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# Institutions of justice and intuitions of fairness: contesting goods, rules and inequalities

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**ABSTRACT**
This paper examines the intrinsic relation between institutions and social justice. Its starting point is that processes of institutionalization invoke societal groups to articulate justice demands which, in their turn, give rise to processes of institutional redesign. In liberal democracies, demands for justice are articulated as a pursuit for emancipation and empowerment of groups that feel excluded by dominant categorizations. The imminent presence of this twin pursuit for justice can be explained by the conceptual inconsistencies that characterize the distinction between the public and private sphere. These inconsistencies also explain why demands for emancipation and empowerment are intrinsically ambiguous and inconsistent. In order to reconsider the question how institutions are to be adapted to allow for social justice while acknowledging the plurality, ambiguity and volatility of justice demands, the paper will propose an empirical and normative research agenda.

## Introduction

Sen (2011) distinguishes two approaches to social justice in literature. First, there is the focus on 'perfect justice', in which scholars try to identify the institutional arrangements for a society that can be considered just from a theoretical perspective. Second, there are authors that concentrate on 'getting the institutions right' by overcoming existing injustices by redesigning institutions. Sen points our attention towards the role of institutions in justice-related issues; still, the empirical working of institutions themselves hardly seems a topic of interest. It is doubtful however whether institutions can be seen as instruments for distributing goods, that are morally neutral in themselves. This raises the question as to what are the implications of their workings for the realization of both perfect justice and overcoming injustices? This paper takes on this question by sketching out an intrinsic relation between institutions and social justice. Processes of institutional redesign

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will be featured as reactions to justice demands articulated within society; at the same time, these demands can be seen as reactions to processes of institutionalization.

Firstly, the paper will set out an 'anatomy of fairness and justice', with fairness, on the one hand, being related to the principle of reciprocity, i.e. the expectation that all members of a community receive a similar share of a certain good, while justice, on the other hand, will be understood in terms of objective sets of rules that are embedded in institutions. As such, justice issues revolve around the interplay between the *goods* that are considered the objects of justice and the *rules* for how to distribute these goods within a certain social context.

Secondly, I will introduce the 'framing'/'overflowing' mechanism introduced by sociologist Michel Callon as the way in which processes of institutionalization give rise to discontent within groups in society, mobilizing two types of justice demands. A first type revolves around *emancipatory pursuits*, meaning that societal groups demand new goods to become considered as subjects of equality. The second type of justice demand concerns an increasing call for *empowerment*. One may observe both progressive and conservative manifestations of overflowing, both involving discourses that are conceptually inconsistent. Such inconsistency is inevitable and should not distract us from the function of progressive and conservative discourses, which is to point us at the continuous possibility of adapting institutions to changing societal demands and normative understandings.

In its conclusion, the paper will develop a research agenda for furthering our command on the relation between justice, institutions and societal contestation. In this, I will focus mostly on the capacity of institutions to adapt to societal demands for justice in line with the pursuit for emancipation and empowerment, and I will outline the types of empirical and normative research that are able to increase these issues.

## An anatomy of fairness and justice

Ethics is a scholarly field congested with evasive concepts; still, 'justice' stands out as a conceptual brain-teaser. At the same time, 'it's not fair!' often is one of the first exclamations in one's lifetime. Not only humans have these seemingly inborn intuitions as is shown by the well-known experiment of Brosnan and De Waal (2014) on the morality of apes and monkeys. In this experiment, a capuchin monkey is given a cucumber while seeing that another monkey receives a grape. Though cucumber is normally liked, grapes are very much preferred, and – apparently feeling wronged by receiving the lesser fruit –, the monkey throws the cucumber angrily away. This experiment reveals that it is not the objective preference about a good which invokes feelings of unfairness, but that these are invoked by some *other party*

receiving a certain good. In other words, intuitions about fairness are relational and object based: they are about not getting the goods that you think you deserve, with goods being both tangible and intangible entities, such as money, reward, attention, food, respect, resources, positions (and grapes). In this, fairness can be seen as related to expectations about reciprocity, in the sense that if there is sharing, each individual is expected to get the same amount of a certain good (De Waal, 2006).

