

Justice as Fairness in South Africa: Rawls and the Failure of the Broad-Based Black Economic Empowerment (BBBEE) Act of 2003

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Abstract

John Rawls's moral theory aims to achieve a form of distributive justice that is founded upon fairness. In this paper, the criteria and principles, as presented by Rawls in his theory of *justice as fairness*, are applied to the enactment of the Broad-Based Black Economic Empowerment Act (BBBEE) in an effort to evaluate whether it satisfies his stipulated conditions. The Broad-Based Black Economic Empowerment Act of 2003 was introduced in South Africa as a means to further mitigate the structural patterns of disadvantage that disproportionately affect the black majority of the population in the wake of Apartheid.

Justice as fairness is initially theoretically conceptualised and contextualised through an explanation of its main elements and thought experiments, namely, those of the basic structure of society, the *original position*, and the *veil of ignorance*, as well as the principles of justice. In this paper, the practical application of this theory of distributive justice is facilitated through the use of the BBBEE Act in an effort to establish whether the act achieves the kind of justice as fairness that Rawls envisions. This analysis is facilitated through a qualitative comparison of the successes and alignments, as well as the failures and divergences of the policy to the theory itself. The outcome of the analysis suggests that the BBBEE policy satisfies some of the Rawlsian criteria for justice as fairness initially, but ultimately fails in practice.

About the author

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1. Introduction

Many decisions and contemporary policies have been informed by the work of the American moral and political philosopher, John Rawls, whose work set out to achieve a more equal and just society through his method of equitably “levelling the playing fields” (Richardson, 2005: 6). The Broad-Based Black Economic Empowerment (BBBEE) Act of 2003, is one such policy. Enacted in 2003 in South Africa, it aims to address the structural inequalities that remain as a product of the Apartheid regime, namely, the exclusion of black people (referring to African, Coloured, and Indian South African citizens from birth, descent, or naturalisation, as stipulated in the act) from participating meaningfully in the economy. Under Rawls’s theory of justice, more commonly known as *justice as fairness*, the instantiation of the BBBEE act serves as a well-meaning and practical attempt at realising distributive justice in South Africa. However, I argue that it is in its contemporary application, or implementation, that it fundamentally fails to achieve this ideal. In order to facilitate the critical discussion of the BBBEE Act as a function of Rawls’s theory, the theory itself will first be unpacked. The impetus for the formulation of this theory of distributive justice will be contextualised and followed by the conceptualisation of the main aspects of the theory itself. Thought experiments, aiding in the accessibility and description of the theory will be discussed – specifically those of the *original position*, the *veil of ignorance* and the *difference principle*. The final portion of this paper will serve as a systematic exposition of the BBBEE Act as, firstly, an extension of Rawls’s theory of justice in its conception and enactment and, secondly, how it fundamentally reneges on these ideals in its implementation in reality. As I will show, the culmination of the analysis shows that the BBBEE Act, while satisfying some of Rawls’s conditions to achieve justice through fairness, ultimately fails to resolve the problem of distribution and racial economic inequality, that it sets out to diagnose and treat in the first place.

2. Conceptualisation and Contextualisation of Key Concepts

In order to successfully unpack Rawls’s theory and understand its subsequent application to the policy of Broad-Based Black Economic Empowerment, a few key concepts will require a brief description. Firstly, the concept of distributive justice in its broader sense. Distributive justice, according to the International Encyclopaedia of the Social Sciences (2008), relates to the system or process by which rewards, burdens and resources are assigned to individuals according to a certain set of moral belief(s). Principles of distributive justice extend this idea in that they serve as a vessel for the morality of political structures and processes that facilitate the distribution of said benefits, resources, and burdens.

