gavin Kerr in his contribution to this special issue. I agree with Kerr that it is difficult to uphold the priority Rawls claims for his first principle of justice over the FEO principle, but I do not think one should view equality of opportunity being part of a principle securing basic liberties (cf. Wallimann-Helmer 2012; 2013, ch. 4). I fear that major liberal and Rawlsian insights are lost if the FEO principle is simply integrated in Rawls's first principle of justice. What is lost on the one hand is that in liberalism it is normally in the responsibility of citizens to reach whatever level of happiness they please. On the other hand and more importantly, there is a loss of the different functions that can be ascribed to the first principle of justice and the FEO principle if they are kept apart.

Kerr provides two arguments for his main conclusion. First, he argues that POD in combination with the two principles of justice as presented by Rawls would still be a liberalism with a utilitarian flavour. Giving priority to the first principle of justice over the FEO principle would still allow for major inequalities in the possession of productive assets and non-human capital simply because they result in a higher net sum of welfare (**12**). According to Kerr, however, if POD

is an institutional regime ensuring equal economic and political freedom for all, indefeasible social and economic rights must be secured not only to ensure the exercise of the classical civil rights and liberties but also the pursuit of individual conceptions of the good (**11**). Pursuing a conception of the good needs those economic and social resources Rawls himself attached to the FEO principle. In consequence, Kerr believes that, for POD to be a true form of a 'liberalism of freedom', what is needed is an extended first principle of justice including not only basic civil rights and liberties but the FEO principle as well.

I share Kerr's concern that the social and economic rights Rawls attaches to his first principle of justice have an overly narrow focus if they only secure the classical civil rights and liberties. For citizens to be free, they need not only to possess the resources necessary to be able to exercise their basic civil rights and liberties. They need also to be endowed with the social and economic means necessary to be able to choose responsibly among different plans of life as well as—at least in some minimal sense—to realise them. Most importantly, social and economic capital needs to be invested in their education. Everyone should be able to calculate, to read and to have at least a minimal understanding of the political, economic, social, cultural and religious systems they live in and minimal knowledge of the options they provide. But granting everyone an indefeasible right to all the social and economic resources necessary to pursue their conception of the good, as Kerr suggests, on my view overshoots the target.

The reason for this can be found in Rawls's definition of 'liberalisms of freedom' itself. True 'liberalism of freedom' is not so much concerned with the net sum of welfare reached in a society but rather with securing liberty for all its citizens. Or as Kerr puts it: "While liberalisms of freedom provide citizens with the all-purpose means needed effectively to exercise their freedoms, they do not seek to guarantee citizens' happiness, 'for that is a matter for citizens themselves' (Rawls 2000, 366)." (**3**) According to this understanding, a 'liberalism of freedom' seeks to leave it to the responsible decisions of citizens how much happiness they will achieve. This means that, in Rawlsian terms, it is left to the individual citizens themselves how well they realise their conception of the good, or more specifically, their rational plan of life. Thus, there seems to be a misunderstanding of the conception of liberty involved in Kerr's argument.

Being free to do or realise something normally means that you are not guaranteed to realise whatever you choose. But if there were an indefeasible right to all social and economic resources needed to pursue one's conception of the good, this would imply exactly such a guarantee. If I would decide right now, after having been trained as a philosopher and teacher for so many years, that being a professional tennis player is a better way to pursue my conception of the good, the way I understand Kerr's argument, I would have to be endowed with the necessary social and economic resources to realise this plan of life. According to Kerr's argument, this would even be true independently of the question whether my plan is rational or not and whether or not I take my decision responsibly. If I have an indefeasible right to the social and economic resources necessary to pursue whatever conception of the good I develop, then the fulfilment of my right cannot rely on any conditions such as rationality or responsibility. In sum,

this is not our usual understanding of a right to be endowed with the necessary resources to exercise our liberties.

Rather, someone capable of exercising his liberties is usually understood as someone possessing those abilities as well as the social and economic resources conceived as minimally necessary to make responsible and well informed rational choices. I believe that to be able to reach such a minimal standard is what should be conceived as the bundle of indefeasible rights and liberties belonging to an extended first Rawlsian principle of justice. It is only this minimal standard and no right to all social and economic resources one might need to pursue one's conception of the good. Otherwise, it would become unclear why the degree and the manner in which someone realises his conception of the good lies in his and only in his own responsibility and rational choice. It would become unclear why a 'liberalism of freedom' conceives the amount of happiness reached by individual citizens to be their own matter.

These last points already shed some lights on my criticism of Kerr's second and main argument for an extended first principle of justice. This second argument directly attacks Rawls's claim that his first principle of justice has priority over the second, especially over the FEO principle. Rawls argues that securing the basic rights and liberties should have priority over securing FEO because human beings have a highest-order interest in developing and revising a conception of the good (Rawls 1993, 310ff.). To secure this highest-order interest, it is necessary that advantages such as more equal opportunities or more material resources cannot be traded off against citizens' basic rights and liberties (Rawls 2001, 47). According to Kerr, the priority of the first principle over the FEO principle cannot plausibly be defended with this argument, since reforming and revising a conception of the good can scarcely be separated from the interest in realizing the rational plan of life stemming from a conception of the good (**11**). Realizing a rational plan of life, Kerr believes, is not secured by the first principle of justice but by the FEO principle. Therefore, it becomes difficult to claim any priority of the first principle of justice over the second containing the FEO principle.