Like monkeys, humans also have strong emotions of pain or anger when they consider themselves wronged. Indeed, it can be said that emotions are the currency of unfairness. Moral emotions motivate us to do something and repair wrongdoing: they entice action, pushing us to change the situation that we are dealing with (Pesch, 2019b). At the same time, it needs to be emphasized that the experience of being treated unfairly invokes an emotion that is very close to that of envy (cf. Heinich, 2009; Russell, 1930). To some extent, this relation is noteworthy because, in contrast to unfairness, envy is usually not seen as a legitimate trigger for change.[1]

In the introduction of *Spheres of Justice*, Michael Walzer observed that justice and envy cannot be identified similarly to the extent of fairness and envy. For Walzer, justice relates to those arrangements in place that prevent envy from 'doing its destructive work'. In other words, justice arrangements present mechanisms that conquer envy by making sure that goods are distributed in a way that is considered acceptable. As such, justice not only secures fairness, but at the same time blocks envy. In sum, justice relates to institutions which present the rules that are accepted by a social collective regarding the distribution of certain goods. Moreover, institutions bring about regularities that provide coordination, so that actors do not have to decide upon a suitable course of action in each and every discrete interrelation (North, 1990).

The presence of institutions explains why justice is so much harder to grasp than the intuition of fairness. Institutions are not singular contexts that can be easily separated, instead they are interconnected in a heterogeneity of ways, invoking both overlaps and conflicts between rules about what can be considered just. A theoretical problem in the acknowledgement of this complexity is formed by the contrastive institutional outlooks of philosophy and social research. While philosophy tends to neglect the complexity of the linkages between institutions, social research does not account for the normative aspects that are intrinsic to institutions. Furthermore, social research takes change as it starting point, with institutions being the main explanation for the stability of social order (Durkheim, 1973; Giddens, 1984); in contrast, philosophy and ethics usually take institutions as stable while ignoring the background of societal change, which makes it hard to acknowledge the dynamics in societal pursuits of justice. Incorporating the descriptive insights

of social research in normative research will help to develop a better understanding about how institutions can be adapted to accommodate new justice demands.

## Overflowing and liberal inconsistencies

Institutions can be seen as social arrangements that allow conflicting claims about the distributions of goods to be dealt with. In a stable society, these arrangements are widely considered as just, they work smoothly and conflicts can be settled. Indeed, state and market institutions host several methods for conflict resolution that allow justice to be maintained in society. However, there may be developments that give rise to demands for institutional change, because the distributions embedded in dominant practices become no longer accepted as just. Sen (2011) argues that institutional change emerges from the realization that certain practices are considered as unfair, mobilizing demands for change. However, how such feelings of unfairness develop and how they give rise to processes of societal contestation are questions that have hardly been addressed in theory.

The dialectical mechanism of 'framing' and 'overflowing' introduced by Michel Callon (1998) is helpful to in understand these processes. According to Callon, institutions that are dominant in society – in the sense that they are reified in stable structures, formal arrangements and technological systems – can be seen as *framings* that forward the way in which society has to understand and manage a certain issue. In the context of justice, framings can be said to concern the constellations of rules about the distributions of goods. Such framings can become contested by social groups that endorse alternative distributions, a process that is labelled as *overflowing*. These contestations give rise to demands for institutional adjustment so to cater to this preferred distribution of goods over society. This account suggests that an institutional view on justice is an intrinsically socio-political process that deals with the mobilization of social groups that forward justice claims in reaction to dominant institutional practices (cf. Warner, 2002).

To understand this institutional account of justice in the context of liberal democracies, it is crucial to highlight the role of the public/private distinction which can be seen as a starting point of the institutional set-up of liberal democracies (Benn & Gaus, 1983). The division into a public and a private sphere can be seen as a constitutive framing, because it allows for the pursuit of equality as the basic principle that motivates modern conceptions of fairness (cf. Rawls, 2001). However, the framing of the public/private division also provides room for *contesting* specific distributions of goods. The reason for this is that there are conceptual inconsistencies in our understanding of the public/private distinction that produce implicit inequalities that are

brought to the foreground if these inequalities become uncovered, and their eradication is endorsed by societal actors.

