
OLIMPIA G. LODDO

Università degli Studi di Cagliari

olimpia.loddo@gmail.com

RULES OF DISTRIBUTION AND THE CONCEPT OF “EGALITARIANISM” IN FELIX OPPENHEIM. TOWARDS UNDERSTANDING DISTRIBUTION*

**I am grateful to Doctor Laura Contini, to Doctor Guglielmo Feis, to Professor Gianmarco Gometz, to Professor Giuseppe Lorini, to Professor Stefano Moroni, to Professor Anna Pintore, to Doctor Roberto Pusceddu, to Professor Wojciech Żelaniec and to an anonymous referee for comments and discussions on previous drafts of this paper.*

abstract

The political philosopher Felix Oppenheim reconstructs a descriptive concept of “egalitarianism” on the basis of rules of distribution. The present paper reverses Oppenheim’s perspective by analyzing the role of distributive rules and of “egalitarianism” towards understanding distribution. In what measure does the concept of “egalitarianism” help us to understand distribution? Is it possible to understand a distribution only on the basis of descriptive concepts?

keywords

Rule of distribution, act of distribution, egalitarianism

1. **What is a Rule of Distribution? Three Definitions of Rule of Distribution**

1.0. A peculiar category of rules, the *rules of distribution*, is analysed by the political philosopher Felix Oppenheim in (at least) three different essays: *Egalitarianism as a Descriptive Concept* (1970); *Egalitarian Rules of Distribution* (1980) and in the 6th chapter of the book *Political Concepts. A Reconstruction* (1981). In Oppenheim’s works three different definitions of “rule of distribution” appear.

1.1. First Definition. Oppenheim introduces the concept of “rule of distribution” in the essay *Egalitarianism as a Descriptive Concept*. According to Oppenheim, rules of distribution establish the distribution of burdens and benefits among the members of a group (defined by the rule). As stated by Oppenheim:

“Rules of distribution have the general form: some specified benefit (e.g., franchise) or burden (e.g., a sales tax) is to be allocated or withheld from any person, depending on whether he has or lacks some specified characteristic (e.g., being a citizen over twenty-one, being white, buying cigarettes). Or: the amount of some specified benefit (e.g., salary) or burden (e.g., income tax) to anyone shall be a function of the amount or degree to which he has a certain characteristic (e.g., his ability, his income)”¹.

1.2. Second Definition. In the essay *Egalitarian Rules of Distribution*, Oppenheim develops the concept of “rule of distribution”. More precisely, Oppenheim distinguishes the *reference group* (the class of people for whom the rule is meant) from the *selected group* (a subclass of the reference group to whom benefits or burdens are assigned) and he founds on the distinction between *reference group* and *selected group* the following new definition of rules of distribution:

“Such rules specify the following, either explicitly or implicitly: (i) a benefit (e.g., one vote) or a burden (e.g., one year’s military service) to be allotted; (ii) a *reference group*; that is, a class of persons to whom the rule is meant to apply, usually defined by a common characteristic (e.g., all citizens); (iii) a *selected group*; that is, a subclass of the reference group to whom the benefit or burden is to be allocated (e.g., all citizens of a certain age)”².

1 (Oppenheim 1970, 144).

2 (Oppenheim 1980, 164); see also (Oppenheim 1981, 96-97).

1.3. Third dDefinition. In the book *Political Concepts. A Reconstruction* (1981), Oppenheim affirms that:

“[Rules of distribution are] rules enjoining one actor to distribute a quantifiable benefit [...] or burden [...] to at least two other actors”³

In the following § 2. I will focus my analysis on the *third definition* of rule of distribution proposed by Oppenheim (i.e. rules *enjoining one actor* to distribute a quantifiable benefit or burden to at least two other actors) and I will try to show that this third definition does not concern the whole category of “rules of distribution” but only a sub-category of “rules of distribution in a wider sense” that I will call *rules of distribution with distributor*. Moreover, firstly (§ 2.1.), I will point out the difference between two sub-categories of “rules of distribution”: (i) rules of distribution with distributor (ii) rule of distribution without distributor. Then (§ 2.2.), I will show the relevance of the distinction between rules of distribution with distributor and rules of distribution without distributor for the comprehension of the concept of distribution.

