

Central European University

# The Autonomy of the Person in Rawls's Theory of Justice

BY

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A thesis submitted to  
the Central European University department of political science  
in partial fulfillment of the requirements for the degree of philosophy  
in political science

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Budapest, October 2002

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## PREFACE

This dissertation takes its origin in the summer of 1997 when I completed my MA studies at the Central European University in Budapest and started thinking about what I should do for my PhD. When the University offered me the possibility to begin PhD studies I was still very much into the history of political ideas and wanted to write a comprehensive study in the theory of sovereignty, parts of which were already worked out in the form of my BA and MA theses. However, during the 2<sup>nd</sup> semester of my MA studies I took a course in contemporary political philosophy with my future mentor János Kis. This course's content significantly modified my theoretical interests. Before I came to CEU I had already read the most important parts from *A Theory of Justice* but had hardly heard of other names that are critical for understanding contemporary debates on justice. As I became more familiar with the subject I got attracted to the themes in contemporary political philosophy as well as to the structure of the argument. Besides, there was something appealing in the way Kis rendered Rawls's and other philosophers's ideas. All this, I believe, made me set aside the history of ideas and go into the contemporary debates on justice.

It goes without saying that the concepts that stirred most of my theoretical passion were Rawls's veil of ignorance and the original position. I was born and grew up in a country in which a minority so easily took the right to arrange social, political and economic relationships on the grounds of being better militarily organized when World War 2 was over. Something similar recurred in 1989, which was around the time when I became politically conscious, when a majority started to dictate the political and economic course of the country only on the grounds of being a majority. I have always felt that there was

something wrong with both things but, lacking an appropriate theoretical apparatus, I could not precisely say what. From this short historical distance, it seems clear that the veil of ignorance and the original position attracted me because they gave my sense of justice a verbal expression.

On the other hand, Rawls's liberalism elaborates another, more basic idea—namely, that people are in some fundamental sense equal. This attracted me as much as it could, as I spent the first years of my post-teenage period in a country surrounded by wars. It is unnecessary to mention what I think about the responsibility of the Milosevic government for the atrocities committed in them. But I want to stress that the more I was thinking about the atrocities, the more I was shocked by the fact of how cheap human life was in the 90s in the Balkans. Long before the conflict started, it was fairly clear that all sorts of nationalisms that started circulating around the Balkans like a specter by the end of the 80s were united in one thing: all of them were prepared to underwrite various forms of discrimination against humans who belonged to different ethnic groups. Some of the Balkan nationalisms did not hide what they were up to, some did; but more or less the idea that unites them all is that people are in some fundamental sense different, and consequently should be assigned unequal moral worth.

Sometimes it is said that there are two kinds of nationalism: ethnic and civil. I want to avoid the discussion of whether this is really so, but I do want to go on record as saying that, no matter what kind of nationalism we are dealing with, nationalism cannot be equated with liberalism since the very idea of any form of theory based on national, ethnic or cultural identity is that people are in their essence different. The terms “liberal nationalism” or “national liberalism” I take to be oxymorones. That people differ is the idea that appears in

the communitarian and multicultural literature that I had to read in order to become familiar with the criticism of Rawls's theory. The identical theoretical premises of multicultural literature with Balkan nationalisms is what made me devote two last chapters to discussing Rawls's liberalism and its communitarian and multicultural critiques. Although Rawls himself eventually departed from this view, I hold that the liberalism of the Rawlsian type is morally superior to any variant of communitarian and multicultural theory precisely on the grounds that it sees all people as equal, which was the premise so conspicuously absent from Balkan politics in the 90s.

Having in mind my personal experience, it is easy to guess what I think about whether Rawlsian liberalism has any relevance for today's political thought and politics in the Balkans and Europe. There is a widely spread belief that the justificatory force of liberalism is no good for practical purposes. Many of those who theoretically buy into the principles of equal human rights, the neutrality of the state, equal opportunities, etc. are prepared to say that liberal principles are nice things to have but that a state erected on such principles will never exist. The strength of this argument derives from the uncontested fact that such a state does not exist today. But it is also an uncontested fact that most of the EU national governments at the turn of the millennium were social-democratic and advocated welfare state and equal human rights, which roughly overlaps with the principles Rawls and other egalitarian liberals defend. More importantly, the principles of egalitarian liberalism are enshrined in the whole array of international conventions beginning with the 1948 UN Declaration of Human Rights that commits the undersigned governments to respecting so-called social rights, stating that these rights are "indispensable for [human] dignity and the free development of his personality" (Art. 22), and closing (for the time being) with the 1996 revised European Social Charter in which almost every article seems derived from the

principles of egalitarian liberalism. These conventions present today the legal instruments of Council of Europe and the European Union, which is to say that each country that wants to apply for EU membership must bring its legislation into line with them. So I do not see any reason for us to stop arguing for such a state. More importantly, I strongly believe that the EU will never be able to turn into a more stable and firmer political community if it fails to justify the arguments for its existence by referring to the principles of contemporary liberalism. Tendencies in this direction can already be discerned in the concept of *Verfassungspatriotismus* advanced by Jürgen Habermas. The same goes for the Balkan and most of Central and East European countries: despite the popular view that these countries will stabilize on a fair basis only if they accept multicultural principles of justice, I claim just the opposite: they will be just only if they accept liberal principles of justice. This dissertation is a contribution to the support of this argument.

## ACKNOWLEDGMENTS

Naturally enough, this dissertation would not look as it does without the necessary interventions on the part of my supervisor Janos Kis. His thoroughness and patience in listening to me and reading a lot of the rubbish I produced within the five years of writing this dissertation is praiseworthy. I should also like to commend his preparedness to explain points I could not understand as well as the points where I was wrong by not using words and phrases he sometimes, I think, should have used. Although I still disagree with Janos on the major point that a theory of justice can be impartially justified by referring to the ideal the autonomy of the person, I would finally wish to thank him for distracting me from pursuing this goal in this dissertation.

When I began writing this thesis I paid no attention to how original it should be. Will Kymlicka, with whom I discussed some matters from this dissertation on two occasions, was the first to make me aware of the fact that at least one piece of the thesis (if not the whole) should be publishable. I should thank him for having made me aware of it early enough, so I hope I will be able to publish at least some parts of the thesis, if not the whole in the form of a book one day. To refer once again to my personal experience, I come from an academic environment where the originality in moral and political philosophy still consists in showing off with an encyclopedic knowledge that abounds in quotations of Plato or Hegel rather than in producing new arguments for theoretical debate. What I want to say here is that I learnt that contemporary moral and political philosophy is about making arguments not about their reproduction. This is the greatest benefit I gained from studying at CEU.

I thank prof. Laszlo Kontler from the CEU History department for bothering to read the first draft of chapter 1. He gave me some useful general comments on how modern liberalism should be understood. Pavel Barsa from the CEU Philosophy department commented on chapters 5 and 6, and tried to convince me to rethink some of the ideas that relate to Kymlicka and Walzer, as well as my overall approach to multiculturalism. Fortunately or unfortunately, I turned out to be much more pig-headed than he had probably expected.

Some acknowledgments go to my Belgrade professors and colleagues. Prof. Miroslav Prokopijevic read the early versions of chapters 2 and 3 and, as a hard-core libertarian, who is at most prepared to say that helping a beggar on the street may be justified only if the unpleasant scene disturbs someone's sight, tacitly, if grudgingly, agreed that Nozick has no case against Rawls provided Rawls's theory is made compatible with weak entitlements. Something similar was said by my former professor Ilija Vujacic, also a libertarian, who, after reading chapters 1-3, also admitted that Nozick simply cannot be defended. I only hope that this thesis will help them extend this conclusion to libertarianism as a whole. I am most thankful to my colleague Djordje Pavicevic who read the whole thesis in its later phase and gave a handful of valuable comments and observations.

# **PART I**

## **AUTONOMY AND ENTITLEMENTS**

## CHAPTER 1

### **Introduction**

#### *1. Two Types of the Autonomy of the Person*

The central concept to understanding Rawlsian liberalism is the ideal of the autonomy of the person. The ideal of autonomy is treated in every chapter of this dissertation to the extent to which it is critical for Rawls's theory of justice and its critiques. Thus, it is necessary, at the outset, by way of distinguishing between the two possible types of autonomy, to establish the way Rawls employs this concept and say something on how it should be read in his works.

There are two tendencies in the approach to autonomy. Both pull in opposite directions. The first is that autonomy must be conceptually linked to a substantive conception of the good. According to this view, it is not enough that individuals be autonomous in choosing how they should live but that the government should be actively engaged in promoting conceptions of the good that are autonomy-friendly. In modern liberalism, this concept was defended by Thomas Hill Green. He wrote that

“man seeks to satisfy himself, not as one who feels this or that desire, but as one who conceives, whose nature demands, a permanent good. So far as it is thus in respect of his rational desire that he makes himself an object of himself, his will is

autonomous. [...] So far the modern state [...] does contribute to the realization of freedom, if by freedom we understand the autonomy of the will or its determination by rational objects, which help to satisfy the demand of reason, the effort after self-perfection. [...] It means a particular kind of self-determination; the state of the man who lives indeed for himself, but for the fulfillment of himself as a 'giver of law universal'; who lives for himself, but only to the true idea of himself, according to the law of his being, according to the nature" (Green 1941: 7-9).

The idea Green expresses is that freedom cannot imply leaving people to their own devices in living their life. This was the old meaning of freedom, which Green rejects. According to this old view,

"man should have power to do what he wills or prefers. No reference is made to the nature of the nature of the will or preference, of the object willed or preferred; whereas according to the usage of 'freedom' in the doctrines we have just been considering, it is not constituted by the mere fact of acting upon preference, but depend wholly on the nature of the preference, upon the kind of the object willed of preferred" (ibid. 9).

In contemporary liberalism, this substantial conception of autonomy was championed by Joseph Raz. He defines liberal autonomy as follows: "A person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options. A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply

drifted through the life is not an autonomous person” (Raz 1986: 204). Raz’s definition of autonomy in substantial terms, implies not only the possibility of autonomously choosing one’s own way of life, but the demand to do so.

The most significant political implication of the ideal of autonomy, taken in substantive terms, is that government must be committed to promoting all conceptions of the good that can be squared with autonomy, and to discouraging, or even punishing all those which cannot. This kind of liberalism is called perfectionist or comprehensive liberalism (Heampton 1998: 177), it follows the Platonian line that living in the state is about achieving the good. Consequently, a perfectionist liberal asks: “Why would the state abstain from enforcing on people the predefined conception of autonomy?” Although Raz thinks that the government must promote value pluralism so that citizens are faced with the diversity of options from which to choose their way of life (Raz 1986: 132-3), he is still prepared to endorse only those options which he thinks not ignoble or immoral—namely, which are derived from the autonomous nature of all humans. The government therefore has to be based on a principle that is “derivable from morality which regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy, which imposes duties on people to secure all the conditions of autonomy, as one of the most important moral principles” (ibid. 415).

One should stress that the ideal of autonomy is not the conception of the good itself. It is rather a second-order conception of the good. As opposed to Plato, who was concerned with a particular type of the highest Good, which he equated with the Beauty and the One (Koplston 1991: 212-3), a perfectionist liberal is concerned with all goods that, as it were, have the right pedigree, i.e. that were arrived at in an autonomous way. Be that as it may,

from the perfectionist view of autonomy it follows very clearly that the government is obliged to create a social environment in which the conceptions of the good which are autonomously arrived at and pursued will be able to thrive. All this is a consequence of the view that people should autonomously decide on how to live. Public policy based on such type of autonomy will most certainly lead to the slow assimilation and dying out of many other conceptions of the good that do not have autonomous action at their basis. Such are the implications of the perfectionist autonomy.

Another way to approach autonomy in contemporary political philosophy harks back to John Stuart Mill. I am aware that Mill was partly perfectionist too. In arguing with Bentham, who claimed that poetry is as good as pushpin, Mill says that only “few human creatures would consent to be changed into any of the lower animals, for a promise of the fullest allowance of a beast’s pleasure” (Mill 1973: 409) Pleasure indeed did not matter for Mill since he also says that everyone must be free to act “according to his own inclination and judgment in things which concern himself [and that he] should be allowed, without molestation, to carry his opinions into practice at his own cost” (Mill 1948: 49). But there is a special way people should go about enjoying and exercising their freedom. Mill states that “it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way.” To make free choice implies no higher authority of any kind, and “he who does anything because it is the custom makes no choice” (ibid. 51). Mill’s autonomy, hence, does not only contain the idea of having freedom to choose, but also the idea of using some individual capabilities to arrive at the right decision and apprehend the truth. When Mill says that “the mental and moral, like the muscular, powers are improved only by being used” (ibid. 51-2), one immediately recalls Rawls’s idea of the two mental powers every person must use in order to be free and equal

with others (Rawls 1993: 19). Mill believed that our experiences differ not only in quantity but also in quality and that “some kinds of pleasure are more desirable than others. It would be absurd that while, in estimating other things, quality is considered as well as quantity, the estimation of pleasures should be thought to depend on quality alone” (Mill 1973: 408).

It is not my present purpose to classify political philosophers of the modern age. What I rather want to do is to mark off two approaches to the ideal of autonomy by referring to some ideas in great political thinkers. What I want to show is that Mill’s thought can be taken to be the predecessor of so-called deontological liberalism that is based on, as it were, the weaker or less demanding understanding of autonomy that inspires Rawls political philosophy, especially in its later phase. Mill contended that his theory “asserts one very simple principle” whose intention is to preclude the usage of physical force, compulsion and control to impose the public opinion of majority (Mill 1948: 68). The element that is critical for understanding his conception of autonomy is not the fear of the state coercion, but of oppressive society. Mill was concerned with the protection of diversified minorities from oppressive majorities, especially if majority is intolerant, “looks at suspicions on minorities and is ready to use the weight of numbers to repress them” (Sabine 1973: 642). He was saying that

“society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression [...] There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain against

encroachment, is as indispensable to a good condition of human affairs as protection of human affairs” (Mill 1974: 63).

One of Rawls’s concerns in his theory of justice, meant to be settled by the veil of ignorance, was the idea that even those who do not belong to majority race or majority class (“the worst-off” in Rawls’s vocabulary) should be provided means for pursuing their way of life without being influenced by the majority. Rawls wanted to find principles of justice that will be accepted by everyone, not because they reflect the opinion of the majority but because they protect the autonomy of the worst-off.

It is of paramount importance here to stress that, although Mill was clear in stating that individual autonomy is a value above all others, he was even clearer in postulating that personal autonomy cannot override other conceptions of the good that cannot be squared with or derived from autonomy. Mill wanted to protect individuals from oppressive majorities in society in cases where the individual was right and society wrong. But should the opposite be the case—that the society is right and the individual is wrong—then the society may offer or even obtrude on the individual “considerations to aid his judgment, exhortations to strengthen his will, [...] but he himself is the final judge. All errors which he is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem is good” (Mill 1948: 68). There is only one possibility where Mill allowed the society’s interference with the individual’s affairs: when the individual’s behavior endangers social order and when “the mischief which a person does to himself seriously affect[s] those nearly connected with him, to a minor degree, and society at large.” The state may interfere, but it is critical to notice that this had nothing to

do with other's dislike for his behavior. If society has to penalize anyone it is always "for the breach of duty to his family or creditor, not for extravagance" (ibid. 72).

Doubtlessly, many liberals prefer to live in a society in which members constantly ask about how justified their beliefs and institutions are. This, however, need not be equated with what government should do regarding the inculcation of the Socratic disposition to scrutinize one's own way of life, which will then directly bring about the ideal of autonomy. Mill is here again a case in point. Where he clearly parts company with the perfectionist view is his statement that the government should stay away from the process of education almost entirely. Although saying that parents stand under an obligation to provide their children with an elementary education, Mill was prepared to defend the view that education must be diverse: "All that has been said of the importance of the individuality of the character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education" (Mill 1948: 95). He was against a state-controlled education because such kind of education "is a mere contrivance for molding people to be exactly like one another" (ibid.). So, the farthest the state can go in public education comes down to public examination, "extending to all children, and beginning at an early age." But to let the state go beyond this point is impermissible, as it would inevitably involve "an improper influence over opinion." This is why Mill thinks that

"the knowledge required for passing an examination (beyond the merely instrumental parts of knowledge, such as languages and their uses) should, even in the higher classes of examinations, be confined to the facts and positive science exclusively. The examinations on religion, politics, or other disputed topics, should not turn on the truth or falsehood of opinions, but on the matter of fact that

such and such opinion is held, on such grounds, by such authors, or schools, or churches.”

In general, whatever the state does in education, this ought not to “hinder [children] from being taught religion, if their parents choose, at the same schools where they were taught other things” (ibid. 96-7). Since Mill believed that “all attempts by the state to bias the conclusions of its citizens on disputed subjects are evil,” it is not difficult to see that Mill would have to endorse the view that any attempt by the state to inculcate the ideal of autonomy in its young citizens would be equally evil.

Another philosopher who also in a most direct way contributed to forging the concept of autonomy was Immanuel Kant. There is one basic Kantian idea that is relevant for this discussion of the concept of the autonomy, especially as it appears in chapters 2 and 3. It is expressed in the form of the categorical imperative that read as follows: “Der kategorische Imperativ ist also nur einziger, und zwar dieser: handle nur nach derjenigen Maxime, durch die du zugleich wollen kanst, daß sie ein allgemeines Gesetz werde” (Kant 1993a: 51).

What sort of actions towards others must be involved in order to make this possible? One of the important parts of Kant’s autonomy is that people should not be making any choices if affected by temporary or immediate inclinations (Kant 1993a: 74ff.) “If the pursuit of happiness is made the maxim of our actions, the will is not autonomous. It does not then live under self-imposed laws, but follows heteronomous principles on which, in Kant’s view, a sound moral theory cannot be founded” (Reiss 1989: 19). The first aspect of Kant’s autonomy is to abstain from desires as such. To what extent Rawls managed to follow this requirement will be discussed in section 9. The second aspect of Kantian autonomy is the

possibility of free choice not influenced by others. I am autonomous only if I choose for myself. No one should put me in circumstances where someone decides for me and makes me decide unfreely (Kant 1993a: 63).

The crux of Kant's autonomy is expressed in his phrase "Treat others as ends in themselves, never as a means". People should never be taken as resources for other people's desires, even willingly. Throughout chapter 2, the implications of this understanding of autonomy will be made clear. Here it suffices to say that the defenders of this view think it enough that people are left to live their lives the way they want. Whether they really do so is up to them.

These were Kant's general statements on human autonomy. There are at least three relevant implications of Kant's political philosophy for a deontological approach to autonomy. The first is that Kant's categorical imperative, with which he supports his concept of autonomy of the person, expresses "equal respect for individual people, which is based on a recognition that people are (equally) creatures with a will" (Lindley 1986: 27). The care about others—which is the implication of the formula "treat others always as an end, never as a means"—even when they may appear not to be worthy of it, is to say that people are equal in a fundamental sense. We must respect others although they live a life which we find wrong, bad, depraved, or undeveloped (Kant 1993b: 600, §38; 601, §39).

The second implication is Kant's understanding of autonomy as a free choice. Autonomy can have many conceptions, but the major concept, which underlies all conceptions, is that "[a]ny conceptions of autonomy which entailed that people are autonomous if and only if they are never able to make any decisions about how to live their lives, would clearly be inadequate to the concept" (Lindley 1986: 3). This is illustrated in §46 of *Die Metaphysik*

*der Sitten* where Kant writes about three principles every government should abide by. The third principle is called *der burgerlichen Selbständigkeit*, for it allows everybody to owe their existence and sustenance not to the arbitrary will of anyone else but purely to his own rights and powers as a member of the commonwealth. Although Kant also insisted on the active participation of every citizen in political life as a condition for an independent life, the idea is that an unautonomous life breaches the fundamental assumption that all people are born equal. Equality in choosing freely is what Kant essentially defended in his political thought, despite the fact that he saw some classes of people as not qualified to act and live autonomously (Kant 1993c: 433, §46).

Finally, the third implication is the idea that whatever we put forward as a political principle must be expressed in a universal form, that is, by not favoring anybody's conception of the good. Universal agreement is possible only if we are able to formulate principles that do not put at a disadvantage anybody's conception of the good from the very beginning. Such principles, however, cannot be formulated if motivated by self-interest, but rather by moral considerations. Kant held that what we often take for reason usually "fools or betrays us, [whereas] the iterated use of the most daily ways of supposed reasoning—for example, causal reasoning—leads us to the cognitive shipwreck of the antinomies" (O'Neill 2000: 76). What we have to do is not to discover principles, but rather to construct them. But in this construction, we must respect one critical constraint—namely, we must construct principles which give reasons to others to adopt them.

To understand this more fully, it is critical to distinguish between "universalizable" and "reasonable". If a principle is universalizable, it only means it applies to everyone. But the principle "All who don't have blue eyes must go to prison" is universalizable because it

applies to everyone who has not blue eyes without exception. To say that a principle is reasonable is to say that all have reasons to accept it or at least not to reject it. “To see whether principles is followable by all, is not enough to formulate it as a formally universal principle, even as a formally universal principle with wide scope, but rather to see whether it is a principle by which all those within some domain could live” (ibid.). Kant argued that if principles are to be universalizable, then a range of actions must be excluded. Thus, “we cannot offer reasons to all for adopting principles of deceit, of injury or of coercion” (O’Neill 2000: 78). It is easy to see that the veil of ignorance—which precludes us from putting forward arguments that are based on their place in society, fortune in the distribution of natural assets and abilities, conceptions of good and plans of life, particular circumstances of their own society and so on—is an alternative way to attain the universalizability Kant talked about.

Let me wrap up this section by adding a final remark on deontological autonomy. Its primary feature is that there is no necessary connection between the ideal of autonomy and public policy. In deontological liberalism, autonomy is taken to insure the equality of the parties when they come together to negotiate the principles of justice. Rawls’s major idea is that the social contract is an outcome of fair procedures that no party has anything to object to. Now, it may be true to say that liberalism and autonomy are a happily married couple, but this is still a far cry from saying that anything follows from this about what the government should do concerning the conceptions of the good held by its citizens. Millian liberalism postulates that it is none of government’s business to promote autonomy. This clearly suggests that Mill did not understand individual autonomy as related to a substantive conception of the good, the application of which may put at a relative disadvantage all other conceptions that are not autonomy-friendly, but as a more general principle that provides

equal treatment to all conceptions of the good. This type of liberalism wants to win allegiance of those who initially do not endorse liberal values, yet it falls short of convincing them that they personally should believe liberalism true or live according to liberal principles.

Liberals cannot have it both ways: either the government favors autonomy or it does not. Some liberals such as Green or Raz, understood this difficulty and straightforwardly said that liberalism must be derived from the ideal of autonomy taken in its most substantive sense. Other liberals tried to compile both approaches, claiming that liberalism can start from autonomy and finish up with neutrality. Rawls is such an example. This brings us to the key issue in contemporary political philosophy—namely, is it at all possible to have a liberal government and state that will be neutral towards different and conflicting conceptions of the good? The suspicion is that if you begin from the idea of autonomy, no matter how general, you will end up having a liberal government that will put at a disadvantage all conceptions that cannot be squared with autonomy. Autonomy therefore cannot be taken to be an impartial basis from which we may proceed to construct legitimate and just principles. I disagree with this objection, but, since defending the contrary claim would take another PhD, in this dissertation I defend it only to the degree Rawls gave me room to do so.

## *2. Overview of The Dissertation*

One might rightly wonder is it not a bit late in the day—more than 30 years after *A Theory of Justice* has been published and so much literature has been produced to discuss, defend,

criticize, or trash Rawls's theory—to write a PhD thesis on Rawls's theory of justice. I believe it is not, and this thesis is an obvious example that there are still people who fall prey to defending “Rawls's earlier self against his later self” (Barry 1995c: 876).

As usual, the reasons to write a PhD are partly personal, partly academic. The personal reasons were mentioned in Preface. The academic reasons are primarily linked to the fact that Rawls never set out to defend some of his ideas but rather engaged in abandoning and changing them. Thomas Pogge wrote in his first book on Rawls that Rawls

“shied away from saying (and showing) clearly and straightforwardly that a particular reading of [his theory] is just wrong. Instead, aiming for an overlapping consensus among political philosophers as well, he has made every conceivable effort to accommodate the moral positions of others, even where such accommodations has diluted the central moral statement of his own conception of justice” (Pogge 1989: 4).

Rawls, for example, discards libertarianism by saying that it has nothing to say about basic structure of society. Since libertarianism sees the state as a set of mutually binding agreements, which makes it similar to any other private association, libertarianism remains silent on what happens if fair starting positions, in time, bring about unjust end-states. Rawls definitely scores here by noting that “unless [basic] structure is appropriately regulated and adjusted, an initially just social process will eventually cease to be just, however free and fair particular transaction may look when viewed by themselves” (Rawls 1993: 266). Since basic structure affects people's life chances, periodical adjustments in the basic structure are necessary. Yet, a more complete defense of the principles that aim to

have a bearing on the basic structure of society would require us to ask why we need to rectify the injustices that occur over time. This line of defense would have to take the tack I take in chapter 2—namely, that the fairness of basic structure matters because the autonomy of the person does. The whole point of chapter 2 is to show that Rawls's theory more coherently develops this idea, whereas Nozick's theory is, eventually, against it.

Nozick wants his theory to derive from autonomy. But, as I will show in chapter 2, his understanding of it sees the concept of autonomy as being reserved exclusively for the well-off people. The liberal requirement is that autonomy must be granted to all. This calls for reopening a debate on the concept of entitlements. I take for granted that the general idea of entitlements is fundamental to any version of liberalism. Consequently, my task here will be to argue that certain kinds of entitlements are compatible with the difference principle, and that people in the original position would select both. What concerned me most was that Rawls is somewhat ambiguous on whether, according to Nozick, legitimate objects of entitlements (such as inherited personal properties of the individual) may be regarded as belonging to common assets. There are at least two understandings of what a common asset could mean in Rawls's theory. On the first, all entitlements are to be taken as common assets of society and distributed anew according to some end-state principles. On another, such a distribution is not called for. What is rather required is that we fix on some bundle of resources that is, under the strict criteria, free for distribution and some that is not. I will try to show in chapter 3 that only the latter is an accurate interpretation of the idea of a common assets since I assume that there are no two opposite aspects of what common asset is but rather two steps towards a unified concept of it. Rawls is clear that no one deserves anything and that those who are better endowed, or more fortunate in their social positions, cannot be said to deserve their entitlements and have to accept the conception of justice that nullifies

the accidents of natural endowments (Rawls 1971: 15, 103). This, however, is only a broad statement that may drive in various directions. In elaborating on how precisely natural and social entitlements may be legitimately nullified, Rawls specifies that to understand “the distribution of natural abilities in some respects as a collective asset [means] that the more fortunate are to benefit only in ways that help those who have lost out” (ibid. 179). Chapter 3 renders this two-step argument for distributive justice clearer. Although Nozick thinks that redistribution is excluded by the fact of entitlements, I am showing that entitlements do not conflict with redistribution. This is because there exist only what I call weak entitlements, thus showing that there are variants of distributive justice that cannot be said to negate entitlements.

Chapters 2 and 3 are an attempt to defend Rawls’s version of liberalism, by way of defending its understanding of the autonomy of the person, against libertarianism and its conceptualization of autonomy. However, after reading these two chapters it will be quite clear that egalitarian liberals, libertarians, and perfectionist liberals will be quite happy if, after all, some version of autonomy of the person is kept at the foundations of their theories. This is not the case with communitarians and multiculturalists who reject Rawlsian liberalism precisely because it incorporates any sort of autonomy and finishes up with a structure of the government that protects autonomous conceptions of the good at the expense of other conceptions of the good that cannot be squared with autonomy. In their attempt to do so, the early communitarians did not fully miss the target. The first two sections of chapter 4 describes that communitarian critique deserves credit in some aspect, and shows how Rawls attempted to overcome this problem. At the same time, it could be said that, in answering communitarian charges, Rawls produced a pretty disappointing answer. In *Political Liberalism* he simply avoided a serious face-off with the

communitarians by limiting the range of the application of his theory to only these societies that already accept liberal values. There are, according to Rawls, three major differences between *A Theory* and *Political Liberalism*, but the second and the third one—which say that political liberalism is not a doctrine of the good but is compatible only with reasonable doctrines and is formulated exclusively by relying on ideas that are implicit in the public culture of democratic society (Rawls 1987)—clearly suggest that the major result of *Liberalism* turned out to be a defense of a trivial argument that the people who are most likely to accept liberal principles are liberals themselves. This has proven to be quite the opposite from the aim of the early Rawls who implicitly claimed that there exist reasons for accepting basic liberal principles even if one denigrates them. Chapter 4, which discusses this Rawlsian shift, shows that the concession was by no means necessary, and that the liberal position can still claim moral superiority in the same way it can in the case of libertarianism and utilitarianism.

Rawls's wish from *Political Liberalism* was to offer a conception that would not be comprehensive but rather serve as a basis for adjudicating conflicts among various reasonable doctrines of the good. This appears to be plausible, but if liberalism is good only for those who buy into it and has nothing to offer to those who denigrate liberal principles, one has to wonder what the purpose of political philosophy is at all. Political philosophy is about constructing universal arguments so that even those who do not endorse them have good reasons to accept them. Rawls, unfortunately, slips into moral relativism and scepticism about the moral strength of liberalism, which will be discussed in section 26. At this point it seem appropriate to announce that the solution offered by Rawls cannot be satisfactory. Rawls says that in order to make political liberalism appealing, it is not enough for it to be a product of a mere *modus vivendi*. What has to be achieved is an overlapping

consensus. The structure of the overlapping consensus suggests that such a consensus is appealing because people over time come to understand what liberal justice achieves (Rawls 1993: 15). But, as I show in section 17, there is nothing in the recast version of the original position that depends on time. The autonomy of person is present from the very start, and whoever contends (as Rawls does) that the things the parties to the original position care about most are their two higher moral powers (an equivalent for the ideal of autonomy) will have no problem in concluding that the parties cannot possibly settle for anything less than the principles Rawls thinks they would.

If *Political Liberalism* was a concession done to appease communitarians, Rawls's last book *The Law of Peoples*, discussed in chapter 5, is a total surrender to the politics of multiculturalism. *The Law* expounds and defends a truly multicultural theory of international justice in which Rawls states not only that liberal societies uphold liberal principles, whereas non-liberal societies uphold non-liberal principles, but that this is how it ought to be. The ultimate implication of this view is that the debate as to whether it is possible to argue for a morally superior principle makes no sense anymore. Of course, Rawls has an immediate way out of this trouble if he simply says that the principle of equal human rights falls outside the scope of international justice. Thus, he writes in *The Law* that the aim of his inquiry is to find different principles of international justice given that there exist liberal and hierarchical societies side by side (Rawls 1999: 3-5). This is indeed an easy way out, but in no way can be squared with one of Rawls's earliest methodological instructions concerning the scope of the applicability of the principles. In "Justice As Fairness", where he, for the first time, outlined the structure of his theory of justice, Rawls defines the term "person" by saying that in some cases it can mean human individuals, but in others "it may refer to nations, provinces, business firms, churches, teams and so on"

(Rawls 1958: 166). The key point comes immediately in the next sentence where he states that “the principles of justice apply in all these instances” (ibid.). Thus, the principles, whatever they are, go all the way down and apply to all individuals and every society, resisting any previously established restriction of scope.

Be that as it may, the end of Rawls’s career and his latest works show that there was no person who did more in order to theoretically promote liberal ideas, but there was no person who did more in making them senseless. For all this, I believe that this dissertation shows that some of Rawls’s key ideas should not be given up, and that they still merit a theoretical defense.

## CHAPTER 2

### **Rawls, Nozick, and the Autonomy of the Person**

#### *3. Premises and Conclusions*

Since 1971, when *A Theory of Justice* was published, Rawls's liberalism has been the target of many critiques. This and the next chapter take up the libertarian critique that was forcefully formulated by Robert Nozick. In his *Anarchy, State and Utopia* Nozick rejects Rawls's theory as a whole, disputing its premises as well as its conclusions. What has specific relevance for this thesis is that Nozick also denied the liberal character of Rawls's theory. Rawls at no point in *A Theory* called his theory liberal, yet it is fairly clear that the principles of justice (basic rights, equal opportunities, and the difference principle) he arrived at are the principles of liberal justice. The most controversial of Rawls's principle for Nozick is the difference principle that mandates the distribution of income and wealth from the well-off to the badly-off. This principle is, in its essence, an egalitarian principle, and Nozick wants to argue that this is what makes Rawls's theory anti-liberal.