The main institutions that figure as the providers of justice in liberal society are those institutions that are to a certain extent public (Pesch, 2021). Primarily, there is the sphere of the state, which cares for equality by providing a constitutional order. In this, the relevance of the impersonal character of the state cannot be overestimated: by handing over the domination over scarce goods to an impersonal agent, envy becomes immobilized. In other words, a neutral disposition takes away the relational nature that marks envy or revengefulness. In contrast, the private sphere hosts a plurality of personal spaces in which individuals or smaller groups may pursue their own goals, convictions, preferences and so on. The plurality of spaces present an individual with a repertoire of life choices that she feels connected to. Liberalism commands us to be tolerant for these personal choices, so that envy or other negative emotions will not have a destructive effects. To these private spaces, we are strongly tied affectively, it allows us to 'be ourselves', pursuing authenticity and unicity (Trilling, 1972). We do so by the art of discrimination: the aspects that are believed to make us who we are singled out, giving us the capacity to nurture important attachments and to develop an identity.

The separation between the realms of equality and inequality is intended to secure the equality of access to material and immaterial goods (cf. Matravers & Meyer, 2010). The idea of equality gives liberal democracy its emancipatory drive: as inequality is seen as a moral wrong, it needs to conquered. This does not mean that inequality is driven out, but rules have been established that pertain to issues that are subjected to acceptable inequalities. In other words, there may be forms of domination over certain goods that are found to be legitimate, insofar the grounds for inequality are equally valid for all individuals (cf. Réaume, 2017).

The public/private distinction can be seen as the framing of liberal societies that allows inequalities to be harnessed. However, equality is always equality of *something* (Sen, 1992), and the objects which are to be equally distributed may differ over liberal societies. Moreover, they may change over time, which has to do with the unequivocal way in which the boundary between the public and private realm is drawn (Mahajan, 2009; Pesch, 2019a). Below, two main conceptual inconsistencies that contribute to the empirical emergence of justice claims will be presented.

A first inconsistency concerns the fact that certain groups of people become *obscured* because of the public/private distinction, inducing inequalities and asymmetries. This inconsistency evolves from the indistinct nature of who a person is in combination with the plurality of ways to demarcate the public from the private (cf. Weintraub, 1997). Different dichotomizations may designate different roles to groups of people, often in an implicit manner. The most salient manifestation of this feature concerns the confinement of

women to the private sphere of the home, while not having access to any public sphere, be it the realm of the street, the economy, or politics (Pateman & Phillips, 1983). This historical injustice is the result of the coexistence of a liberal approach to economics that exists along political liberalism (Benn & Gaus, 1983). The economic form of liberalism identifies individuals strictly as economic agents and the private sphere strictly as the market. Given the dichotomous character of the public/private distinction, the identification of the market as the private sphere implies that the domestic domain is hidden from sight. Another example of this inconsistency is the way in which laborers, who might have had access to city streets and the economy, were excluded from having a political role, until voting rights were given to the full male population.

Also in more recent times, one may see similar types of confounding public/private categorizations. In the economic and policy domains, organizations have come to play the role of economic agents (cf. Chandler, 1977), giving life to the public and private 'sector' which are basically devoid from human individuals (Pesch, 2005). This explains that discussions on the privatization of the public sector, as have been held the last four decades, not only gave rise to a reform of the policy domain but also went to the extent of the attention for socio-economic solidarity, which is key to political conceptions of the public sphere (cf. Sandel, 2020): the result is that individuals are left without a public recourse to turn to when things go wrong; moreover, individuals have to compete in a domain that is dominated by large corporations – an inequality ignored if organizations and individuals are taken as belonging to the same category.

