

JUSTICE WITHOUT CONSENSUS

*A Critical Assessment of
John Rawls's Mediation
between
Kantian and Hegelian Political Theory*

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Preface

The aim of philosophical reflection can be twofold: It either reformulates or reconstructs our concepts and convictions in the light of the changing circumstances of life, or it stands back and glances critically at those changes and at the reconstructions others have made. John Rawls's *A Theory of Justice* is an example of the first kind, this study an example of the second. The approach I choose can leave the negative impression of non-constructive criticism. One can also see it as placing a warning sign along the road we are travelling. Consensus can be a danger when it closes our mind to a critical assessment of the world we are building and a critical distance is necessary especially when we are building our social and political world. I hope this study will bear fruit in a fostering of a critical attitude, regardless of which programs to which we adhere in the reconstruction of our social and political world.

I would like to mention some people who in various ways have contributed to this study:

First, prof. dr. P.J.D. Drenth, former *rector magnificus* of the Free University, who provided financial support for my studies during the academic year 1985/1986 at the *Institute for Christian Studies* (ICS) in Toronto, Canada.

Paul Marshall, professor at ICS, introduced me to the work of John Rawls and gave stimulating critiques during my further studies in this field. I am pleased that he accepted to act as my copromotor. Further, I wish to thank the Institute for their support of my studies in Toronto.

Prof. dr. A. Soeteman commented on drafts of the manuscript with great care and attention to details.

Prof. dr. Sander Griffioen made valuable comments on the manuscript, striving to do justice to both the subject under research as well as the research itself.

Prof. dr. B. Delfgaauw and prof. dr. G.A. van der Wal both made comments on parts of the manuscript at various stages of its completion.

Prof. dr. Henk Woldring introduced me to the field of political theory already before my studies at ICS. Our cooperation started somewhat coincidentally; the road this study travelled was also paved with unexpected developments, so I do not think the completion of my dissertation is the station where our professional relation ends. During the four years of my writing this dissertation, he kept encouraging me by publishing three books and several articles. In hindsight, I think that the most fundamental contribution to this study he made, apart from reading and commenting on all the drafts which rolled off the press, is the time he spent helping me design the over-all plan of this study. The good start we made proved to be almost all of the work to be done.

Last of all, Scott Owen, who became part of my life when I started with this project in Toronto, attempted to make decent English of my somewhat casual style and gave many valuable suggestions for the lay-out.

Amsterdam, November 1990

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INTRODUCTION

In *A Theory of Justice*¹ John Rawls has made a profound attempt to define a conception of justice that can take seriously the pluralism in Western society. His approach is a comprehensive one: He tries to connect a particular idea of justice with more general ideas about the human being. The wide range of topics discussed in TJ and the special, explicit concern for the welfare state—a state in which the least advantaged will get better opportunities—has led to an acceptance of his theoretical insights in quite different political programs.² More important however, in my view, are first, that Rawls, out of the Anglo-Saxon contractarian tradition, tries to meet Hegel's criticism of modern society—*i.e.*, that the ordering of social life cannot be founded on the subjective convictions of abstract individuals—by developing, as he calls it, a Kantian theory. This approach has several virtues in

1. References to Rawls's work will be made either by "TJ # " when the reference is to *A Theory of Justice* or by "year, p. # " when the reference is to one of Rawls's articles.

2. See for the Dutch discussion the articles of P.B. Lehning (1986): 'De spanning tussen vrijheid en Gelijkheid. John Rawls', esp. p. 59, and Marc Bovens (1987) 'Moeten sociaal-democraten Rawls lezen?' Both show that Rawls's theory can be adapted by very different political theories and programs. To give another example, even in management-thinking, some speak of 'Rawlsian strategies'—Freeman, 1984. Also, *cf.* Scheltens 1981.

relation to Anglo-Saxon philosophy. Not only has he caused a revival of a Kantian approach in English-speaking political philosophy in his attempt to give, against utilitarian thoughts, a Kantian moral basis to a contractarian style of thinking (cf. P. Riley, 1983, p. ix) but he also makes his thought more accessible to contemporary continental philosophy.

Second, Rawls's theory is, as it is developed in TJ, a theory which surpasses the limitations of the contractarian approach—it takes its place with the post-metaphysical, communicative philosophy of which Habermas is one of the present European exponents. Rawls is part of the movement to which Quentin Skinner refers as a “return to Grand Theory in social sciences” (Skinner, 1985, 12). Skinner marks as “Grand Theory” those abstract theories about the nature of man and society which have formed the body of philosophy from the very beginning but were scorned under the revolutionary movements of the 50's and 60's. However, nowadays “moral and political philosophers [...] have gone on to revive a view of their discipline as essentially concerned with elucidating the character of the good life and the boundaries of a free and just society” (Skinner, 1985, p. 14). Rawls gives such a ‘grand theory’ in the modern sense: Not supported by metaphysical assumptions, but finding and creating support in the communicative or discursive activity of people, Rawls's theory teaches us about the authentic human convictions that are normative for our existence as individuals in society.

John Rawls's *A Theory of Justice* is a somewhat ambiguous book. Roughly speaking, the theory outlined in TJ changes once the reader is about past the physical middle of the book. This ‘natural border’ separates Rawls's account of individual and his account of society, and on close reading one is left puzzled because the conclusions from one part seem to contradict those of the other.

Depending on which part of TJ one wants to stress, it can be read as either advocating an individualistic, rights-based conception of justice, or as an attempt to account for the inherent communal nature of human beings. Only recently has the sensitivity for this ambiguity arisen. Former critics stressed mostly the first part of TJ, and concluded that Rawls advocated a conception of justice that is ultimately based upon calculating, self-interested individuals,³ or is the result of the choice of an ‘unencumbered self’, a self without historical or cultural bonds.⁴ Only recently has it become clear that Rawls's conception of

3. One can find this line of criticism in George Grant's *English Speaking Justice* (1974/1985) and Alasdair MacIntyre's *After Virtue* (1981).

4. Michael Sandel formulated this critique in his *Liberalism and the Limits of Justice* (1984).

justice does not need *per se* the particular—*i.e.*, individualist—conception of human nature that is given in TJ. Rather, Rawls's conception of justice presupposes a particular tradition of political argument, *i.e.*, the tradition of Western liberal democracy as it is formed over the past two centuries. Rawls's is the voice of "we, heirs of the Enlightenment" (Rorty 1987). This connection with a specific cultural and political tradition is more constitutive to Rawls's approach than the idea of the self that underlies his theory.

Rawls claims to give a view which does not necessarily need to be supported by philosophical or metaphysical positions. Rather, within the construct of an overlapping consensus it tries to give a historico-sociological description of the way we live (*cf.* Rorty 1987). This much is clear: Rawls tries to be the voice of the general political feeling and practice of present day Western society, but I believe his claims go further than that of a common culture of political argument. The contractarian argument Rawls initially employs in TJ is replaced with a consensus-oriented moral theory. In his recent articles, Rawls elaborates the idea of an 'overlapping consensus' and, as I shall argue, this 'overlapping consensus' has its influence both on the publicly recognized political principles, as well as on the moral convictions to which people privately adhere.

This wider scope of the theory of justice, however, yields certain dangers. When Rawls writes about certain political and moral principles that do not conform to the theory he outlines in TJ, he states that some of the convictions people hold do not "strictly speaking violate the principles of rational choice, it still strikes us as irrational, or more likely as mad" (TJ 554). I find this a disturbing line since the implication seems to be that some ideas people have (in this particular case Rawls mentions teleological principles) can admittedly be called rational, but are considered mad by other people and therefore are ruled out. In other words, the border where (political) argument ceases to be of convincing power is also border between sanity and insanity. Disagreeing with Rawls's view might put the question before me: "Am I insane by disagreeing?" One might say that this is only a minor statement of Rawls and that it does not have any systematic consequences for his theory as a whole. I do not mean that one cannot label irrational opinions as crazy or mad; it is the limitation Rawls makes in this quote. It is not the eventual lack in rationality of the opinion in itself that makes it mad, but the fact that some 'we' consider the opinion as irrational, mad. *Where* do we lay the border between rationality and madness, and *who* shall decide over that border? When a theory is put to the test, both theoretically and practically, and has to defend itself

against rival theories and rival practices, these questions become of utmost importance. Investigating a theory from the point of view of this critical border might give us valuable information about the theory as a whole.

That these questions come to the surface, points to the existence of a serious problem in Rawls's theory. This problem is the same problem he initially wanted to solve or accommodate: That of the relationship between individual and society. More specifically, it is the issue of how principles for individual morality relate to the moral principles that should rule in society. Rawls's thesis regarding this relationship can be summarized in two statements:

- 1) Morality is individual and voluntary—this roughly corresponds to the thesis developed in the first half of TJ.
- 2) Man is essentially communitarian: Man is born in society, he does not choose to be in society—this corresponds to the thesis developed in the second half of TJ.

Trying to establish the principles of justice as rules for the living together of individuals thus amounts to seeking congruence between that which is necessary and that which is voluntary.

Rawls's theory of justice is a continuous struggle between the idea that moral principles should be chosen by free, autonomous individuals, and the necessity of, and ultimate good thought inherent in, human association. It is the struggle between the account of the voluntarily choosing individual as given in the original position, and the account of society as a social union of social unions. Rawls tries on the one hand to account for the pluralism of life-orientations inherent in Western society and founded in the freedom of the individual, and on the other hand to point to a possible unity in life-orientations that makes living together according to moral principles possible. According to Rawls's initial evaluation of the fact of pluralism in Western society, people have not only different plans of life (they want to achieve different goals), but also different philosophical and religious beliefs as a result of shortcomings of knowledge, thought and judgment (TJ 127). In his most recent article, Rawls labels these shortcomings as the "burdens of reason" (1989, p. 236). These "burdens of reason" explain how, even when basic rights and liberties are secured for citizens, a pluralism of irreconcilable convictions will exist (1989, p. 235, 236).

In short, the theory of justice settles these conflicts by establishing a publicly recognized conception of justice that removes the paralyzing effects of religious and philosophical strife, so that free and equal

citizens can develop their own capacities as cooperative members of society. The point I wish to make in this study is that this procedure of Rawls where the principles of justice settle conflicts which are religious and philosophical in nature (even if it is by avoiding them) is not as innocent as Rawls presents it, and might seriously endanger the diversities of lifeplans that exist among people. So much must be granted to Rawls that he is seriously trying to safeguard the plurality of lifeplans that just exists given the fact that people will realize their physical and cognitive capabilities differently. But in finding principles that can be the basis for cooperation between people who are in that way 'just different', Rawls shifts to an attempt to settle also religious, moral and philosophical issues. Differences in this field will have their effects on the lifeplans people make for themselves, but settling these differences is altogether a different question. What at first glance appears to be a practical reconciliation between people through removing certain divisive problems from the political agenda, seems on closer examination a systematic attempt to reconcile the religious, moral and philosophical disputes that have endured in Western society. In this study I will attempt to unravel these two threads in Rawls's argument.

In Rawls's attempt to reconcile the differences between people it seems that social or communal principles gain priority over other principles—thus eradicating the initial fact of pluralism and leaving the individual the choice between being mad or complying with the established moral principles that govern the ordering of society. Does Rawls's theory indeed develop in this direction, or is there a systematic argument beneath the surface that can preserve both the pluralism and the unity, the individual autonomy and social necessity? We owe it to all who were labelled mad by the 'we' of society and paid for that with their death or in cells, to clarify this relationship. Not only can we then better evaluate the contribution Rawls's thought has made to (Western) political thought, but insight in this relationship can at least help us to form that spirit that is *public* and under which a pluralism of individual persons can participate as full private persons.

It has been the conviction of political theory in general that society can only run when there is a community of its members. Thus the unity which was found in the Greek *polis* must—needs to be—reestablished on the scale of modern society. From the ideal of the *polis* political theory still derives the core for every free society: "The notion of a coherent society, built upon a free citizenry, organized around shared evaluative norms and objectives, common purposes, and generally accepted criteria for assessments of what is important enough in its

situational problems to require determination by its citizens” (Sherover 1989, p. 3). It is obvious that modern society is completely different from the close community of the Greek *polis*. Still, most political theory considers some sort of substantial consensus, in Sherover’s sense, as necessary for, and characteristic of, society.

Must society have some characteristics that make it a community? Some subtle, some more obvious, signs show that a pluralistic society, once we recognize and accept this pluralism, does resist the attempts to form it into a community. Rather, a pluralistic society is divided into many communities. What, then, is the consensus that can form society into a community? Must society be a community in order to realize justice? Political theory tacitly answers these questions with “Yes” and has been unable to develop a theory of pluralism. What I want to show is that there are good grounds for answering “No,” thus giving the basis of a theory of pluralism.

In PART ONE I shall first give a characterization of the distinction between individual and society as I see it occurring in the mainstream of Western political thought (Chapter 1). Then I turn to an analysis of how this theme develops in Rawls’s *A Theory of Justice* (Chapter 2) and in his later articles (Chapter 3). In PART TWO I then investigate the Kantian (Chapter 4) and Hegelian (Chapter 5) roots of Rawls’s conception of justice. These two historic lines come together in the consensus-oriented moral theory Rawls develops after TJ—I shall elaborate this consensus-oriented theory via Jürgen Habermas’s discursive philosophy (Chapter 6). In PART THREE I then bring these historic and systematic lines together in a direct evaluation of Rawls’s theory: In Chapter 7 I analyze the way Rawls brings together the philosophies of Kant and Hegel in a ‘political mediation’. In Chapter 8 I shall further discuss this political mediation in relation to the establishing of a consensus about moral rules in society. In Chapter 9 I end this study by presenting another view of the position justice in a pluralistic society.

PART ONE

Justice in Society




CHAPTER 1 Individual and Society

IN THIS CHAPTER I shall give a general introduction to the theme of the relation between individual and society as I see it developing in Western political thought. I start with an outline of the relationship between individual and society and the related issue of the distinction between public and private that is fundamental to the interpretation of John Rawls's political theory I develop in this study. In that context I will refer especially to John Dewey's treatment of the distinction between public and private since he shows a fruitful insight into modern Western society where the unity or unification of the public is a problem. I then turn to a short discussion of the different strategies used in much liberal thinking to reconcile individual and society with each other. It will appear that the contractarian strategy that is also the origin for Rawls's theory leaves us with the unresolved dilemma between individual autonomy and the tolerance toward one another's autonomous choices, and the *a priori*—by contract—established morality of the rules in society. Thus the conviction of Western political thinking, that society should be a community, takes shape. Political theory considers society as a more or less morally unified social group,

encompassing the plurality of social groups that exists in the public field.

Society and justice

This study is about individuals and societies and tries to give an account of how the two relate to each other. I take it that one can only speak of individuals *in* society. For these introductory remarks, I would like to define society in a slightly different way from the common meaning as in ‘political society’. I define society in a wide sense as applying to all those circles where individuals happen to live together and in which they are placed involuntarily. Thus, a family, a small village, a city and a state all fall under this general definition. We do not choose to be members of a society; we are born into it and our possibilities to leave are very limited—even immigration is leaving to another *society*. Though one can say that a hermit *leaves* society, it belongs to the experience of the hermit that he takes society with him or her into the hermitage. The hermits of the Middle Ages, nevertheless, were supposed to live at calling distance from each other to be able to get help when necessary. Even for them the ties with society were never completely cut.¹

Apart from society and the social relations that develop in it I want to distinguish community and the communal relations as those relations where people choose or happen to live together based on a commonality or consensus about some ideal, conviction or basic activity. In communal relations there is some more-or-less voluntary choice involved on behalf of the members—people can choose to not be part of a specific community, without then necessarily or automatically becoming member of another community. But ‘community’ is not a voluntary association. A community is characterized by a fundamental *consensus* among its members. A church or other religious group would be a good example of a community. Though people happen to live in a church community, this in itself is not enough for membership. Some acknowledged commitment makes people fully members. In a church the basic consensus about what the faith of the members is or should be holds the group together and decides about membership. Once some member ceases to believe that specific faith, he or she can

1. This is not only an argument against the pure choice-situation designed by contractual thinking, but also tied in with human life itself: A flight from a society will always be a going to another society—*cf.* Dworkin 1986, p. 192f; Raz 1986, p. 369.

always leave the church and cease to belong to some church-community (this is, of course, put more simplistically than it is in real life).

Society and community are thus not mutually exclusive groups. Social and communal bonds can be distinguishable features of the same group. For example, the family is from the eyes of the children more a society than a community: They did not choose to live in this family and they cannot leave family-life, whether a natural or foster-family. For the parents the family is primarily a community, they chose to live together and they can choose to get a divorce (also simplistically speaking).

To put things together in a short definition: Society I define as unchosen relationships, community as consensual relationships. My intention is not to give an exhaustive definition of the various relationships people form. My aim is to show which place consensus has in two fundamental social relationships, *i.e.*, communal and societal relationships. Often both relationships coincide, such as in families and some small local and village communities. I want to speak in that case of communal relations proper or community proper. They are characterized by a consensual membership, apart from the unchosen membership that already exists as a matter of course. So, marriage is a chosen relationship, whereas the village is an unchosen relationship, but in both cases there is a substantive consensus in being part of the community and about the rules that are guiding for the community life. ‘Society proper’ is then those relations where there is no such consensus. Here the bare fact that people happen to live together prevails, some (substantial) consensus is not required for society to be. A modern state is an example. In a state people are likely to disagree about fundamental beliefs and there is usually no *prima facie* obvious point of agreement, except then some practical rules that govern the social life in the state. It is a question then whether a consensus that goes beyond the practical and formal should exist.

Consensus seems hard to reach. We want to be individuals, recognizable persons different from others. Therefore, society is apt to be the stage of conflicts between individuals. But, whatever we set as our goal in life we have to achieve it in, or despite of, society. There is thus also the need to overcome possible conflicts, and overcoming conflicts can be an edifying experience for both individuals and the society around them.

From an early age, we human beings experience that it is not always possible to pursue our own wills and ideals. We meet other people who will frustrate our trying, either by authoritarily prohibiting what we do—and preventing us children from falling from chairs, running in

front of cars, annoying our neighbors or the cat—, or by their having a will which has another direction, forcing us to reconsider our goals and/or think of ways to persuade the opposition. It is on this playing field of adults that strong cooperation or lifelong schisms are realized. The outcome, cooperation, a schism or shifting alliances, will depend on the community of which we are part and the kind of persons we are.

Though we see conflict likely to occur out of the different wills individuals have, we also recognize the wisdom of those people who do not let things go that far, but rather refrain from their immediate goals, thus achieving something that surpasses their own goals and fulfills the goals of many others and their own.

It is in this strange tension—where weaknesses are strengths and my individual goal may not always be what is best for me—that the relation between individual and society takes its problematic character. This tension becomes especially clear when reflecting on the idea of justice, the conception of what kind of rules should govern our living together. Defining the content of a conception of justice seems to imply some basic consensus on a way of life and on what norms should be recognized. Justice does not exist in a moral or ethical vacuum. The ideal of the *polis* appears on stage when talking about justice: justice has its place in what we may call a *moral community*. How exactly we define the idea of a moral community and whether we can consider society as existing of such a community will be one of the main topics in this study. It depends on how we think of the possibility of a community among people in society. Let us for the moment keep to the following guiding-idea: The specific concretization justice gets in a society reflects the values that society adheres to—it reflects that society's moral consciousness.

Speaking about a moral consciousness means speaking about *ethics*. We can look from two different perspectives to some people's ethics: When someone says "We do not do this," we can either ask, "Why not?" or "Who are 'we'?" When asked for the reason we do not do this, the result will mostly be a long debate in which we try to refute each other's reasons, often, however, without a convincing answer at the end. I think that part of this inability to convince in the end is due to an unclarity of the question "Who are 'we'?" I want to stress the importance of this second question throughout this study; the importance, thus, of the 'we-group' that is involved or addressed in ethical issues like the question of justice.²

2. See W. Meeks, 1987, p. 11/12. The first question, as he sees it, asks for an explanation, the second for understanding. See also S. Hampshire 1985, p 4f who in this context

On face value it seems that justice presupposes a moral community—it is the ‘we’ of society that fills in the idea of justice. Some questions arise here that are important for a reflection on justice: Firstly, is there such a community among people in society, is there a ‘we’ of society, as there is a definite ‘we’ of a community? Secondly, if that is the case, what is the basis for this community? And thirdly, what does the possible existence of such a community mean for the relation between individual and society? The answer to these questions is of great importance for how we perceive the possibility of a political, and perhaps moral, consensus among people in society.

That first question, *i.e.*, whether or not there is a community among people in society, is a problem for Western man. Hegel, for one, criticized his time for basing the idea of right and duty on the subjective feelings and individual convictions of separate people. From this, he says, follows not only “the ruin of the inner ethical life and a good conscience, of love and right dealing between private persons,” but also “the ruin of public order and the law of the land” (*Grundlinien der Philosophie des Rechts* p. 22/Transl. Knox, p. 8).³ The unity of a people cannot be found in the positive fact of their living together, but is only to be discovered through the development of thinking or rationality (PhR p. 18). Steven B. Smith rightly remarks that it was thus already Hegel who levelled the critique at modern Western society that a community is not the product of a general will, but “presupposes an already existing community of opinions and customs that in the modern world cannot be assumed to exist” (Smith 1986, p. 137). This critique is being reinforced from several sides nowadays, most strongly and convincingly in Alasdair MacIntyre’s *After Virtue*. At the same time, attempts have been made to meet this criticism by providing an answer to the second question—*i.e.* by giving a new, notably more authentic, account of our moral and political convictions in order to make possible again the experience of a moral community and restore its foundation in modern Western society. In the European context the work of Jürgen Habermas can be seen as such an attempt. In the Anglo-Saxon tradition it is John Rawls’s theory of justice that explores how we can detect and regain the principles that are the kernel of our deliberating about justice and a just society.

opposes explanation to justification and says that justification brings into the picture someone’s way of life.

3. “... die Zerstörung ebenso der inneren Sittlichkeit und des rechtschaffenen Gewissens, der Liebe und des Rechts unter den Privatpersonen, als die Zerstörung der öffentlichen Ordnung und der Staatsgesetze ...”

The paradox

Modern political theory seems to start from a paradoxical point. On the one hand the freedom of each individual to pursue his or her own ends is recognized, on the other hand there is the idea that the individual can only exercise this freedom within the limits of society. Rawls's theory provides a good example of this paradoxical point of departure: Human beings are born in society, they cannot choose not to live in society; and morality is a matter of free and autonomous choice by individuals. Man cannot choose *and* is bound to choose; man is born unfree and has to be free. This paradox has become ingrained in our consciousness when thinking about the principles for political life. It is not without reason that I formulate this paradox as a reversal of Rousseau's famous line: "Man is born free, and everywhere he is in chains" (*Du Contrat Social*, Livre I, ch. 1, p. 351).

How beautiful the statement sounds—that human beings are born free—the reality of life still convinces us that it is only rhetoric (though powerful rhetoric) that can join in the choir of Rousseauian voices. However free the newly born human being might be, without the surroundings of a human community it will never develop into a person. The recorded cases of children who were raised from babyhood by animals show that the presence of humans in the first years of development is essential for the formation of those characteristics which we call human: Language and a conception of the self and the world. Subsequently, the high death-rate among children under one year in third-world orphanages tells us that children need more than food alone. John Dewey characterized this inherent relationship between individual and community in a nice way when he compared that relationship with that between the letters and the alphabet. Just as one cannot think of a letter apart from the alphabet, in the same way one can also not conceive of a person apart from a community: "An alphabet *is* letters, and 'society' is individuals in their connections with one another" (Dewey 1984, p. 278—note that Dewey uses the term 'society' where I would have used 'community proper'; what I call 'society proper' Dewey calls public, see the following).

The human individual is inherently related to a community of human individuals. It is this necessity of human relations which is captured when John Rawls states that "It is not optional for us to belong to society" (Rawls 1977, p. 165). But the step from the interrelatedness of individual and community to the same kind of membership of individuals to society proper is not one of simple extrapolation. Modern society is not the same as the natural commu-

nities (like the family) in which human beings become human individuals. John Dewey shows an accurate sensitivity for this difference when he distinguishes in *The Public and its Problems* the relation between private and public from that between individual and social (Dewey 1984, p. 244). The relation individual-social stands for the relationship between individuals and their acts in the community. Society, in Dewey's view, is not to be identified with this *social* aspect of individual acts, but with the *public*. The public sphere comes in the picture via those acts which affect individuals and communities which are not directly involved in these acts. The public field is constituted by the *indirect* consequences of individual acts (Dewey 1984, p. 245). Public acts are those that yield indirect consequences, *i.e.*, consequences for people I do not know, who are not part of my direct social surrounding and over which I do not have control. The indirect consequences involve "a number [of people] so mediately involved that a person cannot readily prefigure how they are to be affected" (Dewey 1984, p. 268).

Some examples might clarify this. When, for instance, a small village decides to build a bridge over a river that separates the village from its agricultural grounds, this is, according to Dewey, primarily a 'social' act. It has its meaning and effect primarily for the villagers themselves. But when it appears that via this bridge two other villages or cities get a better connection, thus influencing their economic life, the 'social' act of building the bridge becomes also a 'public' matter. It has effects beyond, and indirectly to, the convenience of the village. On another note, my writing an article in the newspaper is a 'public' act *because* it will have effects on people I do not know and which effects I cannot control. 'Indirect' is a matter of social distance. The institutions of society are there to regulate these indirect consequences. The relation between individual and society is then properly understood as the relation private-public.

Dewey draws attention to the fact that 'society' or society proper is something altogether different from the (social) community I am primarily part of. Society will contain several communities. What I want to talk about in this study is the relation between individual and society, understood as Dewey does here as the relation between the private and the public—in my terminology, the relation between individual and society proper. The virtue of the distinction made by Dewey is that it leaves open whether or not society, or the public, needs a conception of a community as underlying the legitimacy of the ordering of public acts.

The problem Dewey saw put before the public was to find the 'Great

Community'. Only in the 'Great Community' could the public find its identity and its ruling power over state affairs. This 'Great Community' would come into reach of the public when it regained the sense of community that belonged to the public in the small communities that make up the 'Great Public' of modern society. The difficulty here is, accurately seen by Dewey, that the 'public' of modern society is too big and spread out over too wide an area to be able to easily obtain this sense of community. The state-constituting public, or the 'Great Community' has to be formed or found despite the fact that indirect consequences of private actions are hardly noticeable and that the affected people are almost unknown and virtually invisible to the actor (Dewey 1984, p. 314). The dialectic turn in Dewey's thought is that the same technological development that disintegrated and scattered the small communities into the 'Great Society', also, through communication technology, bears with it the possibility of shaping the 'Great Community' (Dewey 1984, p. 313ff.).

Whether or not society proper is also a community itself, at least we cannot deny the reality and influence of society for our communal and individual lives. In society we are confronted with the indirect influence of other people's acts on our lives. The sheer fact of these indirect consequences causes not only the direct community, but also society with its rules to be an encompassing reality: Whether we like it or not, we are under the influence of society or, in other words, we are part of the public. Because the public side of acts is the indirect effect of individual acts, the rules that function to regulate these effects also touch the direct consequences of acts—and thus the private side of individual acts. The public sphere is not disconnected from the private. Then there arises the problem of how these rules of society can be accepted by individuals. On what grounds will we accept these rules? Why should we take into consideration the claims of people and groups we do not know, but happen to be part of the society we are part of? What can or should be the character of these rules, what is the character of the ties that bind the public together?

Here present-day Western political theory finds itself in a problematic situation. As "heirs of the Enlightenment" (whether or not we want to be part of this inheritance is irrelevant for the moment—be it only for argument's sake, we have to take the (post-)Enlightenment self-understanding into consideration), we value the autonomy and freedom of the individual, most honestly confessed in the universal declaration of human rights by the United Nations in 1948. This autonomy and freedom is also fundamental to 'our' understanding of morality. Morality, the principles for our acts, must be the expression and choice

of free and autonomous individuals—individuals who are not bound by any ties *a priori*. It is this understanding of morality that is in fundamental conflict with the facts of society. Society confronts us with rules that are involuntarily present, *a priori* limiting what we can do out of our freedom.

Accommodationism and perfectionism

In our modern understanding of politics there is an incongruence between the desires of the individual and the demands of society. Indeed, “[m]odern political philosophy is deeply concerned with the apparent opposition between individual and society” as Peter Steinberger says in his study *Logic and Politics; Hegel’s Philosophy of Right* (Steinberger 1988, p. 5). Put in terms that connect what has been said so far with the philosophical tradition: We face the question of how to combine the Enlightenment ideal of autonomous freedom, as stated in Kant’s philosophy, with the Aristotelian ideal of a moral community. It is the opposition between, on the one hand, the individual who is free to be different and, on the other hand, the behavioral injunctions that society undeniably poses as binding on the individual (*cf.* Steinberger 1988, p. 4, 154). The two poles are clear: On the one side Western society values the *freedom* of the individual to be different and to reflect this difference in his way of life. On the other side there are the constraints in the form of laws and rules that are necessary for the functioning of society. The connected dilemma is deeply rooted. To give one example: Kant conceived of the individual as autonomous and free, but also saw the necessity of a political society under *coercive* laws, in order to make it possible that the freedom of the one can coexist with the freedom of the other (Kant 1793, p. 86). It seems that individual freedom and living under the rules of society stand in a relation of tension, and that freedom and coercion cannot be separated.

Steinberger gives in his study an overview of the possible strategies with which philosophers have tried to overcome this tension. In the general case of a conflict between two moral principles we might either (A) remove the empirical circumstances that lead to this conflict, or (B) adjust and eventually compromise our actual moral principles to each other so that they do not contradict each other anymore (for instance by formulating some exceptions to the rules), or (C) reinterpret the concepts that are involved (Steinberger 1988, p. 10). The relationship between individual and society presents us with a case

where there is a conflict between moral principles: The freedom of the individual on the one hand, and the rules of society that make possible an orderly living together of these free individuals on the other. Strategy (A)—removing the empirical circumstances—would in its most simple form, in this case, mean that we all move to our own deserted island, and thus that the case for political philosophy ends. The undeniable fact of society makes this strategy, however, less realistic. The issue for political philosophy is the choice between strategies (B) and (C); Steinberger refers to these two strategies as, respectively, *accommodationism* and *perfectionism*.⁴ The questions involved will be the following: Relating to (B), how far do people have to restrict themselves in exercising their liberty, and how far can society legitimately restrict that exercising, or, what is an acceptable balance between freedom and coercion; and relating to (C), is it really part of my freedom which is involved here where society is justly restraining certain behaviour, or is it that freedom under the rules of society releases me into true freedom—thus a ‘true’ conception of freedom that is not opposed to coercion?

In general I agree with Steinberger that the contractarian thinking of Hobbes and Locke follows strategy (B) and that Rousseau and Hegel fit into strategy (C). For example the latter: Essential to Hegel’s political theory is that he does not take for granted the freedom people think or say they actually have. The freedom that is limited by social rules is not the autonomous freedom that belongs to the human individual *qua* moral person, but the voluntaristic freedom as caprice. In the state, people only come to the true freedom when they participate in the absolute rational will, constitutionally incorporated in the person of the monarch. This absolute, rational freedom by its nature cannot be limited by anything because there are no limits to the absolute, perfected freedom.

Locke and Hobbes are, seemingly, more moderate in their claims: Their loosening of the tension between individual and society can be summed up in two statements:

- 1) In civil society the individual is free to do what he pleases, *as long as* this striving does not hinder the same striving of other people;
- 2) The rules of civil society are legitimate, *as long as* they do

4. Steinberger states in the end of his study that strategy (A) can be a philosophically sound solution. In fact, Karl Marx adopts in the end strategy (A) when he sees the cancelation of personal property as essential to a solution of the opposition between individual and society—Steinberger 1988, p. 249.

not interfere with the individual's immediate self-preservation (Hobbes), or *as long as* they do not go beyond the common good (Locke).

I do not worry for the moment whether or not this is literally correct. What is of importance is the general structure of this accommodationist strategy. Accommodationism is a strategy of the 'as long as'. Especially in Locke's political thought does this 'as long as' strategy take on a character which raises doubts as to whether accommodationism is as clear-cut a different strategy as Steinberger portrays it.

For Locke the state of nature is a to-be-avoided state because the *perfect* freedom and *perfect* equality of the individuals in this state leads to great, possibly violent, conflict (*Second Treatise of Government*, Ch. II, §4, §7). In society these values of freedom and equality have to be 'diluted' in order to make a peaceful living together possible. The strategy of accommodationism is a strategy of diluting: To what extent must either freedom or the demands of society, or both, be diluted so that human life can flourish. Too much of either corrupts, just as a pure essence is too strong to directly consume.

Accommodationism cannot do without some insight in 'true' freedom; it needs some final, perfect, reference for how far values have to and can be diluted. The difference between accommodationism and perfectionism seems rather to go back to a different evaluation of perfection: Is perfection to be reached (perfectionism), or does perfection corrupt (accommodationism)?⁵

Contract and autonomy

Perfection corrupts seems to be the teaching of contractarian thinking: Because people cannot live without conflicts when their freedom is unrestrained, a contract has to be made in which all participants bargain for a sufficient degree of freedom that can coexist with the same degree of freedom for others. How this process of bargaining is described, and how it is evaluated in specific contractarian theories is not my main concern. The point is that the idea of such a contract stands in a relation of tension with the idea of the moral autonomy of the person that is part of the inheritance of Western political thought. The idea of autonomy has a Janus-head. It states that nothing outside

5. The strategy of removing the empirical causes of conflict would then imply that the social reality falls short of perfection and that perfection can only be reached through some kind of conversion, like the cancelation of private property is a conversion in this sense.

the human individual can prescribe what this individual should do or believe. Neither God, nor nature, nor any superhuman or metaphysical source is *a priori* binding for the autonomous human person. Thus the idea of a contract—an agreement between autonomous individuals—as basis for the state seems to be consistent with this ideal of autonomous personhood. But, if the contract has to have any binding force at all, once the agreement is made it becomes *a priori* normative for future participants, and thus goes against their autonomy—they have to accept, they cannot agree anymore. It is for this reason that the idea of a contract developed from an almost historical event by Hobbes and Locke to a hypothetical, argumentative device by John Rawls, thus providing an idea of contract that can be part of everyone's entrance-agreement.

At the same time, the agreement made in the contract involves a taking distance from the pure individual autonomy people are supposed to possess. The accommodationist strategy means establishing a compromise between the pure freedom and equality and the pure autonomy people have in the state of nature. Unrestrained exercising of people's autonomy is corrupting—corrupting for society. What is established in the contract is a specification of freedom and equality that makes it possible that people can live together in society as autonomous beings. Perfectionist strategies show more pregnantly what is at stake: Here the specification of freedom and equality that overcomes the tension between individual and society is presented as the more truly *individual* freedom and equality. Both strategies try to filter out the individualistic and subjective content in the ideals of freedom and equality that cause collisions in society, in favor of a more general content that can be subject to a broad consensus. And this broad consensus is thought to be the more rational and universal consensus.

The universality and rationality of the content of the contract is also its morality. Morality thus connects two poles of political theory indeed wants to bring together. On the one hand the individual: Morality dictates that the highest good that belongs to the individual is his freedom. On the other hand society: For free individuals, society itself must be free, which means, essentially, arranged according to moral rules. The paradigmatic example of this unity is the Greek *polis*, the city state where public life is an expression of its members' individual morality.

The main problem for modern political theory is not the account of the individual and his moral autonomy that is given, but, rather, the account of society and of the morality of its rules that results from the

union of autonomous individuals. The ideal of autonomy can still be held against the established morality. It is especially the polis-ideal that is criticized in the Western ideal of autonomy. Notably within current liberalism is there much criticism of the idea of a paramount, institutionalized morality in society. So Rawls's criticism that there is not one comprehensive moral doctrine that can establish the unity of free and equal citizens, and that to order all one's effort to one goal is, properly speaking, mad. Others within the same liberal tradition, however, seem more open to underwrite the importance of a common morality, for example Hayek in his *The Constitution of Liberty* where he states that democracy is only viable against the background of a common moral tradition within society (Hayek 1978, p. 106, 206). Despite Rawls's criticism of a common morality, I think that his theory also ultimately rests on some common morality, but on a more elaborate level than a positive moral tradition.