2. Distribution with Distributor vs. Distribution without Distributor

2.0. Oppenheim affirms that rules of distribution can concern different distributive units (for instance: votes, taxes, admissions to college, military services, money).

Despite this fact, independently of their objects, according to Oppenheim’s second definition of rules of distribution, rules of distribution are always characterised by three elements:

- (i) a *benefit* or a *burden* to be allotted;
- (ii) a *reference group*; that is, a class of persons to whom the rule is meant to apply, usually defined by a common characteristic (e.g., being a citizen);
- (iii) a *selected group*; that is, a subclass of the reference group to whom the benefit or burden is to be allocated (e.g., all citizens of a certain age).

According to **the second definition of rule of distribution**, every rule characterised by these three elements ((i) **benefit** or **burden**, (ii) **reference group** and (iii) **selected group**) is a rule of distribution. In this sense the following five rules can all be considered rules of distribution:

3 (Oppenheim 1981, 96).

- (i) considering all the employees of company C (reference group); a benefit of x euros is to be allocated to the employees having characteristic y (selected group);
- (ii) considering all the citizens (reference group); one vote is to be allotted to all citizens of a certain age (selected group);
- (iii) considering all the high school graduate students (reference group); the admission to college Y is allowed to all students that pass the college admission test (selected group);
- (iv) concerning all citizens (reference group), all men that become of *legal age* (selected group) have to perform military service;
- (v) considering all the citizens (reference group); all citizens in the x income bracket (selected group) have to pay taxes.

2.1. Despite the fact that all the rules (that I just listed) can be considered “rules of distribution” (according the second definition of rule of distribution proposed by Oppenheim), not all these rules are “*enjoining one actor to distribute a quantifiable benefit or burden*”. The list of rules of distribution that I have proposed seems to be quite heterogeneous for several reasons.

In my opinion, the main difference between these five rules of distribution concerns the “distributor” (the person or institution who performs the distribution). In fact, in order to make evident the heterogeneity of these five examples of rules it is sufficient to answer the following question:

Who is the distributor to whom the injunction is directed?

2.1.1. Let’s first examine rule (i):

- (i) considering all the employees of the company (reference group); a benefit (for example, a bonus of x euros) is to be allocated to the employees having characteristic y (selected group).

Rule (i) can be considered a rule of distribution “with distributor”. In fact, in this case, the agent (who has to perform the distribution) is the employer⁴.

2.1.2. Rule (i) is quite different from the rule (ii) on the “distribution” of the right to vote:

⁴ The difference between rules of distribution with distributor and rules of distribution without distributor is in part due to the different ontological status of the entities that could be considered as “distributive units”. Normally in order to distribute juridical entities (powers, rights) no distributor is needed, on the other hand in order to distribute material entities it is necessary to enlist a distributor.

- (ii) considering all the citizens (reference group); one vote is to be allotted to all citizens aged x years or older (selected group).

In this case it is impossible to find out who (according to the rule) has to “distribute votes” because rule (ii) does not oblige anybody to distribute votes (or rights to vote)⁵.

Nevertheless, there is a distribution: in fact, according to rule (i), a selected group receives the right to vote, but the ascription of this right does not require any further action but the promulgation of rule (ii), so that the rule itself is a sufficient condition of the ascription of a voting right. In this instance the “rule-giver” and the “distributor” are “the same agent”.

2.2. Both “*distribution with distributor*” and “*distribution without distributor*” should be kept conceptually apart from the act of *throwing something randomly* to a group of people.

For instance, let’s imagine an old man who meets a group of wild and potentially violent children in a park. If the old man throws randomly some candies to the children (in order to preempt their assault), his behaviour is not distribution, because his behaviour is not “rule-governed” by any rule of distribution. In fact, he will be just throwing something randomly to some people.