The theory of justice as fairness, in its essentialised form, is Rawls’s interpretation of distributive justice. His theory is comprised of two main elements or principles, namely, liberty and equality. “Liberty” denotes equal access to individual freedoms, while “equality” refers to the fair distribution of advantages (Richardson, 2005: 6). These two principles are the basis from which his theory stems and are arranged in lexical order – denoting that the first is always prioritised over the second (Rawls, 1999: 55). “Rational individuals” denote people that, given different choices, will decide on an option using calculations or logical thought processes in order to maximise or optimise their own individual self-interest or utility (Mueller, 2001: 68). This definition is of importance, as it underpins the premise on which claims made by Rawls, political philosophers and economists alike have fundamentally based their thinking.

3. Rawls's Theory of Distributive Justice: Justice as Fairness

3.1. History and impetus

John Rawls, who proposed the moral theory of justice as fairness, sought to tackle and attempt to resolve the issue of distributive justice. Before one can talk about the theory itself, it is important to contextualise the impetus for its creation. Rawls first conceptualised the notion of justice as fairness as a product of various influences. His theory came as a response to a theory of justice that was prevalent at the time, namely, utilitarianism. Broadly, utilitarianism is the view that the morally correct action is the one that secures the greatest good or happiness for the greatest number of people (Mill, 1970: 7). This notion is the amalgamation of the works of classical utilitarian philosophers Jeremy Bentham and John Stuart Mill – one to which Rawls is diametrically opposed. Rawls fundamentally disagreed with this notion, arguing that it leaves no room for the protection of individual rights and liberties that form the foundation upon which democratic ideals and institutions are built (Rawls, 1999: xii). This is further explained by Richardson (2005: 6), who presents that the element of the utilitarian definition that Rawls problematises, is that the “average” or “total” utility of society is maximised. In turn, this fails to acknowledge the primacy of the individual and their associated rights by generalising or aggregating utility to a societal level. The fulcrum of the theory which Rawls contends, is the notion that utilitarianism commits itself to serving the aggregate welfare of the population and not to the prioritisation of ensuring equitable or maximum liberty to all individuals (Lyons, 1972: 536).

Rawls clearly states that “utilitarianism does not take seriously the distinction between persons” (1999: 4). This is the main driving factor for Rawls's theory of justice as fairness, insofar that it aims to provide an alternative to what Rawls thinks is not a truly moral means to secure justice (Safodien, 2016: 2). This fervent opposition to utilitarianism is the basis from which the argument in favour of a theory of justice based on fair-

ness stems. However, one area where Rawls's theory aligns with that of utilitarianism is their commitment to normativity, stating what ought to be rather than describing what is. With this said, both theories are informed by a commitment to correct the injustices of society.

Rawls's theory of justice serves as a continuation and extension of the thinking of his predecessors. The social contract theory of Thomas Hobbes and John Locke serve as the partial inspiration and foundation for his formulation of the original position and the veil of ignorance, which will be discussed later (Rawls, 1999: 10). The markedly abstract and hypothetical nature of this conception of the social contract illustrates the extension that Rawls exercised regarding the work of his predecessor (Sarangi, 1991: 195). Locke, particularly in his work *The Second Treatise of Civil Government* (1660), often referenced the social contract as if it were an actual historical event, while Rawls later uses the overarching idea of the social contract to facilitate his explanation of his theory of justice as fairness.

3.2. The essence of *justice as fairness*

The following section will offer a systematic explanation of Rawls's theory of justice as fairness, which is informed by a rejection to utilitarianism as a moral theory – an extension of the ideas of contractarianism and a response to the existence of injustice in society (Freeman, 2007: 156). Core elements that aid in the construction of the moral theory of fairness include the original position, the veil of ignorance, and the principles of justice.

3.3. The basic structure of society

As it has already been mentioned, Rawls's theory of justice stems from two principles: liberty and equality (in that order). The basic structure of society that Rawls envisions is focused on the subject matter of institutions and societal practices. An institution, according to Rawls (1971: 55), is a public system of rules that has the ability to define and assign roles, as well as their associated responsibilities, influence, and im-

munities. The “public system” mentioned here, denotes that everyone involved in a certain institution is privy to the rules and accepts the responsibility associated with involvement in a particular institution (Rawls, 1999: 47-48). It too can be abstract (i.e., rules) or, as a product of the thought patterns and actions of people formed as a consequence of these rules. Rawls strives to resolve the patterns that exist as a result of these current structures, such as alienation, exploitation, and envy, by reimagining the way society is organised and to mitigate the manifestation of such issues in the first place.