Kerr certainly has a point in claiming that it is hardly plausible to separate a highest-order interest in forming and revising a conception of the good from the interest in the realization of the rational plan of life stemming from it. But in *A Theory of Justice* Rawls proposes that liberty must be understood along the lines proposed by MacCallum (Rawls 1971, 202). MacCallum argues that positive and negative liberty must be understood as two sides of a coin exactly for the reasons given by Kerr to challenge the priority of the first principle of justice over the second (MacCallum 1967, 318f.). It simply makes no sense to claim a right of everyone to be entitled to reach a certain level of endowments to be free (positive liberty) without at the same time guaranteeing an adequate space of action to freely exercise those endowments to one's advantage (negative liberty). Thus, to the extent that Rawls argues that liberty must be understood in line with MacCallum, Kerr's argument loses its grip. The first principle of justice (not extended in Kerr's sense) cannot only secure the development and revision of a conception of the good but also the possibility of pursuing it.

In consequence, Rawls cannot be accused of not having shown why his first principle of justice should have priority over the second by the line of argument provided by Kerr. It is not the case that the first principle does not secure the possibilities to realise a rational plan of life. The basic liberties and rights secured by the first principle, however, only ensure these possibilities by guaranteeing a certain minimum of abilities as well as social and economic resources. How well someone is able to realise his rational plan of life beyond this minimum is only formally secured by ensuring that no one is unjustifiably hindered in pursuing it. But such a formal right does not grant any substantial assistance.

Kerr might counter this argument by putting his finger particularly on this last point. For a regime of POD, it is not enough that substantial minimum and formal rights beyond this minimum are secured to pursue one's conception of the good. This is why the first principle of justice should be extended to include the FEO principle, which is concerned with the distribution of social and economic resources necessary to realise goals beyond the minimum secured by basic rights and liberties. But undifferentiated incorporation of the FEO principle into the first principle of justice loses sight of a major insight in Rawls's theory. Arguing for an indefeasible, hence unconditional, right to all social and economic resources one envisages needing for the pursuit of one's conception of the good would not allow the ascription of responsibility to citizens for the advantages and disadvantages they reach by their own effort.

Citizens would not have to take responsibility for their bad choices because an indefeasible right to the social and economic resources to pursue one's conception of the good justifies entitlements irrespective of whether or not someone's choice was responsible. Moreover, an indefeasible right to social and economic resources to pursue one's conception of the good would place most part of the advantages gained at the mercy of social institutions. If someone becomes a professional tennis player by obtaining all the resources needed to reach this goal irrespective of how hard he trains, it is only to a very small extent he himself who deserves being a professional tennis player. In most part, it is the social institutions who take responsibility for him being able to reach his goal. Not being responsible for one's bad choices and having not to take the full responsibility for one's success are both illiberal consequences of Kerr's proposal. They are in conflict with a 'liberalism of freedom' that understands it as a matter for citizens how much happiness (success) they attain by realizing a rational plan of life.

This makes it clear why it is necessary in liberalism to distinguish between indefeasible rights and liberties on the one hand and the FEO principle on the other. Whilst indefeasible rights and liberties must be secured unconditionally, irrespective of responsibility and effort, the FEO principle can formulate conditional claims of justice depending on effort and responsibility. Only those who make responsible choices and show the necessary effort are entitled to fairly equal opportunities. Furthermore, such a conditional right can take into account differences in advantage with regard to social and economic circumstances. Someone finding himself in disadvantageous social and economic circumstances by no choice or fault of his own is entitled to more assistance. In both cases, in the case of more responsible choices and more effort as well as in the case of disadvantage

through no choice or fault of one's own, there is a right to a higher degree of assistance than for cases in which these conditions are not given. An extended first principle of justice which secures these claims unconditionally would cancel the possibility of differentiating between these conditionals.

Simply integrating the FEO principle in the first principle of justice thus loses sight of a major Rawlsian insight. These principles each serve a different purpose in a theory of justice. The first principle of justice unconditionally guarantees both a minimum of competences and a space of action for their exercise. In so doing, it secures for all citizens not only the right to form and revise whatever conception of the good that pleases them but also the possibility to realise whatever rational plan of life they wish to pursue. The FEO principle, in contrast, serves the purpose of securing a conditional right of citizens to fairly equal opportunities if they show equal effort irrespective of their social and economic circumstances.

It is another question, however, whether the distinction between Rawls's first principle of justice and the FEO principle must be drawn by assigning the first principle priority over the latter, and how they relate if the distinction is drawn differently.[1] But I hope to have made clear that the different functions in a theory of justice assigned to both principles is lost if the FEO principle is simply integrated into the first principle of justice. In fact, doing so, as Kerr suggests, leads to consequences that in my view must be conceived as being simply illiberal. Therefore, I strongly suggest not conflating Rawls's first principle of justice with the FEO principle so as not to lose major liberal and Rawlsian insights.

Bibliography

Kerr, G. (2013), Property-Owning Democracy and the Priority of Liberty, in: *Analyse & Kritik* 34, **xx–xx**

MacCallum, G. C. (1967), Negative and Positive Freedom, in: *The Philosophical Review* 76, 312–334

Rawls, J. (1971), *A Theory of Justice*, Cambridge/MA

— (1993), *Political Liberalism*, New York

— (2001), *Justice as Fairness. A Restatement*, Cambridge/MA

Wallimann-Helmer, I. (2012), Die Abhängigkeit zwischen Chancengleichheit und Freiheit, in: Petersen, O./D. Borchers/T. Spitzley/M. Stöckler (eds.), *Proceedings von GAP.7. Nachdenken und Vordenken – Herausforderungen an die Philosophie*, University of Duisburg-Essen, DuEPublico online, 539–558

— (2013), *Chancengleichheit im Liberalismus. Bedeutung und Funktion eines überschätzten Ideals*, Freiburg

[1] See for this purpose Wallimann-Helmer 2013, ch. 5.