Dual citizenship

Man is a city-dweller, the fulfillment of cultural life has always been seen as the life in a city. Babel, Jerusalem, Athens, Rome, these were the centers of the cultures that founded the Western culture. As noted in the last section, the polis-ideal has set the paradigm for the realization of this cultural life. That does not imply that this ideal is accepted unconditionally. One of the most fundamental criticisms leveled at the polis-ideal is Augustine's teaching of the two cities in which man lives: The city of God and the city of the Earth. He thus instituted the idea of the dual citizenship of the believer: Knowing his being member of the City of God, the believer temporarily dwells in the earthly city, not as a full member, but as a passer-by, a pilgrim who only needs shelter for a night's rest (see *City of God*, Book 15, chapter 1).

Though originally meant as exhortation and comfort for the Christian community, this teaching also contains an inherent criticism of political affairs: Every possible human community came under the critique of what was seen as a true community, a *redemptive* community in which man was reconciled with God and with each other. Thus Augustine extended the awareness of what was truly human—*i.e.* being a child of God—with the idea of the truly human community—*i.e.* the City of God. And he did so via a scheme which has now undoubtedly lost its compelling force, but not its influence. The kernel of this scheme is the direct opposition between good (City of God) and evil

(City of the Earth). The true believer is member of the City of God, despite the evil surrounding him in this life. This reading does not find much adherence today; what still can directly speak is that this distinction also has some traits of a distinction between reality and appearance.⁶ The manner in which Augustine conceived of a fundamental opposition between the ideal and the positive is not so much as by Plato resembling that of the shape and its image, but actual, perceived reality, and showing itself not just via some inward individual contemplation or conversion, but also in the appearance of an opposition between communities. Though these communities are not visible in the sense of geographic or social separation, knowledge of them is inherent to the believer's self-understanding.

Moral truth is fundamentally both individual *and* communal. The true community, the City of God, is a to-be-realized ideal (though it is eventually not realized by human force) and a moral looking-glass in which reality must be mirrored. It is above all a community of reconciliation and redemption, a community, once established, in which there is no more conflict or strife and in which people are completely open to one another. Thus not only the individual's belief is put under critique—as follows directly from the call to conversion in the teaching of the early church—but also the society and the community one is part of is critically evaluated. Though the community of the city of God is not a community that can be localized within visible boundaries, nor be realized in the cause of *human* affairs, it works as a device to distance oneself from the actual community people live in and as a hope for a final reconciliation.

Though the influence of this argument is still present in our understanding of morality as a to-be-realized ideal, the particular shape Augustine gave it is obsolete. The idea that there are two different communities in which people live does not find much adherence nowadays. 'Secularization', the abandoning of the idea of an anti-thesis that is constitutive for Augustine's belief in the two cities, led to this. Along with the growing consciousness of human autonomy the idea of a God-given and God-established community of redemption became more and more obsolete. If there was to be such a redemptive community, it should be a man-made product. Political theory does not necessarily work to the actual realization of such a redemptive community, but both the utopians as well as present-day ideals of a free and open communication show the inspiring power of this ideal. We can wonder how far political theory, despite its some-

6. Maybe that an approach like this can bring back the original sharpness of Augustine's evaluation.

times limited intention is carried by the hope of paradise humanly regained.

There is another element, besides autonomy, in Western thought that reinforces the ideal of a humanly produced redemptive community. This element goes back to the same Augustine of the two cities. It is the emphasis Augustine placed on the *will* in human affairs and especially in matters of ethics. Augustine prepared the way for the will to be established as *moral* power. The moral value of an act, whether it is a good or a bad act, depends on the presence of the will. “Unless something is done by the will, it can be neither a sin nor a good deed” (Augustine quoted in Riley 1982, p. 5) From Augustine’s treatment of the will in moral affairs there is a link between contractarian political theory—where all centers around the willed consent of individuals to join society—and the modern self-confession of morality. Kant’s *Grundlegung zur Metaphysik der Sitten* defines the modern individual’s moral creed as: “It is impossible to conceive anything at all in the world, or even out of it, which can be taken as good without qualification, except a *good will*.”⁷ The social creed we find by Hegel in the ‘I will’ of society that, in the person of the monarch, decides in the state.

The affirmation of the autonomy of the ‘I will’ goes together with the affirmation of the ‘make-ability’ of human affairs.⁸ For both Kant and Hegel, the unity to which reason aspires is that of the principles of reason as willed cause of events. The creed of the Renaissance places the powers and the ability to choose and reach the good (or fall to the bad) directly in the human dignity, thus constituting man as autonomous and independent of any preconceived path or order. Man as a “self-defining individual” is born (Taylor 1975, p. 7ff) and this self-defining quality, this actual power to make his own life, collides with the idea of a dual citizenship. Reason became the instrument, and will the driving force, with which man began to (re-)build his here-and-now world, and thus regain paradise.

Because the force of the Augustinian mirror still persists, morality, especially in political affairs, cannot do without some independent standards. One way of establishing this standard was found in the state of nature. This pre-political state changes the non-temporal (*i.e.* not bound to a specific time or space) dualism of Augustine’s two cities to a temporal, historical distinction: The ground from which normativity

7. “Es ist überall nichts in der Welt, ja überhaupt auch außer derselben zu denken möglich was ohne Einschränkung für gut könnte gehalten werden, als allein ein *guter Wille*.”

8. George Grant points out this link in his very interesting study *English Speaking Justice*, (1985)—see especially pp. 9, 10 and 82f. I feel indebted to this study, not so much because of the particular critique of Rawls he gives, but because of his attitude towards liberal society and the kind of moral problems that arise in this society.

springs is not a to-be-established order, but a last resort *behind us*—morality mirrors itself in the natural law.

Also the reference for individual morality changes. The temporal-historical division created by the conversion of the individual, and the subsequent division between converted and non-converted people, cannot survive because conversion is not an action brought to its fulfillment by pure exercise of will—it is rather an embracing of a *given* order which has become known as the best order. For the autonomous individual no order is binding *a priori* other than that which is made up as a result of an individual act of will. And no order is given other than that which is built according to reason. But the Janus-face of autonomy is that it cannot be fully lived without some rules that limit the exercise of that same autonomy (after all, perfection corrupts). When we cannot go outside ourselves to find limits, they must be found inside, or, rather, *among* ourselves. Nobody is a monad without contact with the outside world, but is inherently a human being in community with other human beings. Therefore, what is held for true and valid among *us* should define the limits of our autonomy. The idea of a community of discussion or a discourse is the ultimate step in which the autonomy of the will can fully develop its potential. But who are we? The question: “Who may live in our house?” becomes of ultimate importance.

Kant and Hegel believed that reason was unitarian and would lead to the same results, independent of the persons. Connected with this idea, Kant and Hegel saw in rational, and thus *unitary*, morality a teacher to a higher, ethical life. With Kant we see this when he describes political society as an ‘ethical state of nature’ and the transition to be made to an ‘ethical common wealth’ where the purity of the will is established and people do not act under *compulsive* laws anymore. Hegel places this ethical life more directly as the unity of individual and society in the state.

Once it became clear that the Enlightenment-rationality could not guide morality and that there was no unitary direction to the will that matched the autonomous freedom of the individual (a state of affairs most consequently seen by Nietzsche, and then, on different grounds, made part of twentieth-century consciousness by Max Weber), attempts to settle ethical life became suspicious of promoting not a morality of freedom, but a particular, limited morality. Such a limited morality would threaten the individual autonomy and freedom, or, in other words, would deny the human dignity. And denying that dignity is the cardinal sin for modern political theory.

Instead of directing all individual morality into one channel, human dignity teaches the inherent value of all personal moral choices.

Tolerance of one another's choices is the most esteemed virtue in present-day society. But does this mean that the undertaking of establishing one unitarian morality is really abolished? Definitely not—given that moral rules should be *universal*, the project of seeking those rules which can and must be accepted and recognized by all people still goes on. Only the stage has changed: When Kant and Hegel founded the unity of morality on the unity of reason, they could label individual dissent as due to a lack of guidance: 'Disciplining of the inclinations' (Kant) and *Bildung* (Hegel) were necessary both to become rational and to become moral—summed up in the attempt to overcome caprice and establish the pure rational will.

Nowadays, we take a plurality of morality for granted, consider it a permanent situation in which to establish justice. We recognize each individual's right to his own beliefs and his own way of life, and want to respect that because we consider each individual free and autonomous. Pluralism is not only permanently established in our society, it is also what we boast of. After all, it gives us ample opportunity to exercise our most respected virtue: Tolerance.

Yet, the hope of modern political theory is to establish a universally accepted social morality despite the factual pluralism. It is then important to distinguish between two kinds of pluralism: One simply takes for granted that people are factually different, not only physically, but also mentally—people look different, they behave differently and they lead different lives. This kind of pluralism is more adequately called *plurality*. In order to unite those different people into one society, political theory tends to attack a second kind of pluralism, assuming it is only the result of the factual differences between people. This second kind of pluralism involves the different moral and religious convictions people adhere to—this is properly called pluralism. It is, however, a question whether these differences exclusively rest on the factual differences between people. At least one can say that creating unity among people regarding their plurality, does not necessarily mean establishing unity concerning the second kind of pluralism. The question for political theory is whether also this second, deeper level of *pluralism* must be brought to unity in order to establish a just society. These two layers of analysis are important to keep in mind for the rest of this study.

When Rawls calls those who do not want to join his project mad, we can raise doubts as to how far his tolerance will go. If there is a limit to 'pluralism', is there also a limit to toleration? Does the limitation of 'pluralism' mean that the incommensurability of different moral perspectives is only apparent and that pluralism is in fact plurality and

can be brought back to a deeper unity? Can those limits be reconciled with the autonomy of individuals? What consequences does this have for society? Must society be a unity, a community in the strict sense, for justice to be established? These questions will be taken up in the course of this study.

John Rawls's Theory of Justice

CHAPTER 2

JOHN RAWLS'S *A Theory of Justice* may seem on the surface to be a rebirth of an old contractarian style of political thinking—that it is not. His assumptions and critical comments show a modern philosophical background. Thus, Rawls argues against any metaphysical claim, even to such an extent that he gives a reinterpretation of Kant's political thinking in non-metaphysical terms. The endeavor of TJ is argumentative, even the structure of TJ is like an argument. In developing his theory, Rawls fills in weak or unclear areas, keeping in mind the ideal (just) society he envisions. Understanding Rawls means in the first place grasping this argumentative and idealistic trait. TJ gives the ideal of a society in showing what it actually will look like and how we can realize that ideal. Along with this idealistic trait, there is a positive line of thought. This conception of justice is founded in the human being as it is: It satisfies needs all human beings have *qua* human beings. As Rawls sees it, the conclusions of TJ conform to our intuitive judgments. This means: The ideal that will be realized in the restructuring of society along the paths of *A Theory of Justice* appears to be the underlying conviction in our present political judgment, political thinking and political acts.

The ideal behind TJ is the ideal of the French Revolution. John Rawls's theory of justice is a proposal to give political meaning to all three elements of the ideal of the French Revolution: "Liberty, Equality, Fraternity" (TJ 225). As such an attempt it is unique in the history of political thought.

Rawls sees a clash between the demands of freedom and equality as they are worked out in the liberal democratic tradition. The *Lockean* tradition, as Rawls refers to it, gives greater weight to the rights of the person—freedom of thought and conscience, civil rights and the rights to property—, whereas the tradition of *Rousseau*, as Rawls characterizes it, ultimately stresses the values of public life—equal political liberties (1980, p. 519; 1985, p. 227). Rawls's theory of 'justice as fairness', we can say already, intends to give a moral point of view from which to combine and accommodate these two traditions. This moral point of view is made concrete in the so-called 'difference principle'. This principle states that inequalities should be distributed to the advantage of the least well-off. The 'difference principle' reflects a certain moral attitude: "men agree to share one another's fate" (TJ 102). The background of this principle is formed by a specific interpretation of fraternity: In its political meaning fraternity is "not wanting to have greater advantages unless this is to the benefit of others who are less well off" (TJ 105). Via the 'difference principle', fraternity has a real influence on the giving of shape to society: It leads to taking into consideration the position of the less advantaged. Thus Rawls elaborates the *unifying* moral perspective of liberty, equality and fraternity from which his conception of justice is developed. Fraternity functions as a mediator of liberty and equality. And as liberty and equality emphasize, respectively, what is due to the human being *qua* individual and *qua* member of society, fraternity can be seen as the *trait d'union* between individual and society. From the perspective of fraternity the rights and liberties of the person will be defined according to the needs of society, personified by the least advantaged. Individuals will have this perspective not because of the demands of the society, or because of the rights of the individual, but from the moral or fraternal perspective of "sharing one another's fate." Fraternity is then the independent, fundamental perspective in the agreement to principles of justice which makes the principles unquestionably acceptable for the individual as moral person. The moral point of view behind Rawls's theory is the ideal of fraternity. Rawls's principles of justice give the triune ideal of the French Revolution its political, democratic realization—or so Rawls wants to see it.

Although Rawls heavily relies on an idea of fraternity when he

outlines a well-ordered society as a “social union of social unions” (TJ 527), he does not elaborate further the idea of fraternity. The lack of such an elaboration, however, leaves him already in *A Theory of Justice* with the unreconciled clash between the demands of liberty and equality, of individual and society. This becomes all the more clear in his later clarification on *A Theory of Justice: “Justice as Fairness: Political, not Metaphysical”* (1985). In this chapter I shall give a short outline of the argument Rawls gives for the principles of justice. In a more critical evaluation I shall focus on the way Rawls lays the relation between justice and other moral principles. As a result of the specific function for moral theory the principles of justice have in TJ one is left with some serious ambiguities in the account of society Rawls gives. In Chapter 3 I turn to Rawls’s more recent publications. After TJ Rawls has extended, and partly replaced, the argument of the original position with the idea of a consensus-oriented discussion about a political conception of justice. At the end of Chapter 3 we shall see how this new line of argument changes or, rather, relocates the questions we meet in the present chapter.

Put in terms of Steinberger’s analysis of liberal strategies, I will show that Rawls’s theory does not give a reconciliation or ‘accommodation’ of the tension between individual and society, or, which for Rawls amounts to the same, between freedom and equality. He rather follows a ‘perfectionist’ strategy, redefining both the poles of individual and society. In this chapter I shall analyze Rawls’s account of individual and society and show that the questions which we will meet along the way, can only be understood and resolved when we see the ‘perfectionist’ strategy behind his theory. This strategy will yield new questions, not only to Rawls himself, but also to the stage to which he has brought liberal thinking about justice.

The beginning: Two principles of justice

The core of Rawls’s theory of justice is formed by the two principles he develops in the 590 pages of his only book, *A Theory of Justice*. In the final formulation these two principles read as follows (TJ 302—slightly shortened):

1. each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all;
2. social and economic inequalities are to be arranged so that

they are both: (a) to the greatest benefit of the least advantaged ... and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

It is clear that the three background principles that give shape to these two principles of justice are the ideals of the French Revolution: *freedom*—the first principle asks for (political) freedom or the classical civil rights; *equality*—the first principle does not ask just for freedom, but for equal freedom; the second principle asks also for equal opportunities; *fraternity*—the so-called ‘difference principle’ (principle 2a) states that economic inequality is only justified when it is in the advantage of the least well off.¹ Justice as fairness states a special case of the general idea of justice Rawls holds (TJ 303):

All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.

The purpose of this conception of justice is, according to Rawls, “to account for the social values, for the intrinsic good of institutional, community, and associative activities, by a conception of justice that in its theoretical basis is individualistic” (TJ 264). Rawls’s theory of justice takes this highly original turn: Taking as a starting-point a strong individualism (individuals trying to further their own interests) he tries to design a concept of justice that not only gives each individual his equal due, but is also to the advantage of the least well-off in society. Individualism and care for the socially weaker go together. The way Rawls achieves this is by constructing, along the lines of the contractarian tradition, an *original position* in which people have to choose principles of justice for the society they are going to live in. To this familiar picture, Rawls adds one limiting condition: The principles must be acceptable from a *moral* point of view, which implies that the principles agreed to have to be kept, even if it be to your disadvantage.

The background of this condition is Rawls seeing this limiting condition as tied-in with human beings as moral persons. Sticking to the choice you once made, even if it turns out to be for the worse, is a primary moral virtue for Rawls: “having a morality is analogous to

1. I thus agree with L.A. Alexander when he states that Rawls in fact puts forward *three* principles of justice. Whether the split of the second principle in (2a) and (2b) makes Rawls’s device “intuitively unattractive” and inconsistent with the contractarian method Rawls follows, is in the light of our investigation less important *cf.* Alexander 1986, p. 197.

having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage" (1958, pp. 172, 173). Though Rawls does not deny consequentialist choice for moral principles—the choice in the original position being of such kind—the point he makes is that one should not abandon certain principles the moment they (unexpectedly) appear to go against one's advantage. Here is a first allusion to the Kantianism Rawls sees behind his theory: Established principles must be kept.

For Rawls, when people make a rational choice, *i.e.*, a choice which is the best considering all the evidence about possible results, they will stick to the choice, even when it does not work out to their advantage. There is no place for self-reproach, they have done what “the balance of reasons required, or at least permitted” (TJ 422). So, when we *rationally* choose for the principles of justice, and we can do so in the original position, we will not later regret our choice. In the original position people choose the principles of justice from under what Rawls calls a *veil of ignorance*. Nobody knows his position in society, his capabilities, his endowments with natural assets, intelligence, etc. (TJ 137). What these people do know, interestingly enough, are the “general facts about human society” (*id.*). They know about political affairs, principles of economic theory, the basis of social organization and the laws of human psychology. They know, in short, that they have to live in society—that society is not optional—and that their society is subject to the ‘circumstances of justice’—*i.e.*, that there is a conflict of interests. What I see as the significance here is not how much people know about society, or whether they should know these things, but *that* they know these things. The significance of this will become more clear at the end of this study. Suffice it for now to say that the inclusion of this knowledge as such does not lead the theory to be prejudiced in favor of Western types of society. The only point is that knowing how society works, and however society works, everyone knows that he can get the worst-off place in society, so it is to one's own advantage to provide for enough possibilities to make sure one will not stay that badly situated.

Rawls does not want to revive the old famous contractarian tradition as such. His scope is not to account for the origins and justification of government. Rather, Rawls wants to give a systematic view of the content of justice, *i.e.*, the principles by which people in Western society have been shown to live, but which are subject to dispute in the modern Western democratic society. The original situation is purely hypothetical (TJ 120).² What Rawls, in my opinion, is saying, is

2. We have to take that statement literally, otherwise, it would more or less seem that

something like the following: You and I know exactly what we value and what we hold on to in our giving of shape to society and our reflecting upon what the ideal society must look like. What we are not clear about is whether or not those ideas and values are at the mercy of our choosing them. In earlier theories, political philosophers referred to the state of nature. Now, I have reformulated this contractarian device as a thought-experiment in the original position. It is this contractarian's initial situation with the help of which I can show that those values are, indeed, systematically connected with our being human and are not founded in our mere choosing them.

The way Rawls shows this is via a process in which current judgments are questioned with respect to the principles which form their background, those principles then being refined and those initial judgments adapted to the refined principles, till "at last our principles and judgments coincide" (TJ 20). This process of adjusting judgments and principles leads to a state which Rawls calls 'reflective equilibrium'. This state of equilibrium is then the outcome for the time being and can be subjected to further investigation and questioning, after which a new state will occur in which judgments and principles are in 'reflective equilibrium' (TJ 20). A 'reflective equilibrium' is, so to say, the workable outcome of a moral deliberation. The background of *A Theory of Justice* Rawls points to is a moral theory in which descriptive and normative theory go together in arriving at a philosophically sound account of justice as fairness. Whether such a theory or procedure will cover all our questions about the morality of the principles of justice remains to be seen. Justice does not exist in a moral vacuum, neither does the process of reflective equilibrium start from scratch. One purpose of this chapter is to become more clear about the ethical context or moral point of view behind the theory of Rawls. Rawls adopts a moral point of view; the method of reflective equilibrium finds its *origin* in some moral judgments and we might ask whether or not this origin is valid. The specific origin of justice as fairness is then important, rather than the method Rawls follows after having made a start.³

What Rawls wants to achieve is that principles which are chosen in

Rawls wants to create an original position to his own liking. At various places phrases appear such as "so we meet the favoured interpretation" (cf. TJ 21, 141).

3. A more systematic elaboration of the strategy of a reflective equilibrium is to be found in H. Kaptein, *Ethiek tussen twijfel en theorie*, Amsterdam, 1985. Taking into account the conclusions Kaptein draws, notably that the realization and general acceptance of a moral theory presupposes at least some unity of life-plans (p. 184), I think it important to question Rawls for the ethical background of also the procedure of reflective equilibrium.

the original position will be of the same strength *a priori* as the categorical imperative of Immanuel Kant, *i.e.* they are principles that free and equal rational persons would choose in any circumstance. As he puts it in TJ the principles are chosen as if they were from the point of view from which the ‘noumenal self’ sees the world (TJ 255) and are thus principles which are general in form and universally applicable (*cf.* TJ 135). But Rawls’s Kantianism is an analogy, he rejects the metaphysical claims Kant made when separating the noumenal world from the positive world of the phenomena. For Rawls there is no such duality in the human being. The original position shows rather that it is possible to arrive at this general human level in our actual deliberating about moral principles. The original position provides an actual point of reference independent from “natural contingencies and social accident” (TJ 255), and thus is meant to achieve in a thought-experiment the same as Kant achieved by the metaphysical dual citizenship of noumenal and phenomenal being.

The ideal, just society in Rawls’s theory can also be seen as, in Jürgen Habermas’s terminology, an anticipation which is made in the original position. Scheltens alludes to this when he compares the consensus-idea of Rawls with that of Habermas, and reflects Rawls stating that the just society will be accomplished in the carrying out of and the living by the principles of justice (Scheltens 1981, p. 109-111). That Rawls uses the contractarian model is, in my opinion, nothing more than a rhetorical device connected with the Anglo-Saxon background of his thinking.⁴ Behind the contractarian veil Rawls is making some fundamental and, at least from his point of view, very profound statements about human beings. So, rather than asking whether a blunt contractarianism supports these principles, or whether a refined reflective equilibrium will show that we hold these principles, the question that matters is: do we share the initial moral point of view which the principles of justice presuppose in reflective equilibrium? Does, in other words, Rawls’s account of how individuals form a society and pay tribute to, and comply with, the principles which are agreed to in this society, paint a true picture of how people form society?

In the light of the general reception of Rawls’s theory, and his own explanations and further clarifications in several articles, I take it for granted that he is right that “we” generally agree with the particular

4. Perhaps this goes for all contractarian thinking. For instance, one conclusion one can draw from the “story” A.M. Donner is telling in *Wie maakt de geschiedenis?* is that Hobbes’s state of nature reflects more the actual political situation in England at the time of his writing (in which the King and the Parliament struggled for power against each other) than the supposed pre-historic community in which people have to choose a government (*cf.* Donner, 1987, p. 42ff.).

principles of justice as formulated in *A Theory of Justice*.⁵ The idea of distributive justice is, though not always full-heartedly embraced, more or less common property of most political programs—what is more likely to be a point of disagreement is the problem of “Who are the least advantaged?” or the question whether or not enough has been done for them. Rather, the principles Rawls formulates give a valuable content to the idea of justice, and I might add, they should not be too controversial in Western democracies. However, does Rawls overcome the clash between individual and society which lays at the bottom of much of the problems that arise in a pluralist society about the legitimacy of actions performed by the state in the name of the public interest? The illuminating power of any theory of justice depends on the way it convinces in its initial moral point of view. This ‘moral point of view’ should provide for the legitimacy of state rules and state power. However accepted the practical principles that follow from the principles of justice may be, the moral point of view behind it rests, in Rawls’s own analysis, on a ‘reflective equilibrium,’ and this equilibrium may at all times be challenged. How convincing is this moral point of view in Rawls’s case, how far can it be defended against attacks? These are the questions that matter—and here I have serious doubts about the degree in which Rawls makes a convincing case. Still, it is highly instructive to follow Rawls’s theory because whether or not he fails in his project, even his failure is paradigmatic and illuminating for the state of affairs in Western political thinking.

My doubts are, however, that the very circumstances that lead to the necessity of a ‘grand theory’ like Rawls’s are at the same time the reasons why such a grand theory is doomed to be impossible. The architectonic style of a ‘Grand Theory’, as Skinner refers to it (Skinner 1986, p. 14), is apt to devour, in the end, its own origin: The pluralism of political, moral and religious orientations present in Western society. Taking pluralism truly serious would mean denying any common philosophical, moral or religious point of view. But that would also mean the denial of the possibility of a ‘Grand Theory’. A ‘Grand Theory’ seems only to be ‘grand’ by virtue of some unifying point of view, thus denying the fact of pluralism. If it were possible to develop such a ‘Grand Theory’ then this would mean that the initial pluralism is no pluralism after all, but goes back to some deeper unity. Pluralism, then, is only a quasi-phenomenon, a phenomenon that exists by virtue of some distorted vision on our part. If we want to make Rawls’s theory, or a modified version of it, part of our political

5. Cf. Nagel who explains that Rawls’s principles are less likely to be rejected than his contractual basis. We will come back to this later on—Nagel 1975, p. 15.

understanding and practice, clarity about what Rawls's theory does and does not, and can and cannot, perform in relation to the phenomenon of pluralism, and why this is so, is of great importance.

Clash of interests

The principles of justice which Rawls formulates are of paramount importance for his view of man and society. Taking into consideration the plurality of individual goals, religious convictions, political ideals, etc., the principles of justice must perform a huge task. Under these principles all those different opinions must live together valuing the same basic principles that govern their social relations. Rawls himself is conscious of the size of this task. The origin of his theory is the Western society in which individual interests have to be reconciled. The principles of justice are those principles "that free and rational persons concerned to further their own interest would accept ... as defining the fundamental terms of their association" (TJ 11). What is important is that Rawls sees justice in the first place as principles for *social* institutions, and is not concerned with finding principles that hold for "private associations" or "less comprehensive social groups" (TJ 8)—social justice is the "fundamental case" (1982, p. 159), even to the extent that requirements for individuals can only be formulated after the content of just institutions is defined. In that sense, one can say, according to Rawls, that without social institutions the individual is an empty abstraction (*cf.* TJ 110), or, as Rawls himself says, without social cooperation the individual is incomplete (1987b, p. 36) (remember Dewey's comparing individual and society with the letters and the alphabet—Dewey 1984, p. 278).

When talking about the "circumstances for justice", *i.e.* the circumstances which drive people to an agreement concerning the principles of justice, it becomes clearer how Rawls sees this clash of individual interests. Rawls sees society as a cooperative venture marked by a conflict as well as by an identity of interests. The circumstances of justice "obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity" (TJ 128). Justice seems to be a remedial virtue and not a virtue in itself. Justice is meant to mend the broken: "unless these circumstances existed, there would be no occasion for the virtue of justice" (*id.*).⁶ The question, "What is justice?", is only raised when

6. Michael Sandel criticizes Rawls on this point. When discussing the circumstances of justice, he points to the effect that taking conflict as basis for the occurrence of justice,

there are conflicting interests, or, when a common interest or ideal agreed to by all is lacking. Justice is intended to make possible again cooperation, but how can Rawls account for this cooperation when he states so clearly that justice is made necessary by the *conflicting* interests of individuals in society? Because of this conflict there is not much basis for cooperation in the first place. This cooperation can only be established when Rawls is able to show that complying with justice is in the end advantageous for self-interested individuals and is, in fact, their highest interest. Justice must be a good for the individual. The relationship between individual and society that Rawls establishes centers around the question of how he relates the *right* (justice) and the *good* to each other and how he defines 'the good'.

Individual and society

Rawls sees a person as “a human life lived according to a plan”. Man is, so to say, a ‘planning animal’, and his plan of life determines his good (TJ 408). The obvious problem is that those individual plans of life will most certainly conflict with each other. Justice is at least needed to settle these conflicts and make possible a proper functioning of society. According to Rawls, the individual’s plan of life must be the result of a rational choice in order that individuals experience their life as a complete life (*cf* TJ 422). Rawls presupposes throughout TJ that principles are chosen by rational, self-interested people. The fact, however, that a plan of life is rationally chosen does not tell us much about the contents of that plan—as Rawls himself contends (TJ 424)—nor does it tell us much about the procedure and criteria that rule the choosing of that plan of life—for what is rationality? To clarify the content and the rationality of life-plans, Rawls gives some further demands for these ends. The ends that are contained in these plans have to comply with the following requirements: (a) “the broad features of human desires and needs”—I take it that this includes what Rawls places under the label of the thin theory of the good; (b) the requirements of human capacities and abilities—Rawls works this out in the so-called Aristotelian principle; and (c) the general facts of social interdependence: “the basic structure of society is bound to encourage and support certain kinds of plans more than others by rewarding its members for contributing to the common good in ways consistent with justice” (TJ 424, 425).

justice not only appears to be a remedy for a situation we do not want, but also that it is then unclear whether an increase in justice is also a gain in morality—*cf.* Sandel 1984, 28-34.

Issues concerning (a), the features of human desires and needs, have to do with Rawls's theory of the good and the relation he sees between ethics and justice. The account of what Rawls calls the thin theory of the good and the related issue of the relation between the right and the good are the cornerstones for Rawls's theory. His treatment of these topics will show how Rawls conceives of the person in the original decision making. After we have clarity on these issues, we can proceed to the relation between individual and society. This relation has to do with (b) and (c): The Aristotelian principle and the common good. In the following I will focus on the relation between the right and the good regarding the moral priority (1) and the logical priority between them (2), on the connected issue of the relation between ethics and justice (3), on the Aristotelian principle (4), and on the structure of society (5).

The right and the good—moral priority

The key to Rawls's account of the relation between the right and the good is not to be found in TJ but, rather, in a statement he makes in the second of the *Dewey Lectures*: The construction of justice as fairness “starts from a unanimous collective agreement regulating the basic structure of society within which all personal and associational decisions are to be made in conformity with this prior undertaking” (1980, p. 553). At first sight this looks like a restatement of what we saw earlier: Justice is the first virtue of social institutions. But there is a more pervasive meaning to this. Fundamental for the theory of justice as advanced by Rawls is, as he states it, that the concept of the right is prior to the good: The realization of just social institutions has priority over the way people design their plan of life, and so realize their good. As Rawls clarifies this later on: “something is good only if it fits into ways of life consistent with the principles of right already at hand” (TJ 396). The principles of justice (the right) are not designed to maximize some good. Rawls wants to distinguish his theory from teleological and, what he calls, perfectionist theories, in which principles of the right are formulated in relation to some predefined goal, for example the realization of happiness. For Rawls the principles of right are to be defined independent of some overall goal or good. Only with this priority as a background can something as the public or common good be designed, realized and enhanced. The priority of right is primarily a moral priority. Justice as fairness, as Rawls states it in TJ is a

deontological theory in which the right is not interpreted as maximizing the good (TJ 30).

What, then, does Rawls understand as the good? At the point mentioned before it appears that the good has something to do with economic and social advantages and with individual life-plans: In the principles of the right (justice), persons agree to restrict social and economic inequalities to those in everyone's interest (TJ 30), and they agree to the boundaries that the individual's systems of ends must respect (TJ 31; 1982, p. 160). Later in TJ we get to know more about the relationship between the right and the good. Rawls distinguishes between a 'thin' and a 'full theory' of the good. The reason for making this distinction is that a theory of justice has to provide answers to two questions: 1) will people actually be inclined to agree upon a conception of justice; and 2) is being just a good? These questions are indeed important and will reveal the viability of Rawls's theory, especially since they are formulated in—for Rawls's approach—a typical way. The acceptance of a possible conception of justice depends upon how it relates to conceptions of the good or of goodness. This is another way of saying that justice is a moral concept. Rawls makes already two provisions for this relation by asking (1) what *incentives* there are for an agreement upon justice, and then (2) whether justice is in the *interest* of the parties of the agreement. The first question asks for the motivation of the parties in the original position. The thin theory, in labelling certain primary goods (in short, these contain the basic liberties of freedom of thought and conscience, freedom of movement and choice of occupation, powers and prerogatives of offices, income and wealth, and finally the social bases of self-respect—1982, p. 161) gives an answer to the motivation of the parties in an agreement to the principles of justice. People want to carry out their plans of life, and in order to do so, they prefer more, rather than less of these primary goods (TJ 396ff; 1982, p. 161ff; 1987b, pp. 22, 23). A settlement of the principles of justice guarantees an even chance to these goods for everyone and as a consequence, equal chances for everybody to live the life they choose—primary goods are “all-purpose means” (1988, p. 270).

The second question, “is being just a good?”, must also be answered from the point of view of the thin theory (TJ 398). If people recognize justice as enhancing their good, a stable society shall be the result. Rawls speaks in this relation of the congruence of the right and the good (TJ 399). Being just, then, is a good in the light of the thin theory, for it increases chances for primary goods, and these goods are to the advantage of everyone's plan of life or individual good. The thin theory

already has quite a substantive content: It can label certain characteristics desirable for individuals. There is, however, in Rawls's account of the thin theory, a serious opacity.

At the start of the argument in TJ, Rawls states that the principles of justice—whatever they are—must be “acceptable from a *moral* point of view” (TJ 120—italics added). Now, after having explained with the help of the thin theory that people *want* to agree on certain principles of justice, Rawls points out that there is nothing moral about the goods as defined by the thin theory (TJ 403). The thin theory only states that it is rational to want certain principles of justice (TJ 397, 403), the definition itself is morally neutral (TJ 404). Based on the thin theory alone, we cannot decide whether someone is a good person—both the president and his assassin will be called good in relation to their skills (TJ 403). The thin theory only mentions instrumental goods. Not but after the full theory of the good has been developed can we talk about moral goodness. And, in order to develop the full theory of the good, we need the principles of right and justice; only in the light of the principles of justice, as chosen in the original position, can we judge whether something is *morally* good (TJ 398, 404). The analysis of the thin and the full theory of the good seems to suggest that the concept of right is not only morally but also logically prior to the good. But then it is hard to see how the principles of justice can be acceptable from a moral point of view, because the argument seems to conclude that before the formulation of the principles of justice there is no identifiable moral point of view. How then does Rawls explain this moral point of view?

What is good?

When we want to explain a moral point of view, we have to distinguish between two possible ideas of ‘the good’. The first is the one used by Rawls in his analysis of the thin and the full theory of the good. This idea defines ‘the good’ as what is desired or needed by people. Something is *a* good for me if I desire possession of it or need it. That we all need certain goods (the primary goods) in this sense is the implication of the thin theory of the good. Beyond the list of primary goods we can desire certain goods as part of our own plan of life. The priority of the concept of the right over the good means in the first place that when I formulate the good I desire, I have to take the principles of justice into consideration. Some goods will not be allowed then, for instance dominion over other people. Theoretically I may

want to have slaves but this good would violate the principles of justice—it is not right—and I am thus not allowed to formulate this good as part of my plan of life.

The second meaning of ‘the good’ refers to an idea of goodness or the good life. This idea of good applies to questions like “Am I a good person?” or “Is this a good deed?” It is the whole idea of morality itself that is captured in this second meaning, so it includes principles of justice and ideas of which goods I should desire. When asking whether the principles of justice are acceptable from a moral point of view, I cannot see it otherwise than that this comprehensive idea of goodness must be involved.

My problems with Rawls’s theory rest on this distinction between two ideas of ‘the good’. Rawls wants to distinguish his theory from utilitarian theories that somehow define the right as maximizing the good. For Rawls’s *deontological* theory, principles of correct behavior must be formulated prior to and independently from the maximization of good. But the theory of the good that Rawls develops is not different from utilitarian views: Both see the good as that which is desired by people. The moral point of view that lies behind the theory of justice, however, involves both the concept of the right and the good, but now seen from the light of some idea of goodness. In TJ, Rawls admits that one needs some notion of *goodness* to establish the principles of justice (TJ 396). But, since this notion of goodness “must not jeopardize the prior place of the concept of right, the theory of the good used in arguing for the principles of justice is restricted to the bare essentials” (TJ 396). In this section I want to show that questions about goodness already play a role in the analysis of the thin theory of the good—that this thin theory is not as neutral as Rawls wants to present it. In other words, from a moral point of view it is legitimate to question what the ‘bare essentials’ are, independent of a formal priority of the right over the good. Clarity on this issue is of great importance for the analysis of the mediation and reconciliation between individual and society in Rawls’s theory.