The basic structure of society, in its most simplistic form, is a closed system that is isolated from other societies (Lehning, 2009: 19). This basic structure, and the associated principles of liberty and equality, can manifest themselves in the form of constitutional and legal frameworks. Once implemented, these structures can alter the life chances of individuals so that they can exercise their liberties freely and contently – a so-called “levelling of the playing field” (Richardson, 2005: 6). Society in this form is seen as an opportunity and a space that enables cooperation in the spirit of mutual advantage, which is facilitated through the interaction of rational and reasonable human beings (Lehning, 2009: 20).

3.4. The original position and the veil of ignorance

The inception of the conceptualisation of the theory of justice as fairness, is what is called the “original position”. The original position (OP) is the first thought experiment or hypothetical situation that aids in achieving the critical distance that Rawls claims society needs in order to attain an objective answer to the question of what principles of justice are appropriate for a certain society to achieve the overarching principles of liberty and equality. The essential features of the OP are that no-one knows their place in society, as normally determined by their class, race, intelligence, ability, wealth, or social status. Participants also do not have a conception of their own psychological propensities and their own conception of the “good” (their conception of how to satisfy rational desires). Rawls

assumes that individuals fashion their lives around their own conception of the good (Ekmekci & Arda, 2015: 228). In absence of this conception of the good, or rather, this aspect of ‘not knowing’ in the original position, is known as the “veil of ignorance” (Rawls, 1999: 11).

The purpose of the OP and the veil of ignorance is to place individuals in a situation where, if asked the question of “who gets what?”, people as rational individuals will attempt to maximise the outcome for themselves. Under this veil, one does not know where they will be placed in society or what their life chances will be. This means that, in order to maximise their individual outcome in any situation, they will choose principles of justice that are fair or to the benefit of the least advantaged – for they could very well find themselves in that same position. With the absence of the conception of the “good” and the other unknowns, the parties’ decisions are based on an accumulation of what Rawls calls “primary social goods”: rights, liberties, wealth, income, and opportunities. This is under the assumption that individuals value having more primary social goods, or primary goods, rather than less. Additionally, under these circumstances, people are “mutually disinterested”, meaning that they only are concerned with their own accumulation of primary goods and not with anyone else’s (Richardson, 2005: 10). I posit that mutual disinterest can be likened to respect, in that an individual will not interfere with another person’s accumulation of primary goods given that their own actions will also not be interfered with. Parallels can also be drawn here to the Hobbesian social contract theory in that freedom and safety are secured through a structured understanding (or respect) of others’ autonomy (Rawls, 1999: 10).

Primary social goods are outlined by Lehning (2009: 20) as having the right to freedom of speech, liberty, assembly, association, movement, conscience, and political liberties (having the right to vote and be eligible for public office). Also included in this category are income and wealth, the social basis of self-respect and having choice of occupation. Primary social goods

more generally are the elements that are fairly distributed according to the terms of social cooperation. This extends into the realm of constitutional (political) and economic institutions in that, in the application of the basic structure of society to said institutions, a forecast on the extent of the just distribution of primary social goods can be extrapolated (Lehning, 2009: 21), and a measurement of justice as fairness can be achieved.

This reinforces the self-interested nature of rational individuals which Rawls tries to account for in his theory, rather than idealising or attempting to change it. Rawls describes his understanding of how at birth, there is a lottery in terms of the allotment of circumstances that people enjoy, some examples being: historic inheritance of status, wealth, intelligence, and ability (Arneson, 2007: 80). By removing this lottery through Rawls's OP, it leaves room to establish or conceptualise a so-called "fair" distribution of the principles of justice from an impartial standpoint. In summary, the guiding ideas for a "Rawlsian" society stem from a decision made by rational actors who would accept a certain position of equality – and one that defines their basic structure of association in order to promote their own individual interests to the maximum under any of the stipulations of the original agreement.