The second inconsistency regarding the public/private distinction can be derived from the observation made by authors ranging from Isaiah Berlin (1959) to Chantal Mouffe (2000) that our political outlook is characterized by a fundamental contradiction (Pesch, 2005; Weintraub, 1997): not only is there a 'liberal' conception of politics, there also is a 'democratic' conception (Benn & Gaus, 1983).[2] In terms of justice, the liberal conception is dominant, and the public sphere has to provide equality as defined by rights of individuals by maintaining a sharp division between both spheres. In turn, the rights of individuals exist to safeguard the inequalities that are constitutive for the private sphere. Individuals are fundamentally free to pursue their personal goals, convictions and lifestyles, as long as they do not interfere with the choices of others. In contrast, the democratic conception of the public/private distinction also figures as a strong undercurrent in political and social discourse. In this conception, equality does not pertain to the need to serve your individual goals, but it targets the access to membership of the collective, most notably by empowering actors to partake in the determination of collective decisions.

From a democratic point of view, the boundary between the public and the private sphere needs to be permeable in order to nurture a democratic disposition, as one cannot enter public life without having had the appropriate exercise. After all, public life is one of self-control and self-containment, which are capacities that require training. Especially in our public roles as citizens, we appear to need semi-public settings, so we can learn what it takes to be politically empowered (cf. Habermas, 1999; Van Horn Melton, 2001). Democracy becomes the active pursuit of individuals developing themselves as citizens, but it also becomes the active pursuit of individuals to be *recognized* as citizens – to be taken seriously not only as recipients of policy but also as producers of such policy.

## The ambiguities of emancipation and empowerment

The conceptual inconsistencies sketched out above seem to elicit different forms of overflowing, challenging existing distributions of goods over society and providing room for societal groups to pursue justice. First, one may recognize demands for emancipation: if an individual happens to be member of a social domain because of a prevalent constellation of public/private conceptions, she will be fundamentally underprivileged. If this situation becomes manifest, demands for institutional change will appear in the shape of social groups that are mobilized to advocate change. Second, one may observe demands for empowerment, meaning that societal groups appeal for their democratic right to be recognized in collective decision-making processes.

The inconsistent nature of the public/private distinction can give rise to the exclusion of groups that do not fit dominant categorizations. Especially groups that have been historically disadvantaged, like women, immigrants and ethnic minorities, claim their right for equality. Following these forms of exclusion that are the result of ingrained institutional framings, we can observe a progressive counter-frame which articulates its concerns in terms of 'identity' (Fraser, 2000; Hekman, 1999). In this, the reason why groups have been underprivileged, such as gender, race, or ethnicity, is taken as the starting point for a progressive emancipatory pursuit.

This pursuit raises many conceptual puzzles though, as it reproduces the inconsistencies of the public/private distinction, creating a range of interrelated ambiguities with regards to questions such as: what is public and private? what is a group and what is a person? and what is universal and what is contextual? Below, I will touch upon five conceptual ambiguities within progressive discourses. It is important to acknowledge the intrinsic moral tensions that cannot be reasoned away (Arthur, 1998), as there is no singular point to balance the public and the private (O'Sullivan, 2009).

### Private worries motivate public action

In progressive emancipatory appeals, it are usually private worries that drive public appeals for justice. The elements that make up one's identity are part of her private essence, with all sorts of deep emotional connotations. Striving for equality by making public appeals implies that what is considered to be the core of one's identity is transferred from the private to the public sphere. This explains why debates on identity often raise discomfort, such debates turn private into public issues, crossing taboos, long-held convictions or implicit biases.

### A group needs to be recognized as special if it aspires equality

The identification of excluded groups and accompanying emancipatory appeals often build forth on Marxist analyses of the distribution of resources over society. Initially, this created a focus on socio-economic classes and the political dynamics that create social categories and accompanying exclusionary mechanisms. The nature of contemporary emancipatory claims has changed, especially as a result of feminist critique. Not only economic classes are singled out as relevant social categorizations but also immaterial goods have become goods to be distributed equally (Baier, 1987). Often, emancipatory quests have come to be framed in terms of 'recognition' for the deprived status. The social mechanisms that cause categorizations need to be repaired by appropriate arrangements of redistribution, which takes the shape of acknowledgment: a group needs to be singled out and it has to be given the opportunity to develop and maintain its own identity, while being compensated for historical injustices.