The phenomena of distribution can be considered as an effect of the rule of distribution (with distributor or without distributor). Despite this fact, different kinds of rule of distribution (*rule of distribution with distributor* and *rule of distribution without distributor*) have different effects.

Actually, there are (at least) two different types of distribution: I shall call the first type *distribution without distributor* and the second type *distribution with distributor*.

5 The distinction between rule of distribution with distributor and rule of distribution without distributor is very similar to the one between hypothetical-deontic rules andthetic-deontic rules. This distinction is adopted by Luigi Ferrajoli in order to point out the difference between fundamental rights and patrimonial rights. According to Ferrajoli: “*I diritti patrimoniali [...] non sono già (conferiti direttamente da) norme, bensì essi suppongono norme, ossia norme ipotetico-deontiche che ipoteticamente li predispongono per effetto di atti da esse previsti come loro titoli*” “Patrimonial rights are not (directly conferred) by norms, however they presuppose norms, i.e. a hypothetical-deontic norm that hypothetically pre-establishes them as a result of an act provided for in the norm”.

In *distribution without distributor* no actor has to distribute benefits or burdens, so that the distribution is a *direct effect*⁶ of a *distributive rule* (that is a *constitutive distributive rule*)⁷.

On the other hand, in the *distribution with distributor* (according to the rule of distribution) an actor has to distribute benefits or burdens. Consequently, in this case, distribution is the *fulfilment of a prescriptive rule* that obligates someone to distribute benefits or burdens.

3. “Egalitarianism” as a Meta-Institutional Concept of Distribution

3.0. In § 2.2. I have pointed out that thanks to rules of distribution, it is possible to understand distribution as something different from “randomly throwing something to somebody”. In other words, the behaviour of the distributor acquires its meaning⁸ in virtue of the distributive rule, so that it is not perceivable as random behaviour⁹.

In the present § 3. I will show that the concept of “distribution” is not fully understandable on the basis of rules of distribution. More precisely, I will show that not only the concept of “rule of distribution” but also the concept of “egalitarianism” is a necessary condition for understanding distribution.

3.1. According to Oppenheim, egalitarianism is a descriptive concept that refers to peculiar characteristics of rules of distribution so that it has to be kept conceptually apart from the normative concept of “equality”. According to Oppenheim “egalitarianism” is a “criterion which permits us to classify any actual or conceivable rule of distribution as egalitarian (or not egalitarian), independently of any evaluative or normative consideration”¹⁰.

6 See the concept of “enactment” [“Bestimmung”] in Adolf Reinach (1913 (Eng. trans. 1983)).

7 Gaetano Carcaterra (2012, 102) affirms that:

“Le situazioni e i fatti costituiti [...] si producono in maniera immediata, sono destinati a diventare realtà mercè un unico atto, quello [...] col quale si emana la norma”

“Constituted states of affairs and constituted facts [effects of a constitutive rule][...] are produced immediately [by the rule], they are bound to become real through a unique act, the act [...] through which the rule is promulgated”.

According to Giuseppe Lorini (2000, 230), two sub-categories can be distinguished into the category of constitutive rules (as described by Carcaterra): (i) *institutive rules*; (ii) *ascriptive rules*. *Institutive rules* are rules that create new entities in normative reality. For instance the rule (that can be found in the Canadian *Department of the Environment Act*) “There is hereby established a department of the Government of Canada called the Department of the Environment” is an institutive rule. On the other hand, constitutive rules of distribution on suffrage are ascriptive rules, because they presuppose both the object of distribution and the recipient of the distribution. According to Lorini constitutive rules of this kind have the form “this is yours”.

8 The behaviour of the distributor gets its normative meaning from the rule of distribution. In this sense, even if the rule of distribution (with distributor) is a prescriptive rule, it is possible to speak about constitutive force of prescriptive rules. About constitutive force of prescriptive rules see Żelaniec (2012, 93-102) and Żelaniec (2013).