The OP aims to destabilise the accepted norm of the principles of utilitarianism. This is done by illustrating that under the stipulations of the original position and the veil of ignorance – rational individuals would not choose the principles of justice associated with utilitarianism when given the choice. Furthermore, it would not be a true reflection of a just moral theory (Richardson, 2005: 9).

3.5. The principles of justice

The principles of justice as fairness in *A Theory of Justice* (Rawls, 1999) are at the heart of Rawls's theory and act as a guiding mechanism for their implementation. These principles follow on from the previous concept of the basic structure of society, and are as follows:

The first principle stipulates that a society must ensure that each citizen has equal claim to the most extensive liberties and rights. The second principle addresses social and economic inequality, or the distributive elements and takes the form of two parts: the first part necessitates that the social structures that shape this aforementioned distribution must be open and accessible to all, or, in other words, equality of opportunity, while the second part, also known as the *difference principle*, presents itself as a type of clause to the preceding iteration of Rawls's theory of justice. The difference principle states that inequalities (social and economic) are only justified if they are to the greatest benefit of the least advantaged in society and concerns itself mainly with the primary goods of income and wealth (ibid., 16-17). The difference principle has also come to be known as the *maximin*, in which the long-term expectations of those individuals or social group who are the most disadvantaged are maximised. This can also be viewed as a function of rational choice, in that a person will try to mitigate uncertainty by making decisions that maximise the minimum expected outcomes of one option in comparison to another. This requires the identification of those who are deemed to be the most disadvantaged in society, which sometimes has paradoxical implications. This means that under this rule, the most "reasonable" decision is not always the most rational, as losses are minimised rather than gains being maximized (Harsanyi, 1975: 595). Altham (1973: 77) attempts to resolve this issue by, instead of identifying the most disadvantaged group, he instead identifies the most disadvantaged *individual* and systematically raises the expectations of the least advantaged to the next least advantaged and so on, until an "equilibrium" is reached. This point of equilibrium is a state that Altham believes satisfies Rawls's difference principle (maximin), in that it maximises the social minimum (ibid.).

Considering another angle, Poee (2013: 336) argues that the difference principle, as expressed through Rawls's concept of "equality of condition", can be seen

as an embodiment of equity.¹ Whilst, as alluded to in the conceptualisation of the first principle, the notion of “equality of opportunity” is more reminiscent of that of equality. It is with this caveat that Rawls acknowledges and accounts for inequalities and inefficiencies in society and, rather than trying to solve these with a blanket solution, attempts to offer a tailored remedy as expressed through equity over equality. In terms of the principles of justice, having a more equitable distribution of resources, in turn, necessitates a more equal society.

3.6. Rawls in reality

Rawls, in his theory of justice as fairness, offers largely a hypothetical system in which society can be analysed, namely, through the aforementioned thought experiments of the original position and the veil of ignorance. However, what his theory largely omits is its practical instantiation, aside from his mention of the following two systems in his work: firstly, liberal or democratic socialism and secondly, property owning democracy. Rawls’s theory in practice has been likened to that of the liberal democratic political tradition and, in a similar sense, how liberal democracy occupies a certain space of the political scale (Callan, 1997: 13). The interpretation and application of Rawls’s theory of justice in different contexts and countries have different implications and consequent locations on said scale (Lehning, 2009: 209). For example, in the United Kingdom, it has been viewed as social democratic, while the USA has viewed it as being left-liberal (O’Neill & Williamson, 2014: 13). Property owning democracy is conceived by Rawls to be attractive, in the sense that it values individual entrepreneurship. However, this seems to inevitably encounter practical issues of distribution (e.g., income inequality) when implemented, thus not aligning with the Rawlsian conception of justice.