### Equality of individuals processes through identification with a group

The quest for equal treatment in the public domain gives rise to emancipatory movements that create social groups upon the basis of a certain, often single, feature, such as belief, economic class, or gender. With that, individuals inevitably become member of a collective, bearers of group characteristics instead of being individuals that have the autonomy to shape their own identity. This implies that the demand for recognition implies that emancipation does not pertain to individuals any longer. As social and political processes give rise to inequalities that are suffered by individuals because they are members of certain social categories, it becomes inevitable that individual emancipation proceeds through the emancipation of the group.

### Universal ideals become contextualized

The emancipatory struggle for equality also has as an effect that public and private spheres become even more confounded than they already were. After

all, issues pertaining to identity had originally been designated to the private sphere. In the context of individuals such private issues relate to gender, religion, ideology, but in the context of groups, it is not about choice or predisposition, but about issues with a historical and contingent character. The points us at a paradox: while the principles of equality and individualism are by all means universalist ideals, invoking perfect justice, these ideals automatically receive a contextualized character by their connection to the good of identity. A specific heritage or cultural aspect is designated an exclusive status, in spite of the universalist emancipatory starting point.

## *Group identity defines individual identities*

Another intrinsically related ambiguity is that a group has to be defined externally before it can form its claim for establishing an autonomous identity. In other words, the demand for recognition inevitably follows definitions that are imposed by dominant discourses, and as such these definitions are involuntarily reproduced. The marginalization of an identity that does not conform the expected standards will create large emotional investments in that identity – as this marginalization reduces the core of 'who we are' to exactly that identity.

The pursuits for emancipation and empowerment are intrinsically progressive and they usually invoke conservative counter-demands. In this, commentators are quick to capitalize the conceptual inconsistencies of progressive debates (cf. Hirschman, 1991). Conservative appeals for justice also revolve around the recognition of a specific identity of a group. This shared identity assumes existing categorizations, which usually have a historic origin. The necessity to maintain such categorizations is derived from the fact that all people live a life that is characterized by specific attachments, relating to place, meanings, or practices. Without having these, social and political life would lose their coherence. Our collective identities are built on shared values and experiences that are necessary to have a sense for democracy in the first place.

Still such conservative demands are fundamentally exclusionary, as the conditions of membership are restricted for those who share certain cultural or historical characteristics, often involving contingent national boundaries (cf. Anderson, 1983). Moreover, there often is a clear hint to the destructive emotions of envy and resentment, which dovetails with the problem that in conservative discourse institutions are often represented as structures that are alien to society, while society itself is seen as an undivided, organically evolved, collective. This makes hard to imagine how envy can be effectively blocked by institutions and, furthermore, such an absolutist starting point leaves no opportunity for renegotiating societal categorizations and divisions.

## Two agenda's for furthering justice

Foregrounding emancipation and empowerment reveals paradoxes and ambiguities which give rise to discussions that often come across as uncomfortable. This does not make these moral pursuits less worthy, emancipation and empowerment can be seen as key normative aspirations of liberal philosophy. Not only are they manifestations of the ideal of equality but they also are instrumental with the realization of equality. In this last section, I will reflect the conditions for just institutions, as well as I will present an initial research agenda for the empirical and normative study on the relation between institutions, justice and contestation.

A key takeaway is that institutions have to give room for overflowing, meaning that the contestation of institutional framing is to be taken as input to adapt given categorizations and practices to emergent societal demands (Pesch et al., 2017). This does not suggest that any societal demand is straightforwardly adhered to. When groups within society feel discontent about the workings of certain framings, a societal debate ensues on what to change and what to maintain, while recognizing the plurality of social groups and positions (Pesch & Vermaas, 2020). Given the ambiguity and oppositions of such debates, consensus or even a clear understanding about nature of societal demand will not be easily produced. As such, we have to be prepared for 'clumsy solutions' that work provisionally and that merely good enough for a given time (Verweij et al., 2006).