I intimated in chapter 1 that this dissertation deals with the ground-floor level of Rawls's theory. I am intent to examining the premises of Rawls's theory rather than its principles and the principles's practical implications. When criticizing Rawls's theory, Nozick was more focused on principles, but less on premises. Nozick's discussion implies that Rawls had introduced his theory not at the fundamental, but at the outcome level of the discussion.

According to Nozick, Rawls's theory comes out of nowhere and destroys all that had already been established at the fundamental level. This goes especially for the difference principle that supports a patterned distribution of goods and wealth, thus negating people's entitlements and their rights as side constraints (Nozick 1974: 199, 203-4, 207, 215; 28-34). This move is impermissible, thinks Nozick, because Rawls had not showed that entitlements and rights as side constraints were wrong. I will canvass the concept of entitlements in chapter 3, but the preliminary point I want to make here is that Nozick's charge is incomplete since it is Nozick who avoided addressing the ground-floor level of Rawls's theory where Rawls introduces more general concepts from which the principles of justice stem.

In order to prove Rawls's theory liberal, it is essential to compare the premises of both Rawls's and Nozick's theory. This methodology is suitable since both Rawls and Nozick claim their theory is based on Kant's principle of autonomy. In chapter 1 I argued that the essence of both modern and contemporary liberalism is the concept of autonomy of the person. In this chapter I show that Rawls is, more than Nozick, in agreement with what autonomy entails. Where I think Rawls respects autonomy most is the equal treatment of the parties. I interpreted Kant's phrase "treat others like ends, never as a means" as saying that people should be able to make decisions without being affected by personal or social advantages or disadvantages, respectively. Nozick believed this can be attained only when all are entitled to a set of basic rights. Rawls, however, believed that the circumstances for an autonomous choice can be attained under the veil of ignorance.

Why deal with the ground-floor level at all? A quick answer would be: because it is there. But the right answer is: because of the significance it carries. Rawls's political philosophy

in one significant aspect departs from the philosophies of Oakeshott, Arendt, Popper, Strauss or Vögelin, who worked in the liberal tradition before him. The likeliness of accepting their theory turned mainly on whether you like their outcomes. Rawls shifted the focus: by introducing the concept of the original position, he gave us “a structure of the argument to get your teeth stuck into”. It is this “systematic argumentative quality” that matters in the political philosophy after 1971 (Barry 1996: 538). The major implication of it was that the political principles can be acceptable only if they went through a machinery that operates at the ground-floor level. If the “original position” stands, then the principles are justified; if it fails (say, because it is incoherent), the principles can be rejected.

Let me quickly exemplify what I have in mind. In *Realizing Rawls*, Thomas Pogge claims that Nozick’s reading of Rawls’s theory is mistaken. What, in Pogge’s reading, Rawls suggests is not the interference with the previously established rights and entitlements, but the idea that such rights and entitlements do not exist (Pogge 1991: 18). As a result of such a reading, Pogge sees Rawls’s theory as more appealing than Nozick’s, and urges that we drop the latter and embrace the former. Yet, this claim was, it seems to me, bought into too quickly. This is because Pogge does not explain what makes Rawls’s theory preferable to Nozick’s. Certainly, its appeal cannot lie solely in Nozick’s incomplete interpretation of Rawls’s theory, less even in the fact that entitlements do not exist. (In chapter 3 I will go at some length into explaining that entitlements do exist and can be made compatible with the Rawlsian original position.) The final aim of these two chapters is exactly the same as Pogge’s—in choosing between Rawls’s and Nozick’s theory, we should opt for Rawls’s. However, I shall use a different method in order to arrive at this conclusion. This chapter analyzes and compares the ground-floor levels of both Rawls’s and Nozick’s theories in

order to argue that Rawls's original position and its veil of ignorance expresses the ideal of the autonomy of the person better than Nozick's rights as side constraints.

#### *4. Nozick's Original Position*

Although Nozick claims that his theory supports Kantian autonomy, he does not demonstrate whether the ideas and concepts he advocates are really in agreement with the basic elements of any conception of autonomy. He takes for granted that it is, and constructs his justice as entitlements. Here I will show that Nozick's theory does not reflect Kant's conception of autonomy. The following passage from *Anarchy* ultimately dispels doubts as to what the alleged foundations of Nozick's theory are. Nozick's ideal is a being who possesses the "ability to regulate and guide its life in accordance with some overall conception it chooses to accept." This is "a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself and not merely plaything of immediate stimuli, a being that limits its own behavior in accordance with some principles or picture it has of what an appropriate life is for itself and others, and so on" (Nozick 1974: 49). The whole of Nozick's theory is "the unavoidable consequence of some deeper principle that we are strongly committed to" (Kymlicka 1990: 103). This "deeper" principle is the principle of treating people as ends in themselves, which is Kant's formula for expressing our moral equality.

The autonomy of the person in Nozick's original position is insured by the concept of rights as side constraints. He writes: "Individuals have rights, and there are things no person or group may do to them. So strong and far-reaching are these rights that they raise the

question of what, if anything, the state and its officials may do” (Nozick 1974: ix). Nozick claims that the most we can build on the concept of rights is a minimal state with a narrow set of functions such as “protection against force, theft, fraud, enforcement of contract and so on” (ibid.). All beyond this is unacceptable and insupportable. Such a stance is a natural expression of the Kantian autonomy because it guarantees our separate existences (ibid. 33). “Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and realize our ends and our conception of ourselves, in so far as we can, aided by the voluntary co-operation of other individuals possessing the same dignity” (ibid. 334).

People possess rights already in the state of nature, when the state does not yet exist. Following Locke, Nozick claims that state of nature presents “a state of perfect freedom” wherein “no one ought to harm another in his life, health, liberty or possessions” (ibid. 10). However, since the state of nature suffers from some inconveniences, sooner or later, individuals will form protective agencies one of which will become a dominant one and, thus, a state will emerge. Nozick describes the features of this agency in the following way:

“In any case, to avoid frequent, costly, and wasteful battles, the two agencies, perhaps through their executives, agree to solve peacefully those cases about which they reach differing judgments. They agree to set up, and abide by the decisions of, some third judge or court to which they can turn when their respective judgments differ. [...] Thus emerges a system of appeals courts and agreed upon rules about jurisdiction and the conflict of laws. Though different agencies operate, there is one unified federal judicial system of which they are all components. [...] Out of anarchy, pressed by spontaneous groupings, mutual-protection associations,

division of labor, market pressures, economics of scale, and rational self-interest there arises something very much similar resembling minimal state or a group of geographically distinct minimal states” (ibid. 16-17).

A dominant protective agency becomes a state when it fulfills a necessary condition and announces “to the best of its ability [...] it will punish everyone whom it discovers to have used force without its express permission” (ibid. 24). Therefore, a monopoly of the use of force is a very feature of every state and a dominant protective agency becomes a state only when it starts deciding who has the right to use the force legitimately.

Since the state Nozick is talking about is a minimal one, the most such a state can do is to respect and protect the rights of its citizens. Nozick regards these rights as side constraints. This means that they present a permissible block or constraint upon the government’s action, by setting the moral limits within which government’s political goals may be pursued (ibid. 29). The government is not permitted to embark on any course of action that violates rights as side constraints, however beneficial the consequences for the whole society this violation may produce. Rights ought not to be understood in a utilitarian way, leaving them a derivative status. The problem with the utilitarian understanding of rights is that it assigns them a goal status. In order to promote these goals, Nozick argues, a utilitarian may often violate the rights. If, however, rights are understood as side constraints, their violation is impossible (ibid. 28-30). The reason for placing rights as side constraints is to preserve the “Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable,” argues Nozick (ibid. 30-1). Nozick especially stresses that the concept of rights as side constraints is advanced against utilitarian policy requesting sometimes some

people to bear a burden that benefits other people for the sake of the overall social good. Nozick thinks this possible only if it is proven that there exists something like a “social entity.” However, “[...] there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more” (ibid. 32-3).

This is Nozick’s “original position” from which he derives a specific conception of distributive justice called justice as entitlements. It has three parts: (1) original acquisition of holdings; (2) transfer of holdings; (3) rectification of injustice in holdings (Nozick 1974: 150-2). Nozick calls such a theory of justice historical, because the just distribution of goods depends exclusively upon how it came about (ibid. 153). By contrast, there are structural theories of justice that do not take into account historical events, but rather structure the distribution according to certain patterns, end-results, or end-state principles (ibid. 155). The end-state principle is a principle favoring self-interest of the individual, but in an unjust way (ibid. 201; 153-155).

“The nature of the decision problem facing persons deciding upon principles in an original position behind a veil of ignorance limits them to end-state principles of distribution. The self-interested person evaluates any non-end-state principle on the basis of how it works out for him; his calculations about any principle focus on how he ends up under the principle” (ibid. 201).

In other words, an individual would not be led by the principle of who deserves what, or who is entitled to what according to historical facts, but by his own interests or ends. And

this runs contrary to the historical transaction which is the only moral way to justify somebody's possession.

A perfect example of distributive justice based on the end-state principle is Rawls's theory of justice, argues Nozick (Nozick 1974: 199). He claims that Rawls's theory does not take into account two things. First, that whatever people possess they are naturally entitled to.

“Things come into the world already attached to people having entitlements over them” (ibid. 160). Second, that whatever people acquired through the acts that respect the three principles mentioned above must be just. Theories of justice that distribute wealth and goods contrary to these two principles “treat objects as if they appeared from nowhere, out of nothing” (ibid. 155).

As said in the previous section, when Nozick took as an example Rawls's theory of justice, he primarily had in mind its difference principle, which expresses the general spirit of the theory. Its most general formulation runs as follows: “[a]ll social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless the unequal distribution of any or all of these goods is to be advantage of the least favored” (Rawls 1971: 303). Nozick claims that on the grounds of his conception of entitlements such a formulation implies a “continuous interference with people's life” because it forces a certain group of people to work for others, and this is tantamount to forced labor. It flouts one's “natural right” to the holdings one possesses, because it justifies taking away the possession one earned honestly, and giving it to somebody else. Rawls's difference principle violates the Kantian principle that people should not be used as resources for the good of other people (ibid. 168-74).

### *5. Rights-based Argument*

A couple of preliminary remarks and announcements are needed before I get down to discussing Nozick. In the beginning of the previous section I said that a comparison will be made with respect to the concept of the autonomy of the person. I hope I gave in chapter 1 enough textual support explaining what the concept of autonomy means. The major idea of autonomy, as understood there, is that the individuals has some fundamental needs and interests whose protection must be insured before we set about constructing a theory of justice. This proposition can be couched in various ways, but the key condition that we must not depart from is the prepositions that people are free to make autonomous choices. The problem with Nozick's theory is that, while insisting on the autonomy of the person, he negates autonomy by beginning with a rights-based argument for private property. Waldron defines a rights-based argument as "an argument showing that an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it" (Waldron 1988: 3). If this is the definition of rights-based argument, then the definition of a rights-based argument for private property must read as follows: an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote private property. I will show that the duty to promote private property is precisely what puts Nozick in trouble.

Nozick's justice as entitlements is the first attempt in the history of political philosophy to base a theory on rights since Locke published *Two Treaties* in 1690. Nozick claims to be

drawing on Locke's ideas on many accounts, so it seems appropriate to begin with examining whether or not he uses them correctly. I will show that his usage is incorrect for two reasons. First, Locke's argument relies on theology that Nozick rejects; second, the consequences of the full Lockean account are far from libertarian (Wolff 1991: 105). It is interesting to draw attention to the fact that Nozick, although claiming to rely heavily on Locke's theory of private property, amply misses the point Locke establishes at the ground-floor level (state of nature). What comes first in Locke is not the right to private property but rather the right to subsistence, which limits whatever property system there can be. In discussing Locke's theory, one may easily forget that its premises were abundantly theological. There are, at any rate, two elements stemming from Locke's theology that give priority to what we call today the autonomy of the person rather than to individual rights. Locke talks about the duty to preserve human life. Since God created all individuals for a reason, the preservation of every human being, not only of those who possess some property, is a duty. And since every "man being to be preserved, as much as possible," the duty follows to the effect that everyone stands under an obligation "as much as [they] can, to preserve the rest of mankind" (Locke II. §6). Locke could be read as mandating the right to preserve himself, but he as well can be read as mandating the preservation of others over "the desire for luxury, enjoyment, and the accumulation of power" (Waldron 1988: 146).

God commands man to labor because he wants him to subsist. Locke says that "God gave the Worlds to Men [...] for their benefit, and the greater Conveniences of life they were capable to draw from it (Locke II: §34). It is patent from these theological premises that human subsistence is an obligation that overrides the right to private property. If all streams in contemporary liberalism, including the Nozickian libertarianism, concur in that what matters most is the liberty and dignity of the individual, then property rights cannot possibly

be taken to be the beginning and the end of libertarianism. The four Lockean rights (liberty, health, life, and estate) derive from the more fundamental “right” to subsistence. If they cannot be proven to be compatible with subsistence, their introduction must be put off for a later point.

Another point where Nozick departed from Locke is that Locke’s right to subsistence is of a general kind, whereas Nozick recognizes only the special right to private property. While a special rights-based argument is the one involving not the interest in itself but only the interest that occurred through the line of some contingent events or transaction, a general rights-based argument does not recognize the contingency of the events but sees an interest as essential in itself for the individual (Waldron 1988: 116). Neither Locke nor Rawls rely on rights-based argument in order to support this proposition but if someone tried to show that they do, this would be possible only by invoking a rights-based argument of a general, not of a special kind.

As we can see, the key idea in Locke is that people have a certain special interest (well-being) which they cannot be asked to sacrifice for the sake of collective good, or for the sake of the sacredness of private property. The claim so far is twofold: a) the liberal principle of justice cannot be derived if we begin from a special rights-based argument; b) the autonomy of the person is not a variant of a rights-based argument.

## *6. How Nozick Upsets the Autonomy of the Person*

Nozick claims that the initial acquisition is indisputable and cannot undermine the autonomy of the person provided it took place observing the Lockean proviso. The Lockean proviso demands that the initial acquisition be justified as long as there is “enough and as good left in common for others” (Locke II: §27). Since everybody had the right to appropriate, and since there were “enough and as good” left, if there are some people who were left without holdings, it would only mean that they did not wish to appropriate. It was their choice, not the unlucky circumstances. Therefore, the principle of the autonomy has been abided by (Nozick 1974: 174-82).

In the previous section I said that Locke’s and Nozick’s theories differ in a fundamental sense in that the former develops a general rights-based argument for subsistence and the latter a specific rights-based argument for private property. What additionally marks off these two theories is precisely the Lockean proviso Nozick claims to have taken over from Locke. Locke insists on the right to subsistence. From this right it follows that, at least initially, there are institutions that cannot be said to be in the absolute possession of some and denied to others. There is no reason to think that private property does not fall under this category. For Locke says that “God the Lord and Father of all, has given no one of his Children such a property, in his peculiar Portion of the things of this World, but [...] he has given his needy Brother a Right to Surplusage of his Goods; so that it cannot justly be denied to him, when his pressing wants call for him” (Locke I: §42).

The Lockean proviso mandates that enough must be left to everyone so that everyone can survive. Since no particular conditions were set, it is implied that the survival must be a

survival in the long run. Otherwise, Locke would have been talking about the entitlements the same way Nozick does. But once we combine the concept of entitlements (as an absolute right that those facing scarcity are not supposed to interfere with) with the Lockean proviso, we cannot escape the violation of the right to subsistence that lies at the heart of Locke's theory. Nozick is aware of this trap, so he modifies the proviso by introducing the verb "worsen" and distinguishing between weaker and stringent form of the proviso. The stringent form mandates that "enough and as good" must be left to others to appropriate. But the defender of the weaker form is satisfied with "enough and as good" left to other to use, not necessarily to appropriate (Nozick 1974: 176)

In Nozick's rendition, the proviso reads as follows: "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use things is thereby worsened" (ibid. 178). Most of the problems Nozick has with relying on Locke have to do with the fact that Nozick sees the whole world unowned, whereas Locke saw it as owned by all. This is why Nozick cannot talk about long run benefits, but only about indirect benefits from the initial acquisition. But the point to be stressed here is that if the initial acquisition comes about the way Nozick envisages, it can hardly be said that anyone who was not able to take part in it would be able to get any kind of benefit. The outcome of the Nozickian proviso is that some people are left with having nothing, which can hardly be said to be an upshot of the Lockean state of nature. The key implication is this: the Lockean proviso mandates the entitlements generated by the initial acquisition always sensitive to the further distribution; the Nozickian proviso does not (Waldron 1988: 281). No wonder then, that in his constant referring to Locke Nozick always avoids referring to the fact that Locke said that there is a duty to aid the poor out of one's surplus.

In my discussion on how Nozick violates the autonomy of the person I, to some extent, rely on Jeremy Waldron's ideas from his *Right To Private Property*. Waldron advances two major charges against Nozick. First, Nozick's initial acquisition leaves us with too many unspecified conditions for acquiring; second, the initial acquisition imposes duties on others without their previous consent. Although both Waldron's charges may be taken to show how Nozick violates the major propositions for autonomous action, I will invoke here only the first. Waldron points out that we do not know anything about the conditions that obtained when the resources were being initially appropriated (Waldron 1988: 259). To say that we do not know anything is perhaps an overstatement. While it is true that Nozick did not spell out the terms for the initial acquisition, he gave an implicit specification of it. It may be recalled that rights as side constraints hold in the state of nature as well, not only when the state comes into being. Nozick is explicit in stating that no initial acquisition is possible if it violates rights as side constraints.

I went into some detail in section 4 explaining what, in Nozick's view, rights as side constraints are. There I emphasized that side constraints are placed upon others people's action in order to block the violation of the Kantian categorical imperative that reads "treat others as ends never as a means." We all have separate existences, and cannot be mere resources for others. Rights in this sense are based on a moral conception of the person. But Nozick's understanding of rights and their function in the state of nature is not rounded off with rights as side constraints. Nozick has a somewhat broader concept of rights. If the side constraint understanding of rights is indeed in union with the ideal of autonomy, the other part, as I show in the next few paragraphs, is not.

Jonathan Wolff argues that Nozick's conception of rights is threefold. First, rights are negative rights; second, they are to be understood as side constraints; third, they are exhaustive (Wolff 1991: 22). Assuming that the first feature is clear and indisputable, the second feature mandates that no social utility may override a right of the individual to live the life she thinks valuable. But Nozick also contends that—while admitting that there is much more to morality than rights—political philosophy is concerned with rights, and so must the rights from the state of nature be seen as legitimately trumping any possible obligation that may be enforced upon people (Nozick 1981: 502). Here is an example. Suppose that I own a piece of land where great archeological artifacts are discovered. Nozick would claim that society, which might come to think that the preservation of these artifacts constitutes a social good, has no rights whatsoever over the land. All this because private property has moral priority over any other kind of value. To dismiss this statement and say that the owner has no absolute right to dispose with the piece of land, in Nozick's view, comes down to enforcing illegitimate obligations. Wolff concludes: "Treating rights as being exhaustive—trumping all other moral considerations—allows Nozick to insist that rights have a secure, absolute character. They may not be overridden for the sake of public welfare, nor for the sake of other rights, nor indeed for any other reason" (Wolff 1991: 23). Rights are exhaustive in Nozick's case, and this is what makes them incompatible with the autonomy of the person because any one who cares for autonomy has a good reason to reject to live in a society in which the Nozickian system of natural rights obliges people to accept striving to death if this is the only way to keep the property rights *virgo in tacta*.

This conclusion is strengthened if we see that Nozick differs from Locke in understanding of the nature of rights from the state of nature. Locke did say that people in the state of nature have four fundamental rights, but his idea was to establish the case for fundamental

rights by doing a proper reading of the Holy Script. In his dispute with Filmer, Locke argues that “a proper understanding of the scriptures reveals to us that man is to be preserved as much as possible, and it was from this that he derived his account of natural rights” (Wolff 1991: 27). What we see here is a recast argument for the most fundamental right to subsistence I referred to in section 5. If the preservation of mankind is the root goal of Locke’s theory, then rights as side constraints, or any other type of rights, simply cannot have the privileged status Nozick believes they should. As Wolff suggests, Locke would here rather have to be seen as supporting the utilitarianism of rights, which is the idea Nozick rejects.

Waldron argued that the first objection that can be put to Nozick is that the conditions of the initial acquisition are unspecified. From what I have advanced so far, it seem to be more precise to say that the conditions of the initial acquisitions are not specified with regard to respecting the autonomy of the person. This is even more true when we see that the absence of the precise conditions regulating the initial acquisition regards things as if they came out of nowhere. In criticizing Rawls’s theory of justice, Nozick objected that it treated resources as if they fell from Heaven like manna (Nozick 1974: 198). Since the original position and the veil of ignorance do not take into account that things come attached to the people as their entitlements, Nozick claims that the difference principle infringes upon the autonomy of the person. The difference principle enjoins the distribution of wealth and thereby infringes upon those who justly acquired their wealth. This, however, applies to Nozick even more than for Rawls: if there is any situation that flouts people’s right to acquire, it is Nozick’s initial acquisition. If we accept the definition according to which treating things like manna from Heaven implies an infringement on human autonomy, then Nozick’s theory encourages such a practice, since it allows that material resources be initially

appropriated without exact rules. This means that they are treated like manna from Heaven (Waldron 1988: 279).

To this, Nozick has a ready defense in the form of the Lockean proviso. But referring to the proviso cannot save Nozick from violating the autonomy of the person in a deeper sense.

Nozick says that the proviso postulates that “enough and as good,” remains for others to use after an amount of goods have been appropriated. If someone appropriate all the drinkable water in the area, this leaves other without “enough and as good” and is thus impermissible.

Nozick says that the consequence of this example “brings into operation the Lockean proviso and limits [the] property rights.” (Nozick 1974: 180). But immediately after having said that, he places two conditions on the proviso that well water down the hoped-for limits to the property rights. First, Nozick says that the appropriation must not worsen the baseline situation of the person (ibid. 181). Suppose that two people who have nothing are fighting for a piece of land. The stronger wins and gets the land by force, the other remains with nothing. Soon after, the stronger offers a job to the weaker since this is what the Lockean proviso mandates. But the proviso is silent on what the terms for cooperation should look like. Suppose then that the terms are unfavorable for the weaker. Does s/he have to accept them? Since a job, even under such unfavorable terms, is better than nothing, which was the baseline from which both started, the weaker cannot complain that his position has been worsened. On the contrary, s/he would have to take up the offer, considering it legitimate since he was left with “enough and as good.”

The second condition on the Lockean proviso is equally problematic. Suppose, says Nozick, that we have a researcher who, after collecting some special ingredients (say, chemicals) and putting them together, is able to make a cure for surviving a toxic disease. If s/he leaves

“as good and enough” of the ingredients in nature but refuses to share the cure with others free of charge, does s/he violate the proviso? I would say yes, but Nozick, predictably enough, says no. “The others easily can possess the same materials he appropriated; the researcher’s appropriation or purchase of chemicals didn’t make those chemicals scarce in a way so as to violate the Lockean proviso” (ibid.). Nozick thinks that all the goods that can be acquired are identical in nature to the grains of sand, so if you appropriate one piece of grain, there is always some more left to others. Some resources, however, are not divisible in this sense. The researcher from the previous example indeed may have left “enough and as good” and may have not violated the proviso, but s/he certainly did violate the autonomy of the person because it is clear that without being able to have the access to the medicaments the researchers made, the others cannot possibly survive the toxic disease, let alone pursue an autonomous life.

### *7. The Agreement Basis of Nozick’s Theory*

As noted in the previous section, when the Nozickian initial acquisition took place, there were no exact rules regulating this process. On the contrary, the initial acquisition was possible and feasible just because it was “based on the assumption that the mechanisms for a fairer distribution [were] not available” (Waldron 1988: 280). At first sight, it may seem that Nozick’s state of nature tolerates a *bellum omnium contra omnes* situation wherein the strongest fare better. This would be true if the conditions in the state of nature were totally unspecified. Nozick offered an indirect specification of the initial acquisition by introducing rights as side constraints and the Lockean proviso. I demonstrated in the previous section

that these two concepts did not work, but yet can be taken to constitute an indirect specification of the state of nature where at least certain moral constraints apply.

Let me now have a look at Nozick's state of nature from another angle. Suppose we all accept that the outcome of the initial acquisition is just if the acquisition respects the Kantian proviso that people must never be used as a means but as ends only. How many people who accept autonomy would accept the justice as entitlements? Not many, I say.

This argument has some resemblance to the contractarian argument in political philosophy. A libertarian may warn me that Nozick does not accept the contractarian argument but derives political arrangement from the invisible-hand procedure. According to this procedure, the state does not come into being as a consequence of a contract but rather in a spontaneous way (Nozick 1974: 132). But the point here is not that Nozick's theory needs a social contract because Rawls's does. As a matter of fact, Rawls's theory cannot be said to be predicated on the social contract argument either. Jean Heampton argued not only that Rawls need not use social contract method, but that "he cannot use it if he wishes the two principles to be selected" (Heampton 1980: 324). A similar conclusion was drawn by Dworkin who argued that "the contract cannot sensibly be taken as the fundamental premise or postulate of [Rawls's] theory [...] It must be seen as a kind of halfway point in a larger argument, as itself the product of deeper political theory that argues for the two principles *through* rather than *from* the contract" (Dworkin 1977: 169). Rawls's original position is not a situation wherein parties bargain and make promises to each other, referring to instrumental rationality, but rather a situation wherein they respect the dictates of practical reason to the effect that the only choice that matters is an autonomous choice. Rawls's theory, therefore, is not a fundamentalist contractarian theory, meaning that for his

argument to work the contract is helpful but not essential. As a matter of fact, contract “obscures the moral foundation of Rawls’s principles of justice” (Barry 1998: 187), and, in places, Rawls is more than explicit on that. In his discussion on natural duties in *A Theory of Justice* he claims that the first natural duty is the duty of justice that “requires us to support and to comply with just institutions that exist and apply to us”. But note that Rawls holds that “even though the principles of natural duty are derived from a contractarian point of view, they do not presuppose an act of consent, express or tacit, or indeed any voluntary act, in order to apply” (Rawls 1971: 115-6).

What I call “the unanimous agreement argument” here does not amount to or equal the social contract argument. The former cannot be refuted by pointing at the real absence of such social contract and the impossibility of obliging the descendants. The point is only that those who think that autonomy of the person matters will not accept the outcome of Nozick’s procedures. According to Nozick, a state that has emerged under the invisible hand procedures is legitimate. On the unanimous agreement argument, an actual contract does not have to take place (as a matter of fact, I will argue in section 20 that the whole contemporary liberalism does not turn on the actual contract), but it is essential that people who embrace autonomy of the person and fall under the operation of the invisible hand government hold such a government legitimate.

Now what can we make out of this? Waldron’s second objection is that the act of initial acquisition puts under obligation even those who would have never agreed to that. But, as we saw, Nozick does not buy into the contract argument. The state comes into existence through a line of contingent actions. So, putting some under unwilling obligation may be their misfortune but there is really nothing one can do about it. The chip fell where it fell,

and the state legitimately came into being. Now it may be true that the individuals in the Nozickian state of nature would agree to a set of contingent actions, but more than that, they must also agree to respect autonomy, before and after the state has been established. So the problem here is not that the Nozickian initial acquisition puts others under obligation but rather that it leaves them without necessary means for subsistence. If we recall the root idea of Locke's theory, it becomes immediately clear why this matters. The creation of new obligations without people's prior consent is onerous in a sense that it blocks their access to goods whose use might be a matter of life and death. What Nozick asks us to accept is "that there are actions which individuals can perform whose moral effects is to place millions of others under obligations whose discharge may require them to place their own survival in jeopardy" (Waldron 1988: 267).

In trying to see how individuals act in the state of nature, we have to assign them certain characteristics. These do not have to be some substantive ones ("People always strive to achieve beauty"), but some weak ones, perhaps that "All people are born equal." We could also add that in choosing principles of justice people must not be treated as a means but as ends. This is, as I have announced in the beginning of this chapter, the starting point for both Rawls and Nozick. The only difference is that Nozick believes the absence of unanimous agreement does not modify the situation and enables people to act autonomously. But no matter how much Nozick rejects social contract, he will have to say that we can show that a suggested principle of justice is unacceptable if we show that there is no remotely plausible or coherent counterfactual hypothesis under which that principle would command the universal consent of citizens.

Suppose, then, that we have a batch of individuals in a Nozickian state of nature. Everyone agrees that no contract is needed for a state to emerge, but they rather accept that it is just if it comes into existence through a series of mutual interactions between them. What they must also agree on is that in this kind of activity they must be allowed to act as autonomous persons. Things such as duress, subjugation, threat, pressure, deprivation and the like are, therefore, ruled out by default. Those are, if I understood Nozick well enough, two basic features of the Nozickian state of nature. Now it seems obvious that under these two conditions some kind of state will come into surface. Will it be just? I want to defend the claim that it will not precisely because it will violate at least one of the conditions. Recall that the Nozickian state of nature, respecting rights as side constraints and the Lockean proviso, forbids leaving others without “enough and as good.” But once the initial distribution is completed, Nozick simply does not care how the initial endowments affect the usage of the initial distribution, and how all this affects the autonomy of the person in the long run. Nozick does not see that there is a difference between “initially acquired means” and “means for autonomous living.” These are quite different, and only those who are able to transform the initially collected means (the physician from Nozick’s example) will be able to pursue the autonomous life. The upshot of the Nozickian state of nature will inevitably be some sort of state in which there will be people who are unable to translate initially collected means (if they manage to collect any) into the means for autonomous living.

Here we can make the final step and see where and how the unanimous agreement argument comes in. Under Nozick’s justice as acquisition, it will not be necessary that people sign up to a political contract setting up a state, but it is absolutely unavoidable that the very same people endorse an initial acquisition the upshot of which leaves them without the means to

lead an autonomous life. In terms of their survival and life chances, the Nozickian state leaves the worse off completely at the mercy of those who were better in initially acquiring things. The only thing that can stop the better off to marshal resources and leave the worse-off without any would be the Lockean proviso. But as I have shown, Nozick turned the Lockean proviso into the Nozickian proviso and substantially changed the meaning of it, thus depriving himself of the possibility to call it to his aid here.

The conclusion is this: Nozick's theory cannot be refuted on contractarian ground, but it can be refuted on the ground of negating the autonomy of those who were placed in the state of nature. If I care about my autonomy, it would be an ultimate folly of me to commit myself to Nozick's justice as acquisitions because it would be on a par with committing myself to being unable to have the access to basic resources enabling me to act autonomously. If I really want to remain autonomous, it would be more prudent to take chance in a Hobbesian state of nature rather than the Nozickian one. (Waldron 1988: 277)

What I have tried to show so far is that Nozick's justice as entitlements violates the ideal of autonomy in that it leaves individuals without necessary means to act autonomously. As Waldron puts it, Nozick would be committed to endorsing a society with private property

“even if it can be shown that it does not guarantee the economic prosperity that is often claimed for it, even if the possession answers to no deep human need and does not contribute to the ethical development of the individual—indeed, even if private property does not in the end maximize individual liberty—still, Nozick claims, it must be upheld and protected as the upshot of our respect for a host of

special rights that particular individuals acquired over particular things” (Waldron 1988: 128).

### *8. Rawls’s Original Position*

This chapter’s thesis is that Rawls’s original position is based on individual autonomy. I shall briefly describe the original position’s main elements and proceed with the examination of the autonomy of the person in Rawls’s theory. The most important elements of Rawls’s original position are the veil of ignorance and the primary goods. Rawls explains that the veil of ignorance rules out the following knowledge of individuals: their place in society (class position or social status); their fortune in the distribution of natural assets and abilities (intelligence, talent, strength, spiritual propensities, etc.); their conceptions of good and life plans; particular circumstances of their own society; economic and political situation (type of political and economic regime); the level of civilization and culture; and the generation they belong to. In a word, the people behind the veil of ignorance can be best described as the people who have no idea of who they are and what they want.