In the following section, I discuss and analyse the practical application of Rawls’s theory in relation to the policy of Broad-Based Black Economic Empowerment in South Africa. Through this, I aim to shed light on the efficacy of his theory in securing true and equitable distributive justice within a contemporary South African society.

4. Rawls and BBBEE: The Problem of Structural and Economic Inequality

4.1. Conceptualisation of BBBEE

The Broad-Based Black Economic Empowerment (BBBEE) Act 53 of 2003 was implemented in order to address the historical legacy of Apartheid that left the majority of South Africans namely, black people, trapped in a position of structural economic inequality up until the present day. The repressive laws of the Apartheid era aimed to systematically exclude black people spatially, socially, politically, and economically through the enactment of policies such as the Natives Land Act (1913) which restricted the ownership and purchasing of land on the basis of race (Republic of South Africa, 1913).

The BBBEE Act aims to address these inequalities that still persist by increasing the meaningful employment and participation of black people in the economy, satisfying all with their constitutional right to equality – promoting a higher growth rate and also working to realise a more equitable distribution of income. This policy serves as an appropriate yardstick with which to evaluate the practicality and efficacy of Rawls’s theory of justice as fairness through its ability or failure to diagnose and treat the problem of distribution that South Africa faces today. In a similar vein to Rawls, BBBEE is interdisciplinary, meaning that it is applicable to a variety of contexts – aiming to transform

¹ Equity differs from equality in that the former acknowledges differences and discrepancies between the circumstances of individuals and allocates resources and opportunities accordingly, while

the latter prescribes uniform resources or opportunities to a group (Cook & Hegtvædt, 1983: 218).

different levels and sectors of the economy through one, single policy lens (Thabe, 2010: 1, 22).

4.2. BBBEE policy and Rawls

Rawls's theory of justice and the BBBEE policy intersect at the point where "justice" as Rawls conceives it, is illustrated through the goal of the BBBEE policy to address the structural remnants of Apartheid. "Fairness" is reflected through the enactment – and consequent commitment to fix the exclusion of a specific part of the population from participating meaningfully in the economy. Even before the enactment of BBBEE, South Africa had come a long way from its pre-1994 state and already fulfilled some of the basic requirements as set out in Rawls's theory, such as being a democratic regime, constitutionalising the right to freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person, and their right to hold property and freedom from arbitrary arrest as defined by the rule of law. Therefore, BBBEE caters to the prescription of Rawlsian notions of justice by attempting to redress the rights of those who were not afforded the during the Apartheid era.

4.3. BBBEE and Rawls: Successes and alignments

Rawls and BBBEE align in their shared ideas of justice as fairness and notions of cooperative underpinnings and equitable outcomes. Both make a vested attempt to acknowledge the primacy of the individual whilst also attempting to emphasise the greater value that is created as a product of cohesion and interconnectedness – in both values and in relations. However, this is not necessarily true at the level of implementation for the BBBEE policy and under Rawls's veil of ignorance, ultimately a purely self-interested decision is made. This emphasises the dynamics, intersections and conflicts of self-interest and collective interest that are at play and are crucial in policy design. Furthermore, and as mentioned, post-1994 and pre-BBBEE South Africa satisfies first principle that Rawls stipulates in his principles of justice as having equal and basic liberties through the introduction of the new constitution and

new, functional democratic system (Thabe, 2010: 18-19).

Again, referring to the constitution and to the policy of BBBEE itself, the second principle in theory is fulfilled in that there is equality of opportunity to all under the law and the instantiation of the BBBEE Act aims to further strengthen or reinforce these rights (ibid., 23). In other words, the rights of all are put on paper to ensure maximum and equitable liberty as Rawls suggests. However, as I will show, these objectives and policies do not always translate directly into practice. The debate between ideal and non-ideal theory is aptly reflected in Rawls's justice as fairness and the BBBEE Act in how their practical instantiations do not necessarily reflect their anticipated theoretical outcomes (Valentini, 2012).