At first sight, this clumsiness of institutional reform seems to conflict with the theoretical goal of creating institutions that are perfectly just and even seems to complicate the practical goal of getting the institutions right. But this impression is, at least to some extent, misleading. Firstly, the conditionality of institutional adaptations helps to qualify the tendency to construct just institutions as static and absolute. Moreover, as has been shown above, universalist and contextual justice claims cannot be unequivocally separated in progressive discourse, as they emerge in an interrelated way. This implies that it is necessary to think about the moral principles that underpin liberal philosophy, as they mobilize the very quest for justice, but it is also important to think about institutions that are perfectly just in the sense that they are able to adapt to emerging moral demands in an effective way. In other words, procedural criteria can be seen as intrinsic to just institutions, with these criteria pertaining to the question as to how institutions can adapt to emergent societal demands. Having a more extensive theoretical command on these criteria will surely be helpful to get the 'institutions right' in ways that are more just.

To further this theoretical command that has been introduced here in quite a crude and provisional manner, I will outline both an empirical and a normative research agenda. The empirical research agenda is divided into

three sequential parts, aiming to describe the respective stages of institutional framing, overflowing and institutional redesign. First, social research has to address the distributive and procedural rules that pertain to a system and the goods that are covered by these rules. It also has to deal with the questions about which groups are considered to be members of a certain system for justice and which groups are empowered to change the set-up of rules and goods.

The second part of the empirical agenda relates to overflowing, here questions need to be asked about which groups become mobilized to further certain justice claims, and which institutional framings are contested. The analyses of this paper suggest that these questions can be addressed in terms of alternative conceptions of the public/private distinction. This means that our understanding of the process of overflowing can be articulated by answering questions about which 'somethings' are considered to be objects of equality or inequality; whether a liberal or a democratic take on the public/private distinction can be recognized; and how a certain dichotomous view gives rise to exclusionary tendencies.

The third part of this research agenda relates to the adjustments of institutional arrangements. These adjustments are expected to be 'clumsy', as they need to accommodate a range of justice claims that are in many ways contrastive. The acknowledgment of this clumsy character allows an intricate and realistic analyses of such institutional redesign.

The normative research agenda needs to add insights to the empirical agenda. It basically relates to the assessment of justice claims made in the process of overflowing and the legitimacy of institutional adjustments. Though it needs to acknowledged that tensions and conflicting justice claims are inevitable and a singular evaluative scheme is impossible, at the very least, debates about justice need to be receptive for normative diversity with regards to range of public/private permutations, giving rise to a new, temporal, point of equilibrium. As such, claims that assume a culture that is undivided cannot be accepted because of their intrinsic exclusionary qualities. Important in this respect is the analysis of societal mechanisms that create exclusion. It has been described how institutions may disempower certain groups of people. We have also seen how the ambiguity of the public/private distinction may create social categorizations that privilege some groups over others. Being able to recognize these mechanisms allows them to be addressed and made into subjects of debate.

Also institutional redesign should be based on normative diversity and on the receptivity for future adaptations. Social justice implies that groups that are disadvantaged are compensated somehow in order to become full members of society. This starting point raises quite some elementary questions about which grounds are legitimate for claiming to be disadvantaged, how

claims can be forwarded, what compensation does entail, and how a full membership of society can be determined. All of these questions may be the reason for a new round of contestation – in the end, the quest for justice never stops.

## Notes

1. In case of children and capuchin monkeys, it is almost impossible to separate unfairness from envy as they cannot articulate the reasons for their motivations unequivocally – without wanting to imply that children and monkeys fail to grasp the principle of reciprocity, it may be so that children learn quickly that fairness makes a better argument than envy. Moreover, there is a tendency among young children, apes, and monkeys to maintain a one-directional account of fairness, only making claims if they do not receive their share themselves, not when others receive less than expected (De Waal, 2013).
2. For the sake of clarity, I will use these terms, but there are many alternatives, especially for the democratic conception such as communitarianism, republicanism, and the organic conception of publicness.

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## Disclosure statement

## Notes on contributor

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