The veil of ignorance came under a heavy attack from communitarian thinkers. I explain in chapter 4 how the veil can be guarded against these critiques. For the time being, it suffices to say that the veil of ignorance is not supposed to remove knowledge by virtue of mental engineering. “The idea here is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves. Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of

principles” (Rawls 1971: 18-19). All that Rawls wanted to say with the idea of the veil is that there exists some knowledge that could be treated as irrelevant for moral reasons. Suppose someone says that just because he has a gun pointed at your head, you should follow the principle by which 90% of your annual income goes to him. If you find the threat credible and do not want to die, you will give the money away. Not disputing that there might exist some other plausible arguments that you should give that much of your income to him, the whole point of the original position and the veil of ignorance was that such a threat cannot be considered to be relevant for constructing principles of justice (Rawls 1971: 141). There are some moral requirements you have to comply with if you want to put forward moral arguments. If that much is accepted, then the proposition that people are disallowed to refer to some knowledge when discussing moral matters amounts to saying that you cannot dial a number without pressing a phone key.

Since the individuals do not know their life plans, they cannot be said to attempt to attain them. By selecting the principles of justice, people will try to maximize the primary goods that will help them to accomplish their ends whatever they are. “Thus even though the parties are deprived of information about their particular ends, they have enough knowledge to rank the alternatives. They know in general that they must try to protect their liberties, widen their opportunities, and enlarge their means for promoting their aims whatever these are. Guided by the theory of good and the general facts of moral psychology, their deliberations are no longer guesswork. They can make a rational decision in the ordinary sense” (Rawls 1971: 143). The primary goods are: rights and liberties, opportunities and powers, income and wealth, and perhaps the most important one—self-respect (ibid. 62, 92). Rawls states that the primary goods are insensitive and neutral towards particular life

plans and conceptions of good. Hence, whatever people under the veil of ignorance may prefer, they will always prefer more to less primary goods.

“Now the assumption is that though men’s rational plans do have different final ends, they nevertheless all require for their execution certain primary goods, natural and social. Plans differ since individual abilities, circumstances, and wants differ; rational plans are adjusted to these contingencies. But whatever one’s system of ends, primary goods are necessary means. Greater intelligence, wealth and opportunity, for example, allow a person to achieve ends he could not rationally complete otherwise. [...] While the persons in the original position do not know their conception of the good, they do know, I assume, that they prefer more rather than less primary goods. And this information is sufficient for them to know how to advance their interests in the initial situation” (ibid. 93).

Assuming that under the veil of ignorance parties to the original position always prefer more primary goods rather than less, they will select the principles of justice that are not biased by arbitrary contingencies (ibid. 141). Accordingly, the outcome of the original position will not be in favor of the rich, or the poor; in favor of the more or less intelligent; better or less endowed, etc., but to everyone’s advantage.

By introducing the veil of ignorance, Rawls believed he achieved the impartiality of the original position in a required sense. Moreover, by composing the list of primary goods, Rawls believed he gave everyone a possibility to choose autonomously, thus preserving the Kantian idea of autonomy in full. Rawls alleges that the original position is an interpretation of the Kantian idea of the autonomy of the person (ibid. 251-7). The original position meets

two main requirements of Kant's conception. Firstly, it assigns free and equal status to the individuals. Rawls believes that "the veil of ignorance deprives the persons in the original position of the knowledge that would enable them to choose heteronomous principles" (ibid. 252). Indeed, if the parties to the original position always prefer more primary goods rather than less, they act rationally because they are led by long-term life plans, not by immediate and short-lived desires. However, Rawls's second claim is much more problematic. He claims that the principles of justice are also a categorical imperatives in Kant's sense. "The validity of the principle does not presuppose that one has a particular desire or aim.

Whereas a hypothetical imperative by contrast does assume this: it directs us to take certain steps as effective means to achieve certain ends" (ibid. 253, 181). Since Kant's idea of autonomy implies that the chosen principles should not reflect concrete desires and goals, by preferring only the primary goods without knowing our life plans, Rawls believes that the veil of ignorance implements the idea entirely. Moreover, in some places Rawls thinks his interpretation of the categorical imperative is even superior to Kant's version because the latter is "purely transcendent and lacking explicable connections with human conduct." Rawls believes his interpretation enables us to establish these connection (ibid. 256).

By saying that individuals in the original position always prefer more primary goods rather than less, Rawls is interested in attributing to the persons a motivational force which does not stem from a morally right source, but from their wish to attain their good whatsoever. He thinks that "[t]he preference for the primary goods is derived [...] from only the most general assumptions about rationality and the conditions of human life" (ibid. 253). Since the pursuit of primary goods does not reflect empirical life plans, Rawls concludes that persons in the original position are autonomous. They abstract from empirical knowledge and hence act autonomously. But such an interpretation of autonomy is open to several

objections. I will consider two of them in the next section and then set out to explain how both can be overcome by modifying Rawls's autonomy in section 10.

### *9. The Motivation for Autonomy*

In *A Theory* Rawls strictly says that his two principles of justice are categorical imperatives in the Kantian sense. "Treat the person as ends never as a means" is the categorical imperative Rawls wants to preserve. As this section will show, Rawls is somewhat more successful in doing so, but not completely. He operationalizes the conception of autonomy on which others are always treated as ends, never as a means better than Nozick, but he fails to base it entirely on the Kantian premises.

Rawls's concept of autonomy cannot work for one thing: it is based on teleological premises. Although Rawls says that "the validity of [his] principle does not presuppose that one has a particular desire or aim" (Rawls 1971: 253), in this section I will show that just the opposite is the case.

At first sight, it may seem that Rawls is a pure proceduralist. This would mean that Rawls does not put in the original position any antecedent standards by which the acceptability of the original position can be assessed (Campbell 1988: 72). But this would be a wrong conclusion. On closer inspection one can see that the original position is full of moral and teleological content. This claim is supported by many authors. Ronald Dworkin argues that "the principles that support the original position as a device for reasoning about justice are so widely shared and so little questioned within a particular community, for whom the book

is meant, that the community could not abandon these principles without fundamentally changing its patterns of reasoning and arguing about political morality” (Dworkin 1977: 158). Peter Jones points out that “the most of the moral work that generates the two principles of justice and their associated rights is done by the moral assumptions which structure the contracting process rather than by the contracting process itself” (Jones 1994: 105-6), whereas Norman Daniels says that the acceptability of the original position rests on morally laden views “for example, about the matter of persons as ‘free and equal,’ about the role of justice of society, and about procedural fairness” (Daniels 1996: 7). Tom Campbell argues that Rawls’s original position does not take a morally neutral approach to the major problem of justice—distribution, “but is in fact seeking to explicate a particular moral point of view, namely that in which the autonomous moral agent is supremely valued.” This liberal assumption is presupposed by the theory, not proved or justified by it (Campbell 1988: 84). If so, it is wrong to view the original position as a pure set of procedures deprived of any moral content. It is contrived according to a liberal conception of good, and hence cannot reflect a deontological position.

The original position’s element that most ruins its deontology is the concept of primary goods. The puzzle regarding primary goods is one of the most controversial points in the theory of the early Rawls. I will put off one part of the discussion on the primary goods for section 19. Here I want to discuss the role of the motivation that is embedded in the primary goods and how it is related to Kantian autonomy. Is the motivation of the parties to the original position any different from that of Kant? Kant demands that the motivation should be led by the right not by the good. This is an autonomous behavior, as opposed to the heteronomous one which is led by our conception of good. Kant writes:

“Alle Imperativen nun gebieten entweder hypothetisch, oder kategorisch. Jene stellen die praktische Notwendigkeiten einer möglichen Handlung als Mittel, zu etwas anderem, was man will, [...] zu gelangen, vor. Der Kategorische Imperativ würde der sein, welche eine Handlung als für sich selbst, ohne Beziehung auf einen andern Zweck, als objektiv-notwendig vorstellte.” Or to give the second formulation: “Wenn nun die Handlung bloß wozu anderes, als Mittel, gut sein würde, so ist der Imperativ hypothetisch; wird sie als an sich gut vorgestellt, mithin als notwendig in einem an sich der Vernunft gemäßen Willen, als Prinzip desselben, so ist er kategorisch” (Kant 1993a: 43).

As explained in section 1, in Kant’s view, all actions that are based on any type of desire or external will cannot be regarded as autonomous. In Rawls’s original position, it is clear that external will is ruled out, but what is not ruled out is the desire itself. It became a common place in discussing the relation between the parties and the primary goods that the parties always want “more primary goods rather than less.” By attributing to the parties this kind of desire, Rawls actually presupposed that people must have a goal to pursue. But this is precisely problematic, because this kind of presupposition would simply not be allowed in the “Kantian original position.” Rawls is aware of the problem, so, by introducing the veil of ignorance, he believes he removes all the reasons which could lead the individual to heteronomous behavior. However, under the veil of ignorance such a move cannot be made since “in the original position the circumstances have been changed, but the motives for choosing have not. Seeing that to Kant, it is the motives, not the circumstances, that are important for a moral action, it follows that Rawls’s behavior of individual would be regarded as heteronomous, not as autonomous” (Glentic 1995: 128). Although the parties to the original position do not really know what their life plans are, it must be stressed that

they do not need to know it in order to be teleologically-driven. To invalidate the deontology at the ground-floor, it only has to be shown that the parties know that they have a certain goal to pursue. And Rawls makes no bones that they do.

With the concept of the original position, Rawls wanted to avoid the contingency and accident which would take place if knowledge about the particular were present in the game. The same was desired by Kant. But in order to arrive at such a position, it does not suffice only to eliminate particular knowledge and keep the general, for general knowledge is as empirical as particular. As Glintic points out,

“by conceptualizing the veil of ignorance from the empirical standpoint, enumerating and classifying allowed and disallowed knowledge, [Rawls] let contingency into his moral theory. It was in vain that he later sought to construct various additional methods—such as the maximin rule or rational autonomy—with the purpose of eliminating this contingency. This was not possible since under the assumption Rawls made contingency was irremovable from the original position” (Glintic 1995: 136).

To Rawls, morality and autonomous action is not one’s ability to abstract from one’s personal desires and motives, but rather the capability of directing human action toward a set of general goals (ibid. 238).

The deontological position is untenable in Rawls’s original position. It is critical to stress that this teleological element in Rawls’s theory is not accidental but essential to it. “It is essential because a procedural account of the categorical imperative, as that given by Rawls,

must import motivational or teleological elements to bring about the result—in this case, the two principles [of justice]” (Grcic 1991: 15). The primary goods, then, remain as controversial as the utilitarian and perfectionist approach Rawls attacks.

### *10. The Autonomy of the Person Revisited*

Rawls can be salvaged from motivational trouble in two steps. Stephen Darwall claimed that despite the fact that the persons in the original position are seen as heteronomous, the Kantian interpretation of autonomy in Rawls still holds if we look another way. While it is true that the choice within the original position is heteronomous because it is based on the interested motivation, Darwall says that “the decision of actual rational beings, not in the original position, to act under such principles is an autonomous decision, and hence that the action on such principles is autonomous” (Darwall 166). It is enough that people underwrite the principles of justice from a general point of view after the veil is lifted, not before. Principles may be wished by a person because of a certain egoistic interest he has behind the veil, but Darwall claims the rational person is well able to accept the principles as a rational agent “not merely in virtue of some desire [he] happens to have” (ibid. 168). Thus, “if a rational being chooses to act on principles which would be acceptable to him if he were under the veil (on the ground that they would be acceptable to him under the veil), such a choice is by no means a choice on the basis of his interests and thus is not, on those grounds, a heteronomous choice” (ibid. 166). The only connection that has to be established, in order to preserve the original position “as a procedural interpretation of the Kantian autonomy,” is that people would prefer the principles that emerged from under the veil and the moral restrictions the veil imposes. This idea is backed by Rawls himself who

says that “the two principles of justice and the principles of obligation and natural duty require us to consider the rights and claims of others. And the sense of justice is a normally effective desire to comply with these restrictions” (Rawls 1971: 147). So if the principles are demonstrated to have a capacity to be abided and willed by everyone in real life, the Kantian interpretation of why the principles should be accepted is preserved.

If we see the things this way, it seems appropriate to argue that the objection from heteronomy loses much of its strength. But I want to remind readers that this chapter compares Nozick’s and Rawls’s interpretation of Kantian autonomy, and does not try to locate Rawls’s views in the history of moral philosophy. All I want to argue here is that Rawls’s theory reflects a better variant of autonomy of the person than Nozick’s. And Nozick’s interpretation, as well as Rawls’s, is not immune to deontological objections. If both claim to be based on Kantian deontology, then both fail equally. We should, therefore, leave deontology aside and try to see what Rawls has to say about a conception of autonomy disassociated from deontological requirements.

It is possible to support the claim that in Rawls’s case autonomy equals self-mastery, meaning that a person is autonomous “to the extent that his actions emanate from his self, as opposed either to the will of the other, or from something internal other than his self” (Lindley 1986: 21). The Kantian motivational elements are removed. Persons act autonomously and rationally if their actions are not conditioned by particular inclinations but result from deliberations able to produce certain moral principles that are universally acceptable to a set of individuals. As Lindley put it: “To be autonomous is to act on self-chosen principles. The self is essentially a rational self” (ibid. 23). The departure from Kant is visible at the point where the definition does not insist upon abstracting from our life

plans. On the contrary, it takes into account a special class of concepts of good. To universalize our moral action does not involve abstracting from our life plans, but interacting only with those parties who prefer the primary goods. In other words, the definition is allowed not to prefer the right to the good, because it assumes that all the individuals the definition is applied to share the same, similar, or, at any rate, compatible conceptions of good.

This approach to autonomy constitutes an understanding of autonomy according to which “the normative significance of autonomy resides not in its being the central feature of personhood, but in its being an essential element of living well. Attending to an individual’s autonomy is less a matter of doing what is right than of promoting what is good” (Jones 1994: 129). Rawls announces the adoption of such liberal (not necessarily Kantian) autonomy in his 1982 article: “[The notion of primary goods] rests on the idea [...] that a *partial* similarity of citizens’ conceptions of good is sufficient for political and social justice” (Rawls 1982: 161). He accepts it entirely in *Political Liberalism*, but I discuss the implications of this conception in section 17.

So, how would autonomy as persons being free and equal look in Rawls’s original position? I will draw on the description which Rawls put forward in “Kantian Conception of Equality.” By “free”, Rawls means that each person views him/herself as having a conception of the good life, but at the same time also the capacity to form, revise and pursue his/her own conception of the good (Rawls 1975: 94). On the other hand, “equality” of individuals “is expressed by the supposition that they can have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic arrangements of their society are to be regulated” (ibid.). Or to use a later formulation:

“The principles of justice treat all citizens with respect to their conception of the good as equals” (Rawls 1982: 171). As long as the original position grants this possibility to individuals, it can be regarded as treating individuals as equals. Such a description of the starting position, based on the concept of the veil of ignorance, takes into account the distinctiveness of human lives and the autonomy of the person. Taken in this way, Rawls’s original position cannot be viewed as an strict expression Kant’s autonomy, but only as its modification (Grcic, 1991: 11).

In the end, it is useful to recall that a conception of autonomy so couched is strongly linked to the contemporary understanding of liberalism. It is another issue whether a perfectionist version of liberalism can present an acceptable ground for an impartial theory of justice, and I will postpone giving a detailed debate on this question until chapter 4. Here one should bear in mind that contemporary liberalism in any form is different from the 17<sup>th</sup> century liberalism (of which Locke is the founding father) that was based on the idea of self-ownership (Kymlicka 1989a: 10). Such a version of liberalism is today called libertarianism, and how this looks and what its consequences are I showed by analyzing its most compelling version expounded by Robert Nozick. Contemporary liberalism does not see the idea of self-ownership as the overriding condition for an autonomous life. Rawls says that his first principle of justice does not include the right to own certain kinds of property since this does not fall into the category of the basic rights and liberties (Rawls 1975: 96), it is rather interested in promoting people believe their good life is. “According to liberalism, since our most essential interest is in getting these beliefs right and acting on them, government treats people as equals, with equal concern and respect, by providing for each individual the liberties and resources needed to examine and act on these beliefs. This requirement forms the basis of contemporary liberal theories of justice” (Kymlicka 1989a:

13). Therefore, the primary task for a liberal theory of justice is to “regulate the inequalities and to adjust the profound and long-lasting effects of social, natural, and historical contingencies, particularly since these contingencies combined with inequalities generate tendencies that, when left to themselves, are sharply at odds with the freedom and equality appropriate for a well-ordered society” (Rawls 1975: 95).

## CHAPTER 3

### **A Theory of Weak Entitlements**

#### *11. Libertarianism With Foundations*

In the previous chapter I argued that Nozick's theory does not pay respect to the ideal of the autonomy of the person. In this one, I will take for granted that it does, and see whether the concept of entitlements can be said to support autonomy. I will pursue this goal by partly relying on the argument from the previous chapter. Autonomy is a moral idea that lies at the basis of Nozick's theory. But Nozick wants to strengthen the case for individual autonomy by linking it to the concept of entitlements. The idea is that an autonomous life cannot be led unless individuals are not entitled to their intellectual and material holdings. Before I say that in general I agree with proposition, I am required at the outset of this chapter to stress that in my discussion of entitlements it is essential to resist the claim, made by a number of other writers, that Nozick's theory is without moral foundations. Jeffrey Paul, for example, claims that Nozick "was untroubled by the fact that in the book he merely attempted to make plausible the entitlement theory of distributive justice without providing a detailed moral foundation for it" (Paul 1981: 5). Thomas Nagel, arguing along similar lines, writes that "a discussion of libertarianism would have to explore the foundations of individual rights. [...] But Nozick's book is theoretically insubstantial: it does not take up the main problems [...] and has left the establishment of the moral foundations to another occasion" (Nagel 1981: 193).

I do not think this true. One significant implication that can be drawn from the discussion in chapter 2 is that Nozick's theory of justice does have moral foundations. I stressed that both Rawls's and Nozick's theories were united in relying on the concept of the autonomy of the person, with the difference that Rawls's original position more accurately than Nozick's state of nature respects individual autonomy. This conclusion would not be possible without the analysis in chapter 2, which showed what the moral foundations of Nozick's theory were. Just like Rawls, Nozick also relies on the concept of autonomy (expressed in his concept of rights as side constraints), and this is what gives content to his libertarianism. In this chapter, therefore, I take for granted that Nozick's theory is based on the idea of the autonomy, which forms the ground for his theory of entitlements. It is Nozick's concept of entitlements I examine and challenge in this chapter, not his concept of autonomy.

As will be clear from this chapter, I do not negate the existence of entitlements but rather want to challenge Nozick's interpretation of entitlements. I wish to argue that at any rate it is possible to conceptualize two concepts of entitlements, strong and weak ones. The reason for deploying this division is my aim to defend Rawls's theory of justice as being compatible with the general idea of entitlements. I endorse Nozick's assumption that Rawls's theory is in conflict with strong entitlements, but shall argue that weak entitlements can be incorporated within the Rawlsian scheme. The justification for such an aim lies in belief that the idea of entitlements, in its most general form, can be taken to be a part of any version of liberal political philosophy. But anyone who wants to say so and, at the same time, hold that Rawls is a liberal, must be able to show that Rawls's liberalism is compatible with the general idea of entitlements.

## *12. The Possibility for a Theory of Weak Entitlements*

As described in section 4, Nozick's theory of justice has three parts: (1) acquisition of holdings; (2) transfer of holdings; (3) rectification of injustice in holdings. "The general outlines of the theory of justice in holdings are that holdings of a person are just if [the person] is entitled to them by the principle of justice in acquisition and transfer, or by the principle of rectification of injustice. If each person's holdings are just, then the total set (distribution) of holdings is just" (Nozick 1974: 153). It follows from this stipulation that entitlements are dependant on procedures that specify how someone came to hold something. However, Nozick is clear that some holdings are attached to people before any acquisition or distribution takes place.

"On an entitlement view, [production and distribution] are not two separate questions. Whoever makes something, having bought or contracted for all other held resources used in the process [...], is entitled to it. The situation is not one of something's getting made, and there being an open question of who is to get it. Things come into the world already attached to the people having entitlements over them" (ibid. 160).

Nozick is implicit in linking entitlements and autonomy. His argument is that patterned principles of justice are against entitlements and, consequently, against autonomy. To show this, Nozick gives the example of Wilt Chamberlain, a famous basketball player. If Wilt Chamberlain managed to attract enough people to pay a special premium of 25c each time they go to see him playing, and if this bumps up Wilt's personal budget, any type of

patterned distribution that will require Wilt to abandon a share of it will have to directly negate Wilt's entitlements (for this is why his income has increased), and, indirectly, his freedom to spend what he earned. As Nozick puts it: "The general point illustrated by the Wilt Chamberlain example [...] is that no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people's lives" (ibid. 163). If we agree that autonomy matters, we must agree that people should be entitled to some resources that will ensure an autonomous life. The idea of entitlement is a natural and indissoluble extension of the idea of autonomy. Accordingly, whoever negates entitlements, negates individual autonomy.

Nozick believes that the entitlement theory cannot be included within Rawls's original position because "[n]o historical principle, it seems, could be agreed to in the first instance by the participants in [it]. For people meeting together behind the veil of ignorance to decide who gets what, knowing nothing about any special entitlements people may have, will treat anything to be distributed as manna from heaven" (ibid. 199). Nozick rejects the original position, arguing that it does not show people as already entitled to something. He asks: "Why think the same results should obtain for situations where there *are* differential entitlements as for situations where there are not?" (ibid. 198). Rawls's presupposition that nobody is entitled in the original position is simply wrong, says Nozick. "The whole procedure of persons choosing principles in Rawls's original position presupposes that no historical-entitlement conception of justice is correct" (ibid. 202). And, of course, if nobody knew what they were entitled to, everybody would accept an end-state principle regulating the distribution of goods (ibid. 199). When we understand that Nozick essentially connected entitlements to autonomy it is easy to see what the nature and strength of the objection Nozick raises against Rawls is: it consists in stating that Rawls's difference principle

destroys all entitlements that arose justly from the state of nature by negating them in the same way it negates individual autonomy.

There have been some forceful arguments to the effect that Nozick got something wrong in attributing a destructive capacity to Rawls's principles. Nozick says he puts forward principles that establish procedures for fair distribution, whereas Rawls introduces patterns that wipe the procedures out. But "the difference principle does not select a pattern as such; it selects an institutional scheme on the basis of the pattern it tends to produce" (Pogge 1989: 29). The idea was not, as Nozick incorrectly comprehends, to have the game played, and then to annul the outcome if it does not fit the pattern. The idea was rather to have the game played under different rules—namely, rules that satisfy the principles of justice (ibid. 26). If these different rules are abided by, the outcome of the game will be fair whatever it turns out to be. So Rawls's theory is also about establishing basic rules for fair distribution just like Nozick's.

I believe that Nozick is right if we understand him as saying that a distribution in principle may upset entitlements. But we have to see if there are any obstacles to moving from the generality of this statement to specific cases. As I announced, the concept of entitlements may be made compatible with Rawls's scheme provided entitlements are understood in a weaker sense. The ground for introducing the weak theory of entitlement can be found in *Anarchy, State and Utopia*. Nozick maintains that Rawls's original position is incompatible with his version of entitlement theory. However, this is not the point where Nozick stops. He not only says that Rawls's theory is wrong if his entitlement theory is correct, but also that Rawls's theory must be wrong if *any* entitlement theory is correct (Nozick 1974: 202). This statement implies that we can imagine, at any rate, two kinds of entitlement theory: a

stronger and a weaker one. Had Nozick remained at the point of claiming that Rawls's theory was wrong provided his (Nozick's) was correct, it would not be possible to assume that two types of entitlement theory are possible. Then, either a method for formulating variants of entitlement theory would have to be invoked, or it would follow that there is only one—the Nozickian theory of entitlements. But Nozick said “any”, and opened up the space for introducing two variants of entitlements.

As a first cut in constructing a theory of weak entitlements, it is necessary to consider the most general idea of entitlements. Entitlements are attached to holdings. Holdings can be broken down into two parts. You are entitled: (a) to what you have prior to any acquisition; (b) to what you can make out of what you had prior to any acquisition. What you have at the moment may be your body, innate talents, skills, intelligence, physical endowments and strength, endurance, mood and so on. Call all these primary entitlements. What you can make out of your primary entitlements may be anything you produce by putting these primary entitlements to good use. I may be a talented writer, so I sit down and write a best seller. The book is then a product of my primary entitlements, and everything that is related to it (copyrights, royalties, popularity etc.) *prima facie* can be considered to be my entitlements, too. Call these secondary entitlements.

Nozick has a somewhat different view about what to do with initial holdings and its consequences. His argument goes like this:

- “1. People are entitled to their natural assets;
2. If people are entitled to something, they are entitled to whatever flows from it;
3. People's holdings flow from their natural assets

Therefore,

4. People are entitled to their holdings;

5. If people are entitled to something , then they ought to have it (and this overrides any presumption of equality there may be about holdings)” (Nozick 1974: 225-6).

As we see, Nozick maintains that initial holdings and their consequences should be an inherent part of any concept of entitlements. But it seems to me that we can say that a theory of entitlements that is based on such a lumping may be properly called only a theory of strong entitlements. In contrast to Nozick, I want to argue that the idea of entitlements can survive even if we keep initial holdings and their consequences separated. This can be done by breaking down Nozick’s strong theory of entitlement into two. The ground for the breakdown is again provided by Nozick himself. Nozick wants us to imagine a group of students negotiating how to distribute grades they got after the exam (ibid. 199). He maintains that the most convenient distribution would be the one favoring the end-state principle. Then he says: “Suppose next that there is posted on a bulletin board at their meeting a paper headed ENTITLEMENTS, which lists each person’s name with a grade next to it, the listing being identical to the instructor’s gradings. Still, this particular distribution will not be agreed to by those having done poorly” (ibid.). Now, we can lay aside for the moment the question of what the students would really agree to. It is critical to be aware of Nozick’s neglect of the distinction between the entitlement-list and the instructor-list. The essential difference between the two is that the first one deals with primary entitlements, while the second deals with their consequences. In the first case, it is exclusively about the students’s possession, be it material or spiritual. It pays no attention to the effects of such a

possession. In the second case, however, it is about the results of employing such a possession. When we speak about students's grades, we speak about the results of employing students's spiritual possession. To Nozick, it is substantial to preserve the principle according to which the students are entitled to both: their brains (primary entitlements) as well as the grades resulting from their brains's activity (secondary entitlements). To my mind, it is not necessary to regard these two things as falling under the same category, at least conceptually. The two can be properly separated as long as the rationale for the separation is proven to be a legitimate one.

Before I lay out the argument that buttresses this claim in the next section, I will add a few remarks about the general idea of entitlements. One essential feature of entitlements is that they are at one's disposal. Holdings, to which people are entitled, have the feature of being employed, used up, protected (with force, if necessary), bestowed, given away, abandoned, alienated, wasted, destroyed and so on. Now, let us grant Nozick's claim that the initial holdings (the primary entitlements) are at the absolute disposition of the holder. But Nozick wants us to believe that the secondary entitlements are absolute dispositions, too. One does not only absolutely possess one's organs but any product made by using one's hands, provided one does not infringe on anyone else's entitlements, i.e., provided any further exchange took place by complying to voluntary agreements among adult and entitled people. The picture of such an exchange looks like this: I may be a rich entrepreneur who pays you a poor wage for hard work. The exchange of holdings (money and labor, in this example) that ensues will be just if you have voluntarily accepted my offer. There is no imaginable constraint which can be imposed on the usage of the holdings and there is no right by virtue of which somebody is allowed to take the holdings away. The free will to employ someone and pay him whatever he freely accepts is the utmost judge.

The final implication of Nozick's strong theory of entitlements is this: if all the dispositions are not absolutely had, there are no entitlements. But why? Can we not imagine a system of entitlements in which some resources are inviolably possessed by some people, while some resources are commonly owned? Take as an example teaching positions at schools and universities. If you are a university professor, it can be said that you lay some sort of claim to the teaching position you hold. But it is incongruous to say that you are absolutely entitled to it, for teaching positions cannot be sold like labor. More importantly, no one can prove that personal autonomy is negated if such entitlements are absent from high education system. It would also be absurd to conclude that "the personal liberty of those who hold positions is infringed upon, or restricted, because they cannot sell their jobs" (Ryan 1981: 329).

Besides, there exist communities in which there are a great many goods that are disposable for everyone's use. The Amish or the Hutterites communities in the North America are cases in point. The characteristic of such systems is that mixing your labor with the joint resources does not entitle you to anything absolutely. It may be that some of the products will go directly to you, but there will be nothing in the fact of labor that will mandate the totality of the product to be in your exclusive holding. Nevertheless, entitlements will still exist, and even the absolute ones. You will be still absolutely entitled to do with your primary entitlements as you wish. Moreover, you are entitled to some parts of what you got after the employment of your primary entitlements. So even the idea of secondary entitlements does not disappear from the picture entirely. The point to be taken here is as follows: if one is absolutely entitled to their primary entitlements, but not absolutely entitled to everything that comes out of them, one can talk about weak entitlements.

### *13. Justifying Weak Entitlements*

The main worry for any advocate of weak entitlements is to prove that weak entitlements have a moral basis in the same way strong entitlements do. Nozick rightly points out that the general idea of entitlements is justified by invoking their moral character. The argument can be put as follows: people are autonomous if they are not used by others merely as a means. Autonomy entails entitlements because people can act autonomously only if they have some necessary resources with which to live autonomously. In other words, what's mine is mine, and if you take it away from me, the chances that I carry on in an autonomous way go down. The task of the Nozickian minimal state consists in legally protecting entitlements after it has been agreed precisely what the entitlements consist of. So entitlements are morally justified in that they ensure autonomy for everyone. The thesis I defend here is fundamentally the same, though slightly different in details.

In the past section, where I analyzed the general idea of entitlements, I said that entitlements were composed of two parts: primary and secondary entitlements. I also said that I grant Nozick's claim that primary entitlements are morally indisputable in being absolute. Their indisputability and absoluteness stem from the fact that they are determined. It is determined that all of what you have can legitimately be called yours in an absolute sense, if it is proven that all you lay claim on are the resources indispensable for your autonomous life. Imagine then a situation wherein people negotiate principles of justice. Any outcome that would strip of or negate whatever the parties happen to have at the moment cannot be morally justified, and hence would be unfair. If what cannot be touched by the outcome of

any agreement is pinned down, then primary entitlements are determined, and are the object of no negotiation.

How about secondary entitlements? Are they also determined like the primary ones? Is it obvious, without an additional discussion, what precisely belongs to the category of secondary entitlements and what not? To Nozick, it appears that it is. I, however, want to argue the opposite. I concluded the previous section by saying that Nozick's idea of entitlements is not only about the morality of entitlements, but about absoluteness in holding them. The weak theory of entitlements offers the view that secondary entitlements are morally grounded without being absolute. The whole idea is predicated on the assumption that the secondary entitlements are underdetermined. Let me explain. Suppose you say that whatever you possess in terms of your initial holdings rightly belongs to you. From this point, you go on to claim that the total product of the use of your holdings can legitimately be claimed, too. This appears to be logical: if you are entitled to what you have, you appear to be entitled to what you make out of it. In order to lead an autonomous life (the way I defined it in section 1), there are things that must not be done to people because if such things are done, an autonomous life is not possible. If, say, somebody physically precludes you from moving around, you can rightly disagree with this, contending that the freedom to move around determines your autonomy and your entitlements. But how many cars exactly do you need in order to be able to put forward a similar kind of claim? Some people may say three, some will settle on one, some will prefer bikes, and some will simply say that cars are not the crucial element to their lives, and will prefer walking.

The idea that secondary entitlements are underdetermined is not a purely theoretical matter. It is, as a matter of fact, already implemented in practice. We can see how it works if we

take a comparative look at inheritance law in at least two countries picked at random. It goes without saying that the property you inherit from whoever has bequeathed his property to you must be yours. This is a principle implemented in every country that has private property and civil inheritance law. But if we take two inheritance systems in a comparative analysis, we will see that they may well differ in that they specify different amounts of the bequeathed sum to be given to the inheritor. Why so? Simply because, while it cannot be disputed that the inheritor is entitled to a bequeathable amount, it is underdetermined what this amount precisely consists in.

There will be no argument among liberals of various kinds that everybody needs shelter, food, basic health insurance, rights, liberties and equal opportunities to be able to lead an autonomous life. This can hardly be said for people whose personal wealth almost exceeds the wealth of some third-world countries. The point is not that the wealth of such people must be taken away, but rather that, once basic needs are satisfied and initial holdings secured by entitling people to them, it is not determined what beyond that is necessary for people to lead an autonomous life.