4.4. BBBEE and Rawls: Failures and divergences

The successes of the conception of the South African constitution and the BBBEE Act as a its extension, has been lauded thus far, but there are arguably some gaps in the policy formulation itself that goes against the grain of Rawls's theory. The first instance of this is seen in the conception of the individual within the BBBEE policy framework. The individual is not made a priority, and not defined outside of their status within a group in the policy. This would be a fundamental flaw in the eyes of Rawls, as was illustrated through his rampant rejection of the similar notion discussed in the utilitarian generalisation of the individual into an aggregated group. An attempt is made at addressing and acknowledging the primacy of the individual through the creation of a specific policy to address the issue of racial inequality and its implications for economic access. However, by pooling African, Coloured, and Indian people into one group as "black", reneges on the goal of the policy, not taking into account the complexities of race and the carious lived experiences of the "black" South African community. This reflects the BBBEE Act falling into the very trap that Rawls's theory of justice as fairness aimed to counter: utilitarianism. BBBEE consequently illustrates that the individual is not paramount as is necessitated by Rawls

and rather embodies utilitarian traits of maximising utility for the many over the few.

Secondly, although as it was previously described, BBBEE satisfies Rawls's first principle of most extensive liberty to a certain extent. Some scholars disagree, citing that it does not satisfy the first principle, because "only some are benefiting from BBBEE" (Safodien, 2016: 31). "Some" in this case refers to how the BBBEE policy oftentimes in practice prioritises and favours the employment of qualified black people rather than uplift the unqualified black persons. The policy theoretically works to enable equality of opportunity as stipulated in the constitution to previously disadvantaged groups. However, in practice it is seen that there are inefficiencies which tend to favour specific individuals disproportionately, namely, elites within the black community. This logically implies that liberty is not being maximised for those who the BBBEE policy aims to help, which undermines its theoretical objectives, as well as those of Rawls (Pooe, 2013: 637).

The arguably fatal flaw that separates the BBBEE policy from the Rawlsian conception of justice as fairness, is the fundamental implementation failures that have been seen in its application. The first of these implementation failures are shown through the discrepancies of gender and sectoral outcomes as a function of BBBEE. Statistics from 2019 show that the shareholdings of black women in that year on the Johannesburg Stock Exchange (JSE) were significantly lower than that of their male counterparts, occupying only 0-25% comparatively to 52-100% for black ownership overall across three sectors (B-BBEE Commission, 2019: 53). This is indicative of a blind spot in the BBBEE policy, as it illustrates a failure in acknowledging the interaction between and complexities of race and gender, respectively (Patel & Graham, 2012: 204). This revisits the problematic notion of the difference principle: although there are tangible gains being seen or reductions in inequality, it is of a skewed nature, where black men are prioritised over black women in their economic empowerment. The least advantaged in this

case is not advantaged equitably, as Rawls would necessitate.

Moreover, the BBBEE scorecard system prioritises businesses that are black-owned or have black individuals in senior management positions, assigning rewards and exemptions accordingly to those who are compliant. The outcomes in practice thus far, however, have proved to rather be more effective in cultivating a black middle class over helping those at the bottom of the income distribution (Southall, 2004: 537). With this said, it is still important to note how a creation of a strong middle class can assist in the anchoring of democracy. Expanding on this the growth of a middle class and its associated characteristics, such as reduced inequality and expanding franchise, lend themselves to democratic consolidation and the correction of historic discriminatory patterns (Resnick, 2015: 695).