There is thus a difference between saying that something is *a* good and that something is *good*. *A* good is good in relation to a certain interest, economic, moral, or whatever. But *a* good is not necessarily *good* in the moral sense. Both statements have a different relation with conceptions of the right. We can capture these relations in a couple of statements which each need some attention on their own. Let us first consider the case where I want to pursue *a* good.

1. I pursue a good *and* this good is Rawlsian right (*i.e.* it is allowed by the principles of justice).

This is a clear case of the relation between the right and the good as pictured by Rawls: The good I pursue is within the limits of what is right as defined by the principles of justice. The same goes for:

2. I do not pursue a good *and* this good is not Rawlsian right.

Now the next case:

3. I pursue a good *and* this good is not Rawlsian right

What kind of person am I, in following (3)—am I *bad* or am I *unjust*? In the case of Rawls's theory I am in the first place *unjust*: The good I am pursuing does not fall within the borders of what is permitted by the conception of right—it is not according to justice. In this case two lines of conduct are open to me: (a) I abandon or revise my good; (b) I revise the conception of justice (right). Choosing strategy (a) means that I have been convinced by Rawls that his conception of justice gives a decisive account of what is good and thus limits my choosing goods. When I follow (b), there are again two possible evaluations.

(b') I agree with Rawls that the principles of justice are connected with some fundamental interests of human beings, but I differ with Rawls about the specific content of the principles of right. For example, I can argue that Rawls's concept of justice or right is based on a wrong list of primary goods, *i.e.* this conception of justice values the wrong goods. What we agree to in this case is that justice refers to certain interests of individuals, but we disagree as to which goods are of fundamental interest to human beings.

(b'') I disagree that the right is related to certain interests human beings have. What I label as right is then related to something else, e.g. a creational order, or a natural order, or, more specifically, what I regard as right is right because I consider it good to respond to this order. For Rawls this would be puzzling, because my motivation is not covered by his theory of justice—I do not pursue certain goods—and because it is hard to see whether criteria of rationality apply to me—for Rawls defines rational choice as a choice that safeguards my own interests in the best possible way. The same conclusion will follow from:

4. I do not pursue a good *and* this good is Rawlsian right.

This case is puzzling for Rawls, because once it is established that a good is allowed by the principles of justice (it is right) and it belongs to the list of primary goods, it is implied that I will pursue that good. (for the primary goods are the motivational incentives that actually lead people to an agreement over the principles of justice—without pursuing them, there would not be justice). For Rawls my motivation would fall completely outside the theory. But underlying (3) and (4) is a critical attitude: What I see as a good need not *be good*. So (3) and (4) lead to the question: is what is right (as defined by the principles of justice) *morally good*?

5. The goods I pursue are good, *and* these goods are (Rawlsian or otherwise) right

6. The goods I pursue are not good, *and* the goods are not (Rawlsian or otherwise) right

In these two cases, we have what Rawls would call the ‘congruence of the right and the good for the goods I pursue are also morally good. But now mark the next:

7. The goods I pursue are good, *and* these goods are not (Rawlsian or otherwise) right

This is puzzling: At first sight this seems to be a contradiction in terms. Once it is established that something is not right, it cannot be good. However, when we want this contradiction to disappear, we will tend to modify the criteria of the conception of right that is involved. To give an example, it is not only that a totalitarian regime treats people unjustly that makes that regime unacceptable, there is also the idea that such a regime is morally bad. There is a (moral) reason for why we think such a regime unjust. This will become more clear when we consider:

8. The goods I pursue are not good, *and* these goods are (Rawlsian or otherwise) right

Then we judge without hesitation that the idea of right is not ‘right’. Where we can, without contradiction, judge that some good (a good) is not a right, or the reverse (as in 3 and 4), we cannot do the same when we talk about what *is good* and what *is right*, unless we make the conception of what is right open for modification, and *not* the conception of what is good. For completeness’s sake, with (8) I am not

referring to ordinary cases where someone's liberty under the law is at stake. Drinking too much is not considered good, but it does not make sense to call it unjust in relation to basic principles of justice. What I am after is the relation between the concept of right and an idea of moral good. So, the adjustment of a conception of right to more tolerance can only proceed when it is established that tolerance is good. That intolerance is unjust will only dawn upon us when we realize that it cannot belong to a good life when people are forced to accept certain moral or religious ideas instead of being able to make a responsible commitment to certain principles. Once this conviction is firmly established we can formulate a corresponding concept of right that judges intolerant goods 'unjust'. What (7) and (8) show is that some idea of what is good or *goodness* is presupposed as a norm for what is right. A (renewed) conception of justice comes after the shift in ideas of what is good. The injustice of some good does not ultimately follow from a conception of rightness, but from a conception of goodness.

The relation between both conceptions is far more complex than seen by Rawls. As far as cases (1) through (4) are concerned, it makes sense to distinguish the right and the good as Rawls does. It is not necessary that all people have the ethical motive for acting justly, nor is it an attack on justice when people strive after goods that are unjust.⁷ But once we ask critical questions about the principles of justice, one cannot stick with the account Rawls gives of the relation between the right and the good. For one, the possible evaluations linked with (3) and (4) ask for a looser use of the analysis of the thin and full theory of the good. As we saw, once we question whether justice has to do with the interests of human beings, we are in danger of being excluded from Rawlsian deliberation, for both the conception of justice as well as the conception of rationality Rawls uses are linked with interests human beings have. Strictly keeping with the premises of the original position will lead to the arbitrary exclusion of certain contributions in the construction of justice, for not pursuing certain interests will make the resulting conception of justice not rational. The only way to extend the discussion beyond those who agree with the particular description of the original position Rawls gives is to see the systematic relation between the good and the right as one of priority in that order. Any disagreement in cases (1) through (4), when based on a sound foundation, will lead to discussions about cases (5) through (8).

In order to harmonize the life-plans of individuals who pursue their

7. These are the reasons why Raes vindicates the Rawlsian distinction and priority between the right and the good—Raes 1984, p. 236. So considered can we see the Kantian roots of Rawls's theory—we will come to that later on in this study.

goods, there must be a conception of *moral* goodness that will be the norm for a conception of right. When we thus ask what is morally good, the analysis of the priority of the right over the good as made by Rawls is not only inadequate, but also out of place. What we evaluate as *morally* good will have recursive effects on what conception of justice we define—*i.e.* it will lead to the question of whether or not this conception of justice is morally good. Before principles of justice are formulated, one already has some idea of morality so that one can judge the moral worth of the president and his assassin. If the thin theory of the good cannot make this valuation, the full theory cannot either. The moral good is more than the instrumentality of primary goods or the good I happen to desire. What we see as morally good determines and actualizes what we see as right. Our conception of what is morally good—our ethics proper—connects our conception of justice with a context of normativity that we see as determining the playing-field for man in all his activities.

Differences in what we see as morally good lay at the root of differences we have about conceptions of justice. Arguments about justice are ethical arguments about what the moral good is which justice should serve. *Nota bene*, not which *goods* justice should serve—for my goods, my life plan, should indeed be formed consistent with principles of justice which are established after due reflection—but the moral good which belongs to the human person as moral person, before any individual good(s). When Rawls wants the principles of justice to be sound from a moral point of view, it is this latter point he makes. The analysis of the thin theory itself is limited to *within* the moral point of view.

Ethics and Justice

Rawls addresses firstly the conception of *a* (my) good when he discusses the relation between *the right and the good*. Then it makes sense to say that the right is prior to the good: When someone chooses the goods he wants to pursue, his choice must be guided by the principles of justice. What I choose as my goals in life must take into consideration the justice of the choice, that is, how far I am allowed to pursue these goods without inflicting injustice upon others. These considerations come already into the picture in the case of the pursuit of non-moral or primary goods like income and wealth. These goods immediately show the necessity of some conception of justice.

Another question is whether pursuing these and other goods *is good*.

This is the ethical question which is involved in asking: “Is this good?” On this idea, Rawls is not clear. In TJ we have seen that he blurs the picture when he, on the one hand, claims that the principles of justice must be acceptable from a moral point of view, but on the other hand states that we can only judge whether something is *morally* good after the principles of justice have been formulated (TJ 398, 404). Later, in his 1982 article “Social unity and the primary goods,” he mixes an analysis of ‘is good’ with ‘is a good’ when he first states that a conception of justice results from the “highest-order interests ... to realize and to exercise the two powers of moral personality” (1982, p. 164, 165) and then points out that the way to realise this moral personality has to do with allocating primary goods according to principles of justice (1982, p. 165). Having a moral personality involves striving to be a good person, the just allocation of *goods* as defined by the thin theory seems to me to be contingent upon this striving.⁸ Rather, moral personality has to do with advocating justice itself, among other things. In striving to be a good person, I think it disputable to pose a priority relation between right and good; rather, they seem to be *mutually* dependent: One cannot logically label someone to be a ‘just’ or ‘good’ person when either is missing.

To summarize our findings thus far: Rather than seeing justice as a concept which establishes the relation between law and morality, Rawls considers justice as preceding morality, even containing the basic guidelines for conceptions of morality. Though it is true that Rawls sees the principles of justice as *part* of a moral theory (*cf.* the scheme at TJ 109), morality is not seen as an independent concept, and in avoiding defining the *right* in terms of the good, Rawls seems to fall in the opposite trap: Defining the *good* in terms of the right. Still, if one defines justice in the way Rawls does it makes sense to ask whether being a *just* person is being a *good* person. In Rawls’s theory, we cannot ask this, because it would imply a full account of a conception of morality underlying and preceding the principles of justice. But is Rawls not making this very point: that the principles of justice provide an account for a moral point of view, that they result from the choice of people who *have a morality*. There is indeed a substantive moral conception underlying Rawls’s theory, but that morality cannot be supported by Rawls’s account of the original position and the thin theory of the good. The person in the original position is supposed to

8. Frankfurter speaks of Rawls’s fetishism regarding the primary goods: for Rawls it is always good to have more primary goods. But, says Frankfurter, “it is an error to suppose that a person’s life is invariably improved, or that it cannot be made worse, when his options are increased”—Frankfurter 1987, pp. 42, 43.

make his choice guided by his own interests, and he is placed in such a position that he will make his choice as if it were from the standpoint of a 'noumenal' (timeless and placeless) self (remember, the original situation can be entered at any time). This individual has no moral ideals, because the information he needs to form such ideals is not available to him (TJ 142). The only knowledge he has is that he wants to enhance his own good as much as possible, in whatever circumstances he might find himself after the veil of ignorance is lifted. The moral person changes into a basically self-interested person the moment he enters the original position.

Rawls's idea of justice is systematically linked with the self-interest of people. That is the reason he explicitly asked whether or not being just is a good (*i.e.* non-moral) for the individual. In order to construct a *moral* conception of justice out of people's self-interest—a conception that does not have egoistic or hedonistic traits as in utilitarianism, but is of general, transpersonal character (the Kantian notion of the noumenal self)—he has to neutralize the goods which are of interest for the choosing parties. In the original position the choice for the principles of justice is pre-moral.⁹ By means of a 'stripping down argument' (Hampshire, 1982, p. 147) he formulates the thin theory of the good that contains the elements that are of equal value for all people and thus can serve as minimal incentive to an agreement upon principles of justice.

Rawls follows this procedure out of the moral perspective that people should share one another's fate. In this way he thinks he has shown that this moral perspective is not only within reach of all people (under the conditions of the original position the individual interest is at the same time everyone's interest), but also the most rational, considering people as they are (*i.e.*, self-interested). From the discussion so far it is clear, however, that the moral perspective of sharing one another's fate is not explained in Rawls's theory. The conditions of the original position do not allow for incorporating a specific *moral* attitude.

This much must be granted to Rawls: That this general moral perspective is indeed hard to explain or to defend rationally. But an account of this paramount morality is inherent to each theory of justice. Developing 'just' a theory of justice is not possible: In developing a theory of justice one is, in the end, "promoting a morality,

9. Cf. Scheltens 1981, p 107, 108: "It is important to see that the [partners in the original position] are not guided by moral principles yet. [...] The original position is thus a pre-moral point of view in which the parties concerned have to agree upon their moral principles" (transl. JFG).

a particular arrangement of society and view of life and not analyzing rationally and dispassionately the concept of justice” (Kamenka 1979, p. 23). In each theory of justice, certain ideas about the individual, a way of life to which is aspired, and a view on humankind, are assumed (*cf.* Hampshire 1980, p. 10). We want to know what view Rawls has in this regard.

Justice is not just conformity to the law but “the ideal element in all law, as the ‘idea’ which is the end of the law and in terms of which laws or legal procedures [are] to be judged” (Kamenka 1979, p. 3). Justice is the idea which allows us to ask the question “is this law just?” The moment we ask this question, we have gone beyond the bare limitations of a system of law. We have asked whether the law is good in relation to some other—some higher—value. This higher value is captured in the idea of justice we hold. That idea of justice itself is formed out of our moral or ethical concern.

Justice, then, is the way we look at laws from a moral point of view. Not only is the question, “Is this law just?”, a matter of justice, so too is the *application* of just laws. “The letter kills”—it is at any time a legitimate question how we must enforce the law in a particular case. When Rawls defines his idea of justice as ‘justice as fairness’ he also points to this wider context of morality.¹⁰

There is place for an idea of justice differentiated from both law and from ethics, but not independent of either. Justice is, so to say, the bridge between law and ethics. That means for one that questions of justice cannot be reduced to matters of law or questions of ethics. Justice has to do with what kind of persons (attitudes and deeds) are law-abiding and what is required of, and due to, those persons. And justice is about the social consequences of a particular ethics—it is about the way we ought to govern our social relations. The social relations to which justice applies must be seen very broadly, they include both the family and the relations of individuals *vis-à-vis* the government, the political field, *etc.* Considerations of justice are more clear-cut in those wider relations in which there is not the face-to-face contact of the closer family-relations because in these closer relationships specific ethical aspects are more prominent than in the wider circles of society. A just society is a sign of a developed morality; in contradistinction to this, a family seems to be lacking something if it

10. In my estimation, fairness is not a very good proposal for a characterization of justice. Not only is ‘fairness’ hard to translate into most languages (*cf.* Kamenka 1979, p. 23), it also does not add anything to a definition of the meaning of justice. The gain is at most an emotive connotation which applies only for certain linguistic contexts. The *loss* can be that fairness is also associated with practices which are basically unjust: Criminals, for example, can be very fair, but still behave unjustly.

is only characterized by justice. Thus considered, justice is the first virtue of social institutions—when we call institutions just, that means that those institutions operate in an ethical way.

Some wider characterization of justice is obviously necessary to fulfill the need for a moral defensible idea of justice. As was made clear in the previous section, Rawls's argument of the original position and the analysis of the thin and full theory of the good cannot account for this moral point of view—another line of argument is necessary, as we shall see in Chapter 3. But before we can evaluate the full impact of the establishing of a moral point of view along the lines Rawls draws after TJ we have to look further into how Rawls in TJ describes the way people realize their own good and how they form a society and establish a common good, and how the principles of justice regulate these activities.

The relation between the Aristotelian principle and the common good

Once the principles of justice are settled, people are free to choose the goods they want to pursue. In leaving the original position, they finally know what kind of person they are, and what capabilities they have. The way they pursue their good is now ruled by the so-called 'Aristotelian principle'.

Rawls gives the following definition of the Aristotelian principle: "Human beings enjoy the exercise of their realized capacities (their innate and trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity" (TJ 426). The effect of this principle seems to be highly individualistic, granting the individual his own territory for furthering his interests. As we have seen, the persons in the original position are "concerned to further their *own* interest" (TJ 11, italics added). Furthermore, in his account of goodness as rationality, Rawls states that unanimity concerning the standards of rationality in regard to the *good* (i.e., the goods people pursue) is not required, as it is required in regard to the *right* (TJ 446, 447). Moreover, he thinks it a good thing that individuals' goods should differ (TJ 448). As long as the ends which individuals choose are rationally chosen (and those ends serve to define their good), anything goes. Rawls does not want to impose any further limits on the choice of the individual good. Even the Aristotelian principle is not intended to *limit* the choice of ends, it is meant only to indicate more precisely what kind of ends will be pursued. What the Aristotelian principle (the realization of capacities) does achieve is that, together with the

rationality of the chosen ends, it makes possible the experience of wholeness for the individual. The Aristotelian principle gives a motivational explanation for the ends for which individuals want to strive in their life-plan (TJ 427), and which go beyond the primary goods—we can account “for what things are recognized as good for human beings taking them as they are” (TJ 433). When ends are rationally chosen and conform with the Aristotelian principle, and therefore conform to that individual’s natural capacities, the individual is able to “[view] himself as one continuing being over time,” and “can say that at each moment of his life he has done what the balance of reasons required, or at least permitted” (TJ 422).

This individualism is softened in its effects by a strong ‘communal’ line in Rawls’s theory. Though the ‘Aristotelian principle’ points to the attempt to develop a *person’s* powers, as far as non-primary goods are concerned, the principle is only effective *within* the limits of justice (*cf.* TJ 434). Society is prior to the ‘Aristotelian principle’. Besides, so proceeds Rawls, it is a basic characteristic of human beings that no one person can do everything he might. “The potentialities of each individual are greater than those he can hope to realize.” Therefore, human beings need one another as partners: “Different persons with similar or complementary capacities may cooperate so to speak in realizing their common or matching nature” (TJ 523). The Aristotelian principle for individual plans of life leads to a notion of the “community of mankind” (*id.*). Realizing complementary capacities establishes a cooperation in which “the good attained from the common culture far exceeds our work” (TJ 529). Society is then constituted as a *social union* in which the powers of human individuals are realized in time by people who share final ends and value common activities for themselves (*cf.* TJ 525).

Society as a social union

In his account of society as a social union the all-important question for Rawls is: Does a well-ordered society achieve the good of the community (TJ 521)? This question is important because of the individualistic, voluntarist origin of the theory. Rawls sees two possible conceptions of society which fit his individualistic origin. First, the idea of a ‘private society’. In this society people see social arrangements “solely as a means to [their] private ends” (TJ 521). The public good is instrumental to the individual interests, institutions are not seen as just in themselves, but are calculated (TJ 522). Rawls sees this idea of a

private society realized in what Hegel described as *bürgerliche Gesellschaft*.¹¹ The idea of society as a social union, the second idea based on individualistic principles, can, in Rawls's vision, meet the criticism on the contract doctrine in Hegel's sketch of a 'private society'. Fundamental for the approach Rawls chooses is: 1) The idea that it is not optional for us whether or not we belong to society, that 2) human relations have a social nature, and thus 3) that there is a community of mankind (TJ 523ff; 1977, p. 165). This way of reasoning might seem to go a little too fast. I think that Rawls, in his idea of society as a social union, confronts his theory with the hard fact that, irrespective of all the societal struggles and schisms, people *do* live together.¹²

"[H]uman beings have in fact shared final ends and they value their common institutions and activities as good in themselves" (TJ 522). Out of the 'equal-directedness' of the activities of individuals emerges the idea of society as a social union: People with shared final ends and common activities valued for themselves (TJ 525). A well-ordered society is a social union of social unions, the shared final end being the successful carrying-out of just institutions (TJ 527). Everyone's private life is a plan within a plan, this larger plan being realized in the public institutions of society (TJ 528). But—and this is very important—this larger plan does not establish a dominant end, it is a regulative public intention (*id.*). Rawls wants to establish a *purposeful association* of individuals in society without imposing a *purpose*. When he finally elaborates the ideal of society that is implicit in his theory of justice, he does something quite amazing: Reasoning out of the Aristotelian principle for individual behavior—a teleological principle in that it states that people have *ends* which govern their conduct—the notion of shared and matching ends establishes a community of mankind in which there are no more overall or dominant ends

What kind of association is this where there is no dominant end? Terry Nardin distinguishes in his *Law, Morality and the Relations of States* (1983) practical and purposive associations. A *purposive* association exists when people cooperate for the purpose of certain shared beliefs and interests—there are common rules and common interests or ends. A *practical* association, on the other hand, is an association in which there are only common rules and no common ends. These

11. Cf. TJ 521n; see also Rawls 1977, p.165 where he speaks of justice as fairness as directly opposing Hegel's "civil society".

12. Rawls tacitly owes quite a lot to the idea of an invisible hand or the idea of spontaneous order. The primary force that drives people to a social union is the recognition that we share certain ends. Accordingly, society takes on a certain structure as a result of these unions. Without knowing it, people give shape to society. Cf. Raes 1984, p. 150; for some explanations on this note, see also Griffioen 1988, p. 139.

common rules are recognized because they appeal to people as *moral* agents. According to Nardin, the modern state is such a practical association: the state consists of citizens united under a common rule (law), there is no agreement on ends, relations are formal and procedural (Nardin 1983, pp. 14ff). Rawls's idea of society seems to fall between these two types. People acknowledge "*principles* of appraisal relating to their common *practices* either as already established or merely proposed" (1958, p. 176)—this amounts to a practical association. However, in TJ, Rawls explicitly holds that human beings also share common ends. The idea of this commonality of practices and ends is fundamental to the idea of society as a social union, thus one might conclude that Rawls sees society as a purposive association. In the end, however, Rawls denies a final end which can contain all the different ends people may have. Of course, as moral persons we still are able to appreciate common rules. But when there are no common ends or interests for society, those rules will be kept for formal reasons. That people are willing to share one another's fate asks, instead, for non-formal, rather than procedural ties between people.

It is puzzling how social unions grow out of the knowledge of shared ends, but society as a social union of social unions is denied such a common end. As long as one sees a clash between freedom and equality this problem cannot be solved. Between these poles, the choice is of practical and purposive associations—practical associations if one stresses the freedom of each to do what he pleases, purposive associations if one stresses the equality of all. In both cases, one of the ideals of freedom or equality is compromised. Rawls's approach goes beyond this opposition. There are two avenues open to Rawls: Either an account of fraternity in which the political meaning and moral foundations of this ideal are clarified, or the establishment of society as an end in itself. In the following I will show that Rawls perhaps follows the first line, but ends up working within the second alternative, thus redefining the conceptions of individual and society in a specific way. Though he points to the political interpretation of fraternity or its morality, he never gives a more elaborate and fundamental account of fraternity. This is perhaps a consequence of trying to overcome the opposition between freedom and equality. When freedom, equality and fraternity stand in one line as political ideals, the reconciliation of the opposition between freedom and equality—if it exists—must move to another plane. The moral point of view that carries the political translation of freedom, equality and fraternity in Rawls's principles of justice cannot be discovered on the same plane as the argument for the principles of justice themselves. We have to look for another argument

to clear up the puzzles we met in this chapter. For how can we see that justice as fairness must be acceptable from a moral point of view, when in the original position morality is only formulated after the principles of justice have been defined? Further, how should we interpret that the 'Aristotelian Principle' can account for those things that are recognized as good for human beings taking them as they are, when the 'Aristotelian Principle' has to recognize the limits of the primary goods and the principles of justice? Finally, how can we conceive of society as a social union without a general goal? In the next chapter we will see how the theme of individual and society develops in Rawls's theorizing after TJ.

CHAPTER 3

Private and Public

WHEN READING RAWLS'S account of how the individual endeavor of realizing one's capacities opens the view to the community of mankind, an obvious question comes to mind: Is there any *prima facie* reason to suppose that my realizing *my* capacities makes me part of the wider endeavor of realizing the powers of mankind in society? Subsequently, this idea of a community of mankind seems to be at odds with Rawls's individualistic origin. For if there is such a community, why does it have to be proven by some hypothetical, abstract and individualistic device as the original position?

Indeed the relation between justice as a social virtue and the individualistic basis of Rawls's theory is the central problem as long as we conceive of Rawls's approach as one of accommodating individual and society. This problem arises in the following way: On the one hand, when Rawls works out the individualistic assumptions of his theory (the 'Aristotelian principle'), the emergence of an idea of community is an unexplained leap rather than a consequence of the individual's realizing his capacities. On the other hand, when Rawls works out the idea of society as a social union, the social perspective pushes itself to the foreground, submerging the individual's private plans in the plan

of society as a whole. These two lines of reasoning do not fit together: Out of his individualism Rawls cannot develop a social perspective; out of the idea of a social union, he cannot develop a perspective of the individual. How does Rawls himself perceive a connection and reconciliation between these two lines of reasoning?

In this chapter I shall first explain which conflicts, according to Rawls, will be reconciled by the principles of justice. In order to establish this reconciliation Rawls has to limit the scope of the original position and add a wider argument for the idea of justice as fairness. This wider argument is Rawls's idea of an overlapping consensus. After I have discussed these newer developments in Rawls's theory, I will draw some conclusions from the findings in both this and the previous chapter. Three issues come up in this context: That of the moral perspective of the individual, that of the idea of a moral community, and that of the idea of a moral discourse.

A community of individuals

Rawls does not advocate a bare individualism. It is *within* the limits of the principles of justice that there is no limit to the possible plans of life and no criteria for choice. We have to "recognize the good of all activities that fulfill the Aristotelian Principle" (TJ 442). There are no other grounds for fundamentally criticizing someone's choice than the principles of justice; judgments about the value of someone's life-plan are not to be made. Of course, we do not have to agree with someone's choice, but we cannot connect consequences to this, unless someone's choice goes against the principles of justice. According to Rawls, "To have a complaint against the conduct and belief of others we must show that their actions injure us" or that we are treated unjustly (TJ 450).

The field where possible clashes will occur is *a priori* defined by the principles of justice.

Initially, Rawls characterizes justice as generally "the virtue of practices where people feel entitled to press their rights on each other" (TJ 129). In developing the theory, justice gets a more embracing task: Justice also settles conflicts which result from differences in religious and moral beliefs. The principles of justice define a "pact of reconciliation between diverse religions and moral beliefs" (TJ 221). But now we can wonder, first, whether these differences can be reconciled by the principles of justice and, second, whether differences like this will exist in a well-ordered society. Concerning the first question, it appears that only complaints based on rights-claims (actions which injure us or

which are unjust—TJ 450) will be handled by justice. Differences based upon religious or moral grounds do not originate in rights-claims, and it *is* a question whether we can translate them into rights-claims; characteristic for moral disputes is that they comprise ‘value-judgments’,¹ and these form no basis for complaints according to Rawls. What, then, is contained in this reconciliation between diverse religions and moral beliefs? Let us turn to the second question of whether or not these differences exist in a well-ordered society.

The second question appears hypothetical. As we have seen, within the bounds of Rawls’s theory we can speak only of *moral* concerns in the light of the full theory of the good, *i.e.*, with regard to the principles of justice. The principles of justice give the first preliminary definition of morality. In the light of this, does it make sense to speak of differences in moral beliefs which are reconciled by the principles of justice? In fact, we cannot yet speak of moral values about which we can have different opinions, because we do not have an idea of morality before we have settled the principles of justice. And once we have settled these principles, we also have agreed to a reconciliation of conflicting moral beliefs—at least, that is how Rawls’s theory runs—and to a certain concretization of morality. As far as there will be differences on moral issues, they will be of a kind that can be handled by the principles of justice. Thus this reconciliation can only imply that in making the choice for certain principles of justice, we make the choice for a certain idea of morality. That means that we make an *ethical* choice. Given that this choice is made within the context of a design of justice, this ethical choice finds its origin also in social values. As an *ethical* choice, however, it cannot be limited to the social field. Can the whole matter of ethics be reduced to the question of justice? A reconciliation between moral beliefs can only be made from the perspective of another moral theory. That conclusion was also the result from our discussion of the relation between the right and the good. Now, this is something that Rawls is not explicitly denying (*cf.* TJ 9, 10), but neither does he confirm it. The question for which I seek an answer is, however: What is the status and content of this moral point of view and how is it articulated? On the information Rawls gives about this moral theory, the account of the thin theory of the good is not satisfactory—it only contains the minimum information in order to agree on certain principles of justice, and is, as we have seen, pre-moral. The ‘Aristotelian principle’ does not specify morality either. As we have seen, the ‘Aristotelian principle’ leads to a broader point

1. I use the name ‘value-judgments’ for convenience’s sake, without agreeing with either the common idea that a value-judgment is therefore biased, or that there are identifiable *values*.

of view, the community of mankind, in which the *common good* is attained (however valid this is). This idea of a community of mankind is a clue to the moral point of view that forms the background of Rawls's theory.

The question of what exactly the place of this community of mankind is in Rawls's theory arises especially in relation to his individualistic point of departure. Finding the necessity of justice in the individualistic interests of people, and therewith in the conflicting interests and claims of people, not much is room left for these conflicts after the principles of justice have been settled. In the end—so is Rawls's conviction—people will develop the sense of justice, and the sentiments generated by the sense of justice will overrule the temptations to violate rules (TJ 497). Due to the constant assurance by the principles of justice, so Rawls continues, persons will develop a sense of their own worth that forms the basis for the "love of humankind" (TJ 501). The principles of justice seem to have a deep influence upon the individual. Rawls's idea of society as a social union takes this influence rather for granted; it does not give a deeper foundation for it. How this influence proceeds will become clear when we look into the distinction between private and public made by Rawls. It is this distinction that, as we saw in Chapter 1, lays at the bottom of my account of the relation between individual and society.

Unity through justice

Rawls's theory advocates the primacy of the structure of society in a theory of justice. In his words: "The basic structure of society is the primary subject for a theory of justice" (TJ 7; 1977, p. 159). In order to assess the question of how Rawls's ideal of society and his individualistic assumptions fit together—in other words, how the individual relates to the body of society—we have to look further into Rawls's ideal of society, both as explained in TJ as well as in the elaborations in later articles.

As generally conceived, Rawls's ideal poses the primacy of justice over other concerns in the (re-)construction of society. In this context, Rawls is being criticized that "no acceptable theory of moral behavior [can] claim the lexical priority of social justice over other moral obligations and personal concerns" (Clark & Gintis 1978, p. 318). However, in my opinion, this critique is not adequate in relation to Rawls's approach, and stems from an individualism taken absolute. In order for society to function, people actually have to be restricted in

some way, and how far this restriction goes depends also on the people self.

The principles individuals hold for their actions must take into consideration the demands made by other people. This does not mean that the individual has to deny his personal desires: There will always be some tension between the desires of the individual and the demands of the community. In a healthy situation the individual will acquire the kind of principles that, in certain cases, he is willing to put the demands of society on a higher level of priority than that of his individual wants or desires. This will at least be the case when the individual can see the society to which he belongs as *his* society: The individual must feel himself included in the *we* of society. Put in other terms, the individual experiences society as a community. But the experience of modernity is that society is not a community anymore. There is at least a plurality of communities, and quite often a basic consensus regarding the rules that should govern social institutions which would qualify society as a community is hard to discover.

Rawls recognizes that such consensus is indeed lacking. In taking the human being as a social being, Rawls provides a reference to a possible consensus. He also establishes that social justice has priority over individual concerns, but there is more to this. Justice as fairness does not propose a simple priority of social justice. Rather, in taking the social side of human behavior as fundamental premise, it propagates a deontological monotheism of principles of social justice. Rawls's theory poses a very complex relation between individual and society. Rawls bases his idea of society on the Aristotelian principle for individual behavior and a community of humankind in the light of which all individual endeavors can be seen as contributing to the shared endeavor of the realization of justice. At the same time, society as a social union appears in Rawls's theory to be clothed with an apparel that brings it close to organicist ideas of society. Individual life-plans are considered to be plans within a plan and, above all, the contribution to the common good becomes the overall goal that individuals are to keep in mind and to pursue (TJ 528). Though Rawls wants to establish only a just society, his just society is also a *good* society, wherein individuals rank the demands of society (i.e. the demands of justice) higher than personal (or other) demands (the pursuit of private goods). All plans must be consistent with the principles of justice (TJ 565). There is, thus, not only a priority of social justice in the bare meaning that we have to put aside our purely individual wants in order to be able to live together, but also a *moral* priority of social justice. The

wholeness of the individual in social cooperation is the highest moral good and has to be established prior to more individual goods.

The original position limited

In the light of the original position—where people choose principles of justice in regard to certain goods they need—Rawls's theory can be read as a theory of the (realization of the) good society. But out of his anti-perfectionism Rawls wants to safeguard himself against such interpretations: Justice is not the realization of some good, but an ongoing endeavor to realize just institutions. Therefore, not an idea of the good is regulative for this endeavor, but, rather, a “unanimous, collective agreement regulating the basic structure of society” (1980, 553). Why, then, should we comply with this agreement? In answering this question Rawls shifts to another line of reasoning after TJ. The original position is an argumentative device, it gives a reasonable explanation of why people would agree on certain principles of justice.

The problem that arises in the original position is that it does not apply to people who, for whatever reasons, say they do not *need* certain primary goods. From the working of the thin theory of the good in the original position, one might conclude that those people either would not form a society, or could not be part of the initial agreement. Now it is not Rawls's intention to exclude people at first hand from joining the initial agreement. Parallel to this possible criticism runs the objection that the original position favors only specific, *i.e.*, individualistic conceptions of the good. That, again, would amount to limiting the initial agreement to specific, individualistic persons. Against this Rawls replies first that the primary goods need not be individualistic, but also can apply to needs of people as members of associations and to publicly held goods (1975, p. 542). Second, he also limits the scope of the theory of primary goods. Only people in the original position “are to deliberate as if they prefer more, rather than less [*sic*] primary goods” (1975, p. 543), and this assumption “may not characterize the general motivation of people in society” (*id.*).

That still leaves it to be settled whether the theory of justice is not biased to certain individual or collective conceptions of the good, or life plans, for what happens when people indeed are not driven by a need for these primary goods? In TJ the answer was too short: Only life plans which are consistent with the conception of justice, *i.e.*, which are in need of the primary goods, were allowed. But is this *fair* to life plans which rest upon another idea of the good? In the 1975 article “Fairness

to goodness” Rawls gives the following criteria for excluding certain life plans: “(a) they may be in direct conflict with the principles of justice; or (b) they may be admissible but fail to gain adherents under the social conditions of a well ordered society” (1975, p. 549).

The first criterion is the problematic one we are examining, for what consequences should we draw from that fact? The situation is clarified when we realize that Rawls somehow equates (a) with (b). This second criterion is systematically different from the first. It does not rest on a certain conception of primary goods, regulated by consecutive principles of justice, but goes back to a particular conception of the person involved in society and the realization of justice as fairness. This conception of the person considers individuals in society as free and equal citizens and having two moral powers: The capacity for a sense of justice and a capacity for a conception of the good (1980, p. 520, 521, 525; 1985, p. 233). The second reason (b) states that the person as free and equal citizen and having certain moral powers, will favor certain life plans. The conception of justice involved does not rest *per se* on the need for certain primary goods, but on a specific conception of the person—Rawls moves to a different argument from the one employed in TJ (1980, p. 527). If some life plan does not gain adherents from those persons, one can question “whether its passing is to be regretted” (1975, p. 549). The structure of society—the well-ordered society—works like a filter for possible conceptions of the good: “We have to look at how the theory works itself out; this or that aspect of the original position is not sufficient to settle the matter” (1975, p. 550). Note that not only a certain morality on the side of the individuals is presumed—the two moral powers—but also a certain moral psychology: The capacity for a sense of justice implies a disposition to be sensitive to the moral appeal of justice and the possibility of further growth in that field. In that way, justice as fairness builds its own support. subsequently, the capacity for a conception of the good means not only that one can pursue a good, but also that one can formulate and revise this conception. On their part these moral powers are together the condition for being regarded as free and equal citizens (1987b, p. 16). Justice as fairness is not without commitment.