There are more arguments to back up the claim that secondary entitlements are underdetermined. Let me show this by analyzing some of the methodological errors in Nozick's theory. Nozick claims that moral philosophy presents a ground for political philosophy. "What persons may and may not do to one another limits what they may do through the apparatus of a state" (Nozick 1974: 6). The epistemological consequences of this claim are far-reaching in the area of politics, but to say that the government is permitted to do only what individuals are permitted to do to each other is only *prima facie* clear (Nagel 1981: 195). Even if we say that individuals should be entitled to everything they

possess as well as to their consequences at micro level, as we move from micro to macro level, this becomes less and less clear. Take a version of the famous example about a great disaster that hit the Earth and largely reduced the amount of resources necessary for bare survival. In general, although it sounds plausible to say that everybody has full control over resources they came to possess; however, it sounds morally implausible to hold that someone is entitled to the full control over the resources s/he collected after a great disaster, if this leaves everyone else without them. Nagel's remark is appropriate here:

“One might even agree in part with Nozick's views about what people should do in the limited circumstances that define interpersonal relationships in the state of nature, but not agree that the proper generalization of those judgments is their unmodified application to all cases no matter how complex or extended” (ibid. 195-6).

Let me go one step further. The state of nature obviously does not imply any legal system. The legal system and law come into being through a process in which the government and state have been set up. It is allowed in the state of nature to assume that people are naturally entitled to secured life, health, liberty and protection against harm, but their entitlements to property rights and their rights to control resources have yet to be established (O'Neill 1981: 306). The opposite is also true: it is not plain from the very start what the state has the right to do that exceeds the protection of the basic rights, for “the extension of the state activity beyond enforcing the law against harms and threatened harms to life, health and liberty have not been established” (ibid.). This is precisely the point with undetermined entitlements. We have yet to determine what exactly the state is supposed to do beyond

protecting people from bodily harm. This is an additional activity that does not legitimately fall within the scope of the basic rights and is not compatible with the primary entitlements.

Entitlements are underdetermined. At any rate, the secondary ones. In the rest of the section I will show not only that a libertarian philosopher cannot find a convincing argument to the contrary, but that s/he is required to uphold this very claim in order to be coherent. In order to save strong entitlements, Nozick can invoke the role of voluntarily agreements and say that, if the exchange took place with the absence of coercion, the gain of the secondary entitlements will be absolute. To shore up the case for strong entitlements, Nozick gives the Wilt Chamberlain example, which I reproduced in the previous section. But this example cannot salvage Nozick from troubles since it is based on a trick. The original purpose of the example is not to show that patterns upset property rights, but that patterns upset liberty and individual autonomy. By saying so, Nozick implicitly suggests that the discussion of private property is still some way off. Nevertheless, intentionally going around this suggestion, he pushes us to conclude that the restriction of Wilt's freedom to exchange comes down to coercing and violating his right to absolutely own his basketball talent, and all that comes out of it. The justification for this claim would appear to lay in the fact that Nozick had established Wilt's right to extra profit. But this cannot be established. Wilt's being entitled to the extra profit of 25c can be justified only if a reference is made not to his entitlements but to private property rights. Since entitlements are a pre-legal concept, the existence of such rights is not determined yet. We do need a yet-to-be-set-up system of property rights without which an assumption that "individual property rights are rights to control resources in all ways, to dispose of them however and to whomever the owner wishes, or to accumulate them without limit" simply cannot be warranted (O'Neill 1981: 309).

Moreover, Nozick's problem is not only that he "must assume that all holdings come under the rights of private ownership—that all holdings are private property, but [also that] such assumption of extensive property rights undercuts [his] general case against patterned principles of justice" (Ryan 1981: 328-9). We can imagine examples in order to get at the conclusion that there can be things that any libertarian would ban from being possessed privately and absolutely. The most recent decision to split up the Microsoft company, ruled by an American local court in 2000, is a perfect example. When all resources of one kind are absolutely possessed by one agent, any libertarian would wish to constrain such a right simply because this opens up the room for the emergence of monopoly.

One line in Nozick's argument pushes us to assume that all things are privately owned. But this cannot be so easily assumed because Nozick himself is split on this issue. One horn of his argument is based on the assumption that the morality of his theory consists in the autonomy of the person; the other that morality consists of rights as side constraints. Nozick is very successful in defending strong entitlements by interchangeably referring to autonomy and rights as side constraint, but a coherent defense would require him to make up his mind and refer to only one of them. So Nozick's argument is not really against patterned distribution in general but rather against patterned distribution of privately owned property. He is doing well in rejecting such a pattern of distribution, but once the readers are reminded that the whole discussion is about individual autonomy Nozick's argument rejects nothing.

So far I have not been explicit enough on the morality of weak entitlements. I claim that, although underdetermined, they have a moral basis. Autonomy entails entitlements because individuals must have some resources to lead an autonomous life. Entitlements are required

by autonomy because rights to free movement, health, shelter and the protection from harm is secured by them. This already presents a firm basis for an autonomous life since autonomy is thereby indissolubly and essentially linked to primary entitlements. The underdeterminant character of entitlements is derived from the possibility to hold something without possessing it, and “maintaining a pattern of distribution by ‘preventing’ individuals from freely exchanging their holdings (jobs) does not seem to involve violating their personal liberty” (Ryan 1981: 329). Although there can be situations in which we are not permitted to dispose of private property at will, this is still a far cry from saying that such a ban constitutes the violation of individual freedom. Since weak entitlements are in perfect union with individual autonomy, I conclude by saying that they are morally justified in the same way strong entitlements are.

#### *14. Weak Entitlements in the Original Position*

A coherent view to the effect that the primary entitlements are compatible with egalitarian justice entails that the entitled remain entitled upon the lifting of the veil of ignorance. In order to see whether weak entitlements can find their place within the Rawlsian original position, it is necessary to examine what happens with the primary entitlements once people are put under the veil. Before I hit upon how this is possible, it is necessary to clear up a couple of dilemmas indispensable to understanding the relation between the difference principle and the principle of weak entitlements. In order to buttress the claim that something morally significant stems from the fact that secondary entitlements are underdetermined, I should demonstrate the relation of the notion of entitlements with the notion of desert. This link is essential to demonstrate, as it has direct bearing on this

section's thesis that people behind the veil of ignorance would select the principle of weak entitlements along with the difference principle.

Rawls has two concepts that bring about troubles: common asset and desert. He states that no one deserves their place in a society if this place is a consequence of luck, social heritage, or natural endowments. All

“undeserved inequalities call for redress, and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with few native assets and to those born into the less favorable social positions” (Rawls 1971: 100).

Note that Rawls begins by saying that it is only natural gifts that are undeserved, but finishes up by concluding that less favorable social positions also belong with what is undeserved. The idea behind this is that no one can be held responsible for what they are or are not. There is no separate argument for any kind of entitlements and desert before the institutions that determine who is entitled to what come into effect. The concept of moral worth does not provide the first principle of distributive justice before the institutions and related principles are established. This is the nub of the argument from arbitrariness.

From this argument Rawls derives that everyone is entitled to share in the benefits of the distribution of the assets whatever it turns out to be (Rawls 1971: 101). But if everyone is entitled to share in whatever distribution, then nobody is really entitled to anything apriori. And if nobody is entitled to anything apriori, this is because nobody deserves anything.

Sandel says that, in Rawls's view, people are neither entitled, nor possess anything, but are rather seen as merely guardian or repositories of the assorted assets and attributes located here (Sandel 1982: 82). The notion of desert lies at the base of the dispute here. Rawls says that desert simply does not apply in the cases where distribution is a result of contingent facts (fortunate family and social circumstances) (Rawls 1971: 104). Because no one deserves what s/he has before the initial acquisition, s/he cannot be entitled to anything that results from this acquisition.

I announced in section 2 that I consider the idea of common assets to be a requirement to the effect that we fix on a necessary amount of primary goods that are essential for autonomous living, and then to try to argue that it is only *this* amount (which is by far less than the total common asset of the society) that properly constitutes everyone being entitled to it. I hope the discussion on weak entitlements so far explains what counts as common asset as what does not. Let me now add final remarks on it. It should be said first that Rawls's theory primarily targets at the distribution of the social goods. The most generalized form of the difference principle says that "All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be equally distributed, unless an unequal distribution of any, or all, of these values is to everyone's advantage" (Rawls 1971: 62). So "a hypothetical initial arrangement in which all the social goods are equally distributed [...] provides a benchmark for judging improvements" (ibid.). As we see, while social assets are tackled and redistributed directly, natural endowments are approached in a different way. As Pogge says, "there is no disagreement about whether the better endowed should have and control their superior natural gifts. [...] The only controversy is over what advantages they are to be offered for developing and exercising their special endowments" (Pogge 1991: 64-5). This practically means that you are entitled

to what I call primary entitlements but by no means are entitled to specific procedures or an institutional scheme that additionally awards you for having this talent, while punishing those who do not have it for not having it. “The valuation of the relevant pattern features (income differentials reflecting diverse natural endowments) is meant to influence the assessment of the institutions. It is not intended to inspire rectificatory interference with the holdings that have arisen under some existing institutional scheme” (ibid., 65-6). The better endowed are surely allowed, under the Rawlsian scheme, to keep their talents, advance by using their natural talents, and have benefits from their good fortune but “only on terms that improve the situation of those who have lost out” (Rawls 1971: 101). Hence no better endowed is entitled to say that she has any special claim on a preferred institutional scheme any more than those who are not endowed.

Neither is the notion of desert completely absent from Rawls’s theory of justice, although Rawls says that moral worth also cannot possibly constitute any ground by which we can assess who deserves what. Rawls says that “A just scheme, then, answers to what men are entitled to; it satisfies their legitimate expectations as founded upon institutions. But what they are entitled to is not proportional to nor dependant to upon their intrinsic worth”. And: “The essential point is that the concept of moral worth does not provide a first principle of distributive justice.” (Rawls 311, 312-3). Rawls is saying that in a situation such as the original position it is simply not possible to define the requisite criterion by virtue of which any kind of distribution will be made. But if there is no criterion for any distribution to take place, how does any distribution take place at all? If there is really no concept of moral worth at the base of Rawls’s theory (or of any theory), how can we derive any principle of justice?

The point is simply that desert is differently understood by Rawls. Usually, desert is understood as a reward for a performed act. Miller defines it as some benefit that an agent can get by virtue of some activity or performance (Miller 1999: 133). To praise the excellence of this performed act, it is necessary that the act is performed by someone who has the capabilities necessary for performing the act. In many cases we explicitly appreciate the act, but implicitly appreciate the talent of the performer. So, the distribution based on our action actually turns on our different natural gifts. This concept, by which difference in endowments affects the distribution, is what informs Nozick's theory of justice. But Rawls's idea is different. He implies that difference in natural talents signifies no difference in moral worth, and, therefore, has no bearing on distribution. Those who do not want or cannot develop their talents are not less morally worthy than those who want to or can. As Rawls put it: "Surely a person's moral worth does not vary according to how many offer similar skills, or happen to want what they produce" (Rawls 1971: 311).

The implication of the discussion in sections 9 and 10 is that Rawls's theory cannot be said to not rely on deeper moral values, and the whole chapter 2 was devoted to showing that this deep value is autonomy of the person. Sandel is completely right: "For moral desert to provide an independent criterion of justice, there must be some substantive theory of the person, or of the worth of persons, to get it going" (Sandel 1982: 87). Where Sandel is mistaken (and I will discuss this in some detail in section 16) is when he says that "for Rawls, the worth of person is subsequent to institutions, not independent of them. And so a person's moral claim must await their arrival" (ibid.). It is not the case that in Rawls's view institutions do not come before moral worth. It is indeed not possible to make any theory get off the ground without an appropriate description of the person and moral attributes in the original position.

It is easy to conclude that Rawls thinks no one deserves anything if this statement is derived from the statement that says that Rawls thinks that virtues are not to be rewarded (Sandel 1982: 88). Sandel quotes Rawls as saying that “none of the precepts of justice aims at rewarding virtue” (Rawls 1971: 311). But virtue is not the same as desert. The catch is this. If someone earns something, he merely earned it; but he cannot be said to have deserved it, “because such efforts at self-improvement are not considered (within our public conception of justice) a form of moral excellence. [...] That [there are people] who have trained themselves to juggle six balls or recite the *Iliad* implies nothing about their (moral) Deservingness” (Pogge 1991: 83). Hence it is not true, as Sandel thinks, that Rawls “rules out desert altogether” (Sandel 1982: 86). Pogge says that “Sandel fails to appreciate the distinction between Desert and desert, the stronger and weaker notions” (Pogge 1991: 85). And what the stronger sense of desert suggests is that all people are *prima facie* equally worthy of desert. This coheres with the general egalitarian idea of justice, on which I expand in section 20, that all people are equal in a fundamental sense.

Rawls only wants to avoid a perfectionist theory of justice by which there is an a priori standard of excellence by which it is possible to reward those who are virtuous, because such a theory “fails to distinguish between moral desert and legitimate expectations” (Rawls 1971: 311). There can be many approaches to justice that will differ concerning what is the right criterion for rewarding people, be it beauty, hard work, and so on. But all these different approaches are united in saying that once the criterion for rewarding people is established, it is fair to reward some and penalize others. But Rawls’s aim is to construct a theory of justice that will not be based on a virtue that is conception of the good-dependant. Now, I said in section 1 that autonomy of the person may be qualified as a second order

conception of the good. I also said that it was Rawls's goal to construct a theory that will not promote autonomy in such a way. It is another question if he succeeded in this. But be that as it may, it would be simply wrong to claim, as Sandel does, that Rawls's theory does not aim at giving people what they deserve, only because "principles of justice aim not at rewarding virtue" (Sandel 1982: 88).

Rawls is somewhat ambiguous as to whether or not the concept of desert applies at all in his theory of justice. As I already mentioned, at one point he says that the notion of desert "does not play any role in a theory of justice." I tried to show that it does, but then the notion of desert must itself be differently understood—namely, that all people are equally deserving. As Rawls says, "no one supposes that when someone's abilities are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift" (Rawls 1971: 311). As we see, desert is here but the idea of rewarding desert is impracticable if the first principle of justice comes down to rewarding virtues. Moral worth cannot provide the first principle of justice. What overrides moral worth is legitimate expectations based on the premise that everyone is of equal moral worth. "Thus, the concept of moral worth is secondary to those of right and justice [natural duty and obligation], and it plays no role in the substantive definition of distributive shares" (ibid. 313).

Let me finish up this chapter by saying a word on an original position the result of which is both the difference principle and the principle of entitlements. Nozick's view is that this is under no conditions possible. I argue that it is, provided the principle of entitlements covers only the primary holdings.

If one claims that both the difference principle and the principle of entitlements would be chosen in an original position, one only has to show that the difference principle and the principle of weak entitlements are compatible. This seems quite possible as soon as we refer to the discussion from the previous few paragraphs where I explained that the idea of common asset and the notion of desert do not undercut the case for weak entitlements. If common assets are taken to refer only to secondary entitlements, weak entitlements are home and dry. Second, if the notion of desert does exist in the Rawlsian framework but is understood differently (all people deserve equally to have a chance to live autonomously), then this does not mean that rewards do not exist but only that people are to be rewarded according to their legitimate expectations. Having said that, it is clear that the people from the original position would select the difference principle as well as the principle of weak entitlements, because the difference principle cannot be said to distribute primary holdings.

To sum up. Nozick simply erroneously reads any egalitarian distribution as distributing absolute entitlements, collecting them all together and distributing them anew (Nagel 1981: 201). This is not what egalitarian liberalism is about. It is possible to have a system “under which taxes and other conditions are arranged to preserve certain features of distribution, while permitting choice, use, and exchange of property compatible with it” (ibid. 201). O’Neill supports a similar conclusion by saying that there is no reason to think that end-results or patterned distributions should not be compatible with voluntary transfers of entitlements (O’Neill 1981: 320). Even if we imagine a system with income tax and welfare payments, it is still perfectly possible that such a system would allow capitalist activity to continue untrammelled (ibid. 310). I believe that this chapter gave enough analytical support for the claim that entitlements, as an inherent part of any variant of liberal theory, are perfectly in union with the statement that “greater natural talents are not a collective asset in

the sense that society should compel those who have them to put them to work for the less favored. But society can say that the better endowed may improve their situations only on terms that help others” (Rawls 1974: [231]).

## **PART II**

### **AUTONOMY AND CULTURE**

## CHAPTER 4

### **Communitarian and Multiculturalist Critiques of Rawls's Liberalism**

#### *15. Two Definitions*

In the last two chapters I discussed two critiques of Rawls's liberalism that appeared in the 1970s. In this chapter I will discuss the communitarian and multicultural critique of Rawls's liberalism that appeared in the 1980s and 1990s. Although this dissertation is not a comprehensive study in the communitarian-liberal debate, it is useful to preface this chapter's discussion by differentiating between the terms "communitarianism" and "multiculturalism." Communitarianism is a stream in contemporary political philosophy that has one general and one particular target to shoot down: liberalism and Rawls's theory of justice. Communitarians think that liberals put too much emphasis on the individual. Since communitarians see community as an organic whole, their major objection to any variant of liberal political philosophy is that it does not acknowledge the communal character of every society and the way the community shapes the life of the individual. Communitarians believe that the community matters more than the individual in that the individual life is not possible outside the context of a community. Accordingly, they are prepared to claim that the individual good must be subjected to or derived from the communal good.

Multiculturalists view the whole problem differently. In contrast to communitarians, their key presumption is that a modern society is a pluralistic society composed of many different cultures that espouse irreconcilable values. This is, as a matter of fact, the same presumption from which Rawls's theory starts off, but while liberal theory offers a universal set of principles to each society, multiculturalism, like communitarianism, offers as many sets of principles as there are multicultural societies. Multiculturalists, like liberals, accept the fact that societies are not coherent wholes, but this is precisely why they call for diverse principles of justice. Bhikhu Parekh writes that although various groups that belong to a single society "are too disparate to share a common philosophical and political agenda, they are all united in resisting the wider society's homogenizing or assimilations thrust based on the belief that there is only one correct, true or normal way to understand and structure the relevant areas of life" (Parekh 2000: 1). Since there is no unified society, principles of justice must be pluralistic in that various sets of principles apply to various sections of the society because "in their own ways [diverse groups] want society to recognize the legitimacy of their differences, especially those that in their views are not incidental or trivial but spring from and constitute their identities" (ibid.).

There are communitarians and multiculturalists who view their theories as more suited to achieving what Rawls's theory cannot. I should like to emphasize that the method I am employing in this chapter will be the same as I employed in the previous chapters. I will compare the critiques of Rawls's theory with Rawls's theory itself, and argue for the superiority of the latter where this superiority can be argued for. My discussion will be restricted to three names: Michael Sandel, Michael Walzer, and Will Kymlicka, who are picked because they explicitly refer to Rawls in their critique of liberalism. I shall analyze the concept of autonomy of the person (sections 16-18), the concept of equality, and

appropriate principles for a pluralistic society (section 19). I will round off the chapter by discussing the usage of context and the veil of ignorance in contemporary political philosophy (sections 20-22).

### *16. The Partiality of the Original Position*

One of the most dangerous moves in political philosophy is to presuppose a particular human nature and then to move on to the construction of a political theory that mandates the implementation of such a human nature. Iris Marion Young writes that “[a]ny definition of a human nature is dangerous because it threatens to devalue or exclude some acceptable individual desires, cultural characteristics, or ways of life” (Young 1990: 36). Rousseau’s political thought presents a striking example of this attempt. Rousseau, who believed that people are by nature good and should strive to become morally developed persons, defended political principles by which the government is committed to forcing people to behave the way people allegedly want. (“Government will force people to be free.”) This outlook by some accounts gave rise to the totalitarian ideologies of 20<sup>th</sup> century (Talmon 1952). In contemporary political philosophy similar attempts also exist, and the early Rawls is a case in point. Rawls does presuppose a distinct human nature at the ground-floor level of his theory. Luckily enough, no one would be able to derive totalitarian political principles from Rawls’s theory.

In Rousseau’s case the distinct human nature is said to lead to totalitarian ideology. In Rawls’s case, it leads to the partiality of his theory. Rawls failed in achieving the most important task set by his theory: impartiality of the original position. Susan Moller Okin

rightly criticized Rawls for this, and argued that there existed types of human rationality other than means-end rationality. She notices that Rawls does not disassociate from the tradition in political philosophy where “appropriate subjects of political theories are not all adult individuals, but heads of families” (Okin 1989: 182). The problem here is not who is nominally represented in Rawls’s original position but what are the defining features of those who are represented. Okin claims that human beings differ not only in having different interests, opinions and prejudices, but also “in basic psychologies, conceptions of the self in relation to others, and experiences of moral development.” She rightly reminds us that “a number of feminist theorists have argued in recent years that in a gender-structured society the different life experiences from the start in fact affect their respective psychologies, modes of thinking, and patterns of moral development in significant ways,” from which she concludes that “there is such a thing as the distinct standpoint of women, and this standpoint cannot be adequately taken into account by male philosophers doing the theoretical equivalent of the elderly male justices in the cartoon” (ibid. 194). What Okin forcefully shows is that Rawls is not immune to a long entrenched tradition in political philosophy that first sets off only certain features of human character and then derives political principles from them.

Okin criticizes Rawls for seeing people as rational, taking the term “rational” in one specific and rather narrow sense. It can be said, then, that the main feature of the individuals from the original position is that they are rational in that they are self-interested. Apart from being self-interested, the persons to the original position are ultimately individualistic in their behavior. Whereas the self-interested individual commits Rawls to deriving utilitarian principles (Harsanyi 1975), the presumption of the individuated personality commits him to deriving the liberal principles of justice, which is, as a matter of fact, the final product of his

theory. The attraction of the original position is predicated on the assumption that everyone wants to enter it. But if we let only individualistic beings in the original position, it is a plain sailing to arrive at liberal principles. The snag is therefore this: why would anyone who does not underwrite a type of individualism agree to enter the original position at all? The charge that is most helpful to this chapter's discussion is that Rawls is committed to a metaphysical conception of the person that cannot be constitutively attached to her ends. This is a crux of the objection set forth by Michael Sandel in his *Liberalism and the Limits of Justice*. I will show in this section that this objection essentially fails but that Sandel's charges can be accepted if they amount to claiming that Rawls's liberalism is partial.

Let it be noted that Sandel does not necessarily want to prove Rawls's conception undesirable (although as a communitarian he should), but rather incoherent. Sandel reminds us that Rawls's theory of justice is based on deontological liberalism. The essence of deontological liberalism is that the right has priority over the good. Deontology came in because Rawls wanted, with his version of liberalism, to avoid utilitarian implications. Any version of utilitarian was known as giving priority to the good. The right was then defined dependently of the good: if a political arrangement can be proven to increase the good (say, overall utility), it is a morally right one. Since, according to this view, in the derivation of the principles of justice the right takes precedence over the good, the peculiarity of deontological liberalism consists in not being based on any particular conception of the good (Sandel 1982: 1).

The two major features of Rawls's deontological liberalism are as follows: Rawls advocates the primacy of justice over other political concepts. The primacy of justice allows the existence of some other political and social values but justice must always be seen as

trumping or overriding them. The deontology of Rawls liberalism, as his liberalism on the whole, is in many ways dependant on Kant's political thought. In chapter 1 I have already pointed out the major Kantian idea that inspired Rawls was his categorical imperative that people should be treated as ends, never as a means. What this proposition postulates is that individuals must be treated with dignity because they are intrinsically worthy. It is right, then, to give each person specific consideration not because it can promote his good, but because it respects his dignity. The most important thing for any individual is not to have aims, goals, and conceptions of the good, but rather the capacity and freedom to decide for himself how to live. Rawls fully buys into the idea that the basis of moral law has to be found in the subject capable of autonomous will, not in the object of the will. Freedom, to both Kant and Rawls, is possible only if one can decide without being affected by causes in the sensible world.

Sandel maintains the view that Rawls's position is incoherent in several aspects. Let me first consider Sandel's claim to the effect that Rawls's position is incoherent because it implicitly relies on the concept of community. Sandel argues this by analyzing how the individuated personality is related to the difference principle. To refresh our memory, the difference principle justifies redistribution of primary goods from the well-off to the badly-off. Sandel contends that distribution based on such principle is feasible only if all natural and social endowments are taken to be common assets of the society. "If the difference principle is to avoid using some [people] as means to others' ends, it can only be possible under circumstances where the subject of possession is a 'we' rather than 'I'" (Sandel 1982: 80). That Rawls relies on the conception of the intersubjective self is attested by his understanding of desert. Sandel wants to show that in Rawls's case desert does not exist, for distributive shares do not correlate with moral worth (Rawls 1971: 311). "For Rawls, the

principles of justice aim neither at rewarding virtue, nor at giving people what they deserve, but instead at calling forth the resources and talents necessary to serve the common interest” (Sandel 1982: 88). Since no one deserves whatever s/he possesses, the allocation of the assets is possible only if the community is authorized to allocate them. But if all assets are everyone’s belonging, such allocation can be instantiated only if we presuppose a constitutive conception of the community among individuals. This is, however, precisely what Rawls is not entitled to presuppose, Sandel argues, because Rawls presupposes an individual conception of the person that gives the priority to the personal ends over the communal ones.

It sounds plausible to argue that the redistribution of assets is easier within a company of good friends than in a company of deadly enemies. But it is possible to make the case for the difference principle without referring to the communal context. Brian Barry’s reading of the difference principle is helpful here. Barry says that the argument for the difference principle draws on “definite ideas about the general characteristics of justice” (Barry 1989: 215). Suppose we postulate that people are in some fundamental sense equal, and that equality is *prima facie* just. Then, any departure from the initial equality calls for special justification. This is the direct justification of the difference principle Rawls develops in chapter 2 of *A Theory*. The difference principle is a form of a Pareto improvement, stating that the worst-off have to be as well-off as possible. But it is of a paramount importance to observe that this statement can be made independently of referring to any communitarian value such as solidarity. “The bias towards equality stems from the *prima facie* justice of equality, [...] so that any inequality is automatically suspected” (ibid. 230). Why then would people settle on the difference principle if not for the sake of solidarity? Simply because all sections of the society will benefit from it. “The worst off gain as much as they possibly can

from inequality, so they have no reasonable complaint; and the rest gain even more than the worst off, so *they* have no reasonable complaint. Thus, all groups gain as much as they can reasonably demand” (ibid. 233). Of course, someone like Nozick or Sandel, may ask: “But what obliges me as a better-off to abandon greater benefits for the sake of the worst-off?” Absolutely nothing, provided you do not accept that equality is *prima facie* just, and that the only reason why the better-off are better-off is that this is what the benefit of the worst-off allows. But be that as it may, this rules out any variant of the solidarity argument.

I said in the beginning of this section that the crux of Sandel’s criticism of Rawls consists in the claim that the Rawlsian subjects negotiating under the veil of ignorance are the selves detached from its ends. I explain firstly what this means precisely. Then I will conclude that Sandel’s criticism of Rawls is wrong and, in the last part of this section, try to see if something can be made of it. Sandel claims that Rawls’s version of deontological liberalism fails and that “the liberties of equal citizenship are [...] insecure when founded upon teleological principles.” The reasons for this is that “the argument for them relies upon precarious calculations as well as controversial and uncertain premises” (Sandel 1982: 18-9). Sandel rightly points out that Rawls violates the crux of deontological liberalism—namely, that the right is prior to the good. I fully support Sandel’s objection, which can be seen from section 9 where I discussed at some length how Rawls does violate the deontological premises of his theory, and showed that in this sense he cannot really be said to have made a departure from utilitarianism or any other kind of teleological theory. But Sandel sees as disputable yet another aspects in Rawls’s description of the individual. He says that the Rawlsian individual is not only “merely the passive receptacle of the accumulated aims, attributes, and purposes thrown up by experience, a product of vagaries of circumstance, but always, irreducibly, an active, willing agent, distinguishable from [his]

surroundings, and capable of choice” (Sandel 1982: 19). The latter may well be true of the Rawlsian subject, but for the sake of clarity it is necessary to underscore that it is not the latter but the former that violates the deontology of Rawls’s liberalism.

Sandel writes:

“The independence of the subject does not mean that I can, as a psychological matter, summon at any moment the detachment required to overcome my prejudices or step outside my convictions, but rather that my values and ends do not define my identity, that I must regard myself as the bearer of a self distinct from my values and ends, whatever they might be” (Sandel 1982: 12).

Then he adds that the priority of justice arises out of “the parallel need to distinguish the subject from its situation,” and asserts that, although this account is not defended by Rawls himself, he believes it to be implicit in his theory (ibid. 20). I, on the contrary, believe that it is neither implicit nor explicit in Rawls.

What I will be contending, at bottom, is that Sandel makes his claim about the Rawlsian radically detached subject by presupposing a feature that cannot be presupposed. What Sandel calls “radically situated subject” consists in his possessive nature. The subject’s key feature is that he is always constituted by what he possesses, not by what he is (ibid. 20). In order to make his case, Sandel constantly underscores Rawls’s insisting on the fact that the subject must be able to freely choose. Sandel attributes this insistence to classical liberal doctrine and quotes Rawls as supporting this view by saying that “a moral person is a subject with ends he has chosen and his fundamental preference is the condition that enable

him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit” (Rawls 1971: 561). But from this point, Sandel goes on to argue that what follows from this proposition is that “the subject however heavily constituted by his surroundings, is always, irreducibly, prior to his values and ends, and never fully constituted by them” (Sandel 1982: 22). This is a *non-sequitor*. I see no reason to say that from the major prepositions of the classical liberal doctrine, which stresses the individuals’s rights to freely choose, it follows that individuals never can be constituted by what falls outside the scope of free choice.

The only way to safely put forward a claim like this must consist in presupposing that the Rawlsian individual is at the same time able to abstract from all his identities, thus having himself reduced to the mere will to choose. Sandel is quite explicit on this. He argues that the Rawlsian individual has metaphysical priority, meaning that the individual’s feature to choose its ends is not just a feature among many, but the key feature that forms his identity and always trumps other types of identity. (I will come back to this objection later in this section because it constitutes the only charge Sandel made that can be understood as making Rawls change his mind in the 80s.)

Sandel says the antecedently individuated self might have some goals and ends, but these can never be integral to the self’s identity. The following quotation says it all: “Given my independence from the values I have, I can always stand apart from them; my public identity as a moral person ‘is not affected by changes over time’ in my conception of the good” (Sandel 1982: 62). This simply reads into what Rawls had said much more than he wanted to say. If there was any distinct reason that made Rawls insist on people being able

“to revise and rationally pursue their goals,” it is precisely because their goals and life plans may be affected by changes over time.

The Rawlsian person is notably characterized by different interest and ends. Each person has a conception of the good and a rational life plan with which to discharge these interests and ends. The individuals from behind the veil of ignorance are hypothetical people, but hypothetical in the sense in which Hamlet was a hypothetical character. There is no reason to think that, only because Shakespeare’s Hamlet never existed, there has never been a man who faced a similar dilemma as he did. People get together behind the veil of ignorance precisely because they want to advance their real conceptions of the good. Otherwise the strains of commitment would not be needed in the Rawlsian matrix. It is the concept of the strains of commitment that mandates that no person is allowed to accept the principles of justice if these are shown to impose an unreasonable burden on her/him. It is hardly imaginable that any kind of abstract person would care for the strains of commitment, precisely because they would consider them unimportant. If the individuals behind the veil of ignorance were individuals who had no ends in their lives, they would choose the principles that protect their abstractedness, but the strains of commitment show that they do not. Of this Sandel himself is aware, but he discards it by saying that concrete persons with concrete conceptions of the good are at odds with deontological claims of Rawls’s liberalism. This is true but irrelevant for Sandel’s argument. Rawls’s individuals do have concrete conceptions of the good they want to protect, and saying that this violates the deontological foundations of liberalism only says that it violates the deontological foundations of liberalism. Nothing more.