While the aforementioned notion of compliancy advances Rawls's overarching objectives and some of the BBBEE policy's goals, it too creates negative externalities, as shown through the rising cases of "fronting" to meet BBBEE scorecard requirements (Shai, Molefinyana & Quinot, 2019: 3). By intentionally placing Black, Coloured or Indian South African citizens (as stipulated in the BBBEE policy) in positions that are above their qualification and competency levels, it not only creates injustice in the form of excluding others from opportunities, but it does not give credit to an individual where credit it is due. This notion is again a reflection of utilitarianism, in that fronting uses people as a means to an end and not as an end in themselves – a concept and premise with which Rawls fundamentally disagrees. Rawls, too, does not acknowledge the intricacies and nuance of the emotional aftermath of redistribution, which further compounds the weight of taking emotional element of redistribution and individual nuances into account. Situating the emotions in the work of John Rawls (Banerjee & Bercuson, 2017: 1). Whilst it is often conceived that emotion can cloud policy-making, it is a crucial element to effectuate a more nuanced, considered, and comprehensive un-

derstanding. This would acknowledge the various dynamics that exist within the apparent blanket categorisation of “black people” within the BBBEE Act.

The outcomes of the implementation of the BBBEE policy in South Africa echo the sentiments of Anthony Crossland (1974: 17), insofar as he said that solving problems of distribution in society are not about “how much equality?”, but should rather centre around the reduction of inequalities. This is perfectly illustrated in the way that the arguable Achilles heel of the BBBEE policy, so to speak, is its hyper-fixation on numerical targets to achieve a certain level of “equality”. This mirrors utilitarian metrics of success which arguably have a misguided focus on maximising net equality, rather than net happiness. Ironically though, it is within this fixation that more inequalities are formed and perpetuated. As Karl Sociwa, Group Executive from Market Development Sanlam, puts it, the policy of BBBEE is broadly successful in tracking transformation on the sectoral level, but there exists a disconnect or lack in information around the transformation of individuals lives (Sanlam Gauge Digital Conference, 2021). This encapsulates how BBBEE aims to prioritise the individual, but reneges on this goal in practice, indicating the incongruency between the policy’s formulation and Rawls’s theory of justice.

5. Conclusion

The exposition of the analysis showed the theoretical impetus and underpinnings of Rawls’s *A Theory of Justice* relates mainly to his principles of justice, the original position, the veil of ignorance, and the difference principle. The practicality of the theory was also discussed in order to lay the groundwork for the analysis of the Broad-Based Black Economic Empowerment Act and its successes and alignments and failures and divergences from Rawlsian conceptions of justice. The analysis led to the conclusion that the BBBEE Act draws many parallels to Rawlsian notions of liberty, equality, social cooperation, and justice, but ultimately, loses its footing when implemented. These implementation failures were shown through hyper-fixation on numerical targets for equality, which merely perpetuate and create more inequalities, as seen in the case of “fronting”. In addition, there exists some conceptual misalignments, such as the differing conceptions of “the individual” as well as how justice should be measured. At the conclusion of this analysis, the question remains: can BBBEE rectify its implementation issues and eventually realise the Rawlsian ideal of distributive justice in the future? And, more broadly, if the maximin paradox can be resolved through asking if there can ever be an acceptable level of injustice?

As I have argued, the initial theoretical comparison of the BBBEE policy satisfied some of the Rawlsian criteria for justice as fairness. However, it is in the practical implementation of the BBBEE Act that the policy fails to achieve the type of liberty and equitable distributive justice that Rawls envisions in his theory of justice as fairness.