9 Hans Kelsen (1967, 4) considers the norm as a scheme of interpretation of the act. According to Kelsen “The norm confers legal meaning to the act, so that it may be interpreted according to this norm”.

10 (Oppenheim 1970, 144).

3.1.1. In the essay *Egalitarianism as a Descriptive Concept* (1970) Oppenheim affirms that:

“We must distinguish. “Equality” can be predicated either of certain characteristics of persons, or of distributions made by one actor to at least two others, or of rules stipulating how such distributions are to be made. “Equality” in the first two meanings presents no problem from the point of view of our topic, and we shall be mainly concerned with equality as a property of rules of distribution”¹¹.

In contrast to Oppenheim’s thesis, I think that it is not always so easy to separate *egalitarianism* “as a quality of rules” from *egalitarianism* “as a quality of acts”. In fact, in “distribution without distributor” the promulgation of the rule of distribution and the act of distribution are the same phenomenon, so that it is impossible to distinguish the qualities of the act (of distribution) from the quality of the rule of distribution. The phenomenon of “distribution without distributor” is understandable as distribution not because of (another) rule of distribution but because of the concept of “egalitarianism”.

3.1.2. Oppenheim affirms that “egalitarianism” is a descriptive concept that can “qualify rules of distribution”. More precisely, according to Oppenheim rules of distribution can be distinguished from the other rules, because rules of distribution can be considered egalitarian or in-egalitarian. As stated by Oppenheim (1981, 96):

“‘Egalitarian’ and ‘in-egalitarian’, like ‘just’ and ‘unjust’, can be predicated only of rules of a particular type, which we may call rules of distribution. One may ask whether it is morally right or wrong to legalize or to outlaw divorce or abortion, but not whether such laws are egalitarian or in-egalitarian”¹².

3.2. Oppenheim proposes several formal criteria for determining if a rule of distribution is more egalitarian than another rule of distribution. In this sense, Oppenheim affirms:

“With respect to a given reference group, a rule of distribution of fixed

11 (Oppenheim 1970, 144).

12 (Oppenheim 1981, 96).

benefits or burdens is the more egalitarian, the greater the ratio of the selected group to the reference group”¹³.

3.2.1. According to Oppenheim, the descriptive concept of “egalitarianism” is the condition for the formulation of the factual judgements that a particular rule of distribution is more (or less) egalitarian than another. These judgements could be formulated independently from any other moral consideration about norm’s content. In this sense Oppenheim writes:

“The most egalitarian rules would then be those that treat all members of the reference group the same way and that do not select any subgroup for different treatment. In other words, if either the selected or the excluded group is the same as the reference group, the rule is fully egalitarian (strictly speaking, there is then no selected group”); universal suffrage as well as total absence of elections; universal military training as well as an all-volunteer army (nobody must serve)”¹⁴.

Criteria which are expressly laid down by Oppenheim are useful in order to know if a rule of distribution is factually more (or less) egalitarian than another.

3.2.2. In my opinion, the concept of “egalitarianism” as conceived by Oppenheim is not only a criterion for judging a distributive rule but it is also a necessary condition for the formulation of distributive rules. In other words, it is impossible to formulate a rule of distribution without presupposing the concept of “egalitarianism” because it would be impossible either to define the reference group or to select the group that will get the benefit or the burden.

For example, in order to formulate the norm on suffrage it is necessary to determine a reference group and a selected group. In other words, both the choice of the “reference group” and the choice of the “selected group” presuppose a concept of “egalitarianism”.

In addition, without presupposing the concept of “egalitarianism” it would be impossible to understand a rule as a “rule of distribution” and, consequently, its effect as a distribution¹⁵.

¹³ (Oppenheim 1981, 99).

¹⁴ (Oppenheim 1981, 98).

¹⁵ This is especially evident in the case of *distribution without distributor*. For instance, I have shown (in § 2) that the distribution is a *direct effect of norms* on suffrage (because they are *constitutive rule*), so that the act of promulgation of the rule and the act of distribution can be perceived as the same act.

For example, norms on suffrage could be described as rules of obligation¹⁶ (if we see voting as a duty) or as a power-conferring rule (if we see voting as a right)¹⁷; but the concept of “egalitarianism” allows us to perceive the rule on suffrage as a rule of distribution, so that it is possible to understand its “distributive import”¹⁸.

3.3. Since the concept of “egalitarianism” is a necessary condition for understanding both the sense of the rule of distribution and the sense of the act of distribution, it (“egalitarianism”) can be described as a meta-institutional concept of distribution. As stated by Giuseppe Lorini:

“*Meta-institutional* concepts do not have in the institutions their own conditions of possibility, on the other hand, they constitute the conditions of possibility of certain institutions”¹⁹.

Two vivid examples of meta-institutional concepts are the concepts of “victory” and the concept of “defeat”. As stated by Lorini:

“The meaning of ‘victory’ and the meaning of ‘defeat’ in the sphere of an institution seem go beyond the boundaries of the single institution. The institutions determine the conditions of victory and defeat, and then the extension of the words ‘victory’ and ‘defeat’ in the sphere of an institution like chess or soccer. But the intension of the two words is not determined by the institutions that determine the conditions of victory and defeat. Victory and defeat seem not to be institutional concepts, but rather meta-institutional concepts [...] they do not have in the institutions their own conditions of possibility, but on the contrary, they constitute the conditions of possibility of certain institutions like competitive games”²⁰.

The same conclusions can be reached by analysing the meta-institutional concept of “game”, according to Lorini:

“The concept of game is a (necessary) condition of possibility of both the activity of playing chess (an institutional fact) and the game of chess (an institution)”²¹.

¹⁶ See Carcaterra (2011, 90).

¹⁷ Oddly, the art. 62. 3 of the Belgian constitution [*La Constitution Belge*] can be found under Title III. On powers [*Titre III. Des Pouvoirs*]. Despite this fact, it legislates: “Voting is obligatory” [*“Le vote est obligatoire”*].

¹⁸ Conte (2007, 30) considers the “act (the “deontic statement” [*“enunciazione deontica”*]) one of the five possible referents of the term ‘norm’.

¹⁹ (Lorini 2012, 143)

²⁰ (Lorini 2012, 143).

²¹ (Lorini 2013, in press).

I would add that without the meta-institutional concept of “game” not only a move in chess would not be conceived as the move of a game, but also *the rules of chess* would not be conceived as the rules of a game.

Similarly, “egalitarianism” is a kind of meta-institutional concept because both rule of distribution and act of distribution cannot be understood in abstraction from the concept of “egalitarianism”.

4. **Distribution as an Ethical Behaviour. A Limit of Oppenheim’s Analysis?**

4.0. In the previous paragraphs I showed that both rules of distribution and the concept of “egalitarianism” are necessary conditions for understanding and for performing the act of distribution.

4.1. Oppenheim affirms (correctly, I should say) that we can decide if a distributive rule is more or less egalitarian than another only on the basis of formal descriptive criteria. Despite this fact, we cannot prefer a rule of distribution to another on the basis of formal descriptive criteria (the *ratio* of the selected to the reference group).

In fact, in order to choose consciously between two or more rules of distribution we need to adopt a value judgement on the content of that rule. This value’s judgement is in any case not reducible to a ratio, because it concerns the ethical content of the norm and is the necessary basis for that relation that Oppenheim calls “egalitarianism”²².

In order to formulate a rule of distribution it is necessary to adopt some ethical judgements. More precisely, in order to formulate a rule of distribution it is necessary to adopt value judgements concerning three elements that (according to Oppenheim (see § 1.2.)) “always are specified either explicitly or implicitly) by the rules of distribution” i.e. (i) a *benefit* or a *burden* to be allotted; (ii) a *reference group* and (iii) a *selected group*.

Ethical judgements allow us to choose which the relevant characteristics for defining reference group and selected group are. In fact, every rule of distribution hides a value judgement, because every rule implicitly qualifies the “distributive unit” (what is to be distributed) as a benefit or as a burden. Moreover, ethical judgements allow us to define the “distributive unit” (that which is to be distributed) and (more precisely) to define “distributive units” as a benefit or as a burden, since “distributive units” are never value-free.