As I said, Sandel's statement that "one consequence of this distance is to put the self beyond the reach of experience, to make it invulnerable, to fix its identity once and for all" and that "no commitment could grip me so deeply so that I could understand myself without it" can be supported only if we presuppose that the Rawlsian individual can abstract from all his identities at the same time and put himself in an "empty" space. But what Rawls wants to say with his idea that the subject always must be able to freely choose and that "the self is prior to the ends which are affirmed by it" is that you might find yourself in a situation in which you used to be committed to a conception of the good at one point (which you want to abandon), and arrived at another one (which you now want to embrace). It is the empty space in this transition that is basically abstract, but it should be noted that this abstractedness is by no means spatial, let alone everlasting. The Rawlsian individual is at no point at no place with respect to being attached to a conception of the good.

Sandel refers to Nagel who argued that "the original position seems to presuppose not just a neutral theory of the good, but a liberal, individualistic conception according to which the best that can be wished for someone is the unimpeded pursuit of his own path provided it does not interfere with the rights of others" (Nagel 1973: 9-10). This leads to the third, and in my understanding, most forceful, thought somewhat implicit, objection that Sandel raises against Rawls. Sandel says that deontological liberalism alleges its avoidance of relying "on any particular theory of the person [...] But there is another sense in which this liberalism does imply a certain theory of the person. It concerns not the object of human desires but the subject of desire, and how this subject is constituted" (Sandel 1982: 10).

Rawls formulates the peculiar relation between the self and his/her ends not only as being one of possible relationship that can be found in people, but as expressing people's

fundamental nature (Mulhall & Swift 1992: 47). If Rawls wants people in the original position to be the true people, this fact will violate the deontological requirements. I made it clear in chapter 2 that Rawls's theory is rooted in the autonomy of the person. This is the fundamental premise without which Rawls's theory cannot get off the ground. Rawls fully supports this by saying that "a moral person is a subject with ends he has chosen, and his fundamental preference is for conditions that enable him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit" (Rawls 1971: 561). All this leads to one conclusion: Rawls's original position is rigged, and the rigging consists in letting into it only the people who can be said to embrace the individualistic outlook. This is, I think, Sandel's only charge that can stand up to a serious examination. Rawls's original position eliminates all conceptions of the good that cannot be squared with individualistic values, so proclaimed liberal commitment to neutrality can be attained only at the cost of presupposing individual conception of the person Sandel sees as "antecedently individuated." Not only that it expresses a human nature, but this human nature is a individualistic one.

Sandel is correct in saying that Rawls's concept of the person violates the impartiality of the original position, but he is wrong to think that this makes the Rawlsian liberalism empty. Namely, the alleged emptiness of liberalism would, in fact, support the case for the proclaimed deontological requirements of Rawls's theory. It is not the emptiness of liberalism, but rather the substantive concept of the person that violates the impartiality of the original position. If all people care about are the circumstances in which they will be free to choose their way of life, then such people will not settle on anything less than the liberal principles of justice. Rawls's conception of the person thus assumes a substantial self, not an unencumbered one, as Sandel says (Sandel 1992). Will Kymlicka defines

liberalism precisely in such substantive terms, arguing that liberalism embraces a specific understanding of political morality by which the essential interest of human beings consists in leading a good life, which might be different from leading the life people currently believe to be good (Kymlicka 1989: 10). The implication of this proposition is that people may be mistaken about what the good for them consists in and, therefore, must have the opportunity to revise their life plans. So, “individuals must have the cultural conditions conducive to acquiring an awareness of different views about the good life, and to acquiring an ability to intelligently examine and re-examine these views (ibid. 13). This form of liberalism is called perfectionist liberalism and its most prominent advocate is Joseph Raz, whose definition of autonomy I referred to in section 1. The essential element of this brand of liberalism is that government should be engaged in promoting activities such as liberal education, freedom of expression and press, artistic freedom etc., in order to reward all those who espouse the conceptions of the good that are individual-friendly. Rawls himself is officially against such a view, and his intention is to prove that he can formulate a version of liberalism that is fully neutral as regards conflicting conceptions of the good. The only problem is, as Sandel’s analysis shows, that he has failed to do so.

### *17. The Autonomy of the Person for Political Purposes*

As I showed in the previous section, many points in Sandel’s critique of Rawls are simply wrong. Yet, as I intimated in the penultimate section, Sandel might be on to something in claiming that the constraints Rawls imposes on the individuals from the original position do not allow the entrance to all the people, or at least do not treat everyone in the same way. It is common knowledge that the communitarian critique of the individual personality from *A*

*Theory of Justice* indirectly forced Rawls into reformulating some of his premises. This section looks into how Rawls attempted to redesign the concept of the individuals who negotiate behind the veil of ignorance. Rawls's new intention was to argue that the liberal principles of justice can be accepted not as a *modus vivendi*, but as an object of an overlapping consensus. The implication of this aspiration is that the original position be impartially constructed. I will try to demonstrate that Rawls again failed in this attempt, as the concept of the autonomy attributed to the parties to the original position flouts the requirements of impartiality at the ground-floor level.

Rawls begins *Political Liberalism* by saying that his political conception of justice “offers no specific metaphysical or epistemological doctrine beyond what is implied by the political conception” (Rawls 1993: 10). Political liberalism is a freestanding view, meaning that it is a political conception of justice that is neither derived from a comprehensive moral doctrine, nor from a conception of the good. The political conception of justice is thus seen as “a module that fits into and can be supported by various reasonable comprehensive doctrines that endure in society regulated by it” (ibid. 12). What is, then, the main purpose of the political conception of justice that is supposed to get Rawls out of trouble? The point is that even those who denigrate the liberal principles (equal rights and liberties, equality of opportunity, difference principle, neutrality of the state etc.) are given convincing reasons for accepting them. “For rather than confronting religious and nonreligious doctrines with a comprehensive liberal political doctrine, the thought is to formulate a liberal political conception that those nonliberal doctrine might be able to endorse” (ibid. xvii). This is the situation where “we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justifications of those actions” (ibid. xlvi). If

we can formulate such a conception, then we can say it can be taken to be the object of an overlapping consensus.

How does Rawls intend to accomplish this? Recall the debate between Rawls and Harsanyi. The veil of ignorance, which Rawls “borrowed” from Harsanyi, was meant to ensure impartial judgment from one person’s point of view. The result was, as Harsanyi argued, not the difference principle but rather some version of the average utility principle. In *Political Liberalism* Rawls drops rational choice (Rawls 1993: 16, 53), and focuses exclusively on the ideal of autonomy. But it is crucial to understand that Rawls’s intention is not to offer a comprehensive understanding of the autonomy of the person that goes all the way down to our private lives, convictions, and beliefs, but solely a conception of autonomy for political purposes. This, in short, means that we do not have to behave autonomously in our private lives, but we must accept autonomous behavior in political matters.

Rawls makes a distinction between two types of autonomy in order to describe what autonomy is. Rational autonomy rests on persons’s intellectual and moral powers to exercise their “capacity to revise, form and to pursue the conception of the good, and to deliberate in accordance with it” (ibid. 72). This type of autonomy is compatible with pure procedural justice, meaning that there is no prior principle that the autonomous persons are supposed to follow. “[Parties] recognize no standpoint external to their own point of view [...] This models the idea that when citizens are fairly situated with respect to one another, it is up to them to specify the fair terms of social cooperation in light of what they each regard as to their advantage, or good” (ibid. 73). Whereas rational autonomy refers to the way the parties deliberate behind the veil of ignorance, full autonomy refers to how deep it goes. Whereas in the original position this means that parties are free and equal, in real life it

implies the possibility to affirm “the political principles of justice and enjoy the protections of the basic right and liberties; it is also realized by participating in society’s public affairs and sharing in its collective self-determination over time” (ibid. 77-8).

It seems to me that moral and rational autonomy have same features. Both imply the idea that a person must be given a chance and an environment to challenge his views and change them if necessary. Rawls rightly points out that this understanding, formulated by Mill and Kant, fails to satisfy the criterion of reciprocity and cannot be a part of political conception of justice (ibid. xlv). However, here I seek to show that Rawls did just what he indicates he considers a forbidden move: he placed this moral understanding of autonomy at the ground-floor level of his theory, thus practically violating the requirements of impartiality in the original position in the same way he did in *A Theory*.

On occasions in *Political Liberalism* Rawls is more explicit on what autonomy involves.

Autonomy is the concept by which the parties to the original position are assigned two basic moral powers: 1. the capacity for a sense of justice and a conception of the good; 2. the powers of reason (of judgment, thought, and inference connected with these powers) (Rawls 1993: 19). A sense of justice is the capacity to honor the terms of social cooperation.

Whatever the terms, everyone should be following them. This sounds plausible: if some want to follow the terms and some do not, there may be social cooperation, but it surely will not be a just one. The problem is what Rawls means by a capacity to hold a conception of the good. “The capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one’s rational advantage or good” (ibid. 19, 72). I believe that this formulation expresses the essentials of what Rawls wanted with the concept of autonomy.

One possible explanation as to why Rawls opted for such a framing of the concept of autonomy is the many times mentioned danger of the self-interested personality he embraced in *A Theory*. Bear in mind that Rawls badly wants to get at the liberal principles of justice. But the fulfillment of this wish costs him a rigging of the original position. H. A. Hart was the first who argued that the self-interested personality in the original position may well settle on a trade-off between rights and liberties for higher material gain. Rawls rested his case for liberalism on interest, not on ideals, which transformed the ideal for liberty into a preference for liberty. Hart argued that from such a motivation it “does not follow that a liberty which can only be obtained by an individual at the price of its general distribution through society is one that a rational individual would still want”, because “there may still be in any society people who want more material goods and would be willing to surrender some of their basic liberties to get them” (Hart 1973: [248, 250]). In order to avoid such a dangerous conclusion, Rawls set out to modify the concept of the person not by modifying the concept of personality itself, but by removing the person’s utilitarianism and leaving its liberal side.

That the two moral powers are critical for persons before and after the veil is lifted is testified to by the way Rawls links these powers with basic rights and liberties. In order to meet Hart’s criticism, Rawls now wants to secure basic rights and liberties right from the start by assigning people two moral powers. He says that every basic liberty has what he specifies as a “central range of application,” whereas “the institutional protection of this range of application is a condition of the adequate development and full exercise of the two moral powers of citizens as free and equal persons” (Rawls 1993: 297). This appears to be a vicious circle. On the one hand, Rawls wants to show how basic liberties can be secured and

not be swapped for material gains by assigning people the two moral powers. But when we ask how the case for the two moral powers can be made, we see that this is possible only if we create an environment with basic rights and liberties that insure people's having the two moral powers.

Nor is this the end of the trouble. Rawls wants to leave an impression that the two moral powers are important only in an instrumental sense. When he starts to talk about moral powers in this context, Rawls talks about our nature and its different aspects. He says: "there are many different aspects of our nature that can be singled out as a particularly significant depending on our moral aim and the point of view. [...] In justice as fairness the aim is to work out a conception of political and social justice which is congenial to the most deep-seated convictions and traditions of a modern democratic state" (Rawls 1993: 300). And although Rawls seeks to convince us that "this conception is not to be mistaken for an ideal of personal life or as an ideal for members of some association, much less as a moral ideal such as the Stoic ideal of a wise man" (ibid.), I am inclined to think that his conception of the person still expresses a deeper moral view that predetermines choice under the veil of ignorance.

As said, the requisite capacity for justice consists in the ability "to form, revise, and rationally pursue conceptions of the good." Rawls says that we need to exercise and develop this ability but only as a means to person's good, "and as a means it is not (by definition) part of person's determinate conceptions of the good" (Rawls 1993: 312). It seems that Rawls wished to maintain that we are not committed to developing these two powers because they are constitutive of our personality or our nature. He is explicit in saying that "parties cannot invoke reasons founded on regarding the development and exercise of this

capacity as part of person's determinate conception of the good. They are restricted to reasons founded on regarding it solely as a means to a person's good" (ibid. 315). But he also warns us that "the role of this power in forming other and more rational conceptions of the good and in revising existing ones must not be overlooked. There is no guarantee that all aspects of our present way of life are most rational for us and not in need of at least minor if not major revision. For these reasons the adequate and full exercise of the capacity for the conception of the good is a means to a person's good" (ibid. 312-3).

The overall Rawlsian approach to defining the concept of autonomy is fuzzy. The main problem arises from Rawls's wish to understand autonomy as central for human lives, but at the same time to ascribe instrumental value to it. Unfortunately, such a sleight of hand cannot be done, and one side has to prevail. Had Rawls managed to stick to this instrumental approach to autonomy, he might have succeeded in justifying political liberalism on instrumental grounds. This would mean that people could easily settle on his principles of justice for political purposes without being afraid that their personal conceptions of the good will be affected by it. This, however, is not possible within the Rawlsian framework. Rawls says that the parties who are represented in the original position are the people "who are responsible for the essential interest of a free and equal citizen" (Rawls 1993: 25). But this proposition holds water only if these parties are not obliged to see their highest interest in being free and equal in the real life, that is, in the political process. Behaving so would mean the principles of justice mirror the autonomy of the person as a conception of the good. Why would anyone who denigrates the ideal of autonomy accept that? To be free and equal can hold only at the ground-floor level, where parties are to select the principles. Afterwards, this proposition turns on what people actually would like to do in reality. If they willingly refuse "to form, revise and rationally

pursue” the conceptions of the good in an autonomous way, they should be permitted to do so. The only problem is that this situation cannot arise out of Rawls’s premises and that such people would be disadvantaged in the Rawlsian society.

In *A Theory of Justice* Rawls was charged with rigging the original position in such a way as to obtain the liberal principles of justice from the original position. This was possible because of the substantiality of the argument Rawls put in the original position. This process is repeated in *Political Liberalism* despite Rawls’s intentions not to. Rawls again tries to keep the Kantian understanding of what comprehensive autonomy requires. Kant believed that we act autonomously only when making the decision by not being affected by contingency or external force. Pondering on each decisions is thus required. Rawls follows Kant in believing that autonomy requires making decisions in such a way. The proclaimed new goal of the parties to the new original position is that they want a society wherein they are able to keep, protect, and further such capability. They want to agree on principles that will help them to become full-fledged persons. In *Political Liberalism*, in contrast to *A Theory*, Rawls says that such an understanding of autonomy is deployed only for political purposes, and does not have to be a part of people’s private beliefs and conceptions of the good. But this argument is hardly more convincing than the argument presented in *A Theory*. Rawls says “citizens have the capacity for a sense of justice, but this assumption is purely formal” (Rawls 1993: 315). This cannot be said because the repercussions of having and deploying such a capacity are substantial. Suppose I am instrumentally committed to the project of marrying a wealthy, but obnoxious woman. Once I marry her, it is no reprieve merely to say that my commitment was not real but only instrumental. I am now a married man and can break the marriage only by asking for divorce. People who denigrate the ideal of autonomy could find themselves in a similar situation if the situation is regulated by

autonomy-friendly principles. What I am driving at here is that the concept of autonomy designed merely for political purposes commits everyone who accepts it to much more than what Rawls claims it does. If I am right about this, it will follow that the parties to the original position are not going to settle for anything less than the two liberal principles of justice Rawls puts forward, but it will also follow that the government will be obliged to create favorable circumstances wherein all those conceptions that are autonomy-friendly will flourish. If my highest interest is in being able to autonomously form, revise, and rationally pursue my conception of the good, then this says a lot about what sorts of conceptions of the good I can be tolerated in pursuing. Only such conceptions that can be squared with the concept of autonomy will be protected, for “to form, revise, and rationally pursue” is what justice is about. The problem under scrutiny here is not what citizens may come to think or not to think over time, but rather what the government is committed to promoting. It is typical for people to change their mind. But it is one thing to say that the principles of justice oblige the government to make sure people can change them without paying for it. It is completely another thing to say that liberal government is engaged in creating favorable circumstances for citizens to arrive at their conceptions of the good by submitting them to a Socratic scrutiny.

What I was trying to say here was that the representatives’s two moral powers indicate a second-order conception of the good. Roughly speaking, the conception of the good as autonomy requires that people in their life make autonomous choices and are let free to decide how to live, what to think, and whether or not to speak their mind. Autonomy is a second-order conception in that it does not specify the good, but in that anything can be good as long as it is arrived at by abiding by the requirements of autonomy. The implications are patent:

“If we say that it is important for people to be able to question, revise, and form their substantive conceptions of the good, we shall naturally be led to endorse traditional liberal concern for education, freedom of expression, freedom of the press, artistic freedom etc. [...] We thus may contrast autonomy as a conception of the good with a substantive conception for example a religiously based conception of the good” (Barry 1995a: 129).

Now, it is perfectly imaginable that with such an understanding of autonomy in the background the representatives from the original position are going to select the principles which underwrite liberal institutions designed to promote autonomous life. What follows from endorsing such a conception in the background is that the government will promote autonomy because it is good. The next consequence is that not all conceptions of the good will be equally valuable. “Only those conceptions that have the right origins—those that have come about in ways that meet the criteria for self-determined belief—can form a basis for activity that has value” (ibid. 131-2). Rawls’s ideas on education fully supports this view (Rawls 1988: 267), so “it is to be expected that the institutions which [the principles of justice] ground will be hostile to non-autonomy supporting ways of life, and not justifiable to the non-autonomy valuing adherents of such modes” (Fitzmaurice 1993: 13).

Rawls’s representatives from the original position definitely do not have any need to opt for any other principles which are not based on the autonomy of the person understood as the second-order conception of the good. Here we can see how liberal neutrality fails. Joseph Raz argued that the doctrine of neutral political concern is possible only if the government is neutral “between those conceptions of the good which greatly value an autonomous

development of one's life in accordance with one's rational nature." Such kind of neutrality clearly states that "certain conceptions of the good are worthless and demeaning, and that political action may and should be taken to eradicate or at least to curtail them" (Raz 1986: 132-3). I think Raz is right in pointing out what autonomy as a conception of the good requires. But he was also right in contending that perfectionist procedure is not ruled out by Rawls's arguments against perfectionism, and that "Rawls and others arguing for neutrality in similar ways fail to establish their case, [assuming] sometimes too quick or simple a connection between neutrality and personal autonomy" (ibid. 133).

#### *18. Does Kymlicka Have a Case?*

Let me stay within the discussion on autonomy by taking up the objection to the effect that a liberal theory of the Rawlsian type is blind as to how cultures affect people's free choices. This objection—raised by Will Kymlicka, the leading theoretician in the multicultural theory of today—runs as follows. People should be autonomous in making choices. But some people are able to make meaningful choices only within specific cultural context. "Cultures are valuable, not in and of themselves, but because it is only through having access to a societal culture that people have access to a range of meaningful options" (Kymlicka 1995: 83). Kymlicka defines societal culture as a "territorially-concentrated culture, centered on a shared language which is used in a wide range of societal institutions, in both public and private life, covering full range of human activities, including social, educational, religious, recreational, and economic life" (Kymlicka 2001: 18).

From the very beginning Kymlicka is clear as to what distinguishes the multicultural from the communitarian position. Whereas communitarians, such as Taylor, think that cultures and communities are values in themselves (Taylor 1992), a multiculturalist will rather want to say that they matter because they provide a context within which it is possible for individuals to make meaningful choices. This is precisely why a multiculturalist challenges the liberal view. Kymlicka alleges that most of the contemporary liberals, including Rawls, do not pay sufficient attention to what importance culture plays in the lives of individuals. This is not quite true. Rawls did try to adapt his theory to the objections raised by communitarians. He began *Political Liberalism* by asking “how it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines” (Rawls 1993: xviii). Rawls does not mention “ethnic” or “cultural” doctrine, but it is fairly plain that both could either fall under “moral” or find a separate status within the scheme without upsetting it. So the problem was not that liberals do not address the cultural heterogeneity of the society but rather, as I argued in the previous section, that the liberal response to the communitarian critique cannot be said to be a satisfactory one.

At places Kymlicka argues along similar lines. He understands that the new Rawlsian idea was not to abandon the ideal of autonomy but rather to restrict its scope. Rawls “wants to continue appealing to [autonomy] in the *political* context, while avoiding it in other contexts” (Kymlicka 1995: 159). We do not have to care about the revisability of our choices in our personal life, but in our public life, we must opt for the principles supporting the autonomy and possibility to form, revise, and rationally pursue conceptions of the good. Kymlicka sees this as an incoherent position: why would anyone, who does not accept the ideal of autonomy more generally, accept it voluntarily in political context? (ibid. 160) He

argues, and he is totally right, that if a society consists of some liberal and illiberal cultures, the representatives of the illiberal cultures will not settle on Rawls's principles of justice but rather on some sort of the millet system within which they will be able to exercise their illiberal practices without running the risk of being penalized for it by the liberal government. Thus, the only way to make the illiberal cultural groups embrace liberal principles is to make them swallow a large dose of liberal outlook—namely, that of the autonomy of the person. The fact that Rawls's theory is less comprehensive than, say, Mill's is not a reprieve here, for it can hardly be regarded as more appealing than Mill's to illiberal individuals and groups.

It is interesting though that Kymlicka himself had tried to solve this issue by drawing on the perfectionist liberal point of view. He says that liberals cannot accept the view that communal values and practices are “authoritative horizons” (Taylor 1979: 159). On the contrary, central to liberal view is the idea that such values should be challenged, put in question, and, finally, dropped if proven wrong. A liberal can accept values that are set for him by others so long as these values can pass the test of critical examination (Kymlicka 1989: 50-1). So, Sandel's charge that the self is prior to his ends is misleading, thinks Kymlicka, and stresses that “what is central to the liberal view is [to] understand our selves to be prior to our ends, in the sense that no end or goal is exempt from possible re-examination” (ibid. 52). I do not see how this solves the liberals's problems. If Sandel argued that the concept of the person Rawls conceptualizes violates the equality of the parties in the original position, so does Kymlicka's concept of the person who sees everything as subject to re-examination and revision. The point is again that all those who espouse conceptions of the good other than those based on autonomy will be disadvantaged from the start.

The later Kymlicka reformulated his position. In *Multicultural Citizenship* he laid out his own version of liberalism that is supposed to attract illiberal individuals into accepting liberal principles of justice. Kymlicka still thinks, like before, that people must have the opportunity to autonomously lead their life from the inside and have the resources and liberties required to pursue such a life (Kymlicka 1995: 81). He also holds that people must be able to question the current belief and conception of the good life because “leading a good life is different from leading the life we currently believe to be good” (Kymlicka 1989: 10). But in order to be able to lead a good life, there has to be a cultural context that provides options and makes them meaningful to us (ibid. 1995: 83).

From the established link between individual free choice and culture Kymlicka takes a second step by saying that liberalism should not be only about individuals and their conceptions of the good but also about cultures and their maintenance. If it is true that individuals need a cultural context to make meaningful choices, it does not follow that any context will do. “Cultural membership provides us with an intelligible context of choice, and a secure sense of identity and belonging, that we call upon in confronting questions about personal values and projects” (Kymlicka 1995: 105). Referring to Margalit and Raz, Kymlicka argues that individuals must maintain their original cultures because reculturalization costs. The role of cultural membership is that it constitutes people’s self-identity, whereas “national identity is particularly suited to serving as the ‘primary foci of identification,’ because it is based on belonging, not accomplishment. [...] If a culture is not generally respected, then the dignity and self-respect of its members will also be threatened” (ibid. 89). The final conclusion Kymlicka arrives at is that all individuals who regard their cultures as critical for making choices should have the right to maintain them. In a word,

Kymlicka “tried to show that liberals should recognize the importance of people’s membership in their own societal culture, because of the role it plays in enabling meaningful individual choice and in supporting self-identity” (ibid. 105). The implication is clear: if some people can make choices only within cultural context, then individuals should have a right to maintain their cultures as a primary good.

In this thesis I cannot get into discussion about whether culture constitutes a primary good for individuals. Let me take for granted that it does. What I want to argue now is that culture cannot be a liberal primary good. In order to paint his theory with liberal colors, Kymlicka invokes Rawls’s argument of responsibility and desert. Since, as Rawls believes, no one deserves anything, no one can be held responsible for the poor position they found themselves in. This is precisely what happens sometimes with national minorities, claims Kymlicka. Many times we will find the situation in which the language of national minorities, as the most important determinant for the survival of a culture, will not be able to survive since the priority will always be given to the language of the national majority. But, continues Kymlicka, minorities cannot be responsible for the predicaments they face. Therefore, minorities should be granted group-differentiated and self-government rights that will “compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural market-place” (Kymlicka 1995: 113).

The analogy is clear but, unfortunately, cannot work. There are two reasons for which a liberal may underwrite collective rights to ethnic (or other types of) minorities. First, collective rights are permitted in so far as they do not violate individual autonomy. Second, a liberal can accept the establishment of such rights if there are reasons that momentarily override his compliance to liberal autonomy. This, however, will not happen as a

consequence of the liberal position, but as a consequence of, say, an attempt to resolve urgent social problems. (Affirmative action is a good example.) The key criteria that underlies Rawls's notions of desert and responsibility is that no one is intrinsically worthy or deserving of their possession and background because these are the things over which people have no control. This plainly excludes the notion of worth based on the membership of a race, class or national minority, for basing claims for justice on such features, therefore, gives determinate weight to the contingent facts. Once it is possible to contextualize the rationale for primary goods, the discussion moves outside the Rawlsian framework. A multiculturalist might rightly wonder why the Rawlsian primary goods such as rights, liberties, equal opportunities and income cannot be made race-, gender- or ethnicity-specific. A quick answer s/he might get is that unless the primary goods are not universal and cannot be used by everyone, they would not qualify for primary goods, for primary goods are unique in that they are wished by everyone no matter what kind of life agenda they are pursuing. But the attribute that unmistakably ensures free and meaningful choice, which is Kymlicka's goal, is that the primary goods are convertible. On the liberal understanding of the primary goods, everybody is entitled to a bundle of translatable resources, and how they use them is up to her. This is quite opposed to saying that a person is entitled to culture-specific, and hence non-translatable set of resources, and how she converts them into transferable ones is up to her. If the goods are not convertible, the person is stuck with goods that perhaps can be employed for maintaining a culture, but cannot be employed for an autonomous life.

Kymlicka wants to reconcile individual autonomy with the right to protect culture. But the two might get into an apparent clash. If I am an illiberal father, who does not allow free life choices to my children, I will not settle on liberal principles put forward by Rawls, but

neither will I settle on the principles put forward by Kymlicka. Suppose I am a head of a family in a patriarchal society. According to the tradition of my family (or my community), my daughter can marry only the man I pick for her. It can hardly be said that I do such things in order to terrorize my daughter, but it can pretty safely be said that I thereby uphold the traditional values of my culture. If my daughter does not want to listen to me, traditionally-wise also, I have the right to punish her for being disobedient. Illiberal practice clashes here with liberal principles of justice. A coherent liberal view will in this case mandate the intervention on behalf of the daughter, for a liberal government respects the view that people cannot be penalized for the life choices they make.

The liberal position is universalistic in that liberal principles apply to everyone. If there is a person or a group of people who jointly infringe on someone's opportunity to make autonomous choices, liberal government is obliged to weigh in. Whoever does not endorse this view as a matter of principle is not a liberal. I am stressing this because Kymlicka constantly repeats that he wants to work within the liberal tradition. How then, in Kymlicka's mind, a liberal government should react when confronted with hard cases, namely with illiberal practices like in the example I gave above? Kymlicka admits that there are illiberal groups whose traditional practices deny "to others, such as women, lower casts, or visible minorities" basic human rights (Kymlicka 1997: 41). In replying to the question "What is liberal government supposed to do with them?", Kymlicka raises a cautionary remark that any direct interference with such practices "ignores the way people are bound to their own cultures," and leaves the question open. In his most recent work, the problem of what to do with illiberal minorities almost completely disappears from the frame. In analyzing the situation of minorities in Eastern and Central Europe, he notices that there too "minority nationalists too often exercise their self-government in illiberal and intolerant

ways,” but immediately after establishing this as a fact, Kymlicka quits the discussion, explaining away that such practices cannot be handled because there is no alternative (Kymlicka 2001: 69-70).

To say that illiberal practices have no alternative seems to me to be a smokescreen for saying “Let them do whatever they want even if this is against liberal views,” which would be evidently a nonliberal solution. But I shall not continue to analyze the non-liberal elements in Kymlicka’s theory, and instead focus on what he has to say as a liberal.

Kymlicka proposes that in handling the problem of illiberal minorities and their practices the aim of liberal government “should not be to dissolve illiberal nations or groups, but rather to liberalize them” (Kymlicka 1995: 94; 1997: 41). Bearing in mind that “as a general rule liberals should not prevent illiberal nations from maintaining their societal culture, but should promote the liberalization of these cultures” (ibid. 1997: 42), he suggests that whenever liberal government and nonliberal minorities are in conflict, the most they can do is to “sit and talk” about the conditions under which nonliberal minorities may come to accept and respect liberal values. But why, and on what grounds?

The idea that led Kymlicka to think this possible was the presumption that the ability to

“form, revise, and rationally pursue conceptions of the good” is appealing to persons who are not liberal. He says that “the liberal view [he is] defending insists that people can stand back and assess moral values and tradition ways of life, and should be given not only the legal right to do so, but also the social conditions which enhance this capacity” (Kymlicka 1995: 92).

This is possible only if we presume that we all share the liberal outlook when it comes to making individual choices. This was precisely Rawls's point that Kymlicka impugned and said would not work. Kymlicka spent a lot of effort trying to prove that cultural context matters, not that the liberal cultural context matters. As a matter of fact, he criticized liberals such as Dworkin and Rawls, for writing "as if this process of building common culture extends throughout the entire country, so that there is just one such culture in each country" (ibid. 77; 128). This presumption led the later Rawls to believe that people will easily endorse the liberal principles of justice. Kymlicka, who rightly chides him for having made such a presumption, is now repeating exactly the same mistake by giving his blessing to liberal governments to liberalize illiberal ethnic minorities by peaceful means.

As I said, it may be that culture matters for some individuals. Now, to what extent it matters, and whether we can take for granted that everyone is prepared to sacrifice individual autonomy for the maintenance of their culture is, I think, an open question that will not be pursued here. Be that as it may, if culture matters than it matters the way it is. Suppose you are a member of a liberal community within a larger nonliberal society such as Iran. Suppose, then, that the authoritarian government decides not to dissolve or punish liberal social groups but to make them live in an environment in which liberal way of life is extremely costly. There is no ground on which this move can be justified to a liberal. The same goes for illiberal minorities in liberal societies under a liberal government. If an illiberal community does not accept the principle of autonomy on the short run, there is no room to think it might accept it on the long run. The conclusion I want to draw here is twofold. First, Kymlicka's position cannot be liberal if he wants to hold that liberal governments "have no automatic right to impose their views on non-liberal minorities" (Kymlicka 1995: 171). If, on the other hand, he wants to maintain the view that the liberal

government should liberalize nonliberal minorities by protecting individuals from nonliberal practices, Kymlicka's liberalism does not advance further than Rawls's but rather amounts to its recapitulation.

### *19. Complex Equality, Sheer Inequality*

Contemporary liberalism is predicated on the assumption that people are equal in a fundamental sense. Equality is the central notion to most of contemporary theories of justice, including those which are not liberal. Ronald Dworkin was the first who explicitly stated that liberalism is only about equality and nothing else (Dworkin, 1985: 183). Interpreting Rawls's original position, he says that the most abstract concept that operates in it is equality. The original position is a special kind of situation wherein "the right of each man to be treated equally without regard to his person or character or tastes is enforced by the fact that no one else can secure a better position by virtue of being different in any such respect" (Dworkin, 1977: 179). The early Kymlicka supports this view, writing that "egalitarian theories require that the government treats its citizens with equal consideration; [and that] each citizen is entitled to equal concern and respect" (Kymlicka 1990: 4). Michael Walzer's theory of justice belongs to this stream of egalitarian theories, since the ideal of equal citizenship "plays a pivotal role in Walzer's account of justice" (Miller 1995: 12). In this section I compare Walzer and Rawls's accounts of justice by referring to the concept of the primary goods, the formality of principles, the ideal of equal citizenship, and the possibility for making free choices.

Walzer's critique of Rawls's liberalism is focused on methodological matters. Walzer seeks to construct an alternative approach to the matters of justice, and then to hold out an alternative theory of justice accompanied by intrinsic principles. The most critical concept Walzer attacks is Rawls's concept of the primary goods. To refresh the memory: Rawls thinks that every person prefers a distinctive list of the primary goods that helps him realize his life plans, no matter what they are (Rawls 1971: 92, 433). Besides, every individual wants to increase the bundle of primary goods; she always wants more primary goods, rather than less. In section 8, where I discussed the second proposition, I argued that the proposition "Everyone wants more goods rather than less" embeds in itself a particular understanding of rationality that puts at a disadvantage all those who embrace types of rationality other than means-ends rationality. This chapter looks into Rawls's first proposition, namely that the primary goods are to be universally designed and distributed by formal standards that apply universally.

The idea that the primary goods strongly favor a liberal conception of the good appeared at least eight years before Walzer published *Spheres of Justice*. Thomas Nagel was the first to discuss the partiality of the primary goods. In his article "Rawls on Justice," he claims that the primary goods violate the required neutrality of the original position because the idea contains a strong individualistic bias.

"The primary goods are not equally valuable in pursuit of all conceptions of the good. They will serve to advance many different individual life plans [...] but they are less useful in implementing views that hold a good life to be readily achievable only in certain well-defined types of societal structure, or only in a society that works concertedly for the realization of the certain higher human capacities and the

suppression of the baser ones, or only given certain types of economic relationship among men” (Nagel 1973: [9]).

From this point, Nagel continues by saying that given that “many conception of the good do not fit the individualistic pattern,” the situation cannot be described as a fair choice situation for the principles of justice, and concludes that “there does not seem to be any way of redesigning the original position to do away with restrictive assumption of this kind” (ibid. [10]).

A similar objection was put forward by János Kis who claims that “the choice of Rawlsian primary goods is based on an implicit commitment to a special class of conceptions of the good life, and therefore the procedures which distribute these primary goods among members of the society will not be neutral in the requisite sense” (Kis 1998: 19). The primary goods favor only the set of conceptions of the good that is compatible with the primary goods themselves. The problem is that this set of conceptions of the good may not otherwise be favored across the individuals. The upshot is that the primary goods are end-sensitive, not end-insensitive, as Rawls wants to maintain.

The charge that the original position is rigged in order to bring about the wished result has some force. Recall that the maximin rule, which Rawls employs as a prudent rule for making personal decisions, is supposed to maximize the primary goods. By saying “people always prefer more primary goods rather than less,” Rawls gets into double trouble in trying to keep Kant’s conception of autonomy within his framework. Firstly, if we allow only such goods that are useful to limited (no matter how broad) conceptions of the good, we close off the possibilities for all those who espouse conceptions of the good that require a list of

primary goods other than Rawls's primary goods. The nub is this. Suppose there are two sorts of societies, one characterized by private property, market economy, voluntary associations of purpose; the other characterized by overlapping ownership rights, networks of reciprocal claims, and communal belonging. The point is simply that if we buy into "the Rawlsian account of the primary goods [...]" then a preference for the individualist order seems to be secured" (Kis 1998: 21). As a result, the communal order is bound to vanish. All this because primary goods are naturally compatible with the former type of society but incompatible with the latter. Hence the conclusion that the neutrality of the primary goods is an "incoherent principle, and that, therefore, either liberalism itself must be abandoned or it must be reconstructed so as to be freed of the dubious idea of neutrality" (Kis 1997: 29).

There is nothing dubious about the primary goods. What makes the confusion is their lexical order. Lexical ordering in choosing principles of justice means that there is a requirement that we must "satisfy the first principles in ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply" (Rawls 1971: 43). What Rawls wanted to escape with the lexical order was the practice endemic in the socialist countries between the World Wars. The practice was based on a tradeoff where people exchanged their basic rights and liberties for secure income and welfare guaranteed by the socialist regimes. A liberal point of view is against such practices and, as we saw in what followed after 1989, a great many citizens from post-Communist countries opted for bringing the basic rights and liberties back into the game.

Countries belonging to the so-called Socialist block obviously had the lexical order violated not because they wanted to, but rather because it was imposed on them. Yet, we can

imagine that there are communities or societies that would willingly prefer the absence of the lexical order rather than its presence. This would be a kind of community based on “overlapping ownership rights, network of reciprocal claims, and communal belonging” from Kis’s example. If we suppose that this type of community does not hold basic rights and liberties and equal opportunities sacred, we could rightly say that the lexical ordering of principles puts this community at a disadvantage within a larger liberal community that does honor basic rights and liberties. The claim is strengthened if we realize that the three principles are essentially linked to the primary goods in that every principle deals with a specific primary good. The first principle distributes rights and liberties; the second the access to offices and positions; and the third income and wealth. It can easily be noticed that in such a scheme the lexical priority affects the priority in distributing the goods, so that there is a lexical priority in what good is distributed first and what second. But then, it is the lexical order that is against the non-individualistic conceptions of the good, not the content of the list of the primary goods.

If this is true, then Nagel and Kis were too quick to say that if many conceptions of the good do not fit the non-individualistic pattern, we have to conclude that many conceptions of the good do not fit the primary goods. While it is quite true that the primary goods are closer to the individualistic conceptions of the good than any others, it does not mean that it puts at a disadvantage all other conceptions of the good. One only has to recall what I said in the previous section when discussing Kymlicka’s critique of Rawls. The primary goods have that feature of being convertible. If those belonging to the communal order are dissatisfied with what they can do with their income or basic rights, they are perfectly free to exchange their income for any other good that is more appropriate for their culture. To claim that the money bears an individualistic bias sound unconvincing if we recall that any culture and

civilization throughout history had some sort of money with which to trade, be that cattle, people, ore, precious stones, or pieces of paper. The idea is closely related to what I said in section 1, announcing how the autonomy of the person is supposed to be understood in this thesis. It is correct to say that liberalism is closely tied to the idea of autonomy, but this is still a far cry from saying that the Rawlsian liberalism based on the autonomy and the primary goods mandates that all people must have autonomy-friendly conceptions or utilize the Rawlsian list of the primary goods.

Walzer's discussion of the primary goods draws on Nagel but introduces some new concepts. In opposition to Rawls, Walzer maintains that "there is no single set of primary or basic goods conceivable across all moral and material worlds" (Walzer 1983: 8). The definition of primary goods, in Walzer's mind, turns on the context. Goods do not fall from Heaven with attached meanings; it is people who attach the meanings to them. "People conceive and create goods, which they distribute among themselves" (ibid. 6). Moreover, "there has never been a single criterion, or a single set of interconnected criteria, for all distributions" (ibid. 4). Thus, every distribution of such goods will be different. Walzer's ultimate goal is to argue "that the principles of justice are themselves pluralistic in form; that different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents" (ibid. 6). The modified understanding of the primary goods should be followed by a modified task of political philosophy and the role of political philosopher. Whereas the task of political philosophy is to advance "the principles that are good-specific and the good-specific principles must be culture specific" (Mulhall & Swift, 1992: 128), the task of a political philosopher is to "interpret to the fellow citizens the world of meanings that [they] share" (Walzer 1983: xiv).

Walzer disputes Rawls's idea that there are some fixed bundle of primary goods, but he also disputes the liberal claim to universality of the goods. On the standards of liberal justice, the primary goods are not only universal in that everybody needs them, but also in that everyone is entitled to them. However, the entitlement to the goods is not unconditional. Only if persons meet certain requirements they can claim their share of the primary goods. What needs to be specified is that the requirements cannot be related to morally irrelevant features of the person who claims the goods. Suppose I am the son of Julius Caesar. There is nothing in this fact that entitles me to claim the Emperor throne once my father is dead. Even less if I manage to seize the throne by force. Criteria for the good's (throne's) distribution must be formal, excluding no one in advance, and pertain exclusively to the facts that are critical for enjoying the good. So in order to become a Caesar you must show that you possess necessary skills for discharging the duty, not to submit the birth certificate showing whose son you are. Only then a good can be redistributed from someone else to you. Such distribution is, however, possible only if the goods are convertible. Take money, for example. One feature of money is that it is anonymous, meaning that it retains its value even if it changes possessors. People possessing money are enabled to make free choices by converting money into the satisfaction of the needs they have. Those who have money are, thus, free in pursuing their life plans. Money's utmost advantage is that it does not carry with itself any particular meaning by virtue of which it will be distributed. To design the primary goods in such a way is to insure the equality among the people concerning the freedom to make meaningful choices.

Rawls's liberal understanding of how goods are related to people amounts to saying that people have the access to the goods based on some formal standards which are derived from the notion of equality. Nonetheless, Walzer is dissatisfied with Rawls's operationalization

of equality, and calls it “simple equality.” In the system of simple equality there is one primary good that dominates the rest. Such a system brings about inequalities: “The regime of simple equality won’t last long, because the further progress of conversion, free exchange in the market, is certain to bring inequalities in its train” (Walzer 1983: 14). In contrast, Walzer develops the concept of complex equality by virtue of which different goods are distributed by different criteria. Since in such a system no good is universally convertible, complex equality “establishes a set of relationships such that domination is impossible. In formal terms, complex equality means that no citizen’s standing in one spheres or with regard to one social good can be undercut by his standing in some other sphere with regard to some other good” (ibid. 19).

The system of complex equality excludes domination and establishes separate spheres of justice. In the sphere of health, those who need health get it, while in the sphere of politics, those who want to do politics become politicians. Since the universally convertible good must not exist, it turns out that the purpose of complex equality is to block exchanges between spheres. Once the exchange is terminated “we have no reason to worry about the answers the market provide” even if complex equality brings about inequalities (Walzer 1983: 107). The reason for this statement is that Walzer sees absolute inequalities as unimportant: “It just doesn’t matter, from the standpoint of complex equality, that you have a yacht and I don’t. [...] This is the question of culture, not of distributive justice. So long as yachts [...] have only use value and individualized symbolic value, their unequal distribution doesn’t matter” (ibid. 108). As mentioned, the ultimate goal of Walzer’s spherical justice is to achieve equality among people that Rawls’s theory cannot. Walzer believes that the system of complex equality achieves this goal, for it protects separate spheres within which people are treated according to the way they believe they should be treated.

How far does Walzer advance with such a distribution and how much can it be regarded as superior to Rawls's? To announce the answer: not far and not much. To support the answer, I begin with Walzer's discussion of the criteria for just distribution. Walzer's wish is to show that the distribution of goods must be determined by the meaning of goods. Since the goods are divided up in separated spheres, so will the criteria for distribution be separated. Since there is no universal and common criterion by virtue of which all goods are distributed, goods such as medical care are to be distributed according to need (ibid. 25), money and commodities by market exchange (ibid. 21), education by desert (ibid. 24) etc. Now, in order to make the case for the separation of the criteria, Walzer must be able to argue that the criteria for distribution undeniably stem from the meaning of the goods. For example, Walzer's wish is to maintain that medical aid is to be distributed according to need, as need is inherently a part of health care. But this holds only in some cases. From saying that "People who need medical care should get medical care," it by no means follows that need is constitutive of medical care. Need alone cannot determinate the distribution of medical care, for even those who are currently not in need of medical treatment will undoubtedly want to say that they would like to have free access to medical care. Medical aid falls into the category of general life-supporting goods that everyone desires no matter what they do. If this sounds plausible, then medical aid may be taken to be a more concrete form of a good falling under the category of Rawls's primary goods, which are thought to be universal means in that everyone needs them regardless of whether they need them now or later. This conclusion is supported by Walzer's most prominent disciple, David Miller, who says that "[t]he relationship between the meaning of the good and the distributive principle is not here a conceptual one; it is rather that, once we see what kind of good

medicine is, this immediately *triggers* a particular distributive principle which we see as applying to all good of that sort” (Miller 1995: 6).

Walzer defends two theses: that the criteria for distribution must be plural; that the pluralism of the criteria for distribution must follow the separation of the meanings of the goods. But, as Barry points out, the second proposition has the capacity to undermine the first, thus violating a fair distribution of goods that substantially hinges on the separation of the spheres (Barry 1995b: 74). If a distribution is to be just, the criteria for distribution must not fall within the scope of the established meaning, but rather out of it. Otherwise the distribution will turn on informal and irrelevant criteria. If I am the son of Julius Caesar, I can defend my right to become his inheritor only if I manage to cajole a great many people into believing that the meaning of government is “to render unto Caesar what is Caesar’s.” This is implicitly supported by Walzer’s discussion on desert. “Desert seems to require an especially close connection between particular goods and particular persons” (Walzer 1983: 24). In discussing who should be in possession of nice artistic paintings, Walzer, following his propositions on desert, answers that “we might insist that only artistically cultivated people, who deserve to have pictures, should actually have them” (ibid.). Apply the logic of this sentence to the Caesar example, and you will get this: “we might insist that only politically cultivated people, who deserve to hold power, should actually hold it.” To say that some people are worthy of ruling because, say, they are cultivated in terms of birth, status, or heritage, sounds absurd in the 21<sup>st</sup> century. To say that some people can do politics today means to specify certain set of impartial rules under which political participation becomes possible. Walzer undermines the latter proposition but underpins the former. But if we in advance are able to say who can and who cannot do politics, then there is not much sense in doing politics at all. It becomes immediately clear that Walzer cannot fend off the

objection that any system which allows predetermination for occupying official positions will result in grave violations of the spherical justice.

Walzer wants to keep the spheres separated, but this seems hardly possible in a society where the criteria for distribution are incorporated into the meaning of each good. To understand this, it is necessary to recall that Walzer strongly holds that meanings are to be established by the actual people, not by philosophers. “Here, then, is a more precise account of the social contract: it is an agreement to redistribute the resources of the members in accordance with some shared understanding of their needs, subject to ongoing political determination in detail” (ibid. 82). Imagine, then, a society where the majority of people convinces the rest that their birth or status entitle them to material, social, and spiritual benefits, and then makes the social contract with them. The next logical step is to claim that this is what justice requires in this society. But any such situation will patently go against equality in this society in a structural sense.

Although the actual consent sounds rather appealing as a democratic idea, in cases such as justice, it might be actually very dangerous. It is easy to say that principles of justice must be based on the actual agreement, but what if the circumstances within which the agreement is to be made are unfair? The difficulty consists in the impossibility of escaping inequalities of various kinds (education, communication, status, money etc.). Rawls was right in claiming that real inequalities among people present a harmful distortion for reaching just principles. If Rawls was right, then it makes no sense in such cases to ask what the actual people agree on, but it makes sense to ask “what would be agreed on if the sources of distortions were removed” (Barry 1995b: 78). This is precisely the meaning of Rawls’s veil of ignorance, on which I am going to expand in section 22. Here it suffices to say that

principles of justice, in order to reflect the initial equality, must be expressed in formal terms. This is what Walzer cannot say, for he thinks that “justice is relative to social meanings” (Walzer 1983: 312), but Rawls can, for his principles are precisely of that kind. Basic human rights and liberties must be unconditionally distributed to everyone; jobs and offices according to the equal opportunity principle; income and wealth according to the difference principle. What matters is that none of the principles can be said to have factored in some personal, ethnic, religious, national, or other non-formal characteristics. The Walzerian excludes the domination of the goods. It is quite possible that in the Walzerian system of complex equality goods are not going to dominate, but some people definitely are.

Walzer’s theory of meanings is subversive of his theory of justice. The claim can be tested by analyzing other aspects of complex equality. The aim of communitarian equality is to block the exchange of goods from different spheres. The aim of liberal equality is to make them possible. The purpose of the latter is to give people free choice. Only when individuals are free to exchange in a free market can they be said to be free and equal because they can freely choose the ways of life for themselves. Walzer has the point in noticing that the market allows some goods to dominate others, thus leaving some people without the bundle of goods necessary for decent living. But the idea that Rawls defended was that such injustices are to be rectified by a just distribution of income and wealth regulated by the difference principle. Egalitarian liberals, as opposed to libertarians, see the market as a poor mechanism for a just distribution. This is why a fair distribution of income and wealth is called for by liberal justice. But to say that goods like income and wealth should be administered, while the market is allowed only to arrange what remains afterwards amounts firstly to running the risk of creating an irrationally huge state administration and, secondly,

to impeding free choices of the individuals and eventually to bringing about inequalities.

Let me exemplify this.

Suppose I am an ill person. This qualifies me to take out a special kind of health insurance that is not available in other spheres. After a comprehensive medical test, I learn that my health is in a perfect condition, which makes me take health insurance off my priority list. At least for the next few years I do not have to care about health, and could devote my time to pursuing, say, political career. This, however, can be done only provided money plays a role in the market (as it does according to liberal theory of justice). In this case, I would be able to exchange my special health insurance for resources needed for pursuing political career. However, recall that Walzer's system of complex equality blocks such exchanges, for the resources that are primary in the respective spheres are non-convertible. As a result, I would be left with my special health insurance and could only cry over my destiny that I cannot do politics. Injustice here apparently consists in the absence of the possibility to make choices I regard as meaningful. The equality of opportunity between me and someone who can do politics is flouted. The fact that someone from the political sphere cannot enjoy the niceties of the special health insurance is hardly a consolation.

Of course, Walzer has a way out of this trouble if he says that once you learn you are healthy, you immediately become qualified for something else (say, doing politics). The reverse is also permissible: if you are a politician who becomes ill, you become qualified to take out health insurance not on the grounds of being rich, famous, or popular, but rather on the grounds of being ill. You are in need of health insurance, and this is what makes it possible for you to get it. But if it is so easy to move among spheres, one can rightly wonder what was the rationale for creating them. Walzer could reply that his theory does not have

practical repercussions, because it cannot have them. His goal was rather to put the accent on different meanings of different goods to different people. But Walzer is not entitled to say that because his theory can have practical repercussions. What needs to be added is that the Walzerian society comes into being as soon as a huge state administration is set up in order to determine who is qualified for what. Walzer may not like the way such a huge administration works, but he has to endorse its existence, because it stems from the premises of his theory.

The issue can be pressed further. Suppose I am seriously ill, and in need of a kidney. Suppose also the kidney is momentarily not available in the medical aid sphere, but exclusively on the market. Someone is willing to sell me his healthy kidney for a given amount of cash that enables him to buy the Steinway piano he has always longed for. Walzer's scheme unconditionally blocks such an exchange. But this violates the free choice of the kidney-seller. The purpose of the liberal theory of justice is not to determine the quantity and quality of the goods that are up for distribution. This would come down to equality of outcomes, which is not the aim of egalitarian liberalism such as Rawls's. The purpose is rather to determine the access to these goods. Wherever unequal distribution of income, wealth, power, rights and liberties bar people from accessing what they think important or needed (health insurance or free time), we face injustice, for the free choice of the individuals is blocked. Instead of blocking exchanges among spheres, Walzer blocked the possibilities for individual free choice.

The inequalities that arise from Walzer's theory of justice do not finish here. The discussion in section 16 showed that Rawls presupposes a specific understanding of liberal personality that disadvantages people who do not embrace individual values. Walzer, as a

communitarian, focuses on social meanings and social values instead. The proposition he defends is the following: since everything obtained its meaning by existing in a community, so people also owe their identity and existence to the community. Rawls could say that his principles are the outcome of the original position only if he presupposes an autonomous personality. In a similar manner, Walzer can say that community values override individual values only if he presupposes a specific conception of the person and both of them do that. Focusing on goods is thus a misleading step in understanding the real consequences of Walzer's theory, for Walzer does presuppose a communitarian personality without which his theory would not be possible. Here is the illustration for this:

“By virtue of what characteristic are we one another's equals? One characteristic above all is central to my argument. We are (all of us) culture-producing creatures; we make and inhabit meaningful world. [...] Justice is rooted in the distinct understanding of places, honors, jobs, things of all sorts, that constitute a shared way of life. To override those understanding is (always) to act unjustly” (Walzer 1983: 314).

People are, in Walzer's view, invariably prepared to formulate and arrange their goals and life plans by being inspired by communal standards. This proposition creates apparent partiality. If it can be said that Rawls put all the emphasize on the individuality of the person, Walzer, by contrast, put all the emphasize on their communal character, thus creating, as it were, a communal individual. I by no means want to deny the existence of such people. What I want to underscore here is that Walzer's theory of the person violates the requirements of impartiality in the same way Rawls's theory does.

## *20. Political Constructivism and the Context of Political Philosophy*

Let me have another look, from a methodological angle, at the issues discussed in this chapter. Communitarians and multiculturalists claim liberal philosophy violates the impartiality of the original position by favoring those conceptions of the good that can be squared with liberalism. They do not dispute the context-dependence of liberal conceptions, but this is, in their view, precisely the problem with liberalism: since liberal societies are taken as paradigmatic societies, the outcome of any liberal philosophy will come down to the imposition of liberal values on non-liberal groups and societies. In contrast, the communitarian and multicultural solution consists in letting non-liberal societies remain non-liberal. Here is what can be said to refute this charge. Contemporary political philosophy is supposed to erect political principles from within a construction. This means that the ground-floor level should contain propositions that are less substantive than the principles that will be derived at the end of the construction. Rawls summarizes this idea as follows: “the principles of political justice (content) may be represented as the outcome of a procedure of construction (structure). In this procedure rational agents, as representatives of citizens and subjects to reasonable conditions, select the principles to regulate the basic structure of society” (Rawls 1993: 93). This method is called political constructivism. Rawls deployed it explicitly in the Dewey lectures, but it was implicitly present in his works from the very beginning.

Political constructivism is the method that sets the constraints with respect to what kinds of arguments are valid in the original position. Hence, a theory is a constructivist one if its ground-floor level is arranged in an impartial manner so that whatever comes out of it

counts as just (Barry 1989: 266). Barry concedes that some traces of morality have to be put in the original position, but he stresses, following Rawls, that we must not have a comprehensive or substantive theory of justice already there (ibid. 265). We may begin with moral arguments but only if we begin from the most general and broad characterization of morality. “Otherwise the construction will not have the room it needs in which to operate” (ibid. 273). In this sense, the proposition to the effect that “All people are equal in a fundamental sense” can be taken to be the broadest moral proposition one is allowed to begin with, whereas the proposition that “All goods should be distributed equally” could be taken to be the most general predecessor of Rawls’s difference principle. Since such propositions do not commit you to anything substantial, any construction aimed at developing the idea of fundamental equality needs some flesh around it. But in order to preserve the fundamental equality among human beings the construction must contain nothing more than “the relevant criteria of reasonableness and rationality” (Rawls 1993: 103).

The veil of ignorance is one possible way to achieve the sought-for impartiality, for it precludes people from putting forward arguments that blatantly violate the initial equality among the parties. The veil by no means requires that people strip themselves of their personality, and then get on with their lives in such a stripped form. The veil is simply a device that the ground-floor morality requires. What it precisely means is this: if we want to articulate the situation wherein people will accept the fair principles, we must construct a decision-making situation that excludes favoritism based on friendship, similarity of race or class, and so on. A move such as “I go for it *only* because it benefits me or my people” is simply a forbidden move. As Barry put it,

“[s]omeone who was engaged in impartiality choosing principles to govern his life with others would not endorse a principle on the basis of its favoring himself, his friends and relations, or those who he felt some kind of affinity with. [...] For it is obvious that those who were put at a relative disadvantage by such a principle would wish to reject it, and it could not possibly be said that they were being unreasonable in doing so” (Barry 1989: 290).

But be it noted that to abstain, in a special kind of situation such as the original position, from putting forwards partial arguments that benefit exclusively people you are affiliated with commits you to following such abstinence in real life no more than playing Hamlet committed Sir Laurence Olivier to a real suicide.

One feature of political constructivism is that it is not constructed itself. Rawls asks if the original position, as a device of representation, is itself constructed (Rawls 1993: 103). The answer he gives is no; it is rather laid out. Every construction has a basis, certain materials, as it were, from which it begins. Moreover, if everything is constructed, there will be nothing left to construct afterwards. Rawls writes that political constructivism involves a procedure of construction modeled by original position wherein “rational agents as representatives of citizens and subject to reasonable conditions, select the public principles of justice to regulate the basic structure of society” (Rawls 1993: 90). By saying he is “concerned with a constructivist conception of political justice and not with a comprehensive moral doctrine” (ibid. 90), Rawls announces he will abide by constructivist requirements. Unfortunately, he does not. As said, the construction does the real job only provided what is put in is more general than what comes out. The construction unavoidably breaks down if it is turned into a mere method for expressing political intuitions in other

wording. Now, the problem is that both the early and later Rawls put in the construction more than the “relevant criteria of reasonableness” tolerate. Rawls, namely says that the construction “develops the principles of justice from public and shared ideas of society as a fair system of cooperation and of citizens as free and equal by using principles of their common practical reason” (ibid. 90). He states that “constructivist view is to specify the terms of social cooperation as given by the principles of justice,” but in the article “Justice as Fairness: Political not Metaphysical” he makes no bones that his theory of justice “tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation” (Rawls 1985: 225). In Rawls’s rendition, the construction does not really construct much but rather couches the existing ideas and values in other terms. The reasons for securing the bottom of the construction are again provoked by the bad experience Rawls had with utilitarianism. When Rawls realized that the veil of ignorance was getting him in trouble and leading him to utilitarian outcomes, he started putting into the original position more and more moral arguments in order to avoid the dangerous gap between the premises and the conclusions. But the gap became narrowed “so that the conclusions virtually amount[ed] to a recapitulation of the premises” (Barry 1989: 336).

The point of this short discussion on political constructivism was not to highlight Rawls’s violation of the requirements of political constructivism, but rather to point at Rawls’s preparedness to rely on contextual values. (This is not to say that a full compliance with political constructivism necessarily indicates the absence of context in a theory.) I am mentioning this because I want to underscore the major methodological error in Walzer’s critique of Rawls. Walzer regards Rawls’s theory of justice as detached from the social context within which it arose. Walzer’s major wish is to be an interpretation of local

cultures. His aim is not to tell people how to live, but rather to articulate what they already think. The need for constructivist justification is thus conspicuously absent in Walzer's works. He rejects the constructivist approach "because it is not differentiated by time and place; it is not properly circumstantial." The alternative he defends is "a historical and contextual account of toleration and coexistence, one that examines the different forms that these have actually taken and the norms of everyday life appropriate to each" (Walzer 1997a: 3). Instead of embracing political constructivism, Walzer embraces the method of social criticism in "national-popular mode," writing that "the ideal critic in this mode is loyal to men and women in trouble—oppressed, exploited, impoverished, forgotten—but he sees the people and their troubles and the possible solution to their troubles within the framework of national history and their culture" (Walzer 1988: 233-4).

The major purpose of Walzer's democratic view based on social criticism is actually directed to the debate on judicial review, which partly overlaps with what I am concerned with here. It is to be noted that the judicial review approach sits comfortably with whatever form of political decision-making as long as the decisions comply with basic constitutional principles. Democratic view, on the other hand, claims that "it is right that [people] make laws—even if they make them wrongly" (Walzer 1981: 386). Walzer, who defends this view, would surely have a lot to say on how the justification for such democratic view can be squared with avoiding what happened in 1933 Germany. But what I want to focus on in the rest of the chapter is Walzer's implicit claim that Rawls is an inventionist. Inventionism amounts to constructing principles of justice by not referring to the social context. The opponents of inventionism objects to inventionists's deriving principles out of nothing. Contextualists, in contrast, always refer to real life, articulating what can be found in it. Communitarians, who are contextualists because they will say nothing apart from what

already has a firm root in reality, are prepared to claim that Rawlsian liberalism is an inventionist philosophy because the veil of ignorance excludes the bulk of factual information from the original position. Factual information is precisely what communitarians want to preserve because the removal of it implies the removal of the meaning of the goods (which are to be distributed) and identities (which are to be preserved).

To say that “all distributions are just or unjust relative to the social meanings of the goods at stake” plainly makes someone like Walzer a contextualist. But Rawls is a contextualist, too. He by no means begins by referring to empty space, but to the shared social and existing convictions about justice. (A friend of mine often tells a joke that Rawls’s first book became so popular because it elaborated a secret wish of many Americans, namely—how to affirm egalitarian principles of justice without having to register with the communist party.) In Rawls’s rendition social convictions are called considered judgments. What Rawls had in mind with the concept of considered judgments was that there are real societies and real people who do not tolerate things such as slavery, apartheid, or genocide. It may be worth repeating Dworkin’s characterization of Rawls’s original position by which Rawls’s principles “are so widely shared and so little disputed within a particular community, for whom the book is meant, that the community could not abandon these principles without fundamentally changing its patterns of reasoning and arguing about political morality” (Dworkin 1977: 158). So Rawls begins from considered judgments, believing that many real people share them. He may, of course, be wrong in specifying what these convictions are, but this cannot call into question Rawls’s contextual approach. Rawls also may not have succeeded in coherently articulating these convictions (as a matter of fact, he has not), but this is again a separate problem. What is obvious is that Rawls draws on a common

stock of ideas that can be found in the American society where he was born, lived, and most probably will die.

If we define contextualism as a theory that draws only on the ideas that can be found in a social context, Rawls was a contextualist already in *A Theory*. But in *Political Liberalism* his contextualism comes by a powerful communitarian tinge. There Rawls says:

“the only source from which it is possible to derive any ground for [political liberalism] is the public culture of a democratic society,” which comprises “the political institutions of a constitutional regime and public tradition of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge” (Rawls 1993: 13-4).

The source of justification in the later Rawls's works was notably shifted from the choice situation of the original position towards reflective equilibrium. But this shift was unavoidably followed by yet another shift. “Rawls's explicit shift of the crux of justification to the method of reflective equilibrium boils down to the abandonment of the constructivism proper” (Barsa 1995: 56). This brought bear on the conceptualization of the original position and the parties to it. By Rawls's implicit admission, *A Theory* attempted to discover the truth about our lives (Rawls 1993: xx). Since this unambiguously violates the impartiality of the original position for the reasons I canvassed in sections 16 and 17, Rawls came around to thinking that an acceptable theory of justice has only something to say about how living together is possible. Expressed it in a Kantian way, this means that liberal theory of justice is a consequence of a practical, not of theoretical reason (Barsa 1995: 54).

In *A Theory* Rawls claimed that considered judgments were valid across the board. In *Political Liberalism* he claims they are merely linked to the political tradition of the modern Western society (Rawls 1993: xxiff). Although I do not see what is wrong with the considered judgments being valid universally, what matters here is to underline the purpose of the later Rawls: it is to elaborate and explicate the great ideals that pertains to the context of the Western political culture. Knowing this, it is easy to understand why Rawls thought all parties to the original position would agree on the two principles of justice.

In section 19, where I discussed Walzer's ideas of social contract, I intimated that the outcome of actual contracts may run contrary to the outcome of the philosophical construction. The requirement of the constructivism-proper is that real people's particular interests and beliefs are not factored in the construction of the original position. Several arguments may be adduced to support this view. First, although actual contracts may be able to generate agreement among people, they may not be justificatory (Gaus 1996: 136). Second, people sometimes do not believe that they should follow the consequences of their beliefs, which makes practically every reason rejectable. Third, people often make some decision in a state that is not quite appropriate for making decisions. They may reject the argument from coherence even if it is compatible with their conceptions of the good. The reasons vary: "people can withhold their assent because of obstinacy, selfishness, laziness, perversity, or confusion" (ibid. 131). The reasons against the actual contract is what makes constructivism in political philosophy appealing. "Liberalism, then, does not turn on the claim that we all consent to the conditions of peace, but rather that all individuals have conclusive reason to embrace norms protecting basic interests" (ibid. 173).

In trying to locate the subject who decides on what counts as a good reason, the later Rawls does not differentiate between a king philosopher, who provides independent criteria for justice, and rank-and-file, who strive to overcome their partiality and settle on the fair principles. Rawls

“locates this dichotomy into citizens themselves: on the one hand they believe in the moral truth of their values and ways of life, on the other they are seeking agreement on the fair terms of co-operation even with those who do not believe in their truths. This dichotomy runs through the whole Rawls’s conception in different disguises—the rational/the reasonable, two moral powers, public and nonpublic reason, political/comprehensive and the like” (Barsa 1995: 67).

But what I wanted to say here is that this is possible only by assuming that all these people already share a second order conception of the good, namely—that of the autonomy of the person. This is apparent in Rawls’s conceptualization of the original position and the persons who negotiate principles behind the veil of ignorance, which brought about the claim that liberal political philosophy simply has nothing to offer to the societies in which such fundamental values do not exist (Scheffler 1994: 21).

Walzer’s condemnation for inventionism was derived from his condemnation for innovatism. He, namely, thinks that every society should be regulated by the principle of toleration that preserves *status quo* among different groups. At the international level, the principle of toleration is protected by the doctrine of sovereignty, which is essentially a “doctrine of toleration” (Walzer 1997b: 106). Innovators want to do away with this system because “the radical innovators are not the people who want to extend the toleration: for it is

hard to imagine that it can be extended much further than it already is. The innovators are people who want to restrict it, to establish and enforce a set of rules that derive from ‘a moral common standpoint’” (ibid.). What Walzer actually criticizes is the possibility of having universal principles of justice. But inventionism and innovatism are not necessarily compatible. It is correct to say that the early Rawls subscribes to the picture of the world that is not restricted to only one society, but it is wrong to call Rawls inventionist only because he is against the anti-universalistic project according to which there cannot be universal principles of justice. The early Rawls embraced the view that a theory of justice cannot be a theory that has to say something about justice only in one particular society but must be able to say what justice is in general. This is possible only if the theoretician refers to the common stock of ideas, which is what communitarians think impossible, for every society is allegedly committed to irreconcilable values. The universalistic outlook suggests that the idea about fundamental equality among people Rawls places at the basis of his theory can be found in practically any society in the world. It may be true that in some societies people who embrace the idea of equality will be in a minority, but this does not support the case for the absolute incommensurability of values between cultures. In *A Theory* Rawls was convinced that considered judgments are shared by people not only in his society but in other societies too. Rawls’s veil of ignorance excludes, then, only the knowledge that is most likely to contaminate these judgments. He addresses human beings everywhere because he believes there are readers outside his society that are prepared to embrace the ideas set out in his books. Since I, as someone who cannot be said to have attachments to the American society and culture, personally happen to endorse these ideas, Rawls was certainly right in thinking so. But again, this by no means makes him less contextualist.

All this does not mean liberalism is context-dependant. As Barry argues, the case for liberalism is strengthened if we manage to find societies with full-blown liberal institutions (Barry 2001: 279ff). But theoretically speaking, social context is a helpful but not essential element in justifying liberal principles. The basic liberal institutions such as human rights are based on the idea that all human beings are entitled to live a decent human life. If there are people who want to give up on this entitlement, they are perfectly free to do so, but this still does not strip the case for liberalism from its universal validity. A liberal is thus able to defend fundamental liberal institutions without referring to the fact that such institutions exist in Western liberal societies. Liberal justice mandates the protection of human rights not because there are societies and cultures that protect human rights but because “this is the right thing to do” (ibid. 284).

### *21. Misreading Of the Word “All”*

At several points in this chapter I contended that, for Rawlsian liberalism, social contract is a helpful but not essential part. In this and the following section I will give some more details that will lead towards the conclusion not only that social contract is not necessary but that it also could be harmful to liberal justice. Let me begin by explaining what I think about who, according to Rawls, can be regarded as a legitimate party to the contract. The Rawlsian principles cannot be legitimate if they are not underwritten by all affected. Rawls is explicit on this: “[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which *all* citizens as free and equal may reasonably be expected to endorse in the light of the principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy”

(Rawls 1993: 137). But some liberal principles will not be affirmed by all. Does this establish a strong case for rejecting the liberal principles? I do not think so. To say that we cannot have liberal principles only because those who are non-liberal would not endorse them seems to be on a par with saying that a legislator should abstain from adopting and enforcing laws only because there will be some people who, when they realize they will be affected most by these laws, would not endorse them. Laws that prohibits raping heavily affects those who are raping-prone as opposed to those who prefer sex based on mutual consent. Yet, such laws are enacted all round.

By saying that everyone is party to the contract and that liberal principles must be affirmed by all, Rawls made a great effort to reformulate his theory so that it now includes in the original position all possible conceptions of the good. Yet, such wording, which excludes the rational choice, pushed some to believe that the Rawlsian liberalism by insisting on “all” actually undermines its own foundations. Marilyn Friedman claims that the formulation begs the question: on the one hand, it does insists on all affected being included in the contract; on the other hand, it excludes those who are not reasonable (Friedman 2000). It is true that in *Political Liberalism* Rawls, along with the rational, heavily relies on the notion of reasonable. The first aspect of reasonableness says that the reasonable person is the one who is “ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurances that other will do so” (Rawls 1993: 49). The second aspect of reasonableness Rawls calls the burden of judgment. It means that reasonable people are prepared to admit that even among them there can be a reasonable disagreement as to what kind of principles of justice the state should be based on or what kind of public policy the government should embrace. This is described by the notion of reasonable disagreement (ibid. 54-5).

From Lecture II of *Political Liberalism* it follows that it is only reasonable people who are permitted to negotiate principles of justice. Now note that the concept of reasonableness really resolves it all. Rawls (along with Scanlon and Barry) is committed to saying (and he does say it) that those who are unreasonable cannot possibly enter the agreement and are not asked to; rather they had to be left out. Rawls is explicit on this in a footnote where he postulates that people who are unreasonable must be contained “like war or disease—so that they do not overturn political justice” (ibid. 64).

The unreasonable people are apparently excluded from the political process. But does it undermine the case for the Rawlsian justice? Everything turns on how the word “all” is to be construed. Friedman thinks that liberal justice fares without problem only if it rests “on the consent of *all* the governed” (Friedman 2000: 22). She states that the Rawlsian argument is circular and can succeed only if there is the hypothetical consent of a citizenry based on the invisible condition “that citizens do not hold the illiberal commitments they do in fact hold”, and concludes that “[b]y excluding from the legitimation pool exactly those persons who do not accept the political values and basic tenets on which Rawls grounds political liberalism, Rawls rigs the [contract] in advance” (ibid. 21-2). If Rawls wants to avoid this problem, suggests Friedman, he needs to offer a more neutral concept of reasonableness, “one that is not defined in terms of the politically liberal values he seeks to defend. The challenge for Rawls is to find good but *politically* independent reasons for eliminating so-called unreasonable people from the legitimation pool” (ibid. 28). Her ultimate conclusion is that this cannot be done. Liberalism is destined to offer circular arguments for the acceptance of its fundamental principles. Put it another way, it can be appealing only to those who have already swallowed a large dose of liberalism.

I fully agree that Friedman offers a correct reading of the Rawlsian liberalism as spelled out in *Political Liberalism*. Indeed, this method could be recognized already in articles that preceded *Political Liberalism*. The later Rawls, already in the 1980 “Kantian Constructivism in Moral Theory,” claims that the parties are moved by three high-order interest. By doing so, he forced rational motivation of the parties out of the original position and allowed solely moral motivation. The two first moral powers attest to this claim. The parties have “the capacity for an effective sense of justice” and “the capacity to form, to revise, and rationally to pursue a conception of the good” (Rawls 1980: 525). In 1985 “Justice as Fairness: Political not Metaphysical” he says that his theory of justice “tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation” (Rawls 1985: [189])

As clear from section 20, such moral arguments are permitted at the ground-floor level only if we begin from the most general and broad characterization of morality. Rawls extended the substantiality of the original position more than a generalization permits. While wanting to describe the original position as a fair situation for making decisions on principles of justice, Rawls designed it in such a way so that it could accommodate only our particular intuitions about justice (Lyons 1975: 145-9). People in the original position were equipped with certain moral powers and capabilities, and the veil of ignorance was supposed to insure the exercise of such powers and capabilities. That is why Barry concludes that it seems that “Rawls has hit upon a method whereby you can get anything out of the theory at the end by simply putting it in at the beginning” (Barry 1989: 337).

As amply explained in section 17, this kind of approach surely excludes all those who do not have the wish or need to preserve the two moral powers. But I want to argue here that the whole catch about the problem of reasonableness is not about the two moral powers and substantial liberal values, but about treating each other as equals. I argued in section 20 that the principles of justice in political philosophy cannot be derived from some self-evident axioms, but must be developed through the interaction of theoretical construction and particular observation. Political philosophy thus starts off from broader statements on justice. That all people are equal in some fundamental sense is one of them. Now it becomes immediately clear that all those who do not recognize fundamental equality as valid cannot possibly be treated in negotiating principles of political justice the same way as those who do.

It is important here that we do not call a doctrine unreasonable because it is incorrect. Although we may think some conceptions of the good wrong, the idea of political liberalism is not to discard them on the grounds of being incorrect. A doctrine is unreasonable if

“it proposes to use to use public’s political power—a power in which citizens have an equal share—to enforce a view bearing on constitutional essentials about which citizens as reasonable persons are bound to differ uncompromisingly. When there is a plurality of reasonable doctrines, it is unreasonable or worse to want to use sanctions of state power to correct, or to punish, those who disagree with us” (Rawls 1993: 138).

Political liberalism cannot work if we do not throw in at the beginning a tiny dose of broader moral ideas. If we begin from a pure rationality, as Rawls partly tried to in *A*

*Theory*, we could end up with principles that offend our sense of justice. David Gauthier is a perfect example of such an attempt. So the charge that liberal justice is possible only if all affected agree, no matter who they are and what conceptions of the good they hold, is not a presumption of the Rawlsian liberalism. Note that in the sentence that was quoted at the beginning of this section Rawls says that political principles are legitimate if they are “endorsed by all citizens viewed as free and equal.” Consequently, those who think that some people are less equal than others, or that they should be less free than others, violate fundamental equality and cannot be given equal respect in deliberations on the principles of justice. Liberalism would really destabilize its own foundation if the word “all” were taken to comprise even those who do not believe that all people were born equal. Fortunately, this is not the case.

## *22. The Meaning of the Veil of Ignorance*

There is another ubiquitous communitarian charge against Rawls’s theory. Here I approach it from a methodological standpoint. The charge is that Rawls’s theory of justice does not take into account cultural differences because the veil of ignorance does not permit them. If the unencumbered selves under the veil do not know what culture they belong to, they would not be able to choose the principles that will reflect their cultural or social context. Since many communitarians and multiculturalists, guided by Walzer, Sandel and Kymlicka, espouse a culturalized conception of the person according to which culture matters most, the ultimate charge is that the Rawlsian liberalism is difference-blind and cannot accommodate cultural diversity. This charge is, I want to argue, as wrong as it is frequently referred to by communitarians and multiculturalists.

I will begin by going back to section 16 where I argued that Rawls's liberal individual is what violates the impartiality of the original position. If we want to say something about Rawls's conception of the person and its relation to the problem of the impartiality of the original position, we must concentrate on what Rawls says on the conception of the person and how it violates the requirements of impartiality. It is futile to look into what he says about other matters such as the veil of ignorance. The veil, as I argued in the beginning of the previous section, has another purpose in Rawls's theory. Whereas the conception of the person violates impartiality, the veil of ignorance safeguards it.

The veil of ignorance suppresses the knowledge related to intellectual and physical talents and endowments, social and cultural status, and conceptions of the good. But it is misleading to say that this knowledge is suppressed because it does not matter to people's lives. Quite the opposite is the case. Rawls's believes that such knowledge matters, and it is precisely because it matters, it must be approached in a special way. Liberals do not presume that subjects of justice are abstract beings possessing no distinguishing features such as sex, age, social background, or cultural and ethnic identity. Neither do liberals hold that there should exist a society composed of such people. This would be absurd. What Rawls wanted to express with the veil of ignorance was an old idea that, as a matter of fact, can be traced back to the emergence of the Reformation in the 16<sup>th</sup> century. The Reformation and its aftermaths posed one great problem: how the advocates of various religious doctrines could peacefully live and put up with each other. The solution was found in the concept of toleration that commanded churches's abstinence from trying to impose their doctrine on those who do not accept them willingly. It, however, did not mean that religious difference did not matter. On the contrary,

“demanding that churches and other religious bodies should fit their activities within a uniform legal framework that puts them on an equal footing is actually a way of responding to the importance of the role that religion may play in people’s lives. It is precisely because they recognize the potential for destructive conflict inherent in religion that liberals have insisted on legal regime that depoliticizes religious identity and is in that sense ‘difference-blind’ with respect to religion” (Barry 2001: 68).

It is this historic solution that presents the rationale for the veil of ignorance. Rawls was the first contemporary political philosopher to theoretically mold this idea. I will quote in some detail from *A Theory* which in my mind correctly expresses how the veil of ignorance should be understood:

“[Persons in the original position] know that they have (or may have) certain moral and religious interests and other cultural ends which they cannot put in jeopardy. Moreover, they are assumed to be committed to different conceptions of the good and they think that they are entitled to press their claims on one another to further their separate aims. The parties do not share a conception of the good by reference to which the fruition of their powers [...] can be evaluated. They do not have an agreed criterion of perfection that can be used as a principle for choosing between institutions. [...] Thus it seems that the only understanding that the persons in the original position can reach is that everyone should have the greatest equal liberty consistent with a similar liberty for others” (Rawls 1971: 327-8).

I hope this quotation does away with Sandel's thesis about unencumbered selves, and makes clear that the purpose that stands behind the veil is not to neglect cultural differences but rather to create an environment wherein all these differences will be handled in a fair manner. What is legitimate to offer to the people who are under the veil of ignorance is only what they cannot reasonably reject. The veil thus serves as a set of ethical constraints that blocks moves that are morally unacceptable. It is true though that the veil has other functions in Rawls's case, but already in *A Theory* Rawls signaled an awareness that the veil of ignorance, as it stands, will not do. He writes that "the conditions of generality of principle, universality of application, and limited information as to natural and social status are not enough by themselves to characterize the original position of justice as fairness. The reasoning for the average utility principle shows this" (Rawls 1971: 183). This is why Rawls introduces the strains of commitment argument that puts emphasis exclusively on moral motivation. On this argument, people "cannot enter into agreements that may have consequences they cannot accept. They will avoid those that they can adhere to only with great difficulty" (ibid. 176). This formulation I take to be the most direct predecessor to Scanlon's test of reasonable rejection.

Let me dwell on this. The point of the veil of ignorance is to eliminate moves based on partial favoring of certain groups, be it ethnic, class, or any other. But in Rawls's case this was clearly not enough, for the veil of ignorance put everyone in the same position. The veil indeed excludes irrelevant knowledge but Rawls's original position nonetheless leads to utilitarianism. The person who decides for all will not be reasonably concerned to choose "the rules that will give the greatest likelihood of promoting his interest. Given his ignorance of his actual position in society he is unable to single out those rules that would most favor his actual position" (Kagan 1989: 41-2). The key adjective here is "actual." The

question that arises is, then, how all these same people will be able to defend their different and conflicting conceptions of the good if the actual knowledge on conceptions is suppressed. Although people are not supposed to impose partial principles on others, they can nevertheless reasonably expect that the selected principles will work for their benefit. It would be foolish for you to engage in a debate on principles of justice if you do not see any interest in it. And in Rawls's scheme, people cannot do anything for their actual selves because they do not know what conceptions of the good they embrace. In order to secure the interest of the actual selves, Thomas Scanlon proposed an alternative view by which an act is wrong if it can be reasonably rejected (Scanlon 1982: 110). The implication of the Scanlonian original position, in contrast to Rawls's, is that people are not put under a veil of ignorance simply because they should be able defend their conceptions of the good.

But if there is no veil, how are we supposed to block irregular moves I was talking about in the previous section? Barry, who enlarges on Scanlon's original position, contends that this can be accomplished by employing the concept of reasonableness. He says that:

“[i]n [Rawls's] version of original position theory, the parties do not know who they are, and have conflicting interest, but [in the Scanlonian alternative] we have a different assumption about their motivation. Instead of supposing that each is pursuing his own interest as best as he can in the choice of outcomes, rules, or principles, we now attribute to the parties the desire to reach an agreement on reasonable terms” (Barry 1989: 271).

“Reasonable” here stands for the way of thinking other than means-ends rationality. From its full specification it follows that the parties are permitted to put forward only arguments

that can be expected to be endorsed by all. The concept of reasonableness is, therefore, what saves the day in the alternative formulated by Scanlon and Barry. To say that something cannot be reasonably rejected amounts to saying that such principles “are not only justified within your system of reasons and beliefs, but can be at least openly justified to others as well, [...] because such arguments provide [others] with considerations that are reasons given their systems” (Gaus 1996: 120). This is possible because such arguments cannot take the epistemological form, nor can they be based on being a member of a linguistic community or a rule follower (ibid. 129). But be it noted that all this can be done only if we formulate reasonableness by drawing on the very same sorts of intuitions we used when formulating the veil of ignorance. Put it another way, barring some one from saying “It’s not in my interest and this is why I’m against it” is possible if one deploys the logic that the veil of ignorance deploys. The veil of ignorance thus should not be construed as something that removes our knowledge from the sight, but rather as a device that establishes what arguments are wrong and what right.

The strains of commitment argument from *A Theory* obviously shows that Rawls was aware of the impact utilitarianism made on his theory. Already in the 1971 edition of *A Theory* he states that if not for the strains of commitment, his theory could lead to some kind of utilitarianism (Rawls 1971: 183). In the 1999 revised edition Rawls modified section 29 by adding some remarks that made it clearer that the original position was about reasonable conditions for a fair choice, and by saying that “to the extent that original position embodies reasonable conditions used in the justifications of principles of everyday life, the claim that one would agree to the principles of justice is perfectly credible” (Rawls 1999b: 159). In *Political Liberalism* he is even more explicit on this. His intention was to achieve what Scanlon called moral motivation in the original position. Rawls wrote that

“our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reasons. This is the liberal principle of legitimacy” (Rawls 1993: 137).

What matters here is that the postulation to the effect that any principle will be legitimate if “it may reasonably be expected to be endorsed” cannot work without a device such as the veil of ignorance. Otherwise people will feel free to put forward whatever they wish.

It may be noted that my reinterpretation of the veil of ignorance puts on an equal footing Rawls’s original position and Scanlon’s test of reasonable rejection. My claim here is indeed as follows: once the rational choice elements are removed from the original position, there is no substantial difference between the two. Barry claims that Scanlon’s test differs from Rawls’s original position because it does not contain the veil. He says:

“Where the parties are assumed to be pursuing their own interest, a veil of ignorance is essential. But where they are assumed to be motivated by the desire to reach an agreement on reasonable terms, a veil of ignorance is optional feature—a heuristic device which can be resorted to on occasion but does not have to be relied on to create solutions” (Barry 1989: 331).

The rationale for the absence of the veil consists in the possibility for people to be able to defend their conceptions of the good. In order to fend off unfair proposals, Barry and

Scanlon introduce the notion of reasonableness that imposes the constraints on what can and what cannot be said in the original position. But this is precisely the purpose of the veil of ignorance. What makes the substantial difference between the original position from *A Theory* and the Scanlonian original position is not the veil of ignorance, but the motivation of the parties. Whereas people in Rawls's original position are self-interested, the people in Scanlon's original position are morally motivated. Rawls's moral argument cannot survive without the strains of commitment, but it is not a totally separate moral argument that has no relation to the original position and the veil of ignorance, as Barry thinks (Barry 1995a: 65). The strain of commitments cannot work if certain moves are not blocked when making arguments. Since these moves can be banned only when some facts about ourselves are forbidden from being referred to, the point is that it is the veil of ignorance that does the real job here. It may be true that the whole original position along with the veil of ignorance is only a more dramatic form of putting forward the moral argument formulated by the difference principle (Barry 1973: 14-18; 1989: 331, 333). But if the veil is understood the way I interpreted it here, then one could also say that the Scanlonian original position is only a less dramatic form of putting forward the same moral argument formulated by the same principle. Indeed, Barry confirms this by saying that the Scanlonian "requirement of reaching agreement on reasonable terms has much the same effect as the Rawlsian 'veil of ignorance' in inhibiting attempts by the parties to enhance their own positions at the expense of that of others" (Barry 1995a: 120-1).

## CHAPTER 5

### **The Law of Peoples and the Breakdown of Rawls's Liberalism**

#### *23. The Principles of International Justice*

From the discussion in section 18 it followed clearly, I think, that the liberal government is justified in interfering with whatever illiberal practices of its citizens if such practices are against basic human rights. The proposition I shall defend in this chapter is that a liberal will want a similar logic to operate at the international level. However, I shall not endorse the view that international justice necessarily entails military intervention in cases of violation of human rights. The claim of this chapter is that a liberal philosopher is committed to underwriting the view that the practices of sovereign but illiberal states are morally wrong if they preclude individuals from making free choices in their lives.

Rawls's *The Law of Peoples* is a good example for testing this claim. *The Law* is an extension of the 1993 article with the same name wherein Rawls sketched how his theory of justice applies to international relations. The book indeed offers an elaboration of Rawls's article but by no means can be regarded as an extension of his theory of justice formulated in *A Theory and Political Liberalism*. Instead, Rawls's international theory of justice is multicultural not only at the level of principles but also at the level of premises. The focus of this chapter will be on the latter. I show that Rawls started off from illiberal premises and, accordingly, could not derive anything but illiberal principles of international justice.

Rawls's theory of international justice offers the principles for arranging relations among sovereign and diverse peoples (read: nations or societies). Rawls divides the world's societies into five distinct types: reasonable liberal peoples; illiberal but decent people; outlaw peoples; societies burdened by unfavorable conditions; and benevolent absolutisms (Rawls 1999: 4). He thinks that only first two types of peoples live in well-ordered societies. Although his theory is supposed to be universal in scope, it seems that the key intention of the Law of peoples is to arrange the relations between liberal democracies (the US, Canada, the EU countries etc.) on the one hand and non-liberal democracies and societies (Japan, China, India, Far East countries such as Iran, etc.) on the other hand. (Russia would, I guess, most probably fall within the category of societies burdened by unfavorable conditions.)

Very briefly, these are Rawls's principles of international justice:

- 1) peoples are free and independent;
- 2) they observe treaties;
- 3) they are equal in agreements that bind them;
- 4) they observe duties of non-intervention;
- 5) they have the right to self-defense;
- 6) they honor human rights;
- 7) they observe certain restriction in the conduct of war;
- 8) they have duty to assist other peoples living under unfavorable circumstances (ibid. 37).

The list looks like a list of liberal principles, but this is where its liberalism comes to an end. Although the principles are supposed to be universal in the scope of their application, these are the principles agreed on by only liberal peoples (ibid. 63). Whereas the main task of the

Law of peoples consists in securing peaceful life among diverse societies, the main task of the international theory of justice consists in extending “the Law of peoples to decent societies and [in showing] that they accept the same Law of peoples that liberal societies do” (ibid.). The question that a theory of international justice is supposed to settle is not how to find principles that would be agreed on by all peoples, but how to specify the conditions under which decent peoples may accept the liberal principles picked for them by liberal peoples (ibid. 59). Seeing that Rawls claims that illiberal peoples do have reasons to accept the liberal principles, it is interesting to see what these reasons are.

Part II of *The Law of Peoples* begins with the section titled “Toleration of Illiberal Peoples” (Rawls 1999: 59). Rawls claims that liberal societies must honor the principle of toleration that ensures equal status for illiberal societies (ibid.). But why does Rawls insist on the principle of toleration apart from the principles he listed 22 pages ago? Once the list of principles is endorsed, already principles 1, 3 and 4 mandate mutual toleration and recognition of equal status among peoples. Toleration implies difference but it also implies a shared value that all human beings and their conceptions of the good are of equal worth. Without this value, it would not be possible to get at the principle of toleration. The understanding of tolerance based on the shared value of equal worth gave birth to the concept of human rights that granted everyone the right to be different. To negate human rights comes down to negating the basis upon which toleration is possible. Conceptually, non-tolerance of illiberal people can arise only if illiberal peoples start encroaching on human rights, which is forbidden by principle 6 in Rawls’s list. But, of course, any advocate of toleration would wonder why anyone would call for toleration of illiberal people (or any other people) if this people’s practices involve the breaching of human rights. On the other hand, suppose that even illiberal societies protect human rights in the same way liberal

peoples do, which Rawls establishes as a fact (ibid. 61). But then again: why do we need to stress that toleration must hold separately of the principles of justice that imply the idea of toleration? The described confusion gives rise to thinking that Rawls's insisting on the separate principle of toleration smuggles into his international theory of justice something else.

Rawls regards nonliberal societies as decent societies. Then he goes on to say that these societies respect human rights. But whoever read the 1948 UN Declaration on human rights would need a lot of mental gymnastics to apprehend the way Rawls defines human rights in *The Law of Peoples*. Whereas the Declaration's article 1 postulates that "all human beings are born free and equal in dignity and rights," article 2 postulates that "everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or status." Rawls apparently does not take seriously the postulate that rights belong to human beings *qua* human beings and that rights and liberties cannot be derived from someone's status. Drawing on his criteria for defining decent hierarchical societies, he finds that a society can be said to respect human rights if it sees individuals as co-operative members of various associations and social groups. Rawls thinks this makes sense, for decent hierarchical societies do not have to accept "liberal idea that persons are citizens first and have equal basic rights and liberties as citizens" (ibid. 66). On this view, human rights are derived from associative or corporative status, meaning that individuals can have rights, but only by being members of various social groups, associations, casts, estates etc. (ibid. 68). Rawls here explicitly, and essentially, relies on Hegel's anti-liberal concept of rights by which rights arise from a certain status (be it ethnic or class) and not from the fact that someone is a human being. Hegel writes:

“The second section of the Estates comprises the fluctuating element in civil society. This element can enter politics only through its deputies; the multiplicity of its members is an external reason for this, but the essential reason is the specific character of this element and its activity. Since these deputies are the deputies of civil society, it follows as a direct consequence that their appointment is made by the society as the society. That is to say, in making the appointment, society is not dispersed into atomic units, collected to perform only a single and temporary act [...] On the contrary, it makes the appointment as a society, articulated into associations, communities, and Corporations” (Hegel §308).

Accepting this is tantamount to redefining human rights by definitional fiat. The liberal concept of human rights is predicated on the assumption that every citizen is entitled to the basic set of human rights on the grounds of being a human being, not a member of any association. John Locke can be taken to be the father of the idea. The tacit premise of the Lockean state of nature, wherein people “are equal one amongst other, without subordination or subjection” (Locke II: §§4), is that there were no social constructions. This amounts to stating implicitly that rights belong to individuals *qua* individuals. Seeing that this idea set the stage for the conceptualization of contemporary understanding of human rights, it comes as no surprise that similar views could be found in the political philosophy of the early Rawls. It does come as a surprise, however, that Rawls dropped the idea 28 years after he published *A Theory*.

Rawls’s international principles of justice are preceded by modifications of theoretical premises followed by the conceptual doublings of some of the key elements of his theory of

justice. Methodologically, every type of liberalism takes the individual for its analytical unit. Everything else is derived from this proposition. A coherent liberal does not disallow the possibility of creating associations, groups, or ethnic communities, but it is critical to emphasize that such associations must be created voluntarily by individuals. Although it starts from the individual, liberalism does not insist on an acultural or anational identity of any individual, but it is impossible to construct any liberal theory if one starts off, say, from national identity as the overriding identity of the individuals. As Kukathas put it, “[w]hat has to be denied [...] is the proposition that fundamental moral claims are to be attached to [ethnic or cultural] groups and that the terms of political associations must be established with these particular claims in mind” (Kukathas 1995: 232). The primary goal of Rawls’s veil of ignorance was to eliminate knowledge on national and cultural identities because a liberal does not consider it essential for the selection of the fair principles of justice. A liberal point of view allows the protection of cultural, ethnic, or any other kind of group identity, not because these identities *per se* have the right to be protected but because individuals should be free to associate (ibid. 239).

In his first articles published in the 1950s, Rawls saw individuals as negotiating the principles of justice. In *The Law of Peoples* we read that principles are negotiated by peoples. What is the reason for this methodological shift? I could find none in Rawls’s works. Although Rawls did not bother to define the notion of “people”, it is possible to imagine legitimate cases in which people should negotiate instead of individuals. Suppose that, for some reason, individuals are able to negotiate the principles of local and national justice but are unable to negotiate and select the principles of international justice. Due to this inability of the individuals, it appears more efficient to give this right to peoples. But in *The Law of People* nothing that supports this logic can be detected. Rawls, nevertheless,

keeps talking about people, not about individuals. The negligence of individuals bears on the principles. Towards the end of *The Law* Rawls is explicit in saying that his view on international justice differs from the cosmopolitan view on justice by which welfare of the individual matters (Rawls 1999: 119ff). This should mean that, at the international level, where material and economic differences are more striking and graver than at the national level, a theory of justice has nothing to say on distributive matters. Rawls, however, ignores the fact that the welfare of individuals is a theme espoused not only by cosmopolitans, but also by liberals. If he thinks this theme irrelevant, or irrelevant at the international level, then this should be clearly stated. But, of course, Rawls cannot state this, for such a statement turns the assertion that the law of peoples is derived from liberal ideas that can be found in *A Theory and Political Liberalism* into a mere smokescreen.

It is easy to assert the suitability of one's principles of justice to both liberal and illiberal societies. It is also easy to allege that both types of societies respect human rights. But I argued in this section that such a move is possible only by introducing two different meanings of human rights. That is what we find in *The Law of Peoples*. The first meaning is liberal, while the second is corporatist. It is not clear how Rawls arrives at this double meaning, but it is clear that the double meaning helps Rawls establish an alternative version of "liberalism" that advocates the priority of corporatist rights over liberal human rights.

#### *24. Another Multiculturalist Theory of International Justice*

Rawls's methodological shift from individuals to peoples can mean only one thing: giving in to the communitarian and multiculturalist demands to accept that community and culture

matter more than the individual. Rawls explicitly accepts this demand by referring to Walzer (Rawls 1999: 76), but he accepts it implicitly even more because the whole Law of peoples is a result of a multiculturalist approach to justice. Let me labor on that point. In section 15 I gave benevolent definitions of communitarianism and multiculturalism. There I said that these two streaks in contemporary political philosophy are united in putting emphasis on communal and cultural aspects of human beings. Here I expand on these definitions by distinguishing them from the term pluralism. The reason for this is to prove that liberal theory of international justice can cope with a plural world without invoking multicultural assumptions. “Pluralism is often used to indicate a position according to which different ways and different conceptions of the good should be tolerated regardless of their moral value” (Raz 1989: [118]). The implication of this definition is that any solution that is able to preserve such a state of affairs will do. Liberal universal principles aim at preserving plurality of any society because the liberal regards all conceptions of the good in such a society as equally worth preserving as long as some conceptions are not proven to have pretensions to suggest themselves as having the priority over others. At the same time, this is where liberalism’s relation to the concept of plurality stops. In contrast, communitarianism, radical multiculturalism, and the politics of difference require that this diversity should be a norm. On this view, the sole relevant aspect of people’s identity is cultural identity, whereas other possible aspects—such as, say, the fact that people are related to the labor market—are deliberately neglected. In a word, everything that does not arise from cultural differences is passed over, whereas everything that arises from them is welcomed and embraced. The basic idea of multiculturalism then is predicated on Young’s statement that “a general perspective, that all person can adopt and from which all experiences and perspectives can be understood and taken into account, does not exist” (Young 1995: 190), which is to say that people actually do differ and that differences have

to be validated and perpetuated. People may be treated equally but only as long as they belong to the same culture. Those who do not belong to the same culture are treated unequally. By the end of this chapter it will be clear that Rawls follows this line of thought and that the implications of Rawls's international justice are multicultural in the way I define multiculturalism here. In this and the next section I will explicate how the new original position outlined in *The Law* helped Rawls press the case for multiculturalism at the international level.

The changes that occurred in the original position come down to two conceptual doublings. The first is the doubling of the original position itself. This is Rawls's first radical departure from the basic premises of egalitarian liberalism. The principles of international justice that Rawls set out in *The Law of Peoples* are the result of a choice from the original position. But recall that liberal people, who are the sole parties to it, are in fact situated in two different original positions. The two original positions allegedly do not differ in that they have different outcomes, but in that they are arranged differently. The first original position is designed for liberal peoples to select the principles of international justice that will apply exclusively to liberal societies. In the second original position, the very same liberal peoples attempt to extend the very same principles on decent peoples. The two original positions are introduced because the former is suitable for liberal societies, while the latter is suitable for illiberal. The original position that is suitable for liberal peoples is more or less a true copy of the original position from *A Theory*, within which we find all the irrelevant knowledge eliminated, including conceptions of the good. In "the first use of the original position" people find themselves under constraints that they, as reasonable, rational, free and equal citizens, endorse as "appropriate restrictions for adopting a political conception of justice" (ibid. 30).

The second original position (ibid. 32ff) is, naturally enough, a completely different cup of tea. In it, the liberal people deliberate on how fairly to situate illiberal people so that the illiberal people accept the principles from the first original position. But note that the process of situating illiberal peoples into the second original position does not take place even hypothetically. Although the second original position is designed for illiberal peoples, they are not parties to it. It is so because Rawls holds that the original position is a liberal device for representation that is not quite suitable for illiberal people. Nonetheless, he still believes illiberal people would endorse the principles of the law of people (ibid. 70). This is a weird syllogism. Why would illiberal people allow that someone on their behalf selects the liberal principles of justice? If the outcome of the original position is the principle of equal protection of human rights, it is unclear why a state like China would agree to stick to this principle. The answer to this question can be gotten if we recall what I said when analyzing the double meaning of human rights in the previous section. The fact that the principle of equal human rights looks attractive to both liberal and illiberal people is facilitated by the fact that the concept of human rights can be understood in two different ways. On one understanding, human rights are universal and people enjoy them as individual. On the other understanding, which Rawls adapted to illiberal people by relying on Hegel, human rights are derived from caste status. If the champion of the “liberal” Law of Peoples does not see anything wrong with so conceptualized human rights, then there is really no reason to wonder why any caste state would reject the Law of Peoples along with the principle mandating the inviolability of human rights, and be quite reasonable in doing so.

## 25. *Equality in the Second Original Position*

If we dig deeper into the unnecessarily convoluted structure of the second original position, we find the violation of the probably most fundamental postulate of liberal justice.

Liberalism is a philosophy based on the proposition that people are equal in a fundamental sense. Equality was particularly critical for constructing an original position wherein people are put on the equal footing, accepting certain constraints of moral nature. I discussed this issue in some detail in section 20 and mentioned that this postulate was accepted by other liberals who came after Rawls. Liberalism is distinctive in that it starts off from the ground-floor equality secured by various devices. The early Rawls wanted to achieve equality with the veil of ignorance, Scanlon and Barry with the test of reasonable rejection, Dworkin with equality of resources, Arneson with equality of welfare, Nozick with rights as side-constraints, and Habermas with the rules of rational discourse. The constraints were of sundry kinds but all identical in being universal, namely in applying to all without exemption. To postulate that the veil of ignorance apply to some and to some not, as Rawls now does, amounts to postulating inequality as a key proposition in the original position.

Rawls calls for ground-floor equality among liberal and nonliberal peoples, but the way he conceptualizes equality betrays a wish to maintain the *status quo* of inequalities among these two types of peoples. To illustrate this, I reproduce the paragraph in full:

“Clearly, I have supposed that the representatives of the peoples are to be situated equally, even though the ideas of justice of the decent nonliberal societies they represent allow basic inequalities among their members. (For example, some

members may not be granted what I call ‘equal liberty of conscience.’) There is, however, no inconsistency: a people sincerely affirming a nonliberal idea of justice may still reasonably think its society should be treated equally in a reasonably just Law of Peoples. Although full equality may be lacking within society, equality may be reasonably put forward in making claims against other societies” (ibid. 70).

There is a lot of inconsistency in this as I will show. It is to be expected that people that lacks basic equality “may reasonably think its society should be treated equally.” All this because equality can be conceptualized in various ways. According to Hobbes, people were equal in strength, ability to cheat, and kill their enemy. The result was a state whose legitimacy was derived from sheer force. On the Nazi account of equality, all Jews, Gypsies, and homosexuals were equal in being qualified for gas chambers. The result was gas chambers full of such people. On the conception of equality we find in Rawls’s second original position, liberal societies are equal in being obliged to honor the fundamental equality of human beings, but illiberal societies are equal in having a chance to take a free ride. There is nothing in the second original position that requires illiberal peoples to give every human being equal concern. In the end, they will settle for the principles, but these principles will be principles permitting violations of human rights that liberal societies protect. The question that has to be asked then is this: why would liberal people enter the original position wherein they would tolerate illiberal people’s violation of human rights, thus making senseless the basis of toleration? Toleration of illiberal practices is possible only if one swallows a sleight of hand by which the violation of human rights does not exist wherever it actually does.

As I said, *The Law of Peoples* irresistibly drives to the conclusion that the 20 years of merciless communitarian and multicultural critique have brought about some results. One of the multiculturalists's theses is that in organizing political communities we must uphold an idea of toleration that is derived from moral relativism. Moral relativism is the doctrine to the effect that there exists no apriori ground upon which it is possible to say what justice entails in a society with established meanings. Walzer pushes this claim to the extreme by implying that society with a culturally-based caste system cannot be criticized by people who are not part of this system. So long as people in the caste system share certain meanings, they will know better what justice entails, for the caste system

“is constituted by an extraordinary integration of meanings. [...] And the system as a whole rests upon a religious doctrine that promises equality of opportunity, not in this life but across the lives of the soul. The individual's status here and now ‘is the result of his conduct in his last incarnation [...] and if unsatisfactory can be remedied by acquiring merit in his present life which will raise his status in the next’” (Walzer 1983: 27).

Suppose we replace the “equal opportunities” with “human rights” in this quotation. Walzer would immediately have to endorse the doctrine by which human rights may be ignored provided they are granted in the afterlife. Since this understanding of human rights is context-relative, this is how multiculturalists square moral relativism with liberalism.

The multicultural champion of moral relativism is Chandran Kukathas who claims that the central concept of liberal theory is the concept of toleration that warrants cultural differences and gives full sovereignty to cultural and ethnical communities and nation

states. It is worth pausing for a moment to examine more closely Kukathas's views on international toleration because I believe this is the concept of toleration that informs Rawls's international theory of justice. Kukathas rejects the liberal concept of toleration. Liberal toleration is possible, holds Kukathas, only if we already have a "common moral point" accepted by all. When such a standpoint does not exist, the minority cultures (or individuals) "will be restructured to be brought into accord with majority practice." But this can be done "at the risk of intolerance and moral dogmatism" (Kukathas 1997: 78). Since such toleration puts nonliberal minorities at a disadvantage, Kukathas is set to expound a concept that will give "sufficient toleration to minority communities." This must be done by giving independent weight to toleration, says Kukathas, and gives a two-pronged argument for this. First, he believes that there are no common moral standpoints; everything can be challenged. Even the role of reason, that lies at the heart of modern liberalism, is subject to dispute (ibid. 80). Reason cannot be the guide in settling issues in the public realm because even conceptions of the good that are not based on reason must be part of public realm. "The Amish or (better still) the Hutterites, for example, are interested not so much in participation in as in withdrawing from modern society. My contention is that they are still a part of the realm of public reason. [...] The fact that [some conceptions of the good] are not articulated does not alter the fact that some alternative views are in the public realm" (ibid. 81). The consequence of this is that everybody deserves their place in the public realm and no one can be excluded in advance.

So far, so good, but this does not differ much from a liberal outlook. Where Kukathas unambiguously does part company with liberal position is in his doubts about the existence of common moral standards on the grounds of which toleration is possible. The public realm is, in Kukathas's view, "an area of convergence of different moral practices" (ibid. 84).

Since these practices do not share identical moral views, we have to see that toleration amounts to letting ethnic groups live the life they chosen. Interference of the government is impermissible since “there is little assurance that the power will not be abused” (ibid. 88). The crux of Kukathas’s argument is thus the following: it would be possible to impose liberal standards on nonliberal groups or sub-societies if liberal societies could be regarded as one unified society sharing one common moral point of view from which everything can be derived. But this cannot be true, he holds. “The state is not a community in the same way that Pueblo or the Amish societies are. It is much more of an association of associations. More importantly still, it is not an association of *like* associations but of *diverse* associations” (ibid. 94). Toleration at domestic level entails non-interference with non-liberal practice. At the international level, the same thing is required if we follow the doctrine of sovereignty, which, in Walzer’s view, is the “doctrine of toleration” (ibid. 97; Walzer 1997b: 106).

As may be seen, in Kukathas’s case everything depends on the alleged fact that states are diversified melting pots, while cultural groups are homogenous wholes. That the second part of this proposition is not true was argued by Kukathas himself in an article only two years older than the one in which he lays out his ideas on toleration. In “Are There Any Cultural Rights?”, Kukathas rejects multiculturalists’s claim that cultural groups can have group rights on the grounds of forming homogenous cultural communities. He writes that

“it is important to note not only that group compositions changes over time but that most groups are not homogenous at any given moment. Within communities there may be important differences and conflict of interest. Internal divisions can take two forms: divisions between subgroups within larger community and

divisions between elites and masses, which may have quite different interest. [...] Cultural groups are not undifferentiated wholes but associations of individuals with interests that differ to varying degrees” (Kukathas 1995: 234-5, 236).

Kukathas aside, my point is not only to show that Rawls buys into a so formulated concept of toleration but that he also adopts a moral relativism that presents the groundwork for Kukathas’s theory of toleration. Kukathas, namely, does not only claim that states are composed of many different groups that cannot be said to share a common moral standpoint but that such a standpoint cannot be found at all. He argues for “taking a more skeptical attitude towards established political authority, regarding it (at best) not much more than the outcome of compromise among different peoples” (Kukathas 1997: 98). Of course, my concern here is not to chide Rawls for accepting the relative worth of liberalism based on the uncontested fact that some peoples do not accept a liberal outlook. What I rather want to argue is that whoever accepts moral relativism parts from liberalism. Both Kukathas and Rawls believe that moral relativism is compatible with liberalism. Kukathas says that his concept of toleration plays “a central place in liberal theory” (ibid. 99), whereas Rawls cannot stop calling his international theory of justice liberal throughout *The Law of Peoples*.

Liberalism, however, cannot be based on moral relativism. I argued in section 20 that the case for liberalism can be put without referring to social context, but rather by referring to some general and broad intuitions about justice. Such intuitions, however, are far from being relative or instrumental. But what any liberal has to accept is that liberal principles are true statements about all human beings. If we conclude that there cannot be common standpoints and that everything is relative because everything is culture-, race-, gender-, or context-dependant, and if “the aims of political philosophy depends on the society it

addresses” (Rawls 1987: [421]), then political philosophy can freely announce its death and schedule the funeral. A liberal, as opposed to other various types of post-modernist thinkers and philosophers, is distinctive in that he or she does not see everything as relative. So,

“if a liberal is not somebody who believes that liberalism is true, what is a liberal? The defining feature of a liberal is [...] that it is someone who holds that there are certain rights against oppression, exploitation and injury to which every single human being is entitled to lay claim, and that appeals to ‘cultural diversity’ and pluralism under no circumstances trump the value of basic liberal rights” (Barry 2001: 132-3).

What could be possible reasons for Rawls’s embrace of moral relativism and the multicultural understanding of toleration? It seems to me that the biggest fear that plagues Rawls is the fear of international militarily intervention. In *The Law of Peoples*, Rawls maintains that liberal governments do not have the right to military intervene with illiberal governments’s business, even if these governments violate human rights. But why would the whole thing be about sanctioning and punishing illiberal governments? The purpose of liberal political philosophy is, I suggest, to examine whether it is theoretically possible to derive liberal principles of justice and give them justification acceptable to everyone. That is all. The purpose of liberal political theory is to say something on how institutions that arise from such principles can be implemented. But the attempt to implement them is a far cry from saying that the implementation cannot possibly face some practical obstacles. When the liberal goal is quite clear (as in the case of the Kosovo war, for instance), a liberal philosopher will stop short of supporting military intervention that involves additional violations of basic human rights, which was the part of the NATO military intervention in

1999. Rawls indeed shares the view that justification for liberal institutions may lead to illiberal actions. In his article “Fifty Years After Hiroshima” he criticizes the US’s dropping the atom bombs on Japan, saying it was contrary to one of six principles of just war. One of the principles postulates that

“a decent democratic society must respect the human rights of the members of the other side, both civilians and soldiers, for two reasons. One is because they simply have these rights by the law of peoples. The other reason is to teach enemy soldiers and civilians the content of those rights by the example of how they hold in their own case” (Rawls 1995: [566]).

The dropping of the nuclear bomb was an impermissible move, despite the fact that the Western alliance was pursuing a morally right goal. Quite so. But my point here is that every liberal will not endorse such a move, although he will also approve of morally right goals such as the struggle against Nazism.

Rawls is afraid that liberal peoples will easily agree “that nonliberal societies [that] fail to treat persons who possess all the powers of reason, intellect, and moral feeling as truly free and equal,” and will attempt to subject them to sanctions (Rawls 1999: 60). Sanctioning nonliberal peoples is not permitted, says Rawls, for we cannot be sure, “before trying to work out a reasonable Law of Peoples, that nonliberal societies [may always be] the proper object of political sanctions” (ibid.). A quick answer to this would be that a liberal position takes equality as *prima facie* just, and that any departure from the baseline of equality without benefiting the worse-off (and this is precisely what makes nonliberal societies not

liberal and some liberal societies not just) is automatically suspect. In order to arrive at this position we do not have to wait for any type of Law of Peoples.

But Rawls's position is additionally problematic since it regards political philosophy as if its purpose consists exclusively in punishing all those who think differently. Rawls contends that sanctioning is morally wrong since it violates equality among the parties to the original position. "As we have seen in discussing the arguments in the second original position [...], the parties are the representatives of equal peoples, and equal peoples will want to maintain this equality with each other" (ibid.). But it may immediately be seen that the original position, wherein liberal peoples are situated in one way and illiberal people in another way, will be violated by absolutely every principle that is universal in its application. The principle of sanction is only one among them. The meaning of the original position is to situate everyone similarly with respect to their negotiating capabilities and irrelevant information that can impair the fair outcome of negotiation. If we have to conclude that someone from the original position will not settle on the principle of equal human rights, this can be done only if we define equality by saying that it grants everyone equal right to pursue their conceptions of the good no matter how inconsistent with the similar wishes of others. The purpose of the veil of ignorance was supposed to impose certain limits as to how conceptions of the good may be pursued. By excluding the veil of ignorance from the original position, Rawls violated the ground-floor equality and did away with egalitarian liberalism in his theory of justice.

The second original position is seemingly based on the concepts of toleration and equality. But in Rawls's rendition toleration and equality are euphemisms for *modus vivendi* and *status quo*. Toleration is made possible by *modus vivendi* among peoples, whereas the only

fair solution for international relations among peoples is the one that does not touch into *status quo*. Such *modus vivendi* signals an additional distortion of Rawls's original position. If we ask why it is necessary to preserve *status quo* among people, the only possible answer is that this is required by everyone who knows what kind of the conception of the good he is committed to. Peoples in the second original position do know what conceptions of the good they pursue, they want it to stay that way, and eventually they want to pick the principles of international justice that will reflect this fact. They can do that because the new original position does not exclude this information anymore. But the question to be asked now is what is left of morality in Rawls's liberalism if the original position became permeable to morally irrelevant facts?

#### 26. *The Case for Moderate Skepticism*

I showed in the previous section that the international theory of justice Rawls expounds in *The Law Of Peoples* is based on moral relativism. Here I want to lay out some additional thoughts on what kind of moral relativism this is. I will do this by comparing the relativism from *The Law* with that from *Political Liberalism*. Rawls's attitude about what kind of epistemological status his theory has to have is the crucial aspect that made him revise his theory. In Introduction to *Political Liberalism* he says that in this book he makes an attempt to avoid the trap he did not see in *A Theory*—namely, that his political philosophy is not an appropriate framework for a contemporary pluralistic society. The moral doctrine set out in *A Theory* is essentially a comprehensive moral doctrine. But, continues Rawls, the modern society is essentially not “characterized by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable

comprehensive doctrines” (Rawls 1993: xvi). The difference lies in the fact that no person can reasonably be expected to affirm any of those comprehensive doctrines and assign it a privileged status in the society. This is why Rawls concludes that his theory of justice as fairness was unrealistic (ibid. xvii).

As may be seen, moral relativism is already implicitly here. Yet Rawls’s further reflections on moral philosophy make the relativism even more visible. First, it is really a radical change in focus to say that political philosophy is not concerned anymore with expressing or finding the true nature of the self. Rawls contends that “the problem of stability is fundamental to political philosophy and an inconsistency there is bound to require basic readjustments” (ibid. xvii). Stability, not the good life, is something a political philosopher is supposed to be after. The problem for political philosophy is now to hammer out a legitimate political arrangement acceptable to various and incompatible philosophical, religious and moral doctrines. “This is a problem of political justice, not a problem about the highest good” (ibid. xxv). Now, if someone says that the highest good is not the focus of political philosophy anymore, he obviously implies that political philosophy has to be modified to a degree and adjusted to the problem of stability. I will conclude this section by spelling out how this adjustment is to be made, but at this point I only mention that the reformulation implies an adjustment of the moral assuredness and its transformation into moderate moral skepticism.

Rawls states that “at present there is no agreement on the way the basic institutions of a constitutional democracy should be arranged if they are to satisfy the fair terms of cooperation between citizens regarded as free and equal” (ibid. 4). But immediately after this sentence, he adds that “[t]his is shown in the deeply contested ideas about how the

values of liberty and equality are best expressed in the basic rights and liberties of citizens so as to answer to the claims of both liberty and equality” (ibid.). As we see, while the arrangement is disputable, the ideas of liberty and equality as well as human rights are not. And then he concludes: “What must be shown is that a certain arrangement of basic political and social institutions is more appropriate to realizing the values of liberty and equality when citizens [are viewed as free and equal persons]” (ibid. 5)

Rawls started *Political Liberalism* by making an attempt to recast his position concerning the moral status of justice as fairness, stating that no conception of the good can claim morally privileged status in a society. But a coherently elaborated skeptical position would demand that a political philosopher simply recognizes the maintenance of *status quo* as the best and the most just solution, and then proceed to argue for *modus vivendi*. Rawls is, however, explicit that *modus vivendi* is not the product he is after (ibid. 144-150). That he really cannot decide to settle for a total moral skepticism is argued by Joseph Raz who in “Facing Diversity” claims that the theory of the later Rawls has four features: fact of pluralism; shallow foundations; autonomy (from a general moral theory); and epistemic abstinence (Raz 1990: [63-5]). Noticing that never before has it been suggested that “governments should be unconcerned with the truth of the very views [...] which inform their policies and actions” (ibid. [61]), Raz still shows that moral foundations have been preserved in the *Political Liberalism* phase.

As clear from the previous passages, Rawls claims that modern society is a society in which a reasonable disagreement over what truth exists and endures (fact of pluralism). It also does not seek to ground itself in some deeper moral beliefs and truths which makes it an autonomous theory (that is, a theory with shallow foundations and autonomous status with

respect to the moral theory, to employ Raz's vocabulary). Finally, all this comes down to what Raz calls epistemic abstinence, which is the term explaining that Rawls

“refrains from claiming that his doctrine of justice is true. The reason is that truth, if true, must derive from deep, and possibly non-autonomous, foundations, from some sound comprehensive moral doctrine. Asserting that truth of the doctrine of justice, or rather claiming that truth is the reason for accepting it would negate the very spirit of the Rawlsian enterprise. [...] A doctrine of justice must be advocated on the ground it commands or is capable of gaining a consensus of opinion, and not on the ground that it is true” (ibid. [65]).

Yet, as Raz notices, all this is still not an epistemological disaster, and Raz himself seems to have gone out of his way to salvage the epistemic roots of the later Rawls. There are two passages from “Justice as Fairness: Political Not Metaphysical” that are worth reproducing here in order to show that Raz was right. Rawls says that

“the overarching fundamental intuitive idea, within which other basic intuitive ideas are systematically connected, is that of society as a fair system of cooperation between free and equal persons. Justice as fairness starts from this idea as one of the basic intuitive ideas which we take to be implicit in the public culture of a democratic society” (Rawls 1985: 231). Later on he says that “since the question of which conception of political justice is most appropriate for realizing in basic institutions the basic values of liberty and equality has long been deeply controversial within the very democratic tradition in which citizens are regarded as free and equal persons, the aim of justice as fairness is to try to resolve the question

by starting from basic intuitive idea of society as a fair system of social cooperation in which the fair terms of cooperation are agreed upon by citizens themselves so conceived” (ibid. 244).

Although the goal of political philosophy seems not anymore to be directing us towards true and valuable ideas but rather towards achieving certain practical and political goals (which makes the core of what it means to say that theory of justice is political not metaphysical), Raz believes there is still some room to think that Rawls’s theory is both philosophical and practical at once. The major goal of political philosophy is achieving stability in a modern society. But in asking why Rawls opted for a philosophical theory in order to achieve stability, one unavoidably realizes that it must be because it contains some worthwhile goals.

“So it would appear that while the goal of political philosophy is purely practical—while it is not concerned to establish any evaluative truths—it accepts some such truths as the presuppositions which makes the its enterprise intelligible. [...] Without this assumption it would be unwarranted to regard the theory as a theory of justice, rather than a theory of social stability” (Raz 1990: [69]).

So the very fact that it is the only theory of justice that is able to achieve stability in society is what makes it epistemologically full. People cannot affirm a theory if they are not, at least to a certain extent, convinced of its truth, soundness, validity and so on.

The discussion so far shows that it is possible to defend the Rawls from the political liberalism phase as not being epistemologically shallow or empty. This conclusion is, by the

way, tacitly present in section 17, where I discussed the autonomy of the person in the later Rawls. Still, let us further follow what is happening with the moral foundations of Rawls's works after 1993. Just as one could notice a shift between *A Theory* and *Political Liberalism*, one can now notice a shift between *Political Liberalism* and *The Law of Peoples*. But the second shift is by far more radical than the first. The second shift is neither about the passage from epistemic fullness, nor about total epistemic abstinence. Whereas in *Liberalism* the theory was universal in that it had to be underwritten by all even if false, in *The Law* it does not have to be underwritten by all precisely because it is false. Consensual stability and unity in *Liberalism* was achieved through the fact that everyone begins from their different standpoints but, in the face of it, finishes up supporting the same principles. This is abandoned in *The Law* where peoples starts off from different standpoints but, taking it as a sufficient reason, finish up affirming different principles of international justice. This conclusion is true even if one points at the fact that Rawls offers a unified list of principles. This is true, but, as I was at some pains to demonstrate in section 23, such a list is possible only if the list assumes two different understandings of the idea of human rights. To use again Raz's vocabulary, which has helped a lot to clear away underbushes of the theory of the later Rawls, one can distinguish between the weak and strong autonomy of the theory. Weak autonomy is when a political theory is a part of a comprehensive conception of the good. A theory is strongly autonomous if it does not depend on non-political considerations (Raz 1990: [76]). So Rawls's *Political Liberalism* is a weakly autonomous theory because it, despite Rawls's official statements to the contrary, essentially derives from the concept of autonomy of the person. *The Law* is strongly autonomous because it does not depend on anything that is pre-political.

The Law of peoples simply has no unified moral foundation, but at best several irreconcilable moral foundations, and since it can be read as being designed merely for political purposes, it is not only doubtful whether it is a liberal theory but whether it is a political philosophy at all. This line of thought in Rawls led some to thinking that Rawls's ideas on international justice must be viewed through a completely different lenses. They say that what Rawls is offering now is not a political philosophy approach to the contemporary international order but rather the kind of diplomacy that liberal societies should embrace when dealing with illiberal ones. That Rawls had become a politician already in *Political Liberalism* has already been suggested, again, by Raz who saw *Liberalism* as merely a device for achieving political stability. Rawls is, some may think, repeating the same thing in *The Law*. Now, as Raz says, "there is nothing wrong with engaging in politics, though some may doubt whether this is really what political philosophy is about" (Raz 1990: [67]).

From what has been advanced so far throughout this thesis, it was clear enough that the radical shift that occurred in *The Law* was by no means necessary. Rawls simply significantly modified many of his premises and approaches, and ended up with a different theory of justice. In arguing that the shift could not possibly have stemmed from the premises, I will conclude this chapter by highlighting the elements from *Liberalism* that refers to moral relativism but still does not lead up to where Rawls headed in *The Law*.

Moral relativism is in general not possible without claiming that we should be skeptical about the epistemic status of our conception of the good. Skepticism is an attitude about what kind of epistemological status a conception of the good should have. Two possible answers in relation to skepticism suggest themselves right off. The anti-skeptical view

stresses that what we believe is a good life is true, and all others should believe in it and lead a similar life. The skeptical answer says that we cannot believe any conception of the good, including ours, to be true and claim a privileged status in a society. Before I say that there is actually a third position, which Rawls implicitly and unsuccessfully tried to elaborate in *Political Liberalism*, I want to stress that I submit to the view that a dose of skepticism is absolutely necessary in order to arrive at legitimate principles of justice.

Ever since Rawls reformulated his theory and got rid of the utilitarian virus, his theory was based on a desire to reach an agreement among persons—namely, the desire to propose only those principles that can reasonably be justified to others. To be sure, Rawls reformulated his theory under the great influence of Thomas Scanlon and his idea of reasonableness put forward in Scanlon’s seminal article “Contractarianism and Utilitarianism,” and further developed in *What We Owe To Each Other*. In *Political Liberalism* Rawls makes no bones that he had come under the strong influence of Scanlon (Rawls 1993: 49). His definition of what is reasonable shows not only that Rawls is close to Scanlon’s ideas but that he practically replicated the Scanlon test of reasonable rejection by recasting it:

“Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of social cooperation [...] and they agree to act on those terms, even at the cost of their own interest in particular situation, provided that others also accept these terms. For these terms to be fair terms, citizens offering them must reasonably think that those citizens to whom such terms are offered might also reasonably accept them” (ibid.)

Here I want to give emphasize to the implication of the Scanlonianism in Rawls's works. If the agreement has to be reached, it must be reached on a basis which cannot be said to derive from any particular conception of the good. As I argued in section 17, Rawls totally failed in this endeavor because the whole idea of *Political Liberalism* is not possible without being based on the idea of the autonomy of the person. This surely attests to Rawls's belief that the autonomy of the person (as a second-order conception of the good as defined in section 1) must have some sort of privileged status.

That the relativistic shift did not occur in *Political Liberalism*, but after it, was attested by what was written in the Introduction to the paperback edition of *Political Liberalism* from 1996. In changing his position for (hopefully) the last time, Rawls says that *Political Liberalism* failed in that it presupposed the value of autonomy (Rawls 1996: xliv). He is suddenly explicit in rejecting the view that *Political Liberalism* was not based on any moral doctrine, although the 1993 Introduction as well as Lecture I was spent on arguing that it was not. Three years later Rawls says that political liberalism was based on a form of autonomy that is essentially a moral conception of the good life "expressed in a certain mode of life and reflection that critically examines our deepest ends and ideals, as in Mill's ideal of individuality, or by following as best one can Kant's doctrine of autonomy" (ibid.). In the 1996 Introduction he states that the distinction between political and moral autonomy was unknown to *A Theory*, and that the 1993 version of political liberalism can be accurately said to cover only the former (ibid. xliii, foot. 8). If Rawls is right in what he says in the 1996 Introduction, it covered both, and it in effect started covering the former only as of the 1996 Introduction.

Introduction to the 1996 edition of *Liberalism* is, if understood the way I understood it here, the right introduction to the *Law Of The People* from 1999. The major problem is, as indicated in all post-1980 articles, not “how it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable thought incompatible religious, philosophical, and moral doctrines,” but rather how to find a form of legitimate, stable and just society of free and equal citizens profoundly divided by reasonable *and unreasonable* religious, philosophical, and moral doctrines. Accordingly, the question posed in the 1996 Introduction goes as follows: “For rather than confronting religious and nonliberal doctrines with a comprehensive liberal philosophical doctrine, the thought is to formulate a liberal political conception that those nonliberal doctrines might be able to endorse” (1996: xlvii). Is this possible? The implicit answer offered by the 1996 Introduction is probably not, and my hunch is that the 1996 Rawls is already convinced about the impossibility of finding a satisfying answer to that question precisely because the question was asked. But that Rawls really thinks it impossible was undoubtedly clear in *The Law Of Peoples*, which has been one of the main points I have defended throughout this chapter.

What does this tell us? Certainly not that a liberal or individualistic conception of the good must claim a privileged status. This is actually the missing step in some other liberal variants that argue for the neutrality of the state. Charles Larmore, for instance, claims that finding a solution that will not favor any particular conception of the good is necessary because a modern society is characterized by a disagreement as regards the epistemic status of the conception of the good. Since the epistemic agreement is not possible, Larmore says we have to treat every conception of the good with equal respect (Larmore 1987: 61). He is prepared to say that we must find neutral ground once we realize that not everyone is

prepared to affirm what we believe in. But, as Barry observes, this does not follow. We might think that everyone deserves equal respect, but still be convinced that our conception of the good is true as opposed to the rest. If I believe (no matter how weakly) that mine conception of the good is true and yours is not, I may still, despite this wish to give you equal respect, insist on principles that will imply that you have to abandon your conception of the good and accept mine (Barry 1995a: 176). So in order to get from equal respect to the neutrality of the principles, a mid-step is needed, says Barry—namely, that of skepticism.

We must believe that our conception of the good is true to us, but we must be skeptical that this conception of the good is the only ground on which to erect the principles of justice and the just society. The kind of skepticism that is needed here Barry calls “moderate skepticism,” and it consists in believing that your conception of the good might be true and appropriate for your life but not for the life of others. When it comes to political principles, the crucial step that has to be made is to differentiate between “what can reasonably be believed and what can reasonably be advanced as the foundations of a society’s basic institutions” (ibid. 188). Rawls cannot be more explicit on this than when he says

“[t]he point, then, is that the problem of stability is not that of bringing others who reject a conception [we believe to be true] to share it, or to act in accordance with it, by workable sanctions, if necessary, as if the task were to find ways to impose that conception once we are convinced it is sound. Rather justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizens’s reason, as explained within its own framework. [...] Above all, [political liberalism] does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs. Rather, we are to recognize

the practical impossibility of reaching reasonable and workable political agreement in judgment on truth of comprehensive doctrines, especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences. [...]

A constitutional regime does not require an agreement on a comprehensive doctrine: the basis of its social unity lies elsewhere” (Rawls 1993: 143; 63).

It is fairly clear that anyone who wrote this sentence must imply a dose of skepticism, and precisely that kind of moderate skepticism I am arguing for here.

## CONCLUSION

I titled chapter 5 with a somewhat pompous title, indicating that something terrible has happened to the political philosophy of John Rawls. If I am right about the theses expounded here, it becomes clear that something terrible indeed has happened to it. Rawls obviously decided to follow Walzer in saying that the greatest harm for the existing world order is to disturb the existing *status quo*. According to this view, the political philosopher should abstain from constructing and defending universal principles of justice and keep things as they are. It is true that preserving the *status quo* at the international level may in some aspects secure greater freedom and equality among sovereign peoples. But it is also true that the *status quo* permits the continuation of negation of freedom and equality within some of sovereign peoples of today's world.

Throughout this dissertation I have assumed that the concept autonomy takes central place in Rawls's liberal theory of justice. The overriding implication of Rawls's autonomy was that there cannot exist a political arrangement that makes it possible for individuals to trade their liberties for the greater material benefits, that may be gotten in return. With *The Law* Rawls's does away with autonomy and all the accompanying implications.

Rawls thinks the matters of distributive justice are not proper matters of international justice. Thus he fully neglects the fact that international inequalities are, on the whole, more dangerous than domestic injustices. Take Africa for example. Beside the fact that wars are raging almost across the entire continent as we speak, any egalitarian liberal would be astonished by the fact that in "half of sub-Saharan Africa 600 million people live on just 65

cents a day.” The continent is put in such an unfavorable condition that if only “North America, Europe and Japan were to eliminate all barriers to imports from sub-Saharan Africa, the region’s exports would rise by 14%, an annual increase worth about US \$2.5 billion.” (*The Economist*, Feb. 24, 2001, p. 17). Many countries in Africa and Latin America today do not have their vital interests protected (security, healthy food, water, clothing, shelter, medical care, basic education, etc.), while there are societies in which electricity is used for heating houses during winter. Yet, Rawls believes that a theory of international justice should be silent about such grave contrasts. Perhaps now that we have seen how Rawls imagines that nonliberal societies should be treated, it makes sense to suppose that his international theory of justice is based on a trade-off. Whereas rich societies are supposed not to touch the illiberal practices of poor societies, poor societies are in return not going to ask for the global redistribution of wealth that will give their citizens a chance to lead an autonomous and decent life.

I may seem to hold the implications of the discussion from Part II of this dissertation much more deleterious for Rawls’s and any other kind of liberalism, than anything that was said in Part I. This does not mean that I hold the discussion in chapters 2 and 3 less important; quite the opposite, I actually think that the ideas put forward in chapter 3 are the most original ones in this thesis. Yet, I think that the rejection of universality Rawls announced in his later phase is something that should concern us most. Hence, I would like to finish this dissertation by citing Raz who says that we should always fight the reasons “for political philosophy to abandon its traditional goals of understanding the moral presuppositions of existing institutions and criticizing them and advocating better ones—in the full light of reason and truth.”

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