Bibliography

- Altham, J. 1973. Rawls's Difference Principle. *Philosophy*, 48(183): 75-78.
- Arneson, R. 2008. Rawls, Responsibility, and Distributive Justice, in M. Fleurbaey, M. Salles, & J. Weymark (eds.), *Justice, Political Liberalism, and Utilitarianism: Themes from Harsanyi and Rawls*. Cambridge: Cambridge University Press.
- Banerjee, K. and Bercuson, J. 2015. Rawls on the embedded self: Liberalism as an affective regime. *European Journal of Political Theory*, 14(2): 209-228.
- B-BBEE Commission. 2019. *National Status and Trends on Broad Based Black Economic Empowerment Report* [Online]. Available: <https://www.bbbeeecommission.co.za/wp-content/uploads/2019/06/National-Status-Trends-on-Black-Economic-Empowerment-Report-31-March-2019-Approved-FINAL.pdf> [2021, September 30].
- Callan, E. 1997. *Creating Citizens: Political Education and Liberal Democracy*. New York: Oxford University Press.
- Cook, K. and Hegtvedt, K. 1983. Distributive Justice, Equity and Equality. *Annual Review of Sociology*, 9: 217-241.
- Crossland, A. 1974. *Socialism Now and Other Essays*. London: Jonathan Cape.
- Ekmekci, P. and Arda, B. 2015. Enhancing John Rawls's Theory of Justice to Cover Health and Social Determinants of Health. *Acta Bioeth*, 21(2): 227-236.
- Freeman, S.R. 2007. *Rawls*. London: Routledge.
- Harsanyi, J. 1975. Can the maximin principle serve as a basis for morality? A critique of John Rawls's theory. *American Political Science Review*, 69(2): 594-606.
- International Encyclopedia of the Social Sciences*. 2008. Detroit: Macmillan Reference USA.
- Lehning, P.B. 2009. *John Rawls: An Introduction*. Cambridge: Cambridge University Press.
- Locke, John. [1679-1680] 1963. *Two Treatises of Government*. Cambridge, U.K.: Cambridge University Press.
- Lyons, D. 1972. Rawls Versus Utilitarianism. *The Journal of Philosophy*, 69(18): 535-545.
- Mueller, D. 2000. Capitalism, democracy and rational individual behavior. *Journal of evolutionary economics*, 10(1): 67-82.
- O'Neill, M. and Williamson, T. 2012. [Introduction to] Property-Owning Democracy: Rawls and Beyond. Masters' Thesis. University of Richmond: Wiley Blackwell.
- Patel, L. and Graham, L. (2012) "How broad-based is broad-based black economic empowerment?," *Development Southern Africa*, 29(2): 193-207.
- Pooe, D. 2013. Theoretical perspectives and the implementation of the BBBEE policy framework. *Mediterranean Journal of Social Sciences*, 4(14): 635-642.
- Rawls, J. 1971. *A Theory of Justice*. Harvard University Press.
- Rawls, J. 1999. *A theory of justice: Revised edition*. Harvard University Press.
- Republic of South Africa. 1913. *Natives Land Act No.27 of 1913*. Pretoria: Government Printer.
- Republic of South Africa. 2003. *Broad-based Black Economic Empowerment Act 53 of 2003*. Cape Town: Government Printer.

- Resnick, D. 2015. The Middle Class and Democratic Consolidation in Zambia. *Journal of International Development*, 27: 693-715.
- Richardson, H. 2005. John Rawls. *The Internet Encyclopaedia of Philosophy*.
- Safodien, K. 2018. Government appointments, patronage and social justice in South Africa. Unpublished Dissertation. Johannesburg: University of Witwatersrand.
- Sanlam Gauge Digital Conference, 6 May 2021 [Video file]. Available: <https://youtu.be/ey2B0cif4r0> [2021, October 20].
- Sarangi, P. 1991. Notion of 'State' in John Rawls's Theory of Justice. *The Indian Journal of Political Science*, 52(2): 195–207.
- Shai, L., Molefinyana, C. and Quinot, G., 2019. Public Procurement in the context of broad-based black economic empowerment (BBBEE) in South Africa-Lessons Learned for sustainable public procurement. *Sustainability*, 11(24): 1-27.
- Southall, R. 2004. Political change and the black middle class in democratic South Africa. *Canadian Journal of African Studies*, 38(3): 521-542.
- Thabe, W. 2010. BEE and Rawlsian Justice. Unpublished master's thesis. Johannesburg: University of the Witwatersrand [Online]. Available: <https://wiredspace.wits.ac.za/bitstream/handle/10539/8897/Final%20Submission%20Draft%20Markup%5b2%5d.pdf?sequence=2> [2021, September 30].
- Valentini, L. 2012. Ideal vs. Non-ideal Theory: A Conceptual Map. *Philosophy Compass*, 7(9): 654-664.