Every rule of distribution presupposes these ethical judgements, that are necessary conditions for the formulation of the rule. Such judgements allow us to perceive a distribution as a burden’s distribution or as a benefit’s distribution, but also as a just or an unjust distribution.

22 Cf. (Scheler 1916, 249 (Eng. tr. 242)).

4.2. Rules of distribution can be formulated for the fulfilment of different values (not necessarily the value of “equality”), despite this fact, the same rule analysed from different value’s perspective can appear radically different. For example, curiously, rule on suffrage can be perceived as a rule of distribution of powers or as a rule of distribution of burden. In this sense, values can represent also a peculiar point of view that allows us to perceive on one hand selected aspects of rules and the peculiar ethical meaning of “rule-governed practices of distribution” on the other. Thus, values can represent a peculiar point of view that allows us to perceive on one hand selected aspects of rules of distribution and, on the other hand, the peculiar ethical meaning of the (rule-governed) practice of distribution.

REFERENCES

- Carcattera, G. (2011), *Presupposti e strumenti della scienza giuridica*, Giappichelli, Torino;
- Carcattera, G. (2012), *Norme costitutive*, in Lorenzo Passerini Glazel and Giuseppe Lorini (eds.), *Filosofie della norma*, Giappichelli, Torino, pp. 99-105;
- Conte, A. G. (2012), *Norma: cinque referenti*, in: Lorenzo Passerini Glazel and Giuseppe Lorini (eds.), *Filosofie della norma*, Giappichelli, Torino, pp. 57-65;
- Ferrajoli, L. (2007), *Principia iuris. Teoria del diritto e della democrazia 1. Teoria del diritto*, Laterza, Roma;
- Kelsen, H. (1934), *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Wien. English translation by Max Knight, *Pure Theory of Law*, University of California Press, Berkeley - Los Angeles - London, 1967;
- Lorini, G. (2000), *Dimensioni giuridiche dell'istituzionale*, CEDAM, Padova;
- Lorini, G. (2012), "Can Constitutive Rules Create a Practice?" *Praxis Filosófica*. Vol. 34, pp. 139-148;
- Lorini, G. (in press), "Meta-institutional Concepts. A New Category for Social Ontology", *Rivista di Estetica*;
- Oppenheim, F. E. (1970), "Egalitarianism as a Descriptive Concept", *American Philosophical Quarterly*. Vol. 7, pp. 143-152;
- Oppenheim, F. E. (1973), "Facts" and "Values" in Politics: Are They Separable?", *Political Theory*. Vol. 1, pp. 54-68;
- Oppenheim, F. E. (1980), "Rules of distribution", *Ethics*, Vol. 40, pp. 164-179;
- Oppenheim, F. E. (1981), *Political Concepts. A reconstruction*, Blackwell, Oxford;
- Reinach, A. (1913), "Die apriorischen Grundlagen des bürgerlichen Rechtes", *Jahrbuch für Philosophie und phänomenologische Forschung*. Vol. 1, pp. 685-847. English translation by John F. Crosby, "The Apriori Foundations of the Civil Law", *Aletheia. An International Journal of Philosophy*, Vol. 3 (1983), pp. 1-142;
- Scheler, M. (1916), *Der Formalismus in der Ethik und die materiale Wertethik*, Halle, Max Niemeyer, 5th edition Manfred S. Frings (ed.), Bern, Francke AG Verlag, 1966. English translation by Manfred S. Frings and Roger L. Funk, *The Formalism in Ethics and Non-Formal Ethics of Values*, Northwestern University Press, Evanston, 1985;
- Żelaniec, W. (2012), "On the Constitutive Force of Regulative Rules", *Phenomenology and Mind*. Vol. 3, pp. 93-102;
- Żelaniec, W. (2013), *Create to Rule. Studies on Constitutive Rules*, Milano, LED.