In this way, Rawls does have a case against the criticism that the theory of justice favors individualistic conceptions of the good. But what does it mean “to look at how the theory works itself out”? That seems to imply that the application of the theory provides the moral justification for an outcome to which individual people would object—to paraphrase a criticism of the hypothetical character of the original

position by Thomas Nagel (Nagel 1975, p. 6).² But this seems to me to stretch to far the use of the hypothetical agreement in the original position. Rawls aims at an agreement which is rather independent from the agreement in an original position.³

In elaborating the contours of such a wider agreement it seems that the result of a defense against extreme individualism is the unimportance of the individual point of view. In his 1985 article “Justice as Fairness: Political not Metaphysical”, Rawls makes some points which give way to this criticism. Justice as fairness, so he explains, is not a “comprehensive moral doctrine” (1985, p. 245). Justice as fairness is not a moral idea to govern all of life, but only intended to govern political justice (*id.*). When it speaks of individuals, it speaks of them as free and equal citizens (1985, p. 231). As far as it formulates guidelines for individuals, justice as fairness considers the ‘public identity of persons’. People can have different—and even change—their ‘non-public identity’, but they will still have the same public identity (1985, p. 241ff). The moral agreement which is included in justice as fairness, is a “reconciliation through public reason” (1985, p. 230), for a “public agreement on the basic questions of philosophy cannot be obtained without the state’s infringement of basic liberties” (*id.*).

Rawls makes a distinction between a person’s public and private identity. Citizens as free and equal persons claim to be so in the light of their public identity. They “view their persons as independent from and as not identified with any particular conception of the good, or scheme of final ends” (1985, p. 241). Someone’s private identity consists of his affections, devotions and attachments to particular religious, moral and philosophical convictions—all those convictions that constitute the identity of the person as the person he wants to be for himself and for others. That ‘private identity’ may change over time, without someone’s public identity being affected or changed.

Two questions arise here: First, is Rawls’s theory really that limited in that it does not give a comprehensive moral doctrine? And second, is it realistic to suppose that there is such a sharp distinction between public and private identity that someone’s private identity does not have any meaning for his public identity?

Concerning the first question, I think I have shown above that we have good reasons for doubting the limited scope of Rawls’s theory—to

2. “There is then a real question whether hypothetical choice ... can by itself provide a moral justification for outcomes that could not be unanimously agreed to if they were known in advance.”

3. See also Dworkin’s critique that hypothetical contracts cannot be binding (Dworkin 1978, p. 151). In the light of the interpretation of the original position I am giving—that the original position is an argumentative device—this problem is not so urgent as it would be for a straightforward contractarian theory.

mention one: Rawls considers justice as fairness as the fundamental case for all realizations of justice. Not only is justice the first virtue of social institutions, but also: Justice is *first* the virtue of social institutions. Though it maybe granted that justice as fairness is not meant to govern all of life, it certainly completely defines the space of life for all. Indeed the principles of justice and the society ordered accordingly are of paramount importance for Rawls. Repeatedly he stresses that the individual's conceptions of the good should respect the limits that the principles of justice set for possible conceptions of the good (see a.o. 1988, 253). Although Rawls does not want to advocate the good of justice as fairness as a comprehensive religious, moral or philosophical good, the good of a well-ordered society is at least a political good (1988, 270) and perhaps a comprehensive (*sic!*—1987b, p. 87) good. The reconciliation in a political conception of justice is more than just a practical agreement to respect one another's beliefs. The political conception is presented as one which will meet with consensus, unlike the enduring disagreements about moral, religious and philosophical beliefs. How comprehensive is this conception after all?

Let us turn to the second question: The way Rawls distinguishes between public and private yields a further indication that justice as fairness is more comprehensive than might appear at first glance. It is for Rawls a matter of equality before the law that people should be regarded apart from their private convictions. That is true before the law, but not true from the standpoint of the legitimacy of institutions of society. The claim Rawls wants to make is that people in their *public identity* will endorse the principles of justice. The idea is that the privately held moral and religious convictions cannot lead to a consensus. But in regard to the public identity—the identity that applies to public affairs, or the political good—there is consensus possible about political principles (*cf.* 1980, p. 544, 545). Hence the idea of a reconciliation through free public reason. That also means that the public identity is to a certain extent constitutive for someone's identity as a whole, and thus for someone's private identity. However, that leads to certain difficulties, which are neatly pointed out by Thomas Nagel in his article "Moral conflict and political legitimacy" (1987).

Nagel argues that Rawls's account simply excludes certain moral, specifically religious, beliefs from the original position because admission of these beliefs would make an agreement very difficult, if not impossible, to achieve (*cf.* Nagel 1987, p. 229). But liberalism, so says Nagel, "should provide the devout with a reason for tolerance" (*id.*), so it must take seriously the reasons of the devout. Rawls's position of

splitting the individual apart in a public and a private identity leads too easily to a skepticism about private convictions. Rather, Nagel wants to make an epistemological distinction between the private and public domains by pointing out that, from an 'outside' point of view, one can always see the difference between believing something to be true and its being true (Nagel 1987, p. 229). Nagel's view shows a sensitivity to the pluralism in modern society where people fundamentally disagree on religious but also other moral and philosophical issues. Rather than simply excluding certain issues from a political conception, or declaring dissenters unreasonable, as Rawls's vision seems to imply, Nagel wants to start positively by trying to create a common ground of understanding where people can rationally disagree with each other, and set apart from this those issues where people cannot agree, but are legitimately in their right mind to hold certain opinions (Nagel 1987, p. 232). Thus the consensus reached in the public field does not necessarily imply that dissenting individuals are wrong, or mad. I think that Rawls sees in Nagel's view the danger that the consensus reached is only a practical consensus or *modus vivendi*. Why then, and how, does Rawls make the step to an *overlapping consensus*?

The idea of an overlapping consensus

In the light of these comments, Rawls has clarified some questions connected with his idea of the use of free public reason. These ideas are summarized in the idea of an 'overlapping consensus'. Since 1985, Rawls has developed this idea as giving the best account of the basis of cooperation of people in society and of the justification of the ordering of a 'well-ordered society'. Rawls wants to meet the problem that arises from the pluralism of moral, religious, philosophical and political conceptions. The aim for political philosophy, in a time when it seems difficult or impossible to find a shared basis of political agreement, is "to examine whether some underlying basis of agreement can be uncovered and a mutually acceptable way of resolving these questions publicly established" (1985, p. 226). The aim is "reconciliation through public reason" (1985, p. 230).

The result of this "reconciliation through public reason" and also the safeguard for its existence in time is an "overlapping consensus," *i.e.*, a consensus that is supported by people with different religious, moral and political backgrounds, each for its own sake, or on its own merits (1987a, p. 11). It is a consensus that is supported by each individual, by reference to principles and values that all can endorse.

It is a “publicly acceptable basis for a political conception of justice” (1987a, p. 4), *i.e.*, it is a basis that “includes ideals, principles and standards that all members of society can not only affirm, but also mutually recognize before one another” (1987a, p. 4n5). Rawls thus works out a principle that can be supported by each individual in light of their own reason, as a reply to the suggestion from Nagel that the devout must be provided with a reason to be tolerant.

There are a couple of important assumptions for this result of free public reason. First, as already stated in the 1975 article, justice as fairness tries to be fair to persons (as members of society) and not to (moral or religious) conceptions of the good. The relevant question is not whether it is unfair if some conception of the good is not endorsed by the theory of justice, but whether it is fair to individuals that some conceptions of the good are not allowed (1975, p. 554).

Second, what then is special about individuals that makes fairness their due? The assumption is that for justice as fairness individuals are free and equal citizens, possessing two moral powers: The capacity for a sense of justice and the capacity to formulate a conception of the good. It is in relation to this conception of the person that the primary goods are a basic human need and not merely a subjective desire.

Third, this second presupposition of individuals as having two moral powers identifies the conception of justice as fairness as a *normative* conception. But as a normative conception Rawls does not see it as a conception that governs all of life. Rather than being, what Rawls calls, a comprehensive moral or religious doctrine, it is a political conception, formulating only a partial good, *i.e.*, what people need as citizens. So, the primary goods are called “all-purpose goods” (1988, p. 270), a conclusion that is derived from both the thin theory of the good and the ‘Aristotelian Principle’. The principles of justice are the principles that will provide each individual with the necessary liberties and opportunities to be the person he wants to be and to develop the capacities he has. The idea is that the goods which are distributed by the political conception of justice are necessary for achieving the comprehensive moral, religious or philosophical goods people individually might want to achieve.

Fourth, political relationships are of paramount importance to human beings, apart from other relationships because—and this point Rawls stresses from the onset of TJ—political society is closed: We are not free to leave or enter. Ultimately this means that apart from political society, persons are abstract individuals who can neither have legitimate expectations nor are entitled to anything (*cf.* TJ 110; 1987b,

p. 36). So, a normative political conception is, though a partial conception, a necessary part of anyone's moral conviction.

The essence of the overlapping consensus is that it does not try to find a common denominator among different religious, moral and philosophical conceptions, but rests on the incidence that several moral and religious doctrines, each out of their own reasoning, are able to support the same political conception as regulating their living together. Thus the support is not for convenience's sake as in a *modus vivendi* where people realize that no one can win the argument for the time being, but is given by each only on grounds that are reasonable in the light of their own moral view (*cf.* 1987a, p. 11).

Is such consensus possible? For Rawls there are two arguments why this consensus is not only possible, but is already at work. First, already the method of reflective equilibrium developed in TJ led to the realization that there are certain intuitive ideas about justice that are common to all people as members of society. One can say that the overlapping consensus is reached when our ideas are in reflective equilibrium, and in TJ this equilibrium is shown to be possible. Justice as fairness tries to uncover a political conception that can gain free and reasoned agreement in an overlapping consensus by connecting itself with shared fundamental ideas implicitly present in the public culture.

Second, the content of justice as fairness reflects what is implicitly present in the public culture and is derived from those democratic regimes that have been historically the more successful ones. So, the ideas contained in justice as fairness can be the basis for an overlapping consensus because the content of this idea of justice has already shown itself to be able to gain more support than other political conceptions (1987a, p. 6, 8).

Let me try to reconstruct the foregoing: The justificatory strength of the political conception of justice as fairness rests on the following explanation of the reasonableness and objectivity of the arguments for this conception of justice. In an overlapping consensus those moral convictions are endorsed as reasonable and objective principles which (1) are endorsed by reasonable and rational persons who use their reasoning powers intelligently and consistently. This explanation is, however, circular: It defines reasonable as reasonable. Thus, Rawls specifies this as (2) something is reasonable when it is according to a mutually recognized order of reasons which gives sufficient reasons to convince reasonable persons of the objectivity and reasonableness of the principles. But this would leave room for the belief in some metaphysical order of reason, so Rawls comes to (3): Such an order of reasons exists when there are shared methods to gain knowledge and a

common fund of knowledge as part of a tradition of political thought (in Rawls's case the tradition of democratic thought (*cf.* 1980, p. 539ff; 1987a, p. 8,6).

For the idea of an overlapping consensus it is supposed by Rawls that (1), (2) and (3) stand in a relation of mutual support and respective explanation. In short, something is reasonable when it is considered reasonable in a shared practice that is able to endure in time. Is it? Taken in its full implications, this would lead to a more comprehensive idea of morality in justice as fairness than only a political morality. If the criterion of rationality is what people agree upon what rationality is, then it is hard to see how this criterion of rationality can restrict itself to *public* reason. Reason cannot limit reason to only one specific activity or identity of the human being.

Rawls does not make a definite epistemological distinction between public and private reason. As a result, one can wonder how partial the political morality that Rawls advocates is, and how meaningful the distinction is between public and private identity that he sees as essential to justice as fairness. Does the overlapping consensus leave private convictions unchanged? The way Rawls explains the viability of the overlapping consensus leaves us with doubts. Although this consensus is not presented as a comprehensive moral doctrine, it is nowhere morally neutral! Under this consensus "it is left to citizens individually to resolve for themselves the questions of religion, philosophy and morals in accordance with the views they freely affirm" (1987a, p. 15), and this may cut deep in their individual convictions: Applied to the doctrine of free faith, Rawls remarks that "it is difficult, if not impossible, to believe in the damnation of those with whom we have long cooperated on fair terms with truth and confidence" (1987a, p. 23). So the free public reason is the final judge as to what individual convictions one will have. That does not explain by what or whom this public reason is judged, or whether what public reason establishes as truth, *is* truth. Fundamental dissent with the public reason must in Rawls's view disappear through adjusting of private convictions to public convictions.

There is one possible misunderstanding of Rawls's thought that might have afflicted the analysis thus far: One might argue that Rawls's proposal of a political conception of justice as concerned with someone's public identity is not meant to offer a systematic account of how moral conceptions in general develop, but only applies to those principles that are to order our living in society under a just constitution. For that purpose, we can only use principles that can be affirmed and endorsed by all. To coerce people into some morality they do not

affirm is against the respect due them as free and equal citizens. Presupposed in Rawls's theory is that the idea of justice must be of a kind that its demands are acceptable for everyone. All those conceptions that fail to be supported by arguments that everyone can endorse cannot become part of the public conception of justice. That does not say anything about their truth, it only says that in general people cannot come to an agreement about those issues. The idea is that government should be limited and neutral regarding religious, moral and philosophical questions. So, for example, if God did exist, as long as we cannot agree to that in society, this fact should not be of consideration in the ordering of society.

I think that this is only part of what Rawls is intending. Were Rawls advocating only, and nothing more than, this state-neutrality, I would have written another book. But Rawls does more. The idea of state-neutrality can be seen as an attitude of modesty: One does not want to force people into something if they cannot give their consent, so *all* compromise in some way their individual convictions by refraining from making public rules comply with certain ideals if those ideals do not appear to be supported by other people. This strategy, however, might lead to a constantly compromising of opinions. As there is never hundred percent agreement on any issue, rules have to be made for deciding what majority constitutes sufficient support. In politics, for example, the rule of thumb is then mostly: Fifty percent plus one for current affairs, two-thirds majority for constitutional issues. That creates the problem that dissenters will always be present, and have to make more compromises than the majority. Also, the majority will be fluctuating, depending on the outcome of the elections, likely leading to an instability of government politics over years. Modest state-neutrality seems itself a compromise, and a compromising policy. It is therefore not the choice of Rawls in TJ. Justice is uncompromising.

Rawls wants to establish a conception of justice that is not compromising, and preferably not coercive. The Kantian idea of civil society as people living together under coercive laws is out of question. Coercion only appears in relation to the notoriously intolerant, in relation to those people who resist the rational arguments that lead to the conception of justice as fairness. Coercion is, however, a last resort: in most cases Rawls expects the workings of moral psychology to soften and wipe out the intolerant ideas when they spring up (TJ 219).⁴

The importance Rawls attaches to the workings of a moral psychology shows that his conception is more than some sort of majority

4 M.J. Jackson gives a fine analysis of the problem of coercion in Rawls's theory. See his *Matters of Justice* (1986), pp. 136ff.

strategy or *modus vivendi*. The conception of justice as fairness contributes to the moral development of the people living in a well-ordered society. People acquire the subsequent attitudes, and these attitudes are not limited to what one believes in the publicly-held convictions; also one's privately-held convictions will be influenced. If people's wider (private) convictions are not consistent with the principles of justice, then people will adjust those wider convictions, rather than the political conception of justice (1987a, p. 19); and as we have seen, this will even go so far, according to Rawls, that one may find it hard to believe in the damnation of those with whom one has cooperated on fair terms (1987a, p. 23). Justice as fairness creates its own moral support.

The reason Rawls allocates certain beliefs to the private realm has not so much to do with an epistemological restraint. Current moral and religious doctrines, so is his opinion, have not shown able to cluster together in an agreement, but have led to conflict (1985, p. 226, 245, 248). The beginning of a conception of justice can only be found in the sphere where there is no deep conflict. Existing moral and religious doctrines were not able to overcome conflicts. For one, this could be due to a lack of epistemological criteria, but the idea of justice as fairness can suffer from the same (see the discussions over the function of the original position). What is more likely to be Rawls's evaluation is that because these convictions were not able to gain enough support among citizens, there must be something fundamentally wrong with those convictions. Once we see that there are some moral institutions that do have general support, and see that this support is there because 'we' consider ourselves as free and equal citizens, one can assume that those conflicting convictions are at odds with the basic idea of free and equal citizenship. But then to allocate them to the private identity of individuals is an empty gesture. Public and private identities are still identities of one person, so only a schizophrenic would privately hold beliefs which he knows are irreconcilable with what he publicly affirms.

The whole idea of an overlapping consensus would be senseless if the procedure only affected people's public identity. It would then either lead to an elevation of the schizophrenic, or be nothing more than a *modus vivendi* where people are waiting to see their private 'madness' gain enough support to become part, or the whole, of the public consensus. The workings of moral psychology, at least, need a firmer foundation in people's private convictions. The procedure of the overlapping consensus, however, takes a different course. It starts from some limited, partial conception to which all people can rationally agree and actually *do* agree, and which has shown to be successful

in history. The non-comprehensive character is that it is a consensus on a definite part of human activity—in this case political activity. Based on that consensus the expectation is that it will be self-reinforcing and will grow out into a more complete, more comprehensive view. Rather than *starting* with a comprehensive view, the *result* will be a comprehensive view. How this comprehensive conception will look in practice is left over to the workings of the theory.

Again fraternity

Let us go back to the initial idea—that Rawls tries to reconcile the lines of freedom and of equality in political thought—so that we can see where the foregoing discussion has brought us. First, there is the individualistic line in which figure the rights of the person. Rawls wants to safeguard as much diversity in society as possible, as long as the liberty of one person does not violate the liberty of another. Second, there is the line which advocates the point of view of the public interest. This perspective gives priority to the equality of man in the reconstruction of society. Rawls speaks in this respect of an equal distribution of goods and also of the plan of society in which the plans of the individual have to fit.

Each of these lines of thought connects individual and society in a particular way. The first, individualistic line, leads to the idea of society as a voluntary scheme—society as the voluntary associations formed by free and equal individuals who have the liberty to choose (*cf.* TJ 13). Rawls wants to design a concept of justice that brings society as close to such a voluntary association as possible. Still, society *is not* a voluntary association. If Rawls would have left his theory at this point, TJ would not have been more than other theories based on the calculated self-interest of people.

In the second line, society as a social union, individuals are seen as contributors to the endeavor of realizing justice. People's assets are now common assets, which contribute to the advantage of all, particularly the less advantaged. Individual life-plans are considered a plan within a plan. Still, this does not rule out the reply "So what?" to Rawls's demand "share one another's fate" (*cf.* Wolff 1977, p. 184). One might discard this question as the reply of the ultimate skeptic. However, I think this a legitimate question regarding the issue of the morality of the principles. A theory of justice should at least not give much room for this reply. The one thing worse than opposition is indifference.

The meeting point of these two separate lines of thought is initially presented as the idea of *fraternity*. Fraternity would make it possible to consider relations with everyone at the same level as relations in voluntary associations by establishing an immediate link (*i.e.*, the link through ‘sharing one another’s fate’) between people. Fraternity then establishes a continuity between individual and society, private and public, by providing the moral point of view from which people voluntarily share one another’s fate. The morality contained in fraternity could account for the moral point of view from which TJ is developed.

As Rawls’s theory runs in TJ, the idea of fraternity is both a condition *sine qua non* for the principles of justice as a whole, and it is realized by the agreed-to principles in the original position. The idea of fraternity as Rawls takes it from the Enlightenment adage is of a different nature than freedom and equality. Fraternity touches the person as a moral human being and asks for a commitment that surpasses the demands of liberty and equality.

From the viewpoint of the original position, a moral point of view is not possible because morality must first be established through the principles which have to be chosen. In Rawls’s account of society as a social union the idea of fraternity is captured by the idea of the social nature of mankind which is responsible for the spontaneous formation of social unions. The idea of fraternity is in man’s social existence inherent to society itself.

Morality is, in Rawls’s theory, contained in society. The original position does not constitute society, as was the case with the classical contractarian tradition. In the original position people choose principles that will order their living together—they do not choose a sovereign. *That* people form a society is not a problem for Rawls. Society does not need an explanation.⁵ In the original position the parties choose principles for the society they are going to live in; they do not choose for society, it is not an option for them to become hermits. But neither is there the *need* to form a society as in the classical picture of the war of all against all. What does need an explanation is the morality that is given with the fact of society and that governs its members. Justice, we can say, is not only the first virtue of social institutions, but also primarily the virtue of social institutions. The hypothetical original position is a transcendental argument disguised as a choice-situation, and is only designed to convince that the principles for society are of moral value and in the best interest of the

5. Michael J. Jackson rightly remarks that Rawls thus takes for granted what the classical contractarian thinking tried to explain: The fact of society itself—Jackson 1986, p. 97.

members of society. For the argument to work it does not need to be connected with individuals' concerns. The principles of justice proceed the original position. The fact of society is the vehicle of morality.

Rawls gives a complete reformulation of the poles that constitute the relation between individual and society. Individual freedom is no longer the freedom to be the person one wants to be, but the freedom to use the relative chances to realize the person one might turn out to be once one leaves the original position. Freedom is always freedom *within* the limits of the principles of justice and is specified in such a way that it fully supports the principles of justice (*cf.* Rawls 1980, pp. 543ff). It is worthwhile to note that Rawls does not talk about freedom in his first principle, but talks instead about liberties. The well-ordered society is not characterized by the freedom of its members, but by the equal liberties or opportunities it provides for its members.

Society as a social union is neither the contractarian society in which individual freedom is limited for the sake of cooperation, nor the Aristotelian *polis* where public life is the *telos* of its members, but the primary circle of identification for individuals and the ultimate meaning of their existence: Individuals are there for the common assets of society (TJ 179). There is no tension between individual and society because individuality is being a member of society.

One result of this view is the 'de-ethicizing' of the individual. When ethical principles must be general and the public realm is the place where generality is reached, then there is no ethical point to the private deliberations of individuals. Inasmuch as individuals have a moral point of view, it is their public (general) identity speaking. Their private points of view are excluded from ethical considerations. Rawls's theory leaves the contractarian approach behind and is at par with other kinds of discourse ethics (like Habermas's). Society and the public discussion about its structure is the primary and fundamental point of view, the 'archimedean point' for assessing morality. The overlapping consensus becomes the reference for the realization of the political good of a just society. But how does the morality of fraternity spring up in this discussion? It seems that this morality is somehow contained in the tradition of a certain political conception, or in the public field. How, then, can this public field be normative?

Splitting image

As Rawls declares, he wants to apply the principle of toleration to philosophy itself. The modern state is characterized, according to

Rawls, by a diversity of doctrines and a plurality of conflicting—even incommensurable (1982, p.161)—philosophical and moral convictions adhered to by people. Therefore, “as a political matter, no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state” (1985, p. 225). That, as such, is a disputable statement: Without some general moral conception it would be hard to imagine any sort of justice being established and carried out. But we have to interpret this statement keeping in mind what Rawls makes clear in TJ, that justice as fairness will generate its own moral support by creating a sense of justice. This, in turn, leaves the ideal of tolerance less morally neutral. That modern Western society incorporates a plurality of philosophical and moral doctrines is a good which cannot be denied, nor taken away. What is the issue is whether Rawls removes the moral or ethical concern from this coexistence of different moral views in his society, especially when he splits the person into separate private and public persons.

In his account of toleration, Rawls states that limiting the liberty of conscience is only possible in the light of criteria that appeal to what everyone can accept—that is, to what is based on common knowledge and understanding of the world (TJ 213). What is generally acceptable is, in Rawls’s thought, founded on the principles of justice (*id.*). These principles are chosen by people considered only from their *public identity*. Another possibility is ruled out by Rawls’s explanations on this issue.

In his *Dewey Lectures*, “Kantian constructivism in moral theory” (1980), Rawls states the following: “In public questions, ways of reasoning and rules of evidence for reaching true general beliefs that help settle whether institutions are just should be of a kind that everyone can recognize” (1980, p. 539). In the original position, so we learn here, not only is there an agreement on the principles of justice made or reached, but these principles also determine the ways of reasoning and rules for the weighing of evidence which govern the application of those principles (1980, p. 541). The problem with this is that it means for Rawls that when people live in a well-ordered society, a society that has been ordered according to the principles of justice, they refrain from pressing their point of view when this is based on philosophical or religious grounds which are *not* commonly based (1980, p. 540, 541). In this way, a whole realm of arguments is excluded from the public arena. Actually, we can ask whether there *can* be difference of opinion, a question we have encountered before. Ethical principles must be general, so Rawls agrees, which means that they hold always, for any society and generation (TJ 131). When people

refrain from pressing their opinion in the debate when they think certain institutions and policies to be wrong, then we must conclude that they do not have ethical reasons for disagreeing. But then there are also no real differences of opinion, no “pervasive religious and philosophical differences” (1980, p. 540), or these differences are not important for the public discussion.

For Rawls, there are no *rational* grounds to disagree with the public agreement. But can we *reasonably* be expected to refrain from pressing our point when the grounds we have are not commonly based? A consequence of this would be the following situation: Someone personally holds that a foetus *is* human life from conception, but publicly holds that the foetus first becomes human life when it is three months of age. Many people in government offices see themselves in this situation because their private views are not commonly shared, but does that make it a *virtue* to be appraised in political theory? Consistent with Rawls’s separation between private and public identity such a double position becomes the ultimate political virtue. The fact that the belief that a foetus is human life cannot find enough support for it to be part of the common knowledge and understanding of the world, does not render that belief false (neither does it make it true).⁶ What now happens, however, is that ethically true arguments will be expelled from the public debate on the wrong grounds. For Rawls, it is not the ultimate truth of the ethical point of view which counts, but only whether free public reason can support it in a consensus.

Another point is that, in this way, the establishment of justice does not even appeal to ethical considerations. The ethical conflict exists therein that, in the case mentioned, someone sees that the only line open for public legislature—*serving justice*—is a line which violates his strongest convictions about what is valuable in a human life. Realizing justice has to do with settling questions of ethical truth, and differences of opinion on ethical truth lead to schisms and the need for toleration—toleration in the true sense: Allowing existence of something which one considers to be *not* true. Rawls, however, removes the question of truth from both the public discussion and the idea of toleration.

The post-metaphysical, argumentative assumptions that underlie Rawls’s theory, are themselves—philosophically speaking—subject to dispute. The discussions on the public field are fed by exactly those metaphysical and religious doctrines that will be ruled out in Rawls’s

6. A point nicely made by Thomas Nagel when he points out that ethics is more than the ‘grammar’ of our moral sense: Whatever grammar native speakers agree on is English, but whatever men agree in condemning is not necessarily wrong Nagel 1975, p.2.

common knowledge of the world, and these discussions get their ethical and political significance because they are fed by these doctrines. Only then do they pose the question “what is morally right?”

Rawls’s theory is intended as a *public justification*. Rawls sees the problem of modern democracies and their need for legitimation. He wants to develop a theory that links a particular conception of the person with principles of justice (1980, p. 516). Out of this interest we have followed him, in TJ, in his account of the connections between the right and the good, where society is seen as a good for persons. Justice as fairness not only changes the concept of society, but also the person. At the same time, there is a gradual retreat in the realm of the public in Rawls’s theory. Instead of giving a private *and* public justification for his principles of justice, which would be consistent with the origin mentioned before, Rawls gives only a *public* justification. The *private* side is left out of consideration, and it seems that all that is left over is a society consisting of persons with only a public, and no private, identity. But the moment Rawls speaks of society as a social union of social unions, and includes families and bonds of friendship therein (TJ 525), we cannot see how these social unions consist of anything other than persons with a private identity, especially when Rawls explicitly states that these ties cannot be considered to be purely instrumental (*id.*). ‘Social unions’ such as families and friendships are ruled and articulated by those philosophical and religious ideas which are discredited on the public level. Is it then consistent to hold that for society as a whole, these private considerations do not count? When society has to come as close to a voluntary scheme as possible (TJ 3), what is then the reason to deny just those ideas and convictions which govern our voluntary associations from also governing our giving shape to society and to justice?

Conclusions

These questions urge us to investigate further the backgrounds of the conceptions of individuality and society that Rawls develops. One problem with such an investigation is that the general terms and context of Rawls’s theory give rise to ambiguous explanations. As M. Schoolman points out: “The ontology of liberalism offers no escape from a relation between individualism and communitarianism that is essentially ambiguous” (Schoolman 1987, p. 206). Rawls’s position, I have argued, rests on both an individualistic and a communitarian line of thought and the communitarian line seems to gain the upperhand.

In Chapter 2, I argued that behind the individualism of the choice in the original position is a fundamental moral ideal that sets the stage for the choice for principles of justice. In this chapter I showed that the public moral agreement embodied in the idea of an overlapping consensus would be meaningless if it did not affect the individual's private moral point of view. Justice as fairness appears to be the result of the communal identity of 'we, free and equal citizens'. There are three aspects of Rawls's theory that must be considered on this note. In short, they involve the status of the deontology of the principles of justice, the idea of a public or communal morality, and the question of whether the public support for certain principles of justice can be elevated to a more general level, *i.e.*, can be interpreted separately from a specific cultural identity of 'we, democratic citizens'. These issues I would like to specify as follows.

1) What is the moral perspective of the individual? We have seen that the moral perspective is problematic in Rawls's theory. From the onset, Rawls wanted to see the principles of justice as categorical imperatives in a Kantian sense—principles, thus, which are formulated by persons as noumenal selves. The Kantian perspective is of foremost importance for Rawls's view of the moral powers of the person. In Rawls's moral theory, just as in Kant's moral theory, ethical acts are acts which spring from an autonomous person (TJ 251ff). That Rawls does not succeed in giving a satisfactory account of individual morality has to do with the way his theory relates to that of Kant—Rawls sees his Kantianism as a matter of analogy and not identity, and he reverses the order of social and individual ethics in Kant's ethical thinking (Chapter 4).

2) The question of a moral community. The original position as a pre-moral situation does not seem to imply any moral ties between human beings. But, reflected in the idea of fraternity and the community of mankind, there is a paramount moral background incorporated in Rawls's theory, which seems to imply the existence of a moral community. Although Rawls joins Hegel in his critique on 'private society' or the *bürgerliche Gesellschaft*, he is afraid of advocating anything like Hegel's (presumed) organicist state (though Rawls never refers to Hegel's state in words). At the same time, the way he describes society as a social union and the individual's life-plan herein, leaves the door open to an organicist conception of society in which the individual completely merges into the pre-laid paths of society. The later development of an overlapping consensus and the normativity of this public consensus raises once again questions that can only be considered in relation to Hegel's thinking. Clarity of the relation

between Rawls and Hegel shall give a better view of what Rawls wants to avoid and what he wants to advocate (Chapter 5).

(3) Subsequently I want to continue this research bearing in mind the following considerations: Rawls wants to give a *justification* of justice, without making metaphysical or religious or any other kind of *a priori* assumptions. Is justification in this way possible? Justification as self-reference to the public political discourse is the solution Rawls proposes: Justification by public reason. But how is the normativity and authority of the consensus established? One argument Rawls gives is the original position, but how strong is this argument when it does not elaborate the moral point of view itself? Where, after all, does the public consensus get its moral strength so as to shape and mold our private convictions? Is it based on the force of the democratic tradition, as it seems in the 1987 article? But how can we then establish the rationality of that tradition? What Rawls is aiming at, it seems to me, is some combination of Kantian deontology and a Hegelian communal morality. With that, he is in agreement with Habermas's discursive philosophy. In order to clarify this line in Rawls's theory I will discuss some important insights of Habermas's thinking (Chapter 6).

The challenge a theory of justice has to face is to take pluralism in Western society serious *and* leave it in existence even after a public spirit is established. All attempts to deal with pluralism place themselves somewhere between the autonomous freedom of Kant and the communitarian ethics of Hegel. Let us now turn to these two historical roots of Rawls's thought.

PART TWO

Backgrounds




CHAPTER 4 The Kantian Background

WHEN WE WANT to understand the relation between private and public we arrive at questions about private and public *morality*. We have seen that these stand in a relation of tension, given the premises of Western political thinking that morality is a matter of free, individual choice, and that society ought to be ordered according to *moral* rules, but is involuntarily embracing our life. In the history of political thinking this tension has been resolved in different ways, each stressing either the private, or the public side.

In John Rawls's theory it appeared that he starts out stressing the individual or private moment of this relationship: His starting-point of analysis was the self-interested individual. But when following the path of his theory, it appeared that the public line became stronger, even to a point where we asked whether this public line did not completely submerge the private moment. We then ended PART ONE with asking for the backgrounds of Rawls's idea of individual and social morality.

Western political thinking is split between, on the one hand, an individualist, and on the other hand, a communal approach. Rawls interpreted this split as that between the traditions of Locke and of

Rousseau. But after our journey through Rawls's theory, this opposition boiled down to that between a Kantian deontology of principles of justice, and a Hegelian idea of a moral community. Put in different terms, it is the relationship between and priority of formal rules and the content of morality. It is this relation between form and content, formality and morality, that will be the connection between the following chapters.

Kant's idea of individual moral autonomy and Hegel's concrete communal ethics (*Sittlichkeit*): These are the poles that Rawls tries to connect. In relation to the individual he wants to satisfy the demands of Kantian autonomous morality. And assessing the conception of society that suits his conception of justice, he starts with the same point of departure as Hegel's, *i.e.*, private or civil society: The society as a playground of individual interests. But though he does not want to follow an organicist line like Hegel's, tacitly, especially in later articles, he approaches more and more the Hegelian idea of an ethical-social context as the paramount orientation for the individual morality. We thus have to face the questions of how exactly Rawls does relate to the Kantian heritage so that he can move in this Hegelian direction, and how this Hegelian trait in his thinking changes the status and character of his theory.

Kant's political philosophy

Assessing the relation between Kant and Rawls is an obvious endeavor: Rawls himself points to the Kantian background of his theory. In this respect Rawls is being credited for re-awakening Anglo-Saxon political philosophy to the study of Kant (Riley 1982, p. ix). The precise meaning of the label *Kantian* that Rawls puts on his theory is, however, not at all clear. In two places Rawls gives an explanation of his indebtedness to Kant: First in TJ §40, later in "Kantian constructivism in moral theory" (Rawls 1980—further referred to as *Dewey Lectures*). These lectures are not the most readable of what Rawls has written—the argument is hard to follow and leaves the definite impression that his Kantianism is not without problems.

There are several fields where Rawls can meet problems in establishing a 'Kantian' theory. For one, Rawls states that his Kantianism is a matter of *analogy* and not of *identity*. We cannot assess what that means until after we have outlined what characteristics Rawls borrows from Kant. What comes into the picture here is, first, the notions of *autonomy* and *moral personality*; and second, the idea that according to

Rawls this priority of justice is based on Kant's moral philosophy (TJ 31n). Before turning to these issues I shall give a brief outline of those aspects of Kant's thinking which are important for our present studies.¹

Kant's Critiques

One cannot understand Kant's political ideas without having some insight into his general philosophy. We begin with some moments from the critical philosophy: Kant's critical philosophy is a careful scrutinizing of the powers of reason in order to determine what can and what cannot be known scientifically. That intention is quite adequately expressed in the title of the summary Kant wrote of his *Critique of Pure Reason: The Prolegomena for any Future Metaphysics that may be given the Status of a Science*.² Science, the field of knowledge, is a product of theoretical reason. Metaphysics is not knowledge, but therefore not nonsense. What Kant wants to achieve is a sharp demarcation between science, and non-science so that *both* are under the discipline of reason.

In Kant's philosophy one can find two related conclusions out of this attempt. One can be formulated as follows: We can explain what happens around us from two different points of view. An example of this can be found in a footnote in *Eternal Peace* where Kant explains that we can see the curing of a disease as either the result of some medication—thus in terms of pure natural causality the result of God's direct actions. Neither point of view is a refutation of the other, so argues Kant (Reiss 1970, p. 99n).

The other conclusion reads so: We have to make certain basic assumptions in order to make possible our knowledge and understanding of the world. Theoretical reason cannot account for everything, it has to presuppose certain principles and ideas in order to be able to function. An example of this conclusion can be found in the transcendental ideas of God, the world, the soul, freedom and immortality—we come to this later in this chapter.

The kernel of Kant's philosophy is the distinction he makes between appearance and the 'thing in itself' (*Ding an sich*): *phenomenon* and

1. For excellent introductions to Kant's political philosophy I refer to: Hans Reiss, *Kant's Political Writings*, (1970); Howard Williams, *Kant's Political Philosophy*, (1985); Patrick Riley, *Kant's Political Philosophy*, (1982). Regarding the references I give to some of Kant's smaller, 'post-critical' writings: Because these writings have rather long and complicated titles, I only give short references in the text, and the full titles in footnotes.

2. *Prolegomena zu einer jeder künftigen Metaphysik die als Wissenschaft wird auftreten können*.

noumenon, the world of nature and of freedom. The laws that govern nature—or rather, the laws that govern nature according to the natural sciences—belong to nature as phenomenon. Whether they also govern the things in itself—nature as noumenon—we cannot know. In this way Kant reconciled the certainty we have in the laws of nature with David Hume’s skepticism about our knowledge of natural laws. Thus causality, for example, is not a concept derived from experience but a concept employed by theoretical reason to make experience possible.

Now this is not very problematic as long as it concerns the world of nature, the things around us. But what about ourselves?—are we not ourselves part of nature? “Yes,” says Kant, we can consider ourselves either as a phenomenon or as a noumenon. From the first point of view we appear to be governed by certain laws; considered as a noumenon, we are free of those laws—rather, we are ourselves the lawgivers. Man is both subject to nature *and* autonomous. Morality is seated in our *noumenal* existence, where we are not afflicted by the contingencies and uncertainties (Hume’s skepticism) of everyday life or our *phenomenal* existence.

Both worlds seem to exist quite separate from each other in man. This is put forward disturbingly strongly in the opening line of Kant’s *Idea for a Universal History with Cosmopolitan Purpose (Idea)*:³ “Whatever conception of the freedom of the will one may form in terms of metaphysics, the will’s manifestations in the world of phenomena, i.e. human actions, are determined in accordance with natural laws, as is every other natural event” (Reiss 1970, p. 41/Kant 1784, p. 5).⁴ Perhaps the hidden implication *is* that our conclusions in both fields do not affect each other. That would give at least some explanation for Kant’s insisting that “there is not the slightest contradiction in holding a *thing as an appearance* (as belonging to the sensible world) subject to certain laws of which it is independent as a *thing* or being *in itself*” (*Grundlegung* 94/AA 457).⁵ However, this still leaves the uneasiness that this division into phenomenon and noumenon is hard to digest when the noumenon studies its own phenomenon.

When looking for some kind of connection between these two fields, we find a similarity in the accounts Kant gives of theoretical and

3. *Idee zu einer allgemeinen Geschichte in weltbürgerliche Absicht*

4. “Was man sich auch in metaphysischer Absicht für einen Begriff von der *Freiheit des Willens* machen mag: so sind doch die *Erscheinungen* desselben, die menschlichen Handlungen, ebensowohl als jede andere Naturbegebenheit nach allgemeinen Naturgesetzen bestimmt.”

5. “Denn, daß ein *Ding in der Erscheinung* (das zur Sinnenwelt gehörig) gewissen Gesetzen unterworfen ist, von welchen eben dasselbe, als *Ding* oder Wesen *an sich selbst*, unabhängig ist, enthält nicht den mindesten Widerspruch....”

practical reason. Both are characterized as 'legislation', and therefore both have to be free(d) of the impurities of the phenomenal world. The legislative activity of practical reason is laid down in Kant's notion of autonomy. Autonomy is self-legislation by the will (*Grundlegung* 66/AA 433), as contrasted to heteronomy, where the will is defined given the condition of something which is not-will. The laws governing the will must be the product of the will alone. What Kant is after is the pure form of the will, without reference to any empirical content. Heteronomy is a determination of the will which is related to particular contents and is therewith affected by the caprice and change of the phenomenal world that make the will impure. It would eventually deny the moral character of the will. Heteronomy takes on the form of rules such as: Do this in order to achieve that. Morality is then dependent upon our *inclination* to do this—and inclination is not a lasting drive to action. According to Kant, the morality of our actions depends upon our suspending all particular desires, strivings and goals; then we come to the pure will, duty for duty's sake—moral acts are then not done for the sake of something else (our interests in wealth or a good life after death), but are done for their own sake.

Morality has its place in the world of freedom, where Reason can formulate laws *a priori*, *i.e.* laws which are not conditioned by empirical (natural) circumstances or motivations. As said above, for Kant the principle of morality must be a principle which follows from man's free legislative autonomy—so, the first formulation this leads to is (*Grundlegung* 51/AA 421):

Act only on that maxim through which you can, at the same time, will that it should become a universal law.⁶

This formulation contains a direct link with the pure formality of the *Critique of Pure Reason*: Your maxim should be as fixed and constant as the laws of nature. Therefore, Kant immediately follows with a second formulation (*id.*):

Act as if the maxim of your action were to become through your will a *universal law of nature*.⁷

This is the categorical imperative as a *practical law* or a *synthetic a priori*

6. "Handle nur nach derjenigen Maxime, durch die du zugleich wollen kannst, daß sie ein allgemeines Gesetz werde."

7. "Handle so, als ob die Maxime deiner Handlung durch deiner Willen zum *allgemeinen Naturgesetze* werden sollte."

practical rule (*id.* 50/AA 420). In this second formulation Kant already hints at a unity between pure reason and practical reason.

As Kant himself remarks, the problem with this formulation is that the will can only be driven to action by some content or goal, but this practical law is purely *formal*. Kant saw that the obvious content for the will in utilitarian principles—happiness—is also the reason why they have a general appeal to man. However, utilitarian principles are conditional and thus heteronomous. Kant looks for an end that is autonomous, *i.e.*, which exists in itself and is not the means to some other end. This he finds in man as a rational being (*vernünftiges Wesen*). Man's existence has an absolute value in itself, is an end in itself, and can thus be a ground for a practical law (*Grundlegung* 58-61/AA 426-429). This leads us to (*id.* 61/AA 429):

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.⁸

From this we come to the following step: Each rational being as end in itself sees itself, when subjected to laws, at the same time as a general lawgiver. And as this general lawgiver he sees the laws, consequently, from the perspective of each and every rational being. Each rational being is lawgiver as *member* of a world of rational beings (*mundus intelligibilis*) or a Kingdom of ends (*id.* 72/AA 438). A Kingdom of ends is an analogy with the Kingdom of Nature, but now according to self-imposed rules, instead of externally working causes.

In Kant's moral philosophy then, there is no clear distinction between the social perspective and the individual perspective. The practical law, formulated for the one rational being, contains in its formal principle the law for all rational beings or the Kingdom of (human beings as) ends in itself. The categorical imperative enfolds itself as an *ethical* principle in which individual and social moral principles are given in intrinsic unity. Nothing less, indeed, could be achieved: To pin down the principles that shall guide our actions unconditionally, Kant has to offer a comprehensive approach. Whether or not the aforementioned gap between noumenal and phenomenal world is overcome in this comprehensive approach remains a question to which we shall return after we investigate in what perspective Kant's moral theory places his political ideas.

8. "Handle so daß du die Menschheit sowohl in deiner Person als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest."

Moral philosophy and politics

Kant's view on politics and the ordering of society is given in a nutshell in a remark in *Idea*: "We are *civilized* to the point of excess in all kinds of social courtesies and proprieties. But we are still a long way from the point where we could consider ourselves *morally* mature" (Reiss 1970, p. 49/Kant 1784, p. 15).⁹

The point, in other words, of forming an ordered society, is the moral development of mankind. In *Idea* Kant sets the realization of the powers of reason, *i.e.*, morality, as the final goal toward which history is moving. What does this mean for the ordering of society? It seems at first glance that Kant does not come up with strikingly new insights. He places himself in the contractarian tradition: The union of people in society is a contract, but a special kind of contract. Consistent with the idea of autonomy, this contract cannot be for the sake of some external end as he makes clear in *Theory and Practice* (Reiss 1970, p. 73/Kant 1793, p. 86).¹⁰ Rather, the civil constitution (*bürgerliche Verfassung*) or "commonwealth" (*gemeines Wesen*) is a union which is an end in itself, and therefore an "unconditional and primary duty." This end which is duty and "the highest formal condition of all other external duties," is "the right of man *under coercive public laws*" (*id.*). *Right*, or the concept of law,¹¹ then, is "the restriction of each individual's freedom, so that it harmonises with the freedom of everyone else." This principle is *a priori* set by the legislating reason—not only because it is set by autonomous, free people, but also because empirical ends like happiness cannot serve as a common principle for the will (*id.*).

The civil constitution is then founded upon three *a priori* principles:

1. The *freedom* of each member as a *human being*;
2. the *equality* of all as *subject* to the head of state;
3. the *independence* of each member as a *citizen* (Reiss 1970, p. 74/Kant 1793, p. 87).

The last principle, the independence as a citizen, needs some explana-

9. "Wir sind *zivilisiert* bis zum Überlästigen, zu allerlei gesellschaftlicher Artigkeit und Anständigkeit. Aber uns für schon *moralisiert* zu halten, daran fehlt noch sehr viel."

10. On the Common Saying: "This May be True in Theory, but it does not Apply in Practice." *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis.*

11. The term 'Right' is taken from Nisbet's translation. The difficulty with the German *Recht* is that it refers also to the concept or system of law, a difference which can in English easily lead to misunderstandings. See also Reiss 1970, p. 194n5.

tion. Kant does not advance a democratic rule in the way we understand it. The third principle states that only those people who are financially independent from others (who are their own masters) can be co-legislators—thus Kant excludes women, children, and in general all people who are in service by someone else. Nowadays this sounds odd, but for Kant this follows from the idea of autonomy combined with his departure from public right. As Manfred Riedel points out, Kant’s philosophy of law does not take as its foundation the ‘master of the household’, but the having of property (Riedel 1975, p. 275f). So, only people who have some property of their own and thus do not serve ends other than themselves, people thus who are independent and autonomous, can be general legislators.

The public laws which are thus constituted are the result of a public will. This public will is none other than that of the entire people—an individual will cannot legislate for the commonwealth. From the categorical imperative which establishes a Kingdom of ends in itself, it follows that in the will of the entire people, all men decide for all, and thus each for himself (Reiss 1970, p. 77/Kant 1793, p. 92). This guarantees the justice of the laws, for “only towards oneself can one never act unjustly” (*id.*).

I think it legitimate to say that Kant saw as the final goal of history the morality of man, or, as he puts it, the human species as a rational being is destined, by an Idea of Reason, to the common end of enabling the Highest good (*Religion*, 105). Therefore a civil constitution is not the last duty or end for mankind. Civil society is the *first* duty that is dictated by reason. The laws that are formulated in society are externally compulsive laws. Morality, or the ethical principle of the categorical imperative, demands inner certainty of duty, without any compulsion from outside. From the point of view of morality, acts done under the laws of civil constitution are expressions of legality, not of morality. Still, in the primary duty of civil society there is at least the intention—and perhaps this is the originality of Kant’s political thinking—that some moral ideals can be realized by legal means (see Riley 1983, p. 168).

Correlating with civil society as a juridical being under compulsive acts, there is an ethical commonwealth under laws of virtue (*Tugendgesetze—Religion* 107). Because the laws in this commonwealth are meant to propagate the *morality* of acts, the people itself cannot be the lawgiver. The political laws are only concerned with the outside of human behavior (legality); morality is concerned with the inner motive for acts. Rather, only an ethical being whose true duties are at the same time his commands, can be legislator of this ethical commonwealth.

This being, according to Kant, is the idea of God as a moral World-Governor (*Religion* 105-107).

That Kant is in *Religion* speaking of an ethical commonwealth as a church-community, does not detract from the importance of what he says for the idea of right in politics. The being whose duty is his command and whose will is general law is already in the *Grundlegung* introduced as the crown on the principle of morality. The categorical imperative which states that the principle for our will *should be* principle for general legislation, implies a being whose will *is* law (cf. *Grundlegung* 42/AA 414). And the Kingdom of ends contains a head who is perfectly independent of needs and limitations of the will; in other words a being who is not afflicted by inclination (*id.* 67/AA 434). The imperfectness (*unvollkommenheit*) of the human will causes a gap between *is* and *ought*—only perfection closes that gap, and that perfection is God or the *ought* that *is*.

The actual roundabouts of man are thus characterized by imperfection, falling short of the *ought* that *is*. But this *ought* that *is* is the ethical perspective from which man's actions are judged. It is this perspective that ultimately defines and gives meaning to the juridical actions in a civil constitution. The inner purity proceeds and exceeds the external compliance; the external compliance is only understandable from the point of view of the inner purity. The actual way of humanity is from formality to morality, the systematic relation is that morality defines formality.

Judgment

With this knowledge of the ethical perspective behind the establishing of a civil community we can return to the problem that kept us busy in the first sections of this chapter. Properly formulated this problem runs as follows: How does one combine or reconcile the legislative activity through the concepts of nature by understanding (*Critique of Pure Reason*) with the legislation through concepts of freedom by Reason (*Critique of Practical Reason*)?

The peculiarity of theoretical and practical reason is that neither one can provide theoretical understanding of its object itself: Theoretical reason is legislative for phenomena and (thus) not for the thing itself; practical reason is concerned with the laws that the thing itself (in this case man) formulates and thus cannot represent its object in a phenomenon. This is the shape the problem we met in the *Grundlegung*

takes in the *Critique of Judgment* (*Judgment* B xix): Neither one reaches out to the other.

For Kant, there are three mental powers: The faculty of knowledge (*Erkenntnisvermögen*)—this power he defined in *Pure Reason*; the feeling of pleasure or displeasure (*das Gefühl der Lust und Unlust*)—this power he deals with in the *Critique of Judgment*; and the faculty of desire (*Begehrungsvermögen*)—this faculty he analyses in *Practical Reason* (*Judgment* B xxii). The problem that is put before us is that knowledge is only possible if there are laws under which that knowledge can be subsumed—otherwise our mental powers have no power at all to acquire anything. Thus we acquire knowledge of nature as a phenomenon because we can formulate laws of nature via our faculty of knowledge. Thus we acquire moral knowledge via our legislation out of freedom. But how can these moral laws become effective causes in the world of the phenomenon. For being moral means acting morally but the critiques of pure reason and practical reason seem to tell us that there is an unbridgeable gap between noumenon and phenomenon. In Kant's system, judgment, which he discusses in his third critique, can answer this question of how the legislation of freedom can be an effective cause in the realm of nature.

The concept of freedom *ought* to realize its ends in the empirical world, only then is there no contradiction between the laws of nature and the laws of freedom. The power to achieve this contains two moments: First, the power to think the particular subsumed under the general (*Judgment* B xxv f.). This power can either be *determining*—*i.e.* the general is given and the particular is subsumed under this rule—or *reflective*—*i.e.* only the particular is given and the general has to be found or constructed. Reflective judgment must formulate its own principle in order to do this. Analogous to the results of *The Critique of Pure Reason*, which were that knowledge is impossible without laws, reflective judgment thinks the particular for which there is no *a priori* law under such a unity *as if* some understanding (not ours) has designed them for our faculty of knowledge (*Erkenntnisvermögen*). Thus it makes possible a system of experience according to particular laws of nature. Here the second moment of Judgment comes to the fore: that of *purposefulness*. Nature is represented in such a way as if an understanding contains the ground of unity of the variety of empirical laws. Causality by laws of freedom is thus possible as the final end that ought to exist. The idea of a purposeful nature makes it possible that what practical reason poses as a final end is realized through the laws of nature. In this context we also have to situate Kant's political philosophy—as he himself does in *Judgment* §85.

Reflective judgment implies a critical use of concepts—which means it is concerned with the *limits* of what we can know with certainty and *how* we can know what we know. Determining judgment is only dogmatic in its use (§74). Reflective judgment is autonomous—it constructs its principles out of its own reason, without reference to experience (§71). The idea of a purposefulness of nature is a critical principle which states (§75): “*By the particular constitution of my cognitive faculties* the only way I can judge of the possibility of those things and of their production is by conceiving for that purpose a cause working designedly, and, consequently, a being whose productivity is analogous to the causality of an understanding.”¹²

Kant’s philosophy in its completion aims at a certain unity. That is the main reason why in *Judgment* the teleological moment is defined. After having explained the legislation of nature—the phenomenal world—and the legislation through freedom—the noumenal world—the question arises of what the unity of these two worlds consists. The question about this unity already arose at the end of the *Grundlegung*. Then it was rather problematic to think this unity. In *Judgment* Kant states this problem more positively (*Judgment* B xx): “There must, therefore, be a ground of the *unity* of the supersensible that lies at the basis of nature, with what the concept of freedom contains in a practical way ...”¹³

The unity that Kant finds is the teleological judgment. The special character of this unity is that it brings together not only nature and freedom, but also the idea of the one and the many and the moral question of the relation between *ought* and *is* (B xx): “... the concept of freedom is meant to actualize in the sensible world the end proposed by its laws ...”¹⁴

The unity of nature and freedom is the ruling of nature by freedom. As we saw, the realm of freedom is the realm of morality, the realm of the unconditional *ought*. Through the teleological unity this *ought* can or will *be*. Out of this unifying perspective Kant’s political and historical views enfold themselves in fully: The final end of humanity is the morality of its existence. This coming to be of what morality says *ought* to be, is not so much the *bridging* of a *gap* between is and ought;

12. “... ich kann *nach der eigentümlichen Beschaffenheit meiner Erkenntnisvermögen* über die Möglichkeit jener Dinge und ihre Erzeugung nicht anders urteilen, als wenn ich mir zu dieser eine Ursache, die nach Absichten wirkt, mithin ein Wesen denke, welches, nach der Analogie mit der Kausalität eines Verstandes, produktiv ist.”

13. “Also muß es doch einen Grund der *Einheit* des Übersinnlichen, *welches* der Natur zum Grunde liegt, mit dem, was der Freiheitsbegriff praktisch enthält, geben ...”

14. “... der Freiheitsbegriff soll den durch seine Gesetze aufgegeben Zweck in der Sinnenwelt wirklich machen ...”

rather it is a ‘discipline of the inclinations’ (B 394) or the liberation of the will from the despotism of the desires (B 392), as preparation for a “dominion where Reason alone will be in power” (B 395). Reaching this state of affairs is the “plan of nature”, as it is called in *Idea*, notwithstanding our freedom, because it is the outcome of the laws of nature, now not only constructed by our understanding, but first dictated by Reason. The final ends of the laws of nature are the same as those of the laws of freedom.

The importance of Kant’s political thinking is his insisting on a unifying perspective in view of morality, and the way he looks at the development of man’s powers: His vision is, what I would like to call, a constructive tension between *is* and *ought*. The norms posed in the *ought* are real rulers with which to measure the actual acts of man. The realm of *is* is not the actual situation *per se*, but the actualization which will come to be. What *ought* to be, what the laws of freedom prescribe, is an anticipation of a to-be-constructed state of affairs—not constructed out of nothing, but out of an idea of what ought to be. In order to actualize this state of affairs, an educational process is necessary which will lead man to a higher state of morality. Morality is not simply found, it must be fought for—fought for against the wrongful desires, inclinations and opinions connected with the contingent ends people have. The *here and now* is the state of affairs which has to be overcome, and in order to overcome this, we must grasp norms which do not cling to our actual existence, but which are void of this wrongfulness. Diversity of opinion is something which must be left behind in the recognition of the laws of freedom. The most these differences and antagonisms will lead to, is the recognition that we have in some way to overcome them. Thus, in the *Idea*, Kant speaks of the asocial sociability (*ungesellige Geselligkeit*) of man that leads to the notion of a civil community—a community that will legally realize some moral ends, even in the absence of a good will (*cf.* §83; *Idea* line 7). Civil society is a station on the road to morality, not the destination—the destination is the ethical community, the sovereignty of Reason or the pure will.

Kant and Rawls

After this outline of Kant’s thinking, let us now turn to the way in which Rawls uses the ideas of Kant. We will focus particularly on the idea of autonomy and the priority of justice.

When Patrick Riley sees Kant’s political thinking springing from the

paradox “that true politics must pay homage to morals, but without being able to count on the moral incentive (good will) that, if completely efficacious, would transcend (mere) politics altogether and produce an ethical commonwealth under laws of virtue” (Riley 1983, p. 167) he not only characterizes the attractiveness of Kantian moral theory for political theorists like John Rawls, but also points to a fundamental tension between formality and morality which connects Kant’s with Hegel’s political theory. As we shall see, Hegel was also aware that, in the state, laws would only bind people formally and that something more than outer compliance is necessary for ethical life. Besides, it is a problem for Kant that he cannot guarantee that reason will be an effective cause in human acts; the sovereignty of reason is a *duty* and humans do not automatically follow their duty (*cf.* also Woldring 1987, p. 12).

The attraction Kant has for liberal thinkers like Rawls is his refusing to go beyond the level of ‘outer morality’ in his political theory. Though I have shown that his moral theory does rely on a specific content as safeguard for the teleological structure of the moral principle and its final ends, in his political theory he sticks to the device of ‘making people *worthy* of morality and happiness’ (RV B 834), rather than making them *moral*. It is for this reason that Kant can state that a peace-promoting society can be achieved even by a community of devils. This procedural line has made his thoughts appear less spectacular or novel than those of Locke, Rousseau and Hegel, to mention a few. It also means that a revival of his political thinking had to wait for a more general procedural approach to politics.¹⁵

This ‘making people worthy of happiness’ is also the appeal Kant has for Rawls (*cf.* 1987b, p. 49). The rather limited scope of Kantian politics makes it ideal as philosophy for the liberal politics of toleration. However, Rawls is not inclined to assume Kant’s splitting apart of noumenal and phenomenal world, and this will divert him from the rather neutral ‘making people worthy of happiness’ to the more Hegelian ‘making people moral’, or establishing ethical life.

Autonomy and moral personality

Autonomy, morality and freedom are closely linked concepts in Kant’s philosophy. Autonomous choice, *i.e.*, choice out of freedom, constitutes

15. That is not to take away from the lasting appeal Kant’s internationalism and his reflections on the political possibility of peace have had on political thinkers after his death.

the morality of the choice. This same interrelatedness we see by Rawls. A moral person, so we find (Rawls 1980, p. 525), is characterized by two moral powers: The capacity for an effective sense of justice and the capacity to form, to revise and to rationally pursue a conception of the good. The first aspect Rawls distinguishes in freedom is “that free persons hold themselves entitled to make claims on the design of social institutions in the name of their highest-order interests” (Rawls 1980, p. 543)—people are “self-originating sources of claims” (*id.*), the claims they make originate from their being moral persons, not from any prior duties or obligations: Moral persons are in this sense autonomous, according to Rawls. Rawls refers to autonomy in two different ways. First, as far as TJ is concerned, he summarizes the Kantian idea of autonomy as: “Kant held, I believe, that a person is acting autonomously when the principles of his actions are chosen by him as the most adequate possible expression of his nature as a free and equal moral being” (TJ 252). Now this is *not* what Kant held. Kant did not use the notion of expression. This notion is introduced by Rawls in order to meet the common criticism of formal emptiness made against Kant’s ethics, but is alien to Kant’s philosophy (*cf.* TJ 255). Kant’s idea of autonomy is that principles are chosen for their own sake, and not with regard to something else. That is, in short, the first and formal description of the categorical imperative. When we compare this with the circumstances under which Rawls’s individuals choose the principles of justice, we see that in *that* case there is no autonomy: Under the veil of ignorance, Rawls’s individuals are self-interested, they possess a plan of life and some conception of the primary goods they want.¹⁶ There is a substantial content to their will and they choose principles that will further this content. Thus, at most they choose “generally heteronomous rather than particular heteronomous” (Wolff 1977, p. 115), but by no means autonomous. The principles cannot have the status of categorical imperatives, though Rawls wants to introduce them as such.

Things get more complicated in the *Dewey Lectures*. Here Rawls differentiates between “rational autonomy” and “full autonomy”. The first applies to the agents in the original position, the second—full autonomy—to citizens in society. But, and this is somewhat puzzling: “Rational autonomy is that of the parties as agents of construction: it is a relatively narrow notion, and roughly parallels Kant’s notion of hypothetical imperatives” (Rawls 1980, p. 521). The idea of a categorical imperative does not show up in these lectures, though the only Kantian idea of autonomy is the categorical imperative. Still, Rawls

16. Here I follow the critique of R.P. Wolff in *Understanding Rawls*, Princeton 1977.

wants to speak of autonomy: the parties are not required to apply any antecedent principles of right and justice, and they are moved by their interest in developing their moral powers and to advance their “determinate but unknown ends” (Rawls 1980, p. 528).

We now have to focus on a second meaning of the idea of autonomy that figures in Rawls’s thought. This idea is stated as follows: “Kant’s idea of autonomy requires that there exists no ... order of given objects determining the first principles of right and justice among free and equal moral persons” (Rawls 1980, p. 559). Rawls’s account of morality centers around the choice made in the original position. How far does the moral person in Rawls’s original position parallel the autonomy of Kant’s pure will? Is Rawls’s view that the individuals in the original position have determinate, but unknown, ends, a correct view when compared with Kant’s claim that autonomy requires that no *a priori* content is given to the ends that determine the will? Before we can look deeper into this question, we should give some attention to matters that relate to the priority of justice.

The priority of justice

Rawls is seen as the initiator of ‘deontological liberalism’—a label given by M.J. Sandel (1984, p. 1). As Sandel describes it, this liberalism holds the primacy of justice over other moral and political ideals. This means two things: first that the demands of justice outweigh other moral and political interests. Second, that the justification of principles of justice does not depend on some vision of the good, rather the right sets the bounds for the good (*id.*, p. 2).¹⁷ Support for this view is found in Kant’s *Critique of Practical Reason*, where he states:

This is the place for an explanation of the paradox of method in a critical examination of practical reason. The paradox is that the concept of good and evil is not defined prior to the moral law, to which, it would seem, the former would have to serve as foundation; rather the concept of the good and evil must be defined after and by means of the law. (PV 110/AA 62)¹⁸

17. Cf. TJ 31: In justice as fairness the concept of the right is prior to that of the good.

18. “Hier ist nun der Ort, das Paradoxon der Methode in einer Kritik der praktischen Vernunft zu erklären: daß nämlich der Begriff des Guten und Bösen nicht vor dem moralischen Gesetzen, (dem es dem Anschein nach sogar zum Grunde gelegt werden müßte) tetetetete, sondern nur (wie hier auch geschieht) nach demselben und durch dasselbe bestimmt werden müssen.”

To base the priority of justice on this quote is a misinterpretation of Kant. For Kant the realm of morality is located in the noumenal being of man, and the world of politics concerns man as a phenomenal being. In the quote above, Kant speaks of the moral laws (*moralische Gesetze*) which belong to man as a noumenal being. For Kant this paradox results from the systematics of his philosophy. If one wants to establish whether or not the will has pure determinants *a priori*, then one cannot presuppose something (*i.e.* the idea of good and evil) as decided, before one has to decide for it. Methodically, one has to leave the door open for practical laws *a priori* and this door would be closed when one takes certain contents of the will as starting-point of analysis. We should not forget that Kant sees the purity of the will as the kernel of morality, and the activity of the pure will is lawgiving. But these moral laws are not to be equated with a positive idea of justice.

It is then a rather big and unwarranted jump to conclude from the systematic priority of the *moral* law to ideas of good and evil, that the principles of right have a practical (empirical) priority over the good. The moral law concerns our *noumenal* existence. Politics is the realm of our *phenomenal* being. The idea of justice has a definite political use and meaning—thus we cannot say that ‘the right is prior to the good’ and base this on this particular passage of Kant without some further qualifications.

In Rawls’s theory, the priority of justice first meets the problem that it is not clear whether the principles of justice are autonomously chosen, so it is not clear whether those principles are, in the Kantian sense, *moral* principles. But then we also meet the problem that we cannot equate principles of justice with the moral law. The principles of justice define right conduct, as we saw in Chapter 2, and only in conjunction with the full theory of the good can we say something about moral worth—the concept of the right is for Rawls in a certain sense preceding to morality. If Rawls’s interpretation of Kant were correct, that would not only mean a narrowing of the idea of morality, it also would also consist of what is not allowed for Kant: Equating the noumenal with the phenomenal world.

Not only is Kant misinterpreted when equating moral laws with right, but the idea of the good is also improperly used in this interpretation. As we saw in Chapter 2, the priority of the right over the good only makes sense when talking about ‘goods’ and not when talking about the *morally* good. In the previously quoted paragraph, Kant tries to find a definition of the moral law that does not depend on objects of the will—even primary goods are not allowed to play a role in the determination of the will (*cf.* Höffe 1979, p. 216). Kant does

not talk about goods, he analyses the idea of good and evil, and this also in the perspective that morality has the highest good as its object *a priori* (PV 108/AA 4). There is a methodical priority of the 'law' over the good, but this relation is not one of limiting the good, but one of supporting the systematic place the good has in moral reasoning. And this is a different relation than that between the right and the good in the constructivism of Rawls.

Having established the relation Rawls depicts between the right and the good as non-Kantian, it is clearer how he differs from Kant in the case of the relation between personal and social justice. The categorical imperative that Kant formulates applies primarily to the maxims we personally hold for our actions; it is the purity of my individual will that counts and it is the universalizability of the individual maxim that shows this purity. In the *Dewey Lectures* Rawls, correctly, points out that there lies a systematic difference between his and Kant's philosophy:

Thus, Kant proceeds from the particular, even personal, case of everyday life ... Justice as fairness moves in quite the reverse fashion: its construction starts from a unanimous collective agreement regulating the basic structure of society within which all personal and associational decisions have to be made. (Rawls 1980, p. 552, 553)

Rawls makes some interesting points here. We already saw that he makes personal affairs subordinate to social affairs (Chapter 3). But there is also a different systematic movement behind his thought: deontological or deductive, versus inductive. Rawls starts his reasoning from the unifying principle and not from the variety of phenomena. In Kant's terms: Rawls thinks determining (*bestimmend*) and not reflective (*reflektierend*). Moral principles are not guided by a unifying idea that fits the particular way man's understanding functions (as Kant's *reflektierende Urteilskraft* establishes), rather the principles themselves are the essential unity given prior to particular workings of the principles. Unity is not reached after due reflection, but is the starting-point of reflection.


Still, Rawls wants to speak of himself as a Kantian theorist. We are now in a position to assess in what way he *is* Kantian, and what this means for the relation individual-society in his theory.

As it appeared, the *persons* in Rawls's original position cannot be regarded as autonomously choosing moral principles. This does not directly discard those principles themselves as conditional or hetero-

nomous (in this respect I agree with Raes, *cf.* Raes 1985, p. 238). It does mean that the *individuals* are not the same as the Kantian noumenal self: Their choice is conditional upon their (self-)interest. In order for Rawls to establish the autonomy of the moral principles, he has to abdicate the individual moral point of view. Rawls's construction of the original position makes it unimportant that we can point at concrete individuals who choose principles of justice. Everyone at each moment can enter the original position and make up his mind. The other side of the coin is that *nobody* need enter the original position and nobody need make a choice. Rather it is in the general public identity of individuals—individuals thus who are primarily parts of society—that principles of justice are chosen. The given fact of society forces principles of justice to the fore. If, so to say, society chooses principles of justice, we can account for *this* choice as an autonomous moral choice in a Kantian sense. Society is, in Rawls's view, an endeavor in which people participate for society's own sake. Society does not serve any general or final ends, it is an end in itself. In the same way that Kant's moral principles found their content in man as an end in itself, so Rawls's principles of justice take on content through society as an end in itself. This is Rawls's Kantianism as analogy: Practical reason is essentially not an individual reason, but a social reason (*cf.* Raes 1985, p. 237). Social institutions should follow Kantian principles and only in a derived form are principles formulated for individuals and the relations between states. The principles of justice define a moral society based on Kantian principles, and this moral society defines the right that is prior to the individual good. The deontologically formulated conception of right is itself good, because it consists of autonomous principles, principles that do not belong to a noumenal individual self, but to a 'noumenal society'. Morality is a matter of societies.

In this society, within the bounds of a deontologic conception of justice, individuals strive after their personal goals and interests: In particular, they want to realize their innate capacities. Rawls formulates the 'Aristotelian principle' to account for this human activity. Unlike Kant's political society where people live together under compulsive laws so that one's freedom can coexist with another's, individuals are given their own playground of freedom according to the *a priori* limits of social principles. The starting-point for assessing the relation between individual and society is not the question of how my freedom can coexist with someone else's freedom, but the question of what space of freedom is warranted for individuals by the principles of justice. The freedom that Rawls wants to preserve is not the freedom that figures in the classical tradition: That tradition is concerned with

the freedom to live according to autonomously chosen plans and to maximally realize the person one is. Rawls considers the minimal freedom necessary to see the rationality of the principles of justice. This is the freedom of a *social* self that only has to maximize its relative chances to realize the person he might become.



Hegel's Conception of the State

CHAPTER 5

RAWLS'S THEORY OF JUSTICE started along accommodationist lines (*cf.* Steinberger 1988) but ends with a more perfectionist redefinition of freedom, and brings us close to an *Hegelian* account of politics—that is where we ended the last chapter. Rawls's establishing of a social self that is accountable for morality is approaching Hegel's idea of a specific ethics (*Sitte*) as constituting community. Rawls moves to a point where the formality of the principles of justice is not enough to account for their acceptance, but has to be provided with content. The universal form of the principles of justice receives its completion in a specific practice. And this is close to Hegel's completion of the universality of morality with the ethical life or *Sittlichkeit*. This makes it all the more important to consider the presence and consequences of an Hegelian line of thought in Rawls's theory. In this chapter I start with a short account of why it is important to consider Hegel's political thinking in this study. After all, in contradistinction with the relation between Kant and Rawls, the connections between Rawls and Hegel are not so obvious. After I have shown that there are some fundamental insights that Rawls shares with Hegel, I shall give an outline of the elements of Hegel's political theory in which the state figures as the

unity of, and mediation between, the individuals in their private purposes and their general or public life. I then conclude by showing how a similar mediation as realization of an ethical life is constituting for Rawls's description of how people live in society under the principles of justice, and how their way of life is normative for this realization.

This chapter is an 'in-between'. What I want to show is that Rawls can do more with specific insights of Hegel than he initially thought, and that the idea of the state as incorporation of *Sittlichkeit* yields an illuminating contribution to the idea of an overlapping consensus as developed by Rawls. A full evaluation of the contribution of this analysis of Hegel's political thinking, however, can only be given via the development of a community of discourse as found in Jürgen Habermas's communicative ethics. In other words, a full understanding of the impact of this chapter is reached in the chapter on Habermas which follows.

Anticipations of Rawls

Rawls's relation to Kant is one of critical agreement; in relation to Hegel, Rawls initially seems openly to reject any similarities. Rawls wants to defend himself against the limiting effects on freedom of organicist conceptions like Hegel's. But as it appears, freedom is also limited, or at least radically changed in content, in Rawls's own account. A comparison between Rawls and Hegel is all the more intriguing since Rawls is mostly placed within a particular individualistic tradition, whereas Hegel is rightly seen as representing an approach to politics that takes as its origin the value of the community. But was not Rawls's intention also to account for the value of community (*cf.* TJ 264, 265)? What results will this 'communitarian' approach yield for the individual?

In TJ Rawls quite superficially discards some kind of communitarian or Hegelian approach when he states that "[n]o doubt even the concepts that we use to describe our plans and situation, and even to give voice to our personal wants and purposes, often presuppose a social setting as well as a system of belief and thought that are the outcome of the collective efforts of a long tradition [... but] to use them to characterize our ties to one another is to give a trivial interpretation of human sociability." (TJ 522). Rawls's initial intention is to go beyond the mere given of our actual beliefs and social bonds.

However, one can trace Hegelian elements in Rawls's political

theory. In his account of society as a social union, Rawls speaks about the social unions as originating in the mutual recognition of shared individual ends. In mentioning this, he moves in the direction of Hegel's account of the corporations. Rawls seems to distinguish a pattern in society which is not (yet) the state itself. Rawls shows at least more sensitivity to the problem of social differentiation than Kant with his universalistic and cosmopolitan citizenship of the owner of property. Rawls's subject is an individual-in-social-circles.

There are, however, more systematic similarities between Rawls's and Hegel's political theory. First, as we have seen (Chapter 2), Rawls takes the idea behind *private society*—society consisting of members pursuing their own interests—as the starting-point of his political theory. By redefining the idea of a private society in terms of society as a social union of social unions, Rawls tries to escape the calculated self-interest of the private society, and replace it with the moral idea of a society under principles of justice. Rawls's 'private society' covers the same area as Hegel's 'civil society': That of the acts that flow from human self-interest. Rawls is afraid of the organicist conception of the state which Hegel employs to overcome the negative aspects of civil society. But does Rawls himself really escape the hidden organicism that seems to be present in his conception of society as a social union and is more prominently visible in the idea of an overlapping consensus?

Second, Rawls and Hegel both stress the importance of the fair distribution of economic goods as a key element in a conception of justice. When Hegel characterizes civil society as a state based on need in which people are producing to satisfy their constantly changing and growing needs, he characterizes the ethical incompleteness of civil society as, to a certain extent, a problem of the distribution of economic goods. Classes of rich and poor are produced, and the poor are more and more robbed of their self-respect (*cf.* Avineri 1972, pp. 147ff). I do not intend to elaborate this problem of economic inequalities much further. As Avineri convincingly argues, this problem is not solved within Hegel's system because he is caught in a dilemma between either leaving the state out of economic activities, and thus leaving the poor—*i.e.*, those who cannot be self-subsistent members of civil society—out of the mediation in the state, or bringing in the state, but then eradicating the distinction between state and civil society altogether, and thus stopping the process of mediation and progress (Avineri 1972, p. 151). What is of foremost importance is that Hegel recognizes that the problem for modern states is no more the production of goods, but the distribution and consumption of goods

(Avineri 1972, pp. 152,153). Though Hegel does not provide a definite solution for the problem of property and poverty, his intention of restoring the unity between private person and public person, made so problematic by economic inequalities, answers a voice that is heard through time and nowadays given ear by John Rawls.

It seems a long way from the initial anti-Hegelianism in TJ to an acknowledgement of a congruence in thought in some later articles. As I have already explained, traces of a line of thought that is close to Hegel's can be found throughout TJ and some later articles. Indeed, as is mentioned by Joshua Cohen, the idea of citizens acquiring norms by participating in institutions that conform to them, is derived from Rousseau and Hegel (Cohen 1989, p. 744n37). The acquisition of a 'sense of justice' seems to proceed rather via the Hegelian line of *Sittlichkeit* than via the Kantian idea of practical reason—it is a matter of living under the principles of justice, rather than the result of some private reasoning. Though Michael Jackson, at the end of his critical study of Rawls's theory, concludes that TJ, in stressing the universal rules of social justice, takes the approach of *Moralität*, at the expense of providing an idea of *Sittlichkeit* (Jackson 1986, p. 167), the message of the 'overlapping consensus' seems to be that there is such an idea of a common practice behind the formality of the conception of justice. The viability of the conception of justice depends on the establishing of this very common practice. The universality of the formal rules can only be fully realized in the concrete, substantial, ethical life.

A further concern is that the teaching of Hegel's *Philosophy of Right* is not necessarily as organicist and anti-individualist as Rawls used to think. As Steven Smith writes in his article "Hegel's critique of liberalism," (1986) the corporations in Hegel's conception of the state on the one hand seek to prevent an atomization and particularization of individuals, and on the other hand, seek to provide the individual "with some wider and morally satisfying forms of social life without merely submerging his identity or 'personhood' within them" (Smith 1986, p. 137). Hegel's political thought takes seriously the question of social differentiation as a buffer between the individual and the state (see also Taylor 1975, pp. 407ff). In the same way as Rawls, Hegel is serious about providing the individual with a free playground for his own interest, as well as a morally or 'well-ordered' society. Whether Hegel's conception of the state does indeed lead to an organicist embracing of the individual by society, the state, or even history, is a question which I will not deal with in this study. Assessing this problem asks for a detailed monograph on Hegel's political thought and its relations with the philosophy of Spirit and the philosophy of history,

and such a study is beyond the scope of this book. In addition, it is not necessary. Hegel's *sensitivity* to specific problems in modern society is more important for the argument I am developing than the specific *solutions* he offers.

A closer look at Hegel's political philosophy—in particular his account of society and the State as fulfillment of the ethical life—will be of value for a better understanding of Rawls. Viewing Hegel as part of the background to Rawls's thinking is thus not as artificial as it appeared at first. What I want to show is that Rawls's theory of justice indeed develops along a more Hegelian line. I also take it that Rawls is not denying this development. In the 1987 article, "The idea of an overlapping consensus," he states that the idea of a justification based on a mutually acknowledged political conception as fundamental to an overlapping consensus also plays a central role in Hegel's *Philosophy of Right* (1987a, p. 6n10). Insight into some basic ideas of Hegel's philosophy of right will be of great importance in understanding the development and implications of the idea of an overlapping consensus.

It is a platitude to say that Hegel does not win a prize for clarity of exposition. For our purposes, we only need some of the basic insights Hegel developed in the *Philosophy of Right* (*Grundlinien der Philosophie des Rechts*—PhR). In the following I shall present these insights in a way that will make as little use as possible of the complete philosophical system that Hegel designed. Perhaps this is abusing Hegel's own conviction that an *introduction* to his philosophy was impossible: "... only the whole of science is the totality of the idea" (... *nur das Ganze der Wissenschaft ist die Darstellung der Idee*) (*Enzyklopädie* 1830, §9). So be it, I prefer to keep my own argument as clear as possible.

Hegel's conception of the state

The connecting line between Kant and Hegel is well known. Hegel¹ criticized the formal emptiness with which Kant's moral philosophy ends. Hegel wants to give content to this formality in order to finish morality. Morality is finished in *Sittlichkeit* or ethical life², the customs and practices of a community. Realization of ethical life is the goal of the state.

This content is given in the development of the Spirit (*Geist*), or, as

1. Excellent introductions are Shlomo Avineri, *Hegel's Theory of the Modern State* (1972); Charles Taylor, *Hegel* (1975); Steinberger, *Logic and Politics* (1988); and Heyde, *De verwerkelijking van de vrijheid* (1987).

2. I translate *Sittlichkeit* with 'ethical life'.

one may call it, the development of rationality (*Vernünftigkeit*). This development proceeds through stages which are dialectically related. Each stage gives way to its opposite: Both, then, are canceled and preserved on a higher level (*aufgehoben*) in a third stage, which in its turn becomes the first stage of a new dialectic. The development which takes place is from implicit to explicit. Thus, as Hegel proceeds in the *Enzyklopädie*, the philosophy of the Spirit begins with *Logic*, which is about reason itself, its concepts, relations, etc. In the *Philosophy of Nature* we meet reason as incorporated in the different objects of nature and the relations between them, or the idea in its being different. In the *Philosophy of Spirit*, both come together in the idea of reason as the *willed cause* of events (this is comparable to the way Kant's three critiques fit together), leading to the development of the ethical as a 'second nature'. The philosophy of Spirit is then also a threefold movement: First the *Subjective Spirit*—man as natural person; second, the *Objective Spirit*—man in his relations in society; third, the *Absolute Spirit*—the absolute rationality in which man's existence has become explicit and brought to unity in knowledge of the truth, a knowledge which itself develops via *Art, Religion, and Philosophy*.

The transitional character of society in the development of Rationality, and its preservation in the Absolute Spirit poses the problem of diversity and unity at the heart of Hegel's political philosophy. Hegel's approach to politics links two questions in a particular way: First the general political problem that also governs the present study and which, in the words of Ch. Taylor, runs, "how to combine the fullness of moral autonomy, with the recovery of that community, whose public life [is] expressive of its members" (Taylor 1975, p 365) Secondly, this problem is connected with the fundamental question of how to distinguish what is generally recognized and valued amongst the different opinions (PhR, p. 14).³ As Kant's philosophy, Hegel's *Philosophy of Right* is a fight against the subjective belief of the individual. Individual opinions are only to be considered when they are part of what is, or can, be generally recognized. The relation individual-society must be interpreted in the light of the distinction between particular and general and thus has epistemological and ethical dimensions. The task for political philosophy is to show how the individual can lead a general life so that the truth of the state, the reconciliation of particular and general, is realized.

For the present argument, the most important aspect of Hegel's political philosophy is the distinction he makes between the State and

3. PhR: *Grundlinien der Philosophie des Rechts*. In the text I will give quotes from the translation made by T.M. Knox.

society. With that he goes a step further than Kant's political philosophy. The state brings about a qualitatively different relation between individual and society from that in civil society. The qualitative step consists of a fulfillment and a bringing to its end of what is contained in civil society. The state is in Hegel's dialectic the *Aufhebung* of the separation between the universal and the particular. In the unity of the state, Hegel also tries to reconcile the individualism contained in modern (liberal) society—individuals striving for their self-chosen goals—with the Antique ideal of the *polis*, the moral community of citizens.

In order to understand what Hegel means by this, I wish to begin somewhere toward the end of PhR—a procedure which is not so strange considering Hegel's method where destination and point-of-departure are one (see §2). In §303 Hegel states: "The state, however, is essentially an organization [of members which are similar groups themselves], and hence no one of its moments should appear as an [unorganic] aggregate."⁴ The state is not an 'aggregate' of atoms—that would result in a formless mass, "The Many as units". *Vis-à-vis* the state the individual has no direct relation, but a mediated relationship—the individual belongs to the state as a member of some social circle.

The state as the keystone of society

As was said above, the most important new aspect which comes to the fore in Hegel's philosophy is the difference he makes between state and society. Hegel distinguishes three segments of the human community: family, civil society (*bürgerliche Gesellschaft*) and the state. Each means a different way in which individual persons relate to the group around them: as *member* of a family; as individual person and bearer of rights in civil society; as *member* (again) of the state. In his idea of the state, Hegel wants to account for both the ethical unity of free persons—the *state* according to the ideal of the *polis*—as well as the differentiation in *civil society* as a result of a market-economy.

The unity that is brought about by the state has three aspects which I wish to discuss in the following. First, the state is, in Hegel's theory, the keystone in the development of society; second, the state has two ethical foundations, *i.e.*, the family and civil society; third, the state is the incorporation of the rational will, and thus forms the unity of the different individual wills.

4. "Der Staat aber ist wesentlich eine Organisation von solchen Gliedern, die *für sich Kreise* sind, und in ihm soll sich kein Moment als eine unorganische Menge zeigen."

The state as keystone of society means for Hegel that it is the underlying principle for *and* the final result of the development of society. In the analysis of society the state appears to be the result, but in reality the state is the first given, within which family and civil society develop themselves (PhR §256).

Though the natural unity in the family is a foreshadow of the unity of the state and can be qualified as an ethical unity, its ethical character is only implicitly and limitedly present. For Hegel, the realization of rationality is the end of his theory—the natural unity with a natural ethics must be replaced with the *thought* unity and ethical life of the state.

Subsequently, the unity of the family is only temporary: This unity disintegrates with the death of the parents and the members become individual persons, pursuing their own interests in civil society (§179). The family disintegrates in a multiplicity of families that relate to each other as private persons. Out of the particularity of each individual family springs the generality which shall be characteristic of civil society. This generality of civil society is also its *ethical* character, but the ethical life is still separated in, on the one hand, the extreme particularity of individual interests and, on the other hand, the generality of society. Only in the state can particularity and generality be reconciled. The state restores the unity of the family as a ‘second nature’ so that the individual is no longer just a bearer of rights, but *member* (*Mitglied*) again, this time of the state (§258). Civil society is thus characterized rather by conflict than by unity. People relate to each other as individual bearers of rights, and the individuals in civil society have their private, particular interests as their ends. It is this society in which contractarian thinking has its origin. The important point is then: Why does Hegel need a different principle, *i.e.*, the state, in order to bring about unity. Put in other words: Why can civil society not contain the ethical unity of its members?

Hegel characterizes civil society as a state based on need (§183). Ethical life is lost in its extreme moments—on the one hand the abstract universality of society: The formal generality of its structure; on the other hand a subjective particularity: “the concrete person, who is himself the object of his particular ends” (§182). As burghers of civil society the individuals are private persons, all striving after their own interests. The disintegration of the family sets free the individual caprice (*Willkür*). As a result, the individuals relate to each other as independent persons; only the ties of mutual needs bind them together (§33A). Civil society is the place of morality (*Moralität*)—the place where the moral idea of duty for duty’s sake is present. Kantian

morality is, in Hegel's view, tied to civil society. This is both its truth as well as its limitation. Morality has its own generality in the idea of duty (§133) but this generality is not (yet) brought to unity with the subjective particularity of the individual will. Therefore, morality is not the ethical: In order to give content to duty, we need a community that establishes a habit (*ethos, Sitte*) as a second nature (§151, §135A).

Kant's moral philosophy has the will as caprice (*Wille als Willkür*) as its subject, and therefore results in a civil society under *compulsory* laws. For Hegel, however, ethical life cannot go together with compulsion. Still, morality, and especially Kantian morality, is concerned with the purity of the will. Hegel does acknowledge the right of the will only to accept what it itself can hold rational, but this is only a *formal* determination. The formal determination of the subjective will cannot distinguish between the truth or falsity of the insights it acquires (PhR §132).

As Kant rightly saw, so Hegel continues, morality is concerned with the *good* will. That means that the will must act according to duty (PhR §133). The only determination of duty is: Do justice and advance the good of oneself and that of others (*cf.* PhR §134). But this determination cannot be found within the sphere of duty for duty's sake. To determine the content of duty one has to go beyond that sphere to the sphere of the absolute (*Sphäre des Unbedingtes*—PhR §135).

The determination of the will via the principle of non-contradiction only leads to contradictions. Non-contradiction can justify any act, moral or immoral. Hegel grants that Kant's principle of the categorical imperative at least brings closer a concrete practice—after all, it takes into consideration a world in which your maxim would be general law—, but it still leaves us with an unresolved conflict. For, as Hegel points out, once we establish that there be property and that human life is to be respected (as Kant does), then one cannot without contradiction choose between theft or a murder (PhR §135).⁵

5. In the earlier *Phenomenology of Spirit* he explains extensively his critique on the idea of (Kantian) morality. Our *moral* acts aim at the creation of a reality that is determined by an end (*die Hervorbringung einer durch den Zweck bestimmten Wirklichkeit*—PhG, 454). Our acts need ends, and morality cannot provide ends. The idea of an end for acts is contrary to the idea of duty for duty's sake, the basic principle of morality. An end for morality causes duty to be performed for the sake of that end, and would make morality impure (PhG, 462). Morality, duty for duty's sake, is unfinished. The individual conviction is (still) the absolute moment for morality (PhG, 444). Morality belongs to the self of 'absolute freedom'—the self where, through the absolutization of the individual freedom, the singular and the universal are split apart (PhG, 465). The content that can be given to duty will be a singular content. However, our moral acts contain a perplexity due to a multiplication of duties. According to Hegel, one never finds a plain, singular duty, but always a set of different, conflicting duties (PhG, 460ff). Though conscience brings about some rest in this conflict of duties, it is only

Morality is not yet the ethical because morality's maxim of duty for duty's sake only makes sense when we already *know* what we actually have to do (§135A). Only in the state is the rational determination of the will made that provides the content of Right and Duty. This rational determination is neither the particular property of the individual, nor is it in the *formal* shape of impression or sensory knowledge, but it is of general determination (§137). Grasping this concrete content, this ethical, is not possible as long as we are stuck with the abstract generality of civil society; it is gathered in the concrete generality of the state.

Two ethical foundations

The state is not, however, the only community in which people will find unity and satisfaction. Hegel's insight is already so elaborate that he sees that the modern state is too big, general and abstract for the individual to be fully participating in the business of the state (PhR §255A). Rather, the corporations in civil society provide the individual with the necessary sense of generalness (*allgemeine Tätigkeit*). With that, we touch upon a second point. Hegel distinguishes two ethical (*sittliche*) foundations for the state: The family and the corporations. The family contains the subjective particularity (our individual will) and the objective generality (we still form a family which 'acts' like one person) in a *substantial* or implicit unity. The corporation contains these two aspects which are divided in civil society only in an internal unity: The particularity of individuals is here at the same time that which unites them and establishes the right of their particular wealth (*besonderes Wohl*) (§255). The corporation is a 'second family' for the individual (§252). The common goal, which is the goal (*Zweck*) of the corporation has only absolute, ethical reality in the *state*—here the person as individual is both recognized in his right of full development of his *private* interests, as well included in (*übergehn*), recognized by and working for the *general* interest (§260). "The principle of modern states has prodigious strength and depth because it allows the principle of subjectivity to progress to its culmination in the extreme of self-subsistent personal particularity and yet at the same time brings it back to the substantive unity and so maintains this unity in the principle of subjectivity itself" (§260).⁶ This brings us to a central *self-certainty*, and not grounded in universality. It makes no sense asking the conscience whether or not this particular duty is the true duty (PhG, 480; PhR, §137).

6. "Das Prinzip der modernen Staaten hat diese ungeheure Stärke und Tiefe, das Prinzip der Subjektivität sich zum *selbständigen Extreme* der persönliche Besonderheit voll-

problem of modern states which was already understood by Hegel *i.e.*, the problem of a meaningful differentiation of society so that the partial communities do not inhibit the connection of members to the whole of the state (*cf.* Taylor 1975, p. 416). That Hegel makes the problem of differentiation a concern for his theory causes Hegel to part with Kant's political philosophy and contractarian thinking in general. Meaningful differentiation *is* a challenge which any viable political theory has to face. We will come back to this later.

The corporation (*Korporation*) is the particular which has become objective (§206). In the corporations, people group together according to their talents, capabilities, and also their caprice—the corporations provide a social integration for the competing particular interests of individual persons in civil society (§252). In these groups, people find their honor (PhR §253). But there is more to this: The corporation is the meeting point of particular and universal (§290A) and, without the corporation, the individual is a mere private person (§207). The corporation is the place where individuals lead a *public life* (§255). Via his membership of a corporation, the individual participates in the general end (*allgemeine Zweck*) that has its reality in the state (§256). Or, conversely: “The state is actual and its actuality consists in this that the interest of the whole is realized in and through particular ends” (§270A).⁷ The corporation is the only place where each individual can combine the living out of his particularity—being a person with private interests—with what we can call the common end—being a member of the state. The corporations are therefore *mediating* instances between the government and the particular circles and individuals. Members of the state are members of a corporation and only in that identity can they be considered by the state. The universal destination of the individual is to be a private person and, as a thinking being, to be consciousness and will of the universal (*i.e.*, being a member of the state—§308).

Put in these words, Hegel's thoughts can be read as advocating an all-embracing, all-powerful divine state which demands total compliance. Especially when Hegel speaks of an “organic” organization of the state has this given reason for misunderstanding. But we have to take care—Hegel's speaking of the organic relations highlights that, in these relations, individual parts are *members* which support each other by fulfilling their *own* destination; the particularity of the individual circles is the condition for the functioning of the whole (§286).

den zu lassen und zugleich es in die *substantielle Einheit zurückzuführen* und so in ihm selbst diese zu erhalten.”

7. Hegel's account of the corporations owes credit to the idea of the invisible hand, or spontaneous order—*cf.* Griffioen 1988, p. 139.

Subsequently, Hegel sees in *civil society* the power that demands strict compliance. The particular interests of people characterize civil society as “the system of needs” (§189). The subsequent multiplication of needs (§190), demands the individual to work in order to satisfy those needs. At the same time, this binds civil society to protect the individual (*cf.* §238). A last point that can be made here is that Hegel is more interested in the actual workings of the state or society—the realization of Spirit, that which is real and thus rational. Given there is civil society, there must be a state (*Enzykl.* §527). The state is that level of analysis of political reality where it can be shown that the universal *truth* and the individual (subjective) *will* can be reconciled and unified. As such, the state provides the universal space where individuality can exist.

Unity and the will

How can the state unify the individual wills? This is the third point on which I want to focus: The state as the reality of the substantial (individual) will (§258). Hegel saw Rousseau as the originator of the concept of will as principle for the state. The will, however, contains the elements of caprice and voluntarism which endangers that same state. The state incorporates the *general will*—which for Hegel is completely different from the common (*gemeinschaftliche*) will he sees in Rousseau’s political theory. The general or objective will (and will is thinking itself) is the “in itself” rational will (*an sich Vernünftigen*)—the general will remains valid and true even when it is not recognized by individuals (§258A).

This point is important in relation to Hegel’s critique on the contractarian thought of his days. In the section referred to (§258), he makes clear that when society is considered to exist for the security and protection of property and personal freedom, it is civil society and not the state that is the object of investigation. Then, the interests of the individual itself are the final goal which unites individuals, and being a member of the state is still optional. The union of individuals in the state is, in this case, a *contract* based on the caprice of the parties—not based, thus, on the necessity and rationality of the general will. The state in Hegel’s thought, however, is the place where individuals lead a general life—because this is the ultimate destination and condition for satisfaction in work and being.

The point of Hegel’s critique here is not so much simply to attack any kind of contractarian thinking. Rather, it is clear to Hegel that the

historical origins of the state do not matter for the systematic idea of the state.⁸ The systematic meaning of the state cannot be assessed by means of a contract. And it is this meaning which is the relation between, and the unity of, generality and particularity. The state is the ultimate *rational*: Rational being the universal and the single, so that, “What is rational is actual, and what is actual is rational” (PhR, Introduction, p. 10; *cf.* also *Enzykl.* §6).⁹

Only the state can perform this, because it is the *in itself* rational (*vernünftige*), the final incorporation of the Idea (*Geist*) and so the final embodiment of will. In §7, Hegel defines the will as unity of the ego, the particularity brought back to universality. The state is this unity for society—the state is the self-determination of the will. This unity is an absolute end in itself (*Selbstzweck*—§258) in which the necessary development of individual goals and interests is fulfilled by their participating in the universal life of the state.

The unity of the state, it is known, has its pregnant visual counterpart in Hegel’s insisting on one monarch as head of state. As this one person, his function is limited: “... he has only to say yes and dot the ‘i’” (§280A). The monarch is a representative individual, who embodies the general principle that underlies the state (*cf.* Taylor 1975, 399). The relation between the individual and the head of state is that of identification. As a result, people do not take part in social life based on representation—legitimate decisions have to be brought back to some kind of identification (*id.*). In Hegel’s political theory, this identification is brought about by the estates. We have seen this in the section before. What is of interest now is what this means for the relation between individual and society.

Hegel departs from the way contractarianism sees the nature and legitimacy of government in the establishing of a *general will* (§258A). This contractarian general will, according to Hegel, still preserves a division of society into factions. Because the general will is the will of each and every individual, it eradicates the social differentiation in estates which gives tribute to individual particularity. The individual *has* to will what the general will wills, which leaves no place for what he might do out of his own freedom. The bare fact that the general will is an abstraction, makes the actual government a faction apart from, and opposed to, the general will—itself a ‘definite will’ that does not allow other particular wills in its vicinity (PhG 432ff).

Civil society is the playground of individuals pursuing their own

8. §258: “Welches nun aber der *historischen* Ursprung des Staates überhaupt ... sei ... geht die Idee des States selbst nicht an ...”

9. “Was vernünftig ist, das ist wirklich; und was wirklich ist, das ist vernünftig”—p. 24.

interests. The idea of a contract has its place here, but such an idea would still lack the necessity of an ethical bond. Hegel is quite clear about the social contract: The state seen as being there for the security and protection of property and personal freedom is still a state which is open to our choice regarding our membership—membership is not necessary, but optional because the contract is constituted by the caprice of the participants, their particular will and interest (§258). The disintegration of the ethical life in civil society prevents the formation of a universal, *i.e.*, rational, will that unifies the individual wills. The most that can be reached in civil society is a *common* will, which would not be a *rational* will. The state is not the playing-field of individual wills and/or interests. This cancels the will as a legitimizing force (Riley 1983, p. 199)—but not as politically important! The state has a property of its own: An absolute will (will, again) that cannot be reduced to a balance between individual wills. The will contained in the state does not represent individual wills, but individual wills identify with this ultimate ‘I will’ because as the realization of Spirit the *I will* of the state is the true and rational will in which all participate.

In the realized ethical life, this ‘I will’ provides the content for the individual wills, and thus for what is Right and what is Duty. The ethical life (*Sitte*) of the community finds its concrete shape in the spoken *I will* by the head of state. But this spoken *I will* is nothing more than the content of the individual acts; in the *Sitte* the actual identity of every and each individual becomes visible—*sein* and *sollen* are one. In ethical life the ultimate truth of Spirit takes on its actual, historical reality. Because truth is in this way the content of each and every individual’s act, the life in the state, as Hegel sees it, cannot be considered as repression of individuality.

How, though, does truth touch the ethical life? This is the final point we must consider, before we can evaluate the relation between Hegel’s and Rawls’s sketches of society.

Society and truth: Religion

The relation Hegel draws between religion and the state is of special importance for understanding Hegel’s political philosophy and the actuality of his thoughts today. Hegel himself has clearly seen the importance of this relation: He dedicates a long section (among the longest) to this issue in each of *Philosophy of Right* and *Enzyklopädie*. In the following I mainly use these two sections, *i.e.*, PhR: §270 and *Enzykl.*: §552. One proviso in advance is necessary: The state is the final

stage of the Objective Spirit; religion belongs, as second stage, to the Absolute Spirit. When comparing state and society directly, there is the danger of comparing apples with oranges: What Hegel says about religion in these paragraphs can only be fully comprehended in its consequences and truth from the standpoint of Absolute Spirit. Nevertheless, religion is important for the state because of the actual church community which exists next to the state. Hegel wants to avoid basing the state on religion or making the state choose for a particular religion. This urges at least some clarification at this point of the objective spirit; and though the content of the true religion has to wait for clarification in the absolute spirit, the systematic importance of religion as phenomenon in the unfolding of truth presses itself to the fore in the state-community. This is made most clear when Hegel accounts for the Christian religion as the formulator of the infinite right of subjective freedom (PhR §124). Religion is indispensable in the development of the Spirit.

In both treatises, Hegel makes clear from the outset that “the content of religion is absolute truth.” On that note, religion is the foundation of the state which is the “divine will as present, in actual shape and *organization of a world unfolding spirit*.” State and religion are therefore inseparable (*Enzykl.* p. 432): “Because religion is consciousness of absolute truth, only that can count as right and justice, duty and law, *i.e.*, as *true* in the world of the free will, which participates in this truth, which is *subsumed* under it and is concluded from it.”¹⁰

The state is the divine institution which corresponds to, and participates in, the absolute spirit, “the eternally real truth in which the knowing reason (*wissende Vernunft*) is free” (*Enzykl.*).

Philosophical insight teaches us that church and state are not opposite regarding the *content* of truth and reason, but are distinct in *form* (PhR): Religion is the subjective conviction—belief—which has truth as a *given* content, whereas the state is the knowing part, which has truth as known by thought and concepts. This implies two things: First, because religion participates in the truth of the spirit, it can lead to fanaticism when people only base themselves on their religious conviction and deny the truth in the state as the reality of reason.

Second, religion is the deepest integrating moment for the disposition of the individuals in the state. It is therefore required of the state that it should demand its people to be members of a church community. This is because the teaching of the church is not only concerned with

10. “Indem die Religion das Bewußtsein der *absoluten Wahrheit* ist, so kann, was als Recht und Gerechtigkeit, als Pflicht und Gesetz, d.i. als *Wahr* in der Welt des freien Willens gelten soll, nur insofern gelten, als es *Teil* an jener Wahrheit hat, unter *sie subsumiert* ist und *aus ihr* folgt.”

the inner conscience, but also the expression of a content that is the same as that of the laws and rules of the state.

State and church can only be closely connected in their content and teaching. The idea that the church is free to teach what it likes, is, for Hegel, parallel to the idea of the state as being there for the protection and safety of life, property and individual caprice—the *Not- und Verstandesstaat* in civil society (Knox, p. 171/PhR p. 424). That, in its turn, would have the result that “the element of absolute truth, of mind in its higher development, is placed, as subjective religious feeling or theoretical science, beyond the reach of the state. The state, as the laity pure and simple, is confined to paying its respect to this element and so is entirely deprived of any strictly ethical character” (Knox p. 171/PhR p. 424).¹¹ Because religion has truth as its content, it cannot be left to individual, subjective convictions, but must be a *true* religion, at par with the actual embodiment of truth, the state. Not as its servant, but as necessary guarantee and cornerstone for the realization of ethical life. The state *does not* rest on its own when it comes to rational laws and justice—religion is not a handy and desirable extra, but essential for the ethical life of the state (*Sittlichkeit des Staates*) (*Enzykl* p. 433). It is, says Hegel, an abstract and empty picture to think it possible that individuals act only according to the meaning and letter of their laws, and not according to the spirit of their religion, in which lies their innermost conscience and highest obligation (*id.*, p 435).

State and religion are inseparable. Through insight in the final realization of spirit do we see that the state is the realization of truth in which we participate via religion. The state is the only actual community in which we can live the ethical. Religion safeguards the ethical by providing the disposition for the ethical: The state differs from religion in that it does not care about with what disposition individuals obey the laws. But without the true disposition, individuals would not live ethically, and religion provides this necessary completion of ethical life. Once again, the state is neither there for religion, nor in conversely; *nor* does the state force individuals into certain dispositions. As the realized ethical life, the state realizes the same truth that is participated in through religion.

11. “Das Element des höhere Geistigen, des an und für sich Wahren, ist auf diese Weise als subjektive Religiosität oder als theoretische Wissenschaft jenseits des Staates gestellt, der, als der *Laie* an und für sich, nur zu respectieren habe, und das eigentliche Sittliche fällt so bei ihm ganz aus.”

Rawls and Hegel

The sentence that ended the last paragraph not only formulates the essence of the relation between state and religion, but also that between individual and society. The state as knowing truth consists of free, rational individuals—free rational individuality means that individuals do not act according to their caprice (*Willkür*), but according to the general will, which is the participation in the (organic) state. It is this ‘perfectionist’ reformulation of the poles of individual and society that shows that the problem of individual and society is not a matter of compromising either pole, but essentially a non-problem (*cf.* Steinberger 1988, p. 210).

The idea of an ‘organic’ state is one of the main stumbling blocks for Rawls: Such a theory of the state would subject all human efforts to one project. Hegel’s theory, however, is somewhat more refined. The organicism of Hegel’s state is at least a form in which individual members do willingly what the state ‘wills’—it is a picture not of hands doing what the brain commands, but hands with their own mind consciously doing what the brain says (Steinberger 1988, p. 207, 208). The explanation Steinberger gives is perhaps not ultimately convincing, just because it is a *possible* reading, and not a systematic explanation of the organicist tendencies in Hegel’s thinking. Steinberger is aware of this fact. The differentiated picture given in the description of civil society as a system of needs where individuals pursue their own interest to the extreme, may also be an answer to the ‘needs of the system’, as Griffioen puts it: “Ultimately, Hegel’s realism might be less prompted by his desire to be true to the reality of civil society than by his attempt to demonstrate that in the modern age the Spirit, embodied in the state, has attained enough strength to bring about the unity (in diversity) of the whole of reality” (Griffioen 1988, p. 145). However this may be, I think that Rawls’s problem with Hegel’s organicism primarily concerns another aspect of Hegel’s thought. Even granted that Rawls would agree with the sunnier reading of Hegel’s organicism, the biggest problem for him is that it supposes one single truth which is realized in the state and participated in by individuals. For Rawls, organicism is a vice that limits the freedom of the individual on behalf of some social ideal and is inherently intolerant, hence trespassing all the moral premisses on which justice as fairness rest. The root of this is indeed that all branches of organicism pose one single truth to which all endeavor must comply. For Rawls, this amounts to intolerance and would involve coercion of individuals.

One can question, however, whether Rawls’s theory is far away from

an organicist conception. As I explained, there is the redefinition of freedom as 'freedom within the bounds of society as end-in-itself' that is contained in Rawls's theory. The way Rawls describes the individual life-plan as a plan within a plan, leaves the door open to organicist interpretations. Therefore, the problem of Hegel's organicism seems to me rather a diversion in the relation between Rawls's and Hegel's thinking. It seems to me that Rawls is blaming Hegel for speaking aloud about something he himself more or less agrees to. This point of convergence can be discovered when analyzing the apparent similarities between Rawls and Hegel when they both stress the importance of a praxis as an additional, and even constitutive, force behind formal (moral) rules.

Neither for Rawls, nor for Hegel, is the contractarian situation sufficient ground for moral principles. Hegel captures this in the critique he levels against Kant's idea of *moralität*. Within the formality of *Moralität* there will be the conflict of subjective wills which can only be resolved through the established ethical life or *Sitte*. The mere subjectivity of the will in the contractarian morality also plagues Rawls's refined analysis of the original position. The criticism, though, that Rawls's 'original position' only considers persons as calculators of their self-interest, is not completely to the point. For Rawls, this individualism is only theoretical and one can wonder whether the 'original position' can indeed perform the task of explaining the value of community. The value of community that colors the principles of justice cannot sufficiently be explained from the theory as advanced in TJ, though the elements for such an explanation are present there. There is, in later articles, a remarkable shift to stressing the importance of a public culture as background to the theoretical construction of justice as fairness. This practical background, though, was already present in TJ itself where Rawls argues that through, living under just institutions, people will acquire the proper sense of justice. The establishment of a moral conception like justice as fairness has never been an exclusively deontological project for Rawls: Participation in certain practices is at least as constitutive for the morality of justice as fairness as the argument from the original position. It is, then, not so much a diversion from earlier arguments, but rather a deepening of the line in TJ when Rawls alludes in the later articles to a traditional and historical bias for the conception of justice of which TJ gives the outline.

The practices Rawls sees as part of social life are, however, less elaborate than what Hegel paints before the mind's eye. For Rawls, the distinguishable circles in society, as there are family, friendship, work,

etc., are all social unions, and the formative principle for social unions is that people group together because of the recognition of shared final ends and common practices (TJ 525). Though Rawls tries to find a principle that, politically speaking, does not give value-rankings of different associations (TJ 527), this attempt works against him when he sees society as a social union of social unions—society as an end-in-itself. One of the conclusions of the Kantianism in Rawls is that this end-in-itself is the meaning of all those different associations, thus making society the moral horizon for the individual.

There are several institutions within Hegel's idea of the state which mediate individual and society, notably the family and the corporations. The idea of an organic state goes together with a differentiated picture of social and individual life. Family and corporation each have a distinct systematic identity *vis-à-vis* the development of the state, but are also necessary particular institutions for the functioning of the state. Hegel gives more content to the idea that a bare individual is an abstraction—a conviction that is also Rawls's. Hegel sees the corporations as essential for the personal dignity of the individual—thus generalizing the principle we saw by Kant that only economically free persons could participate in political society—but he also recognizes a non-volitional structure in society itself, *i.e.*, the family. Not all human bonds are the result of the individual's particularity, as are the corporations and Rawls's social unions.

The principle of shared final ends Hegel reserves for the formation of the corporations in *civil society*. The corporations—where the individual leads a general life—and the family—as a natural bond between people—form the ethical foundation of the state. The state is not characterized as the result of some recognition of shared final ends, but as a realization of the ethical life and, as such, as an enduring embodiment of the universality inherent to civil society and the temporal unity of the family. The state is an artificial, second, nature; not a unity based on some congruence in acts of will, but result of the rational will. That leaves for Hegel the potential problem of other communities that compete with the state. One such community is the church-community, and Hegel reconciles church and state not by subjecting the latter to society as end-in-itself (as Rawls's solution does), but in pointing out that both church and state aim at the same ethical life as the content of their practice. State and church differ in the form they give to this content. Potentially, there is at least the recognition that the state is not the exclusive point of identification for the individual. For Rawls's political conception there is only one communal bond that is important, and that is being member of society.

Nothing can go beyond that fundamental determination of the individual, no other bond can claim identity constituting importance—all other ties are ‘particular’, *i.e.*, purely voluntary.

Hegel and Rawls share the starting-point in civil society, where there is a conflict of different individual interests which have to be reconciled in some way. For Hegel, underlying, and contrary to, civil society is the natural community of the family. The state restores the unity of the family, without denying or cancelling the diversity that undeniably exists in civil society. Rawls does not distinguish any community formation other than that of social unions, and thus finds the unitary force in civil society itself by reinterpreting the actual conflicts of interests. So he sees that there is not only a conflict, but also a factual and systematic coincidence of individual interests. People do share common ends, they do value common practices, and they need these common practices because no one in his lifetime can develop all the potentialities he or she has (TJ 523). Moreover, man as a historical being lives and realizes himself based on what has been realized of human capabilities in time.


Rawls’s just society is a realization of human potential *in time*. In light of the youngest developments of Rawls’s thinking, this means more than the working of a Kantian practical reason. Kant’s *praktische Vernunft* is a universal human capability with unitary effects that even can be effective via non-moral means. Its moralizing power is practice-independent. Rawls’s moral conception is practice-dependent, its historical success is constitutive for its formulation and reinforces its further development. How different is this historical unfolding from Hegel’s realization of Spirit. Hegel’s state also realizes itself at the cross-roads of history and community, but for him this is the universal unfolding of world-spirit. The whole point of Hegel’s political theory is the reconciliation or mediation between the universal and the particular. Each element in this mediation has its own universality. The establishment of the ethical life is the establishment of the universal practice. This universal practice, however, is not to be confused with the idea of practice as constituting human identity that figures in the so-called communitarian critique on Hegel. It is important to realize that Hegel’s ethical life is a *universal* practice and reflects the stage of development of Spirit—to use the term ‘practice’ as referring to Hegel’s ethical life is somewhat misleading. Ethical life, as Hegel understands it, is more than a characterization of personal identity: It contains the unity of man’s existence in relation with the development of Spirit, or the Absolute, and is thus not relative to social meaning but, rather, defines social meaning. The communitarian idea of a

practice is an argument against the sheer deontological deduction of principles of morality in Rawls's theory; Hegel's ethical life is the necessary content that realizes the inherent universality of morality.

Rawls's critique is then that Hegel makes the realization of a just society dependent upon a humanly-independent force, *i.e.*, the development of world-spirit. Rawls does not want to make any references to an Absolute or world-spirit, but still has a universal claim: The principles of justice as fairness apply for all citizens, and the morality contained in those principles has a profound influence upon the content of the convictions and beliefs between which it establishes a reconciliation.¹²

In the last articles Rawls seems to tend to a more parochial interpretation of justice as fairness: Justice as fairness is placed within the tradition of modern democratic states. That would, for me, weaken his case against Hegel: Both can then be seen as elaborating and starting from a not accounted for situation, be it the world-spirit or the democratic state. But at least Rawls cannot stop here: He has to inquire about the existence of democratic states as to why they come into being and why they have shown to be successful. Subsequently, the reconciliation at which justice as fairness aims can be historically located, but must be universal in content: It is a project people will advance, despite their particular beliefs and convictions—at least that is the claim Rawls is making. A culturally or historically limited reconciliation would itself be in competition with other proposals. What therefore must be established is an interpretation of Rawls's reconciliation through the principles of justice that *does* justice to both the Kantian deontology of moral principles as well as the Hegelian ethical life of shared practices, without either making metaphysical claims (Kant) or referring to the establishing of a world-spirit (Hegel). In other words: Against the threat of making Rawls's theory of justice parochial, is there a *universal practice* that can carry the reconciliation through free public reason? It is here that we have to add to the historical inquiry a systematic inquiry of Habermas's discursive ethics, for Habermas sees exactly this establishing of a universal practice that combines the deontology of first principles with a communal practice as the focal point of his philosophy.

12. The proposal of Gerald Doppelt to see the Kantian personality as meta-view behind the original position, would render this historical line in Rawls's thinking meaningless—Doppelt 1989, p. 823.



Habermas's Communicative Ethics

CHAPTER 6

JUSTICE AS FAIRNESS gains moral support when it develops into an overlapping consensus. This is how Rawls accounts for the moral foundation of his theory in his later articles. With this he takes an argumentative turn, thus taking up a line of political thinking that is already present in the work of John Dewey. As Dewey stated in *The Public and its Problems*, what is essential to democracy is not that it aims at majority decision, but, rather, that democracy is characterized by the ways in which the majority comes to be. The problem for the public, as he saw it, is “the improvement of the methods and conditions of debate, discussion and persuasion” (Dewey 1984, p. 365). This points us directly to the issues which are at stake here, for Rawls proposes a certain method of discussion. Rawls lays a direct link between discussion and moral support—the overlapping consensus is a reconciliation through public reason. In the previous chapter we concluded that the moral support for justice as fairness is based upon a common practice. So we might say that the morality contained in justice as fairness is supported by a *practice of discussion*.

The idea of an overlapping consensus intends to give the morality behind Rawls's theory—the morality of ‘sharing one another's fate’—

fixed ground. But to what extent does it accomplish that? With his idea of a discursive moral theory, Rawls places himself in line with the philosophy of Jürgen Habermas. Habermas himself has given critical appraisal to Rawls's argumentative approach. Subsequently, other authors have pointed to similarities in the theories of both Rawls and Habermas (cf. Benhabib 1982; Mara 1985; Raes 1985). Where Habermas joins Rawls, as G.M. Mara has pointed out, is in the idea of a procedural society: criticizing politics is a discursive effort, it is carried out in ongoing discussions in society (Mara 1985, p. 1043). In the following, I shall analyze how Habermas's wider perspective can clarify the problems we raised in relation to Rawls's approach.

The previous chapter ended with the tentative finding that the outline of a universal practice could reconcile the Kantian and Hegelian elements in Rawls's theory. The problem of this reconciliation is that of a mediation between form and content, formality and morality, or the universal and general and the particular and local. Jürgen Habermas's thinking is—more than Rawls's theory—an attempt at such a mediation between Kant and Hegel via a universal practice. But Rawls also points in the direction of some more or less universal discursive practice as background to his theory when he speaks of a reconciliation through free public reason. With that in mind, we can see in Habermas's philosophy an important contribution to a deeper understanding of the philosophy behind justice as fairness.

The reconciliation in Habermas's philosophy between Kantian and Hegelian themes can be summarized as follows: The establishing of a universal practice of discourse is only possible via the introduction of formal rules that canalize each contribution, so that the practice can develop its full rationality. The development of rationality is the keyword for Habermas, so we will start with that aspect of his thinking.

Habermas and communicative action: An overview

Habermas's intention, as he formulated it in his *Theorie des kommunikativen Handelns*,¹ is to provide a more comprehensive perspective on

1. I shall use the following identifications for the works of Habermas used in this chapter:

TWI – Technik und Wissenschaft als Ideologie;

WTh – Wahrheitstheorien (edition 1982);

TkHI – Theorie des kommunikativen Handelns, Band 1;

TkHII – Theorie des kommunikativen Handelns, Band 2;

MkH – Moralbewußtsein tseintseinund kommunikatives Handeln;

phDM – Der philosophische Diskurs der Moderne;

RM – Recht und Moral;

the process of rationalization as it was first described by Max Weber. More specifically, he wants to remedy the defects of Weber's approach. The problem with which social and political theory since Weber is confronted, according to Habermas, is the question of why rationality took on the specific form it has in Western culture. For Habermas, being part of the movement identified with the *Frankfurter Schule*, this question is connected with that of whether or not this (Western form of) rationality is necessarily an instrument of oppression.² In Habermas's hands these questions give way to a powerful evaluation of Weber's analysis.

In short—following the account Habermas himself gives of Weber's thought—Weber saw Western rationality as the cause and effect of a process of disenchantment (*Entzauberung*) in which religious world-views gave way to a secular culture where the rational elements of those world-views kept on living. This secular rationality applies to the relation between means and ends. Rationality is the optimal matching of means with (given) ends. This end-rationality (*Zweckrationalität*) gives way to the specific modern society with economic and legal institutions. Modern society is a bureaucratic society, a functionally organized society. The price Western man pays for this development is that moral values cannot be rationalized in this way: Morality is concerned with the ends we choose, but rationality connects means to ends and cannot decide about those ends themselves. Though science and society are ordered according to rational principles, the choice of the ends for which we strive, or should strive, is not under the discipline of rational principles. It is here that Weber sees the disenchanted (*entzauberte*) gods still present; in relation to ends, there is an ongoing fight between these gods. (Weber 1968, p. 603, 604).

Habermas begins his criticism of Weber with this conviction: For him the fight between the gods can, and must, be decided by man. The main emphasis in Habermas's critique of Weber is that Weber did not start with the systematic question of which forms of rationality and rationalization are possible. Instead, he took one specific, historically grown form of rationality, *i.e.*, rationality as end-rationality, for granted (TkHII p. 449). Habermas develops a wider idea of rationality: He defines as rational all those expressions (acts or thoughts) for which arguments can be given in a discussion or *discourse* (TkHI p. 23, 34). In this way rationality applies to relations not only between man and his natural environment, but also to the relations between man and his

nU – Die neue Unübersichtlichkeit.

2. It is especially Herbert Marcuse who advanced this thesis, see *One Dimensional Man* (1964); in Habermas's early works one can find already critique on this thesis, see TWI.

social environment and between man and his inner-world. Though Weber used his conception of rationality specifically to rationalize the social sciences, this conception applies, according to Habermas, only to the relations between man and his natural or physical environment. Because Weber used this limited conception of rationality, it follows that he could neither trace rationality, nor trace potential rationality, in the other relations.

Around these three relationships of man, Habermas distinguishes three perspectives from which the world appears to an actor: An objective, a normative and a subjective perspective. Communication takes place within one, or more, of these perspectives. Corresponding to these perspectives are three claims of validity (*Geltungsansprüche*): An expression can be (objectively) true (*Wahrheit*), normatively right (*Richtigkeit*) and/or (subjectively) sincere (*Wahrhaftigkeit*). So, when someone says: "The president should increase taxes," we might criticize this statement in three possible ways (or, of course, a combination of two or more). We might criticize the objective conditions that are the background for this statement, *e.g.*, that actually there is no economic need for this measure; or we refer to normative aspects, *e.g.*, that we think that increasing taxes now would mean that individuals have to pay more than a fair share in government expenses. Finally we might criticize the subjective aspect: We suspect the person who made the statement is not sincere since before the election he tried to convince us to vote for the president because he would not increase taxes.

These three perspectives tie in with three basic interests Habermas distinguishes and identifies as driving forces of human beings and as formative for specifically human life. As he formulated it in an earlier stage of his thought, these interests are Labour, Interaction and Emancipation (TWI, title-chapter). These three 'anthropologic' (as Habermas calls them) categories are the knowledge-leading interests which lay at the base of the different sciences—respectively the empiric-analytical or technical (natural) sciences, the historic-hermeneutic or practical (social) and the emancipatorical sciences or critical theory. Habermas's aforementioned critique of Weber and Western culture is that the predominance of technical rationality has over-shadowed practical rationality and suppressed the critical reflection of human beings, thus killing the process of emancipation. But emancipation—included as *telos* in language—is the deepest, most profound interest of the human species: With the appearance of language—with the first word ever spoken—the idea of a form of communication (*Sprechsituation*) is introduced in which only the force of the better argument counts, and not the power someone has (TWI p. 163). In

Habermas's philosophy, emancipation captures the ultimate human and most humanly interest: To be free from oppression—the root of oppression being distorted, false knowledge.

Emancipation is the inner driving force in human life, culture and science. According to Habermas, characteristically *human* life develops, in its very beginning, not from contact with the environment, but from within. Its shape is expression of what is truly human, its origin is reflection on one's fundamental needs in a specific time and under specific circumstances. Emancipation is being true to one's innermost nature as a human being: "The expressive attitude toward inner and outer nature describes ... a complex of aesthetical-practical rationality within which the production of knowledge can take an authentic form, *i.e.*, an interpretation of needs that will be renewed under changing historical circumstances." (TkHI p. 327—transl. JFG).³

This leads to some initial criticism Habermas can level at Rawls. The interest in emancipation is a deeper and wider interest than that which Rawls distinguishes in the thin theory of the good; according to Habermas, the primary goods seem to be more or less a preliminary, and thus limited, concretization of certain more basic needs (MK p. 104, 133). Though both Habermas and Rawls agree in the importance and necessity of making society a place for human beings to dwell, Habermas believes Rawls adheres too much to a derivative level of interests. Most importantly, Rawls already takes needs for granted which for Habermas should be subject to a discourse. Rawls does not ask whether the actual needs of human beings are also their *true* interests, thus taking for granted the possible distortions in people's knowledge of themselves. For Habermas, the actual interests people say they have are open to reinterpretation under the critical, fundamental interest in emancipation. Rawls is not systematic enough in his foundation of the principles of justice according to Habermas. Though Habermas recognizes Rawls as a very important representative of a cognitivist moral theory to which he himself is also committed (TkHI p. 317), he takes it that Rawls, by formulating the two principles of justice, gives a preconceived content to a discussion, instead of giving a foundation for a moral point of view (MkH p. 133).

Habermas has, in two respects, a more advanced theory of human interests. First, the human needs for truth, rightness and sincerity are wider and more general than the list of primary goods Rawls gives.

3. "Die expressive Einstellung gegenüber innerer und äußerer Natur umschreibt ... einen komplex ästhetisch-praktischer Rationalität, innerhalb dessen die Wissensproduktion die Form einer authentischen, also unter veränderten historischen Bedingungen jeweils zu erneuerenden Interpretation von Bedürfnissen annehmen kann."

Second, these interests are connected with being human as such, and not with the workings of a Kantian practical reason. They are founded not in the one world of actual reality and not in the metaphysical world of the noumenal self. These fundamental interests are the leading interests in human practice—as we saw with Hegel, practice goes before formality. This gives, potentially, a wider foundation to norms of justice than Rawls seems to give, for behind the possible norms of justice is not a specific (*i.e.*, modern democratic) practice, but a universal practice.

How does this universal practice relate to the problem with which we began this inquiry into Habermas's thinking? The diagnosis that Habermas gives of the process of Western rationality is that the potential rationality in the different relations in which man stands—specified in the relation between man and nature, man and his social world and man and his inner world—are laid on the Procrustean bed of end-rationality. Due to this absolutization of a specific form of rationality, rationality has become an oppressive instrument. For Habermas, end-rationality belongs to the technical sciences that explore the relation between man and nature, but is alien to man's relation with his social and his inner world. This reign of end-rationality, then, is oppressive to man's social existence and to his personal existence. This leads to the "colonization of the life-world" (TkhIII p. 488), *i.e.*, the process by which social structures are more and more confronted and adapted to strategic treatments where effectiveness and technological soundness of means count, rather than understanding and the morality of the ends. Thus not just normative or moral discourses, but the total endeavor of establishing and continuing a universal practice in which moral norms can be formulated is paralyzed.

This colonialization of the life-world is one of the negative repercussions on Western society caused by the predominance of end-rationality. We see this when we consider what Habermas distinguishes by *System* and *Life-world*. The life-world is, in its broad meaning, the whole of human acts and works that makes up society and that exists over time. This existence in time is made possible by communicative action. It is this communicative action that has the inherent drive to become rationalized (emancipation!). Rationalization in this context means that communication is ultimately governed by yes/no statements (*Stellungnahmen*) reached by the force of the best argument (*cf.* TkhII p. 219). Mutual understanding (*Verständigung*) is the aim of communicative acts and this understanding is a condition for the free and open

communication (*herrschaftsfreie Kommunikation*) in the ideal speech situation.

With the rationalization of the life-world the *system* comes into being. By 'system', Habermas means all those more or less institutionalized spheres—like juridical power, police, economy, education—that have as their function the sustaining and reproduction of the life-world. These institutions secure the rationality of this reproduction by providing fixed procedures that will be uniformly applied. But herein also lies the danger of a disconnection of the life-world. And that is what has happened in Western culture, according to Habermas. By virtue of the exclusive focus on end-rationality or third-person rationality, the institutions more and more estranged themselves from the life-world and looked upon the life-world from the observer-perspective (third person) as a to-be-planned object, thus negating and overpowering the normative legitimacy and sincerity of the life-world. Economy and Politics are such norm-free institutions that become more and more impersonal and demanding for the life-world. Habermas sees an especially clear case in the development of the juridical system (TkhII p. 523). We shall turn to this analysis in order to get a clearer insight into the relation between normative and formal aspects Habermas distinguishes in the constituting of society.

Law and morality

Habermas shows the effects of this colonization with the process of juridification (*Verrechtlichung*) of Western society. In short, in this process, written law more and more penetrates informally ruled interaction. This means both an encroachment (*Ausdehnung*) of law, as well as a concentration (*Verdichtung*): Law becomes applicable to more situations and becomes more specific and detailed. In Tkh, Habermas sees mostly the negative aspects of this process, *i.e.*, the objectivation (*Verdinglichung*) of communication-oriented interaction. Though the institution of law in the civil *Rechtsstaat* safeguards the life, liberty and property of individuals via morally based rights-claims, there also develops an ambiguity: Law safeguards freedom *and* at the same time takes away freedom (TkhIII p. 531). Habermas sees this development most clearly in the social security system: The legal right to welfare benefits is a step forward from the traditional care for the poor, but at the same time it leads to a bureaucratic-instrumental involvement in the life-world, because the guarantee of social welfare can only be applied via individual claims based on specific general facts. Social

relations are then confronted with if-then modes of reasoning which are intrinsically alien to them (TkhII p. 531, 532). The institution of law in a social welfare state both serves the social integration and demands the disintegration of those life-world relationships that have to be brought under the control of law (TkhII p. 534). Previously informally structured circles become more and more formally organized (TkhII p. 539). The 'system', then, not only actively molds and shapes the life-world, but also overpowers and paralyzes it.

In TkH, Habermas stresses almost exclusively the instrumental function of law, thus arriving at the rather negative critical position *vis-à-vis* the juridification of Western society. In TkH, law appears as a collaborator with the oppressive effects of end-rationality. Subsequently, he emphasizes that law has two entwined aspects: That of the moral legitimation of rules, and that of the positivity or instrumentality of the rules. The first aspect brings the development of law into a more systematic relation with the communicative morality that lies at the base of TkH. In the Tanner Lectures *Law and Morals (Recht und Moral)* (1988), he presents a more positive evaluation of the development of law.

According to Habermas, the development of Western rationality, leads to the situation that belief in the legitimacy of law and right can no longer be based upon collective religious and metaphysical certainties. Instead, legitimacy rests in the rationality of law and right itself. But is this rationality inherent to law itself, independent of moral facts? Is, in other words, a justification of law and right only formal or also material? For Weber, any demands of a material justification would annihilate the formal rationality of law and right (RM p. 53). This positivistic-like stance is, according to Habermas, only defensible if the formal characteristics of right can be labeled rational in a strictly morally neutral way (RM p. 56). As we have seen, Habermas's critique of Weber was that Weber gives a *non-neutral*, one-sided picture of rationality as *end-rationality*. And as a result of this limited, non-neutral idea of rationality, Weber cannot allow a material justification of norms of right.

The positive law that Weber thought only formal, had itself a close connection with certain moral incentives that resulted from the economic order in Western society (RM p. 58). Habermas goes one step further: Not only did Weber not see the material morality behind the law, neither did he see the presence of an *ethical* formalism behind a legal formalism (*cf.* RM p. 61, 62). The nature of this ethical formalism becomes clear after considering the wider context of values that Habermas distinguishes.

Habermas maintains that the idea of a *social contract* does not give a certain *content* to legal systems, but a formal *procedure* to justify what will count as law. In this procedure, the production of norms itself is placed under normative control (RM p. 62-64). *Before* juridically binding statements can be formulated, there must be agreement, not on the content of those statements, but on the procedure via which consensus about those statements can be reached.

In other words, theories of the legitimacy of law and its rationality can only be viable when they adequately express this 'moral point of view' (RM p. 79) out of which a procedure to assess practical-normative questions can be formulated. Habermas's proposal is that this moral argumentation should be considered itself the procedure for rational decision making (RM p. 79, 80). The moral point of view is made explicit, not in a monological weighting of the best way to further one's own interests, but in a discourse in which everyone is supposed to contribute to a common search for truth and in which consensus is reached only by the non-compulsive force of the better argument. Behind the principles of law and justice is a moral argumentation, and not, as Habermas sees in Rawls's theory, a rational choice in a hypothetical original position (RM p. 80).

Morality precedes the law—but does this mean that the idea of law cannot be disconnected from morality? Kant's theory, says Habermas, is an example of a theory where morality completely absorbs the law (RM p. 115). But this complete entangling is against the nature of law itself. Moral norms are ends in themselves; legal norms are, in addition to this, means to other ends (RM p. 83)—legal norms have an instrumental function. Positive right is the medium by which society is constituted and via which it is reproduced in time. This constitution and reproduction itself must fall under the discipline of reason (RM p. 116)—only then is the instrumental aspect of law duly recognized.

Habermas thus advances a moral discourse as foundation of principles of right instead of a choice of moral principles as, in his eyes, Rawls essentially does. When discussing the distinction and priority Rawls makes between the right and the good (Chapter 2), it appeared that in the abstraction of the original position Rawls can uphold the idea that the right is prior to the good, and that thus a (guided) choice is made for certain principles of justice. But in the wider context of life in society, it appeared that some idea of goodness, and thus some more encompassing morality, must be presupposed in order to make sense of the choice in the original position. The leading questions from then on have been what this morality is, and, more specifically, how Rawls accounts for this wider morality. In Chapter 3 we saw that the idea of

an ‘overlapping consensus’, or the reconciliation through free public reason, was introduced to account for the morality of justice as fairness. Behind the choice in the original position Rawls places a moral argumentation for certain principles of justice. For Rawls, the conception of justice is not exclusively or primarily a choice in the original position but part of a tradition of public argument. Habermas does not sufficiently recognize this discursive turn in Rawls’s thinking. I believe that both can gain by looking at one another’s contribution to a just society established through a discursive use of reason. What remains is a more serious difference in the concept of rationality employed by Rawls and Habermas. In TJ, Rawls explicitly uses an idea of instrumental rationality or end-rationality and though he subsequently moves to a wider idea of argumentative rationality, there still remain the remnants of this instrumental reason. Rationality is instrumental rationality, as is necessary in the choice situation of the original position. But the moral argumentation behind his theory needs a more refined idea of rationality in order to produce consensus between different moral beliefs. What free public *reason* is, is not elaborated much further. Habermas’s critique of Western rationality can correct this lack of elaboration on Rawls’s side. Habermas’s thinking—as we saw—starts with a critique of the idea of reason itself, and he develops a systematic approach of how this cleansed rationality can become a consensus-producing power in the ethical discourse. To this idea of rationality we now will turn.

The moral foundation of Western rationality

What is the moral point of view that Habermas (and with him Rawls!) sees as mandatory for the legitimacy of law and justice? In a system of morality, the distinguishing characteristic of a moral point of view is traditionally taken to be the principle of universalizability. Here is the cutting edge of Habermas’s argument. Habermas’s formulation of the universalizability-principle runs as follows:

A valid norm must meet the condition that the consequences and side effects, which will expectedly follow from its general acceptance for the satisfaction of the interests of each individual, can be freely accepted by all who are involved (MkH p. 131—transl. JFG).⁴

4. “Jede gültige Norm muß der Bedingung genügen, daß die Folgen und Nebenwirkungen, die sich aus ihrer *allgemeinen* Befolgung für die Befriedigung der Interessen *jedes*

According to Habermas this criterion is, in contradistinction to that formulated by Rawls, in its essence discursive or dialogical—it asks for the acceptance by all participants. The criterion Rawls follows in the original position is monological: It only asks that I will accept the consequences of the criteria I choose.

In the elaboration of a dialogical perspective lies the solution at which Habermas aims. As the task for modernity he sees that Western culture and philosophy must create standards for normativity out of itself (phDM p. 16). According to Habermas, it was Hegel who first noticed this task as characteristic for modernity (*die neue Zeit*) (phDM p. 26). But to fulfill this task, Western thinking was impaired by the use of reason that is foundational to Kant's critiques: The principle of the knowing subject that relates to itself as an object and tries to understand itself 'as in a looking glass' (phDM p. 29).

This principle of subjectivity, so Habermas proceeds, should have provided the normative content of modernity but cannot achieve this because the subject-oriented reason leads to abstractions that split the ethical life that carries the formation of norms. Habermas repeats thus in a different setting the analysis of Weber's idea of rationality we encountered earlier. The principle of subjectivity determines the *objectivating science* which disenchanting nature and freed the knowing subject. Subsequently, subjectivity shapes *moral principles* as to acknowledge the subjective freedom of the individual, and determines *modern art* as absolute internality (again the three worlds) (phDM p. 28).

The alternative for this monological subjectivity would have been the intersubjectivity of the unrestrained formation of the will (phDM p. 54). This alternative can only work under the conditions of a change of perspective. Habermas sees this change as a necessary step, considering the constant failure of Western philosophy to finish Hegel's project. All the attempts till now proceed in the direction in which the later Hegel pointed. There has been a counter-discourse that went back to the ideas of the younger Hegel, but in fundamentally criticizing this project of modernity, they have failed, because all these attempts were still thought from within the limits of subjectivity.

The necessary change of perspective is a change of paradigm: instead of subjectivity with its paradigm of knowledge and self-consciousness, we have to turn to the communicative paradigm of mutual understanding (*Verständigung*) between speech and act-competent subjects. Concurrent with this is a change in attitude: The objectivating attitude

Einzelnen voraussichtlich ergeben, von *allen* Betroffenen zwanglos akzeptiert werden können."

is no longer fundamental; in its place comes the performative attitude of participants who come to an agreement 'about something in the world' (phDM p. 345, 346). This means a completely different relation between the subject and himself. Within the reflective attitude of subjectivity there is a doubling in the spectator-perspective of the transcendental I (spectator) and the inner-worldly place of the empirical I (being watched), without a mediation being possible between these two perspectives of first and third person.⁵ This attitude is cancelled and replaced with a 'reconstructive' attitude which comprises an interpersonal relation which is structured as an entwining of the perspectives of speaker, hearer and actually uninvolved spectator—or, as the entwining of first, second and third person. Reflection still has its place here: In the third person-perspective under which everything in the inside or outside world freezes to object. But now, the perspectives of the first and second person can reconstruct this objectivating act of the third person. In the place of *reflective self-consciousness* comes the (re-)enactment of *reconstruction* (phDM p. 347). In this paradigm shift, then, is cured the disease which was firstly diagnosed, but ill treated, by Max Weber: The predominance of end-rationality was caused by the exclusive perspective of the third person that is connected with the subjectivism of modern Western culture.

Rationality

The reproduction of society must be placed under the discipline of reason—Habermas's critique both of the subjectivity of Western thinking and the relation of right and morality centers around his conception of rationality.

Rawls's idea of rationality is not far removed from Weber's *end-rationality*: The rationality of people shows itself in how well they construct means for enhancing the interests they have. Now, Habermas is not against bringing rationality in relation to certain human interests, but he sees the human interests in a wider context than Rawls sees them. This makes Habermas critical of the interests people actually have, for if he is right about the overpowering effects of end-rationality, we have to ask whether the very interests we have at the moment are truly our human interests, and not the interests forced

5. This is the same problem we encountered by Kant's division between noumenal and phenomenal world and which was partly solved by Kant in the constructive approach of reflective judgment.

upon us by the demands of the end-rationality of the 'system'. What is needed is to go one step further than Rawls: Rawls only gives an explanation of existing needs, but a moral principle needs a foundation of the needs themselves (*cf.* Mkh p. 89).

In order to give this foundation, Habermas has to establish that moral expressions can be treated rationally, in the same way that empirical and scientific statements can be. This is not the same as asking whether normative statements can be true or false. Habermas considers 'true', 'good' and 'right' as *predicates* and not as statements about characteristics. The statement

(1) It is right to tell lies,

is not to be compared with:

(2) This car is red,

But with:

(3) It is true that this car is red (Mkh p. 63).

This makes the way free to consider normative and assertive statements as making claims to validity (*Geltungsansprüche*) which can be subjected to argument. Ethics can be founded in a logic of moral argumentation (Mkh p. 67). That logic forms itself in the life-world, where people have conflicting validity claims when coming to an agreement 'about something in the world'—be it the objective world (the totality of existing facts), the social world (the totality of legitimately ruled interpersonal relationships) or the subjective world (the totality of our own experiences). The truth of a proposition means the existence of the corresponding facts, in the same way as the rightness of acts means the fulfillment of norms.

But there is a considerable difference between the validity claims of truth and rightness. Though both consider discursively redeemable claims of validity, claims on truth are directly, and only internally connected with speech-acts: For Habermas, the order of nature is validity-free, thus does not depend upon our agreement. Facts are constituted independently from their being recognized. Normative claims to validity reside in norms and only derivatively in speech-acts. Society is not validity-free, social reality itself has an internal relationship with normative validity claims. Norms have to be recognized, otherwise they will become utopian (Mkh p. 70, 71).

Norms cannot be forced to acceptance by either deduction or empirical evidence. This does not mean, however, that the attempt to establish the rationality of norms fails here. Just as empirical statements have to be coherent with existing statements and theories, induction being the bridging principle between the singular statement and the general hypothesis, so likewise is there a bridging principle for normative statements that connects the singular statement with general norms—thus establishing the coherence of normative statements. This principle is the principle of universalizability. But the attempt to rationalize moral statements does not stop at establishing the coherence of a system of moral statements. What Habermas aims at is a *consensus*, and this brings us back to a more direct confrontation with Rawls's theory.

Dialogue and consensus

For Rawls and Habermas, the political process is one of consensus producing argumentation. Since I have shown that Rawls and Habermas share the same argumentative approach to the establishing of norms, and after I have explained how the wider concept of rationality Habermas employs can be seen as a necessary extension to Rawls's less developed concept of rationality, we are now in a position to investigate how this use of rationality can bring about consensus: I will do so via the critical notes raised in an essay of Sheila Benhabib. Her remarks touch directly the issue with which we concluded the chapter on Hegel: How can Rawls reach above an internal defense of Western democratic citizens to a universal defense of the principles of justice? If Rawls cannot reach this universal level the use of free public reason would only confirm what we happen to believe already.

As Benhabib points out, Rawls and Habermas share two important theoretical principles: (1) The principle of *rational consensus* for the justification of norms, and (2) the principle of metatheoretical proceduralism (Benhabib 1982, p. 49). Regarding this first principle, Rawls and Habermas design a hypothetical situation in which this consensus is to be achieved: the original position and the ideal speech situation, respectively. As Benhabib points out, there is a circularity in each conception: The normative principles that have to be established via a consensus are already presupposed in the design of the hypothetical situation (Benhabib 1982, p. 49). In Rawls's case, this circularity is already present in TJ: "The principles of justice and their realization in social forms define the bonds within which our delibera-

tions take place” (TJ, 563). We do not start from scratch, our choice is made based on some foregoing realization of the principles of justice. This is consistent with the idea of a reflective equilibrium. The original position is, above all, an argumentative tool. The function of the original position is primarily to sharpen our existing ideas and conceptions, however developed these might be. It is not at all required that the existing beliefs be limited to primary intuitions, they most likely already contain some realization of justice as meant by Rawls.

Later on, this circularity forces itself more to the fore. In the *Dewey Lectures* (the place where Benhabib starts her criticism), Rawls concludes that justice as fairness is only meant to describe the idea of justice that is at home in democratic societies and that it presupposes that people are willing to share a certain normative conception of the person (1980, p. 518; Benhabib 1982, p. 53). In other words, a certain kind of society and a specific ideal of human personality are not only the result of living under the principles of justice, but are already presuppositions for its working.

According to Benhabib, a similar circularity appears in Habermas’s idea of the ideal speech situation. The ideal speech situation “already stipulates a prior normative commitment to the *equal right of all* to be considered as rational and free beings” (Benhabib 1982, p. 58). This circularity, however, is only the surface appearance of a systematic argument—Benhabib also points this out. The ideal speech situation is an anticipation made in everyday talk of a dialogue in which only the force of the best argument counts (*cf.* WTh p. 180, 181). But what *is* the best argument?

The ideal speech situation meets four formal requirements that safeguard that every participant can make his contribution freely. These requirements are that (1) participants must have equal chances to start and enter a discourse, that (2) participants must have equal chances to make and criticize statements in the discourse, that (3) participants must have equal chances at making representative speech-acts—they must be sincere, and that (4) participants must have equal chances to make regulative speech-acts (WTh p. 177, 178).

These requirements being met, participants can have an undisturbed communication in which (1) the pragmatic meaning of interpersonal relationships and the meaning of the propositional content of the statements is understandable—this requirement is fundamental to any form of communication. Consensus is only reached when, in addition, the participants (2) recognize the truth of the statements contained in the speech-act, (3) recognize the rightness of the norm underlying this speech-act, and (4) do not doubt the sincerity of the other participants

(WTh p. 138). As it is, someone's sincerity can only show itself in his or her deeds, so for a discursively reached consensus, only (2) and (3), the claims to truth and rightness, can be the subject of a discussion, and it is this kind of discussion in which consensus will be reached about the truth and rightness of a statement. Still, these four claims are also presupposed in all actual communication: We normally have to be understandable in order to communicate, and we normally take it that people are speaking the truth, and are sincere, etc.—otherwise it would be pointless to participate in any conversation. But *because* time and again it appears that people do not meet these requirements, that they do tell lies, that they (knowingly or unknowingly) have hidden strategic purposes behind what they say, the model of this undisturbed communication is also a *counterfactual* hypothesis or, as Habermas calls it, an anticipation of a to-be-realized situation.

One way of seeing this is the distinction Hegel made between development and structure: That which is structurally the first and driving principle, is the last that will be realized in the development—so the state, being the underlying structure of society, comes into being via, and only after, family and civil society. Likewise, the ideal speech situation is already present underlying the first word ever spoken (TWI, p. 163), and is also a to-be-realized ideal *before* us.

One problem with Habermas's consensus theory thus far is that it only applies to an ideal situation and not to a real dialogue: In a real dialogue there are too many distortions to rely on the actual truth of the consensus. To deal with this problem, Habermas stresses an alternative interpretation of the ideal speech situation: Instead of an *anticipation*, the ideal speech situation is a *presupposition* of actual discourses (nU p. 228, 229; cf. Ferrara 1987 p. 45).

The ideal we reach for is thus already contained in our reaching, for otherwise it would not be possible to strive for it at all. This is what Habermas takes from the idea of the presupposition of a mode of discourse, which states that it is a mistake to repudiate certain principles when still continuing to use the form of thought and discourse in question.⁶ The principles of the ideal speech situation are then not open to discussion because denial of them would mean the end of every actual communication through speech. Habermas also refers to R.G. Collingwood on this note, and it is illuminating to pay some attention to his 'logic of questioning'. When you question

6. Habermas cites A.J. Watt 1975, p. 40, who explains that the presuppositions of a mode of discourse are principles which are not proven true, but "that a mistake is involved in repudiating them while continuing to use the form of thought and discourse in question"—MkH p. 93.

something in search of evidence, you have already some tentative idea of the evidence you will be able to use. “To ask questions which you see no prospect of answering is the fundamental sin in science [...] Question and evidence ... are correlative.” (Collingwood 1983, p. 281). The criticism of actual speech is, in the same way, inspired on some tentative idea of what ideal speech ought to be, or is.

Criticism does not make a fresh start—we start with our actual judgments, as in Rawls’s method of reflective equilibrium, or with the everyday presupposition of undisturbed conversation where Habermas’s conception takes its starting-point. The way we question our actual situation contains already the direction in which we are looking for an answer or solution. That does not mean that we will find only that for which we are looking. The criticism of circularity is only valid when there are no limits to what we may put forward in assessing and criticizing our present situation. For both Rawls and Habermas, it is not ‘anything goes’. For one, it is their conviction that there is a certain ground on which all criticism rests and which cannot be optional itself. Subsequently, they believe there are arguments that can make that particular ground more plausible. Circularity is raised as a criticism when we do not agree with the ground underlying a theory—in the case Habermas presents, however, this would amount to a disagreement on the truth of the statements made, a disagreement thus which can be expected in the ideal speech situation and is in basic agreement with the grounds of the ideal speech situation. At least we can argue about the grounds of a theory—not to find conclusive evidence—but in order to clarify whether or not this ground is capriciously chosen, or more or less plausible in itself.

Habermas’s idea of the ideal speech situation appears in a most general way to be supported by the criterion of universalizability he formulates (see above). As we already saw, Habermas’s is a dialogical criterion. This results in two modifications of Rawls’s approach: First, needs of individuals can themselves be subject to public discussion (*cf.* also Benhabib 1982, p. 62, 63). Habermas will not accept the list of primary goods Rawls formulates as the primary motivational force of people in society. These goods themselves are open to discussion in the light of the three basic human interests. Habermas’s social criticism starts from these fundamental interests—the primary goods Rawls takes as basic needs contain, then, too much content: A content which first has to be agreed upon in a discourse. Therefore, Rawls’s is not a systematic contribution to the theory of communicative action (MkH, p. 104, 133). Habermas begins at a level before or deeper, similar to the level on which Rawls sees individuals as rational beings and having

certain moral powers (Rawls 1980, p. 525). This criticism is tantamount to saying that Rawls does not give an explanation of the ‘moral point of view’ (cf. Mkh p. 133).

Second, Habermas constructs his ideal speech situation because human beings have, in language, the possibility of shifting between the three perspectives of the first, second and third person. Above we saw that it was the entwining of these perspectives that replaced the reflective self-consciousness of transcendental subjectivism. Under the communicative paradigm that Habermas proposes, it is not ‘subjective knowledge’ which is to be achieved, but intersubjective *Verständigung*. But is this a truly *dialogical* point of view? Though Habermas claims that this is an entwining of the perspectives of speaker (first person), hearer (second person) and uninvolved spectator (third person), we can wonder whether these perspectives cannot also be perspectives of one single *I*. If this shifting of perspectives is to achieve *Verständigung* about ‘something in the world’, be it a fact of science or a social norm, then this procedure seems only able to work when there is a “unified and self-reconciled subjectivity” (Benhabib 1982, p. 73) underlying Habermas’s conception of the ideal speech situation.

There is a dialectic in the discursive philosophy Habermas proposes, a dialectic adequately captured by Benhabib when she states that:

Discourses arise when the intersubjectivity of ethical life is *endangered*; but the very project of discursive argumentation presupposes the ongoing validity of a *reconciled* intersubjectivity. (Benhabib 1982, p. 71; italics in original)

That may cause us to wonder about the validity of the shift of paradigm: Based on a reconciled subjectivity, the three perspectives of speaker, hearer and spectator ultimately need not be the perspectives of two or more persons, but can still be attached to one single person. The dialogical criterion of universalizability, for example, can then still be applied monologically by someone who makes a good case for having expert entrance to the deliberations of this unified subjectivity.

Both Habermas’s and Rawls’s idea of a universal practice conceive of it as an ongoing discussion in society. Both ultimately refer back to this discussion itself when formulating criteria regarding who can take part in this discussion. Habermas, however, brings us further in explaining the nature of this communicative society. But it seems that he can only keep his claims by implying some reconciled subjectivity behind the dialogical formulation of norms. This leads us into broader questions about the idea of community that is implied by discursive

theories like Rawls's and Habermas's. To investigate those implications, we need to leave this stage where individual thinkers are questioned, and try to pull the threads together which were laid out in the previous three chapters.

PART THREE

Consensus




CHAPTER 7

Rawls between Kant and Hegel

IN PART TWO, we confronted Rawls's theory with two important historical predecessors, Kant and Hegel, and a contemporary thinker with whom he shares some insights on the idea of a consensus-oriented moral theory, Habermas. Let us now turn to a more general discussion of the themes we have thus far developed.

In this chapter, I shall analyze the contours of the mediation Rawls establishes between Kant and Hegel. The way Rawls accommodates individual and society is by a specific combination of Kantian and Hegelian elements. To outline the contours of this mediation we have to analyze the specific distinction Rawls makes between public and private. This analysis will lead us to a discussion about the so called 'communitarian critique' of Rawls's theory, the Hegel-inspired critique which claims that Rawls does not give an adequate account of the communal ties that are constitutive for the individual's identity. We then conclude this outline with the related issue of the rationality's place in the mediation Rawls proposes. In the next chapter I shall turn to a more specific account of the mediation Rawls establishes via the political aspect of human acts.

The nature of the mediation

From the discussion of Kant, we learned that Rawls does not elaborate an individual moral point of view, but a social one. The individual does not choose moral principles in a Kantian autonomous way. Rather, his own interests lead the choice for the principles of justice. The principles of justice can be regarded as autonomous in relation to society: It is society as end-in-itself which gives content and form to the principles of justice. To go one step further, in Rawls's theory society takes the place of God in Kant's moral theory: Society is the crown of the teleological system, the end that is not end to something else but an end-in-itself. Society is the moral horizon for the individual. Thus considered, Rawls's idea that it is not optional for us to belong to society becomes close to a Hegelian embracing of the individual by society.

It appeared that Rawls's theory is indeed closer to Hegel's conception of the state than Rawls himself wants. Not only can Hegel's organicism be interpreted in a less anti-individualistic, less overpowering way, for both Rawls and Hegel the problem of the distribution of economic goods was of central importance for the conception of a just society. Subsequently, it appeared that Hegel paints a more differentiated picture of society than does Rawls. For Hegel, individuals never stand naked before the state, but always mediated via institutions. The constituting principles of the state are the family and the corporations and estates in the *bürgerliche Gesellschaft*. Hegel is keenly sensitive to the danger of abstractness of the modern nation state. Against this, in Rawls's picture of society, there is only one formative structure, the idea of a social union. Also the individual's choice of moral principles is not primarily rational, but social, *i.e.*, within the limits of a conception of justice and thus within the limits of a social morality.

But Rawls is advocating something else than an impoverished Hegelian society: We will get an understanding of that when we look at what Rawls and Hegel have in common. The fundamental issue where Rawls and Hegel seem to meet is in the idea of a practical ethics or *Sitte* underlying moral principles.

The limited interpretation of the original position gave way to the idea of an overlapping consensus in Rawls's theory. In the overlapping consensus, people agree to certain rules that are normative for their living together now and in the future. What is important for Rawls is that this consensus is a rational one. But if one does not want to find a reference for this consensus in the realization of Spirit, or the Absolute, how can we then conceive of the support of morality through

consensus? For Rawls, a Kantian deontology of first principles has to provide the reference for the further elaboration of the idea of a just society. But this deontology does not rest on a Kantian metaphysical transcendentalism where the Godly will and the human person as member of a kingdom of ends-in-itself provide the first principles of morality. For Rawls, society is this end-in-itself—the reference is the publicly established order of reasons. In other words, a *Sitte* or established practice provides the final reference. For further elaboration on this theme we turned to Habermas’s discursive ethics in which conditions for dialogue and consensus form the core of a moral epistemology. It appeared that this possibility of consensus rested on a unified and reconciled subjectivity. Thus it seems that the problem that Rawls found inherent to Hegel’s approach—the anti-individualist organicism—is reproduced at the end of a theory of consensus: The social, but unified, subject replaces the plurality and particularity of the individual participants.

The primacy of society over the individual is the primacy of cooperation over individualistic strategies. Thus we can reformulate the line we discovered in PART TWO. This, then, can account for Rawls’s interpretation of society, rather than the individual, as end-in-itself and as the focal point of morality—thus applying Kantian ethics to the reconstruction of society. Subsequently, it shows why the individual is above all a social individual and an abstraction outside society—thus taking over Hegel’s concrete moral life as the focal point of the principles for a well ordered society. Finally, the primacy of cooperation points to the idea that the agreement reached has normative force for individuals’ moral deliberations—thus approaching Habermas’s community of discourse and his dialogical ethics. These three lines of reasoning, and the systematic relations between them, will be further explained in this chapter.

Pluralism and unity

One task to which Rawls sets himself is the reconciliation of the pluralism of life-orientations in Western society. The fact of a pluralism of different moral, philosophical and religious orientations is becoming a major point of controversy in contemporary philosophical and political thought. Roughly speaking, one can distinguish two attitudes toward this pluralism. One still holds on to the idea that there is one unifying idea underlying these different orientations. Thus, pluralism is not absolute, it is the appearance of a plurality of possible

orientations that exist by virtue of human erring. Clearly this is the standpoint of that stream in philosophy that we call Enlightenment and has been the mainstream in Western thought over the past centuries. Its main line of thought has been that the enlightenment of our thought will overcome the defects of human erring.

The other attitude is that there *is* such a pluralism of different orientations, each impossible to reduce to the other. Cultural relativism—the affirmation of the different ways of life people have—is one form in which this attitude appears. In recent times this attitude has been formulated under the label ‘post-modernism’. Its belief is that reason itself cannot settle all the differences that appear between people, but that one neither can leave the issue at: there just are different opinions, each valuable in its own terms. The post-modern condition is one of a match (*agon*) between the different orientations (*cf.* the analysis of Lyotard, 1979).

Hegel’s conception of the state can be seen as a kind of middle-ground between these two attitudes. Though he aims for an ordering of political life according to rational principles and explains this rationality as a unitary and unifying force, he also connects the establishing of the rational state with a specific form of life. For him, it is not only rational contemplation that leads to Enlightenment, but also the embodiment of rationality in concrete ways of life. The stumbling-block of Hegel’s thought is that he made the incorporation of rationality in the concrete ethical life dependent upon the self-revelation of Spirit in history, a process which is *not* initiated by man, but, rather, asks individuals to do what the time demands (*was an der Zeit ist*). It is this line of thought that forms the breaking point between Hegel and the constructivism of Rawls.

Rawls tries to have both the contemplative constructivist rationality of Kant and the way of life that Hegel proposes. On the one hand, he gives the outline of an argument for certain principles of justice in which these principles appear as the outcome of rational deliberation. This deliberation moves in a general Kantian manner: The aim is to formulate, by abstracting from the empirical conditions of the participants, those rational first principles from which a deontological deduction and construction of a well ordered society can be started.

On the other hand, Rawls sees that one can never begin from scratch (*cf.* Rawls 1987, p. 6). The origin of deliberation is found in the political institutions people in a modern democracy have. The well-ordered society is already present in our actual politics or our way of life. There is an historical bias in favor of Rawls’s well-ordered society. His claim is that the political intuitions that the theory of justice takes as the

starting-point for building a conception of justice, are those that have been incorporated in the political regimes that have shown to be successful in history. This established way of life is further supported by an overlapping consensus, and it is here that a further parallel exists between Rawls's and Hegel's philosophies. This consensus supports a justification in which people are enabled to recognize what are valid reasons for a particular conception of justice, among the differing particular convictions of people (*cf.* above; Rawls 1987a, p. 6, 6n10). This idea of an overlapping consensus takes the place of the realization of Spirit: It is now the ongoing discourse in society that leads to a formulation of the criteria for what is valid and reasonable.

The consensus which thus develops is further reinforced by Rawls when he puts the full force of Kantian moral reasoning on this public discourse. As we have seen, justice as fairness is primarily concerned with *public* reason, and only secondarily with private reason. The plans of life people privately pursue must be consistent with the publicly held conception of justice. Or, in other terms, the public morality of justice as fairness has also normative quality for private moral considerations because this public morality, supported by one's own reasons, meets a common order of reasons and is thus rational. The rational, public morality is a constitutive part of each individual morality.

With this strategy, Rawls places himself in the line of thought that still believes in the unifying quality of reason, and he does so by taking up the challenge of a pluralism of convictions. The overlapping consensus does not formulate a ground of unity among the different life-plans people happen to have. *That* is the function of the original position: to find the shared needs of all those different people. The overlapping consensus seeks unity among the different moral, philosophical and religious convictions to which people adhere. Rawls does not want to advocate either a relativism *vis-à-vis* this pluralism, or leave this pluralism to some kind of competition. He holds it possible to find some consensus that can bring those different convictions together. Because of the pluralism, Rawls cannot start with the private convictions held by each individual. The public reason is of course also an individual reason, but not a private reason. The essence of Rawls's approach is that all, possibly antagonistic, diversity of opinion is placed in the private realm of the individual's identity, and that the unity that can be found among these diverse opinions is placed in the public identity of individuals. The construction of a conception of justice as a moral political conception then starts as a *partial* conception, *i.e.*, a conception that only is concerned with, and results from, the individual's public identity. This partial conception is opposed to other moral,

religious or philosophical conceptions which are comprehensive in that they both define the individual's public and private conception before formulating a conception of justice.

Identity and individuality

Rawls's theory paints a split-image of the individual. In his theory, individuals have a fixed public identity and a variable private identity. In the well-ordered society where this order is supported by an overlapping consensus, people will have come to an agreement about this ordering on the principles they can affirm out of their public identity. This public identity, so Rawls claims, will endure changes in someone's private identity.

When Saul converts to Paul on the road to Damascus—so runs the example Rawls gives (Rawls 1985 p. 241)—he only changes his private identity; but both Saul and Paul will have the same public identity and can accept the same ordering of society because they still have the same public identity. As an *empirical* statement this is false. The mission for which *Saul* went to Damascus he did not and would not execute when he arrived there as *Paul*. The *public* idea he had, that it would be better for the (Jewish) people if the so-called Christians were eliminated, clearly changed.

Empirical incorrectness does not refute the claim of Rawls *per se*—rather, it is Rawls's claim that Saul would, after rational deliberation, not have gone on this mission. Rawls's claim is that both Saul and Paul would have agreed to the same principles of justice if they had made a rational choice; and since they are both capable of rationality, they can make this rational choice and agree to the same principles of justice in the light of their public identity.

My problem, however, is that *Paul* is still more likely to come to this consensus than *Saul*. My doubt has arisen because, considering that we suppose people to be rational or capable of rationality, Saul is *not* doing something to which individuals would agree in the overlapping consensus. Saul's private identity will keep him from endorsing the principles of justice that Rawls's rational individual would endorse. But why should he be irrational in doing this? I think it rather clear that Saul would not agree to a specific presupposition of Rawls's theory.

We began this study with the idea that justice has its place in a group that can say "we." Throughout this study I have shown that in Rawls's theory there is also such a 'we-group'. I spoke of 'we, heirs of the

Enlightenment’ and later specified that as: ‘We free and equal citizens, capable of a sense of justice and of formulating and revising a rational plan of life.’ In this way, the individual already has an identity preceding his private and public identity. In order to distinguish this identity from Rawls’s public identity, I will call it a *communal identity*. This communal identity results in a specific public and private identity which stand in a mutually dependent relationship: The principles that are endorsed via someone’s public identity are principles that are based on what people privately are, and *visé versa*. The interchangeability of one’s private identity is only present at the surface: The private identity of the individual is already pinned down in his communal identity. Rawls’s theory finds its origin in a shared identity of people and out of this communal identity he formulates moral principles for their living together. In this way he does not have to start with formulating specific moral principles for individuals, nor does he subsequently have to specify these. His theory does not need to say anything because the people have already filtered out what is allowed—their most fundamental identity is that of free and equal citizens possessing specific moral powers so that they are unquestionably attracted to the voice of the principles of justice.

To return to the story of Saul and Paul, I believe that at least Saul would not have agreed with the presupposition of “we free and equal citizens”. How do we judge those who are dissenting in this way? In TJ, as we have seen, Rawls is very straightforward: We consider them mad. ‘We’, free and equal citizens, see them as mad. But what right do ‘we’ have that we can consider as mad those who do not agree with us on this issue?

The ideas Rawls formulated subsequently can be seen as an attempt to give an argument in support of such a view, or, more limitedly, an argument which shows the truth of a Rawlsian consensus. Even so, at the end of the explanation of an overlapping consensus, there is still the initial consensus that ‘we’ are free and equal citizens, ‘heirs of the Enlightenment’.

The communitarian critique

These remarks will become clearer in relation to the so-called ‘communitarian critique’ levelled at Rawls. I believe that this communitarian critique misses the point that Rawls himself is developing a ‘communitarian’ argument (as I concluded in Chapter 3). One might accuse me of giving an apocryphal, communitarian reading of Rawls’s

theory, but I want to argue that this ‘communitarian’ reading is indeed what Rawls is implying, and that Rawls’s communitarianism is a direct result of the primacy of society over the individual. At the outset of TJ, Rawls states that “each person possesses an inviolability founded on *justice* that even the welfare of society as a whole cannot override” (TJ 3, italics added). Part of the implication of this statement is that individuals have rights over, and against, society. What is *not* the implication is that individuals have rights *prior* to society. Rights do not belong to naked individuals, their rights and inviolability are grounded on justice and thus on an ordering of society. It is clear throughout TJ that belonging to society is for Rawls the paramount fact of human life, and that the task put forward in TJ is to account for this value of community by a theory that is only in its *theoretical* basis individualistic (cf. TJ 264). In TJ Rawls tries to explain, defend and elaborate the prior and ultimate value of community in such terms that even an individualist will be convinced to join society and comply with the demands of the community. Rawls’s is that only within the limits of justice—and so within the bounds and bonds of society—what is known as the liberal individual can flourish and be safeguarded. A proper critique of Rawls’s theory is, thus, not a critique of his idea of the liberal individual, but a critique of his idea of society.

As an aside, it may be said that one consequence of this is that the good life, if one can use this expression in a rather general way, consists, for Rawls primarily in the social life. This is implied in Rawls’s account of the thin theory and the full theory of the good. As we saw in PART ONE, the thin theory of the good accounted for the basic motivation of people to agree upon a conception of justice. It is Rawls’s claim that because human beings all need for their individual plans of life the goods labeled by the thin theory, *and* that formulating the principles of justice will give the only, if not best, chance for all people involved to acquire these goods, people will actually live in society under the principles of justice. So, living in society under the principles of justice is living a (the) good life because what we then get is necessary for whatever good life we want to live.

In the context of the interpretation of Rawls’s political philosophy that I give the so-called communitarian critique is placed in a different light. I shall show that this critique does not always hit the target, and that Rawls’s thinking is more comprehensive than this critique seems to suggest.

Rawls’s theory of justice has been criticized for advocating an unreal view of the individual. Especially Michael Sandel’s critique of John Rawls in *Liberalism and the Limits of Justice* has given shape to this

so-called communitarian critique. Rawls's constructed choice-situation in the original position would presuppose bare, separate individuals, without any historical or social ties, and, as a consequence, without any particular identity. Rather, our identity would be fixed once and for all in accordance with the requirements for choice under the conditions of the original position, so that the whole idea of self-reflection would disappear. Asking "Who am I?" would be impossible; the only relevant question would be: "What ends shall I choose?" (Sandel 1984, p. 58, 59). But this abstract or 'unencumbered self' lacks the identity to be able to make a choice in the first place, because it is stripped off that very social, historical and cultural identity that would make a choice possible. Rawls's conception of the self in the original position, argues Sandel, is hypothetical, and no actual person ever chooses for the principles of justice (Sandel 1984, p. 154). According to Sandel, a further problem that arises from this "unencumbered self" is that, in this way, Rawls rules out that people choose ends that would change their identity, and also that the good of community cannot be considered as constituting the identity of the self. Thus, Rawls's conception of the person cannot support the strong, constitutive conception of community that is implied in Rawls's idea of sharing one another's fate, and sharing final ends (Sandel 1984, p. 64, 65; 150-154).

But this unchanging personal identity is exactly what Rawls needs in his idea of an overlapping consensus. It is, as we have seen, the individual's public identity that is of importance for Rawls. In order to establish an overlapping consensus, we need a point of view that is not, or at least not directly, affected by changes in the individual's private identity. Or, to put it in more neutral and more Rawlsian terms, an overlapping consensus is a consensus between people with different conceptions of the (or their) good, the consensus being independent of those different conceptions, but still supported by all on their own terms. For the rather limited purpose of establishing an overlapping consensus, an 'encumbered' self would make the theory more or less cumbersome. Instead, Rawls's method of remaining at the surface gives his theory a clarity and simplicity which is also its argumentative force. For Rawls the sketch of the original position does not imply an ontological priority of the self over its ends (Rawls 1985, p. 238), so we do not need to consider ourselves as 'unencumbered' in order to be convinced by the thought-experiment of the original position.

I tend to agree, thus far, with Rawls. But that does not render the critique of Sandel completely irrelevant. For Sandel, there is no "guarantee that only 'private' and never 'public' events could ... be decisive" for the self (Sandel 1984, p. 183). As Wallach adequately

summarizes the communitarian critique, there still remains the problem that Rawls “misconstrues how ‘private’ attachments become ‘public’ concerns ... how the political dimensions of our lives as citizens embrace *both* public and private realms” (Wallach 1987, p. 589, italics in original). Sandel rightly observes that there is a serious tension in Rawls’s theory when Rawls combines a public deontology of justice with a private voluntarism and utilitarianism of conceptions of the individual’s good. This is indeed a problem for Rawls’s theory, but Sandel does not adequately analyze it. What Sandel does not recognize is that Rawls employs the picture of an unencumbered self because he wants to bring unity among people’s different communal selves. Nor is Sandel quite right in stating that Rawls describes the individual’s choice for his or her good as voluntaristic. Rawls’s voluntarism is qualified: The individual is free to choose goods *as long as* these goods fall within the limits of justice. Sure enough, Rawls presents the principles of justice as the result of a choice made by ‘unencumbered’ selves in the original position—the abstractness of the self and the principles it chooses precedes the voluntary choice the self makes for its own plan of life *afterward*. But the original position is primarily an argumentative device, and the whole idea of such a choice situation only makes sense when some definite cultural and moral identity is presupposed—that was the conclusion of our discussion of the relation between the right and the good in Chapter 2. We can then conclude that a critique of the conditions of the original position is not addressing the right issue. It is not so much a question of why the implied conception of the self in the original position can support the strong sense of community that Rawls’s theory advocates, but what the historical, cultural and moral identity is of those people who can be convinced by the argument of the original position. In answering this second question we shall see how Rawls’s ‘communitarian’ point of view develops itself.

The original position is a “device of representation” (Rawls 1985, p. 228) and, in my opinion, the replacement for Kant’s worlds of the phenomenal and noumenal self. The metaphysical dual world of phenomenon and noumenon is reproduced on the level of actual society as a split between public and private identity. So, as William Galston says, Rawls’s liberalism does not rest on an unencumbered self but on a *divided* self: The private attachments are under the criticism of a public conception of morality (*cf.* Galston 1989, p. 722). It requires us, given the persons we are, “to abstract from our particular, but not our shared interests” (Gutmann 1985, p. 312). Thus the division Rawls makes between public and private serves the same

purpose as Kant's distinction between noumenal and phenomenal world: To distinguish the objective and general or universal from the purely subjective and individual. With that Rawls also would agree with Hegel's dictum to find what is generally valid among the different and conflicting opinions.

The essence of the construction of the original position is not that we make certain choices, but that we have certain needs. The primary goods are, after all, not so much subject to our choice, but subject to our needing them as human beings who live in society: This is important to realize. Remember that general knowledge about the workings of society and human psychology are not excluded from the information available to the persons in the original position. People generally know how society works—and thus they know what is at least necessary for living in this society. The relevant question in the original position is not “What ends do I choose?”, but, “How can I get a fair share of the goods I need in this society so that I will have fair opportunities to realize the (private) ends I have or might have?” The primary goods are necessary for my being able to choose later. If I do not have some liberty, wealth, self-respect, etc., I cannot make a rational plan of life in the first place (*cf.* Rawls 1988, p. 255-258), or, in other words, without those goods I cannot live a human life—they are ‘all-purpose goods’.

The original position functions as a device for discovering our shared interests, as opposed to our individual or particular interests. It is constructed to filter out the voluntarism and arbitrariness in the individual's choice of their good. As a reflective and critical device it helps us to recognize the intersubjective or objective needs of each individual on which to base an unchosen ground for justice. This limits the scope of the device. Though Sandel is right when he states that one cannot ask in the original position “Who am I?”, this question is also redundant for the establishment of justice. In a just society, people who will give different answers to this question live together. Leaving out the question “Who am I?” from a conception of justice, in order to be able to face up to this pluralism, is not an unsound move on Rawls's part. Desiring acceptance by as large a number of people as possible, we have to remove potentially conflicting questions from the constitution of an agreement.

If the critique of the unencumbered self stretches the original position beyond its intended function, it might still be asked, as Sandel does, whether the individual's choice of his good can be left as voluntarist as Rawls describes it. I think that Rawls is partly justified in painting this picture, because once we have accepted that leads to

the principles of justice, we have also accepted a wider morality as binding upon our individual strivings—see the discussion of the right and the good in Chapter 2. Within these limits the choice of life-plans can be left to voluntary choice. And this wider morality implies an identity of substantively encumbered selves.

Like Kant's distinction between phenomenal and noumenal self, Rawls's distinction between public and private serves the purpose of stripping down human agency to its non-particular, non-voluntarist and non-decisionist kernel. Both Rawls and Kant strip down to certain desires. This may sound strange in relation to Kant, but as we have seen, Kant was aware that only a specific desire would drive people to act. Most desires, however, are conditional: They lead us to do things because we want something further, thus constituting a never ending chain of ends to be reached. The only moral desire would be a desire for an end-in-itself. And as we explained, this end-in-itself which is the content of the moral law is the human being. The desire for the moral law is thus characterized as the only *rational* desire, the only desire which is in accordance with reason, and—as a rational desire—belongs to the noumenal self. As such, this desire is universal because it belongs to the rational world where only reason reigns.

We can say something similar for Rawls's shared interests in the primary goods. The desire for justice is a (moral) desire for an unconditional good: Society as an end-in-itself. This was the change in perspective we saw occurring when comparing Rawls's theory with Kant's. But Rawls does not have the transcendental and metaphysical arguments that Kant had at his disposal to establish what rationality is. So, whether or not the desire for justice is rational, must be established in another way. It is here that the original position comes into the picture. In the thought-experiment of the original position we try to put clearly before us what our particular, and what our rational desires are. The rational desires are those that we have as a moral person with an ability to formulate a conception of the good, whatever that conception might be. The rationality of our desires does not depend on a fixed idea of reason, but on a mutually recognized order of reasons in a practice of practical reasoning shared by reasonable and rational persons (*cf.* Rawls 1987a, p 6, 7; remember in this context that the criterion of justice is the political conception of justice itself, and that justice as fairness creates its own moral support). The universality of this reason rests in its being mutually recognized. The primary goods which are formulated define the rational desires of everyone who wants to live a complete, moral and rational life. It is then also rational to comply with the demands of justice, both because that would make a

rational plan of life possible, as well as because it is in accordance with the mutually recognized rationality of the agreement.

If this reasoning is correct, then the question “Who am I?” can only be asked from outside the whole endeavor of constructing a conception of justice. The answer will lead to a rather encumbered self: A self which, apart from particular desires, knows that it needs a couple of very basic goods and as a result has a moral desire for a certain conception of justice—for the very nature of these basic goods is that the only way to acquire them is to live in a society that is ordered according to those principles of justice. As a result, this self knows of a commonality with other selves, and of a community in which it is rational to want these basic goods and which supports the achievement of these goods. Or, conversely, a self which knows that rationality is to want these goods and thus to live in a society where it can get these goods. Thus the self is part of a ‘we’ that has a specific idea of what is rational to want for human beings, or, on a lower level, of a ‘we’ where a certain idea of what is good for human beings is shared. Against Sandel’s critique that the persons in the original position miss any identity that would enable them to choose, I would point out that it is not a *choice* for primary goods, but a realization of specific human needs that underlies Rawls’s principles of justice.

One might argue that Sandel is saying the same thing when he states that “what goes on behind the veil of ignorance is not a contract or an agreement but if anything a kind of discovery” (Sandel 1984, p. 178). According to Sandel, Rawls’s individuals either make a choice for the principles of justice out of necessity—and thus they do not have to choose—or they make a purely arbitrary choice for their individual good. Rawls is thus giving a poor view of voluntaristic choice (Sandel 1984, p. 164, 165). Sandel’s agents of voluntaristic choice should have the ability to base their choice upon self-reflection, and this self-reflection is impossible for Rawls’s agents. However, Rawls has said from the very beginning that he wanted to come as close as possible to a voluntary choice for the principles of justice (TJ 13), the implication clearly being that a purely voluntary choice for the principles of justice is not possible. After all, if society is not optional for us, then justice, being the principles for ordering society, cannot be a matter of purely voluntary choice either. It must be stressed that the original position is used by Rawls as an argumentative device that works *in the context of* an already existing discussion. As a further consequence, the identity of the self—and the locus of self-reflection—is for Rawls not a purely individual identity, but a communal identity and a communal reflection. The context of self-reflection is the individual-in-community in a

state of reflective equilibrium. *Within* the argument of TJ ‘public’, events cannot change the self’s identity. But the public identity that is presupposed in Rawls’s theory throughout, has certainly had effects upon the identity of the self. For people who have this public identity the argument of the original position is convincing. What Rawls is aiming for is an idea of justice that can be agreed upon by everyone, despite each individual’s ‘communal’ identity. The communitarian critique is not sufficiently aware of Rawls’s attempt to overcome the pluralism of life-plans and moral and religious convictions that tend to pull people apart.

Neither Rawls, nor the ‘communitarians’, realize that, in the final analysis, Rawls’s theory is supported by a heavily encumbered self. When Rawls misses the point of how justice embraces both our private and our public existence, then the problem underneath is not Rawls’s account of individual agency, but how he describes that the public field is constituted by people with their different private identities. The problem is not how public ends (and, with that, certain historical and social conditions) can be constitutive for the identity of the self—for Rawls is not denying this—but how what Rawls calls ‘private identities’ are constitutive for the public identity of persons and for the direction of the public argument. It is the question of how consensus is reached that is central here. How does the public moral discourse proceed and how does this procedure relate to people’s private identities?

Rationality and madness

Contributions to the public moral discourse should be rational in the widest sense—the overlapping consensus is defined as a reconciliation through free public *reason*. In the last section, we saw that there is a definite communal identity of citizens implied in Rawls’s theory. If Rawls wants to establish a mediation between Kant and Hegel which is unqualifiedly a mediation via the idea of rationality, then this communal identity will lead to some serious problems. The scheme of such a mediation is clear: The moral principles one holds should be rational—which means that they should confirm to a deontology of first principles (Kantianism) and are rational in relation to a certain practice (Hegelianism). However, in Rawls’s theory, the idea of rationality is not only opposed to irrationality or immorality but also to *madness*. The step from irrationality to madness seems not too big for Rawls. I do not want to imply that Rawls systematically relates irrationality with madness, but the way he sometimes does so, com-

bined with the overall outline of the theory of justice, is disturbing. Early in TJ, Rawls states that ethical doctrines that do not take into account the consequences of the acts they prescribe “would simply be irrational, crazy” (TJ 30). That maybe so, but Rawls subsequently takes a typically harder point of view. He qualifies the point of view of those who subordinate their goals to one paramount end as not strictly violating principles of rational choice, but as *mad*; to give the literal quote: “Although to subordinate all our aims to one end does not strictly speaking violate the principles of rational choice ... it still strikes *us* as irrational, or more likely as mad” (TJ 554, italics added). This sentence is so peculiar that it amounts to a communitarian point of view of which even Hegel did not dare to dream of. People who put their self in the service of one system can still be called rational, but they strike *us* as mad. *Us*—this will become more and more clear after TJ: Justice as fairness is connected with a certain tradition, with people who accept certain basic assumptions as binding before anything else. Justice as fairness is concerned with people living in modern democracies (Rawls 1980, p. 537), and only people who already have certain moral powers can be considered as free and equal under the principles of justice (Rawls 1987b, p. 16). The morality required for living in society becomes the entrance ticket for individuals. That, as such, is perhaps not so strange; the disturbing point is that people who do not have the right morality to live in this society, are not seen as incorrect, nor as potential subjects for moral growth, but most likely as people who are mad. For Rawls, justice as fairness will produce its own moral support—just as any viable theory of justice should. Via the moral psychology Rawls outlines in TJ, it seems that moral development will take place rather naturally and necessarily in the direction of a morality of principles—of a deontological morality. If the claims of this moral psychology are true, then one can support the view that people with other moral principles are perhaps rational—*i.e.*, one can reconstruct their arguments—but that they are more likely to be labeled as insane since they are not psychologically healthily developed people.

If Rawls’s mediation is seen as a redefinition of the concept of rationality, then this parochial interpretation of Rawls’s theory is unavoidable. The people who happen to live together and happen to agree in an ‘overlapping consensus’ are the final judges for contributions to the moral discourse. Society becomes a closed system where arguments only rest on majority agreement; individual convictions are either allowed within the four walls of the private realm, or seen as suspect when ventilated in the public realm when lacking enough (numeric) support.

Seeing Rawls mediation as a *rational* mediation leads to a parochial interpretation of Rawls's theory. It is only for people who accept certain premises that his theory is convincing. This makes it questionable how open the 'overlapping consensus' will be toward the pervasive differences between convictions that will persist in a well-ordered-society according to Rawls. But even inside this parochialism, tensions are building up that lead to questions that spring the boundaries of a tradition. Moral concerns have an inherent universal quality which cannot be kept captive in a tradition. Elaborating this universal content would be of foremost importance for Rawls's theory because the alternative is a war between traditions: Traditions that label each other as mad, and cannot come to any consensus at all. Rawls does not want this; the theory of justice is, rather, explicitly intended to make possible cooperation in the situation of a conflicting pluralism of political, moral and religious convictions that characterizes Western society.

The acceptance of the principles of justice as the basis of cooperation and civil virtue seems to have as its negative consequence the setting of the border between sanity and madness. But once we turn away from the direct relation with rationality, there appears also a positive consequence: It has truth-bearing qualities: The overlapping consensus that grows out of the acceptance of the principles of justice also leads to a revision of individual moral convictions. This appears most clearly when Rawls remarks that the development of the doctrine of free faith is "connected with the fact that it is difficult, if not impossible, to believe in the damnation of those with whom we have long cooperated on fair terms with trust and confidence" (Rawls 1987, p. 23). On the one hand, this statement of Rawls reinforces my criticism that he makes social morality paradigmatic for individual morality—with the connected danger of a parochialism; on the other hand, he makes it clear that living together in a pluralist society is not a matter of being indifferent to one another's opinions, or being skeptical about a possible establishing of a unifying morality, but brings with it a certain truth: Living together according to the principles of justice will give way to a truer morality. Rawls thus takes up the same project as that on which Habermas is working: That of establishing ethical life as the incorporation of reason, not related to a historical determined manifestation of Spirit anymore (as it was by Hegel), but based on the unifying power of reason itself, the unifying power of reason exercised and realized in the actual living together of people. In taking up this project, Rawls moves away from the mediation via the concept of rationality in the direction of, what I would like to call, a *political*

mediation that can overcome the otherwise unavoidable parochialism in his theory. I call this a political mediation because it starts in that very activity where we directly deal with our differences and conflicts regarding life-plans and fundamental convictions. This social-practical context mediates the idea of rationality that belongs to the use of 'free public reason'. I shall describe in the next chapter how this mediation is elaborated.




CHAPTER 8

Political Mediation

THE ARGUMENT OF the original position, it will be clear now, can only be seen as an argument internal to a specific society. It is a device that in certain critical situations will show people who have paid their entrance fee how to proceed with the discussion in society. Society becomes a normative tradition, with which I mean: The primary locus of normativity is the society as an ongoing discussion about normativity. This communal aspect sets the stage, and the limits, for the topics of the discussion. What seems to be forgotten, though, is that the discussion is kept going by individuals—not by individuals in a timeless original position, but by concrete living individuals with their own, more or less rational ideas, convictions and perhaps prejudices. That we have to pay an entrance fee—that we have to overcome our less rational convictions and our prejudices in order to be able to live together—is clear. The discussion about accommodationist and perfectionist strategies in Chapter 1 pointed that out. What matters is either on what grounds, and to what extent this will be done, or what the content is of those rational incentives that will form a basis for a society of individuals. Rawls gives a ‘perfectionist’ redefinition of individual freedom and society, but in constructing a practical reason

as a social or public reason he rules out a redefinition of *individual* reason, and so cannot defend why I should choose for this *society* (or why *Saul* should choose likewise). Rawls gives an argument for those who live in a Western democracy—those who belong to ‘we, Western democratic citizens’. But why would we want to be such citizens? To answer this question we need an approach other than the one the original position offers. We need an approach that can account for why *society* is the locus of normativity. As the argument stands now, society is the paramount fact about individual lives; social morality is the paramount morality, to the exclusion of other (private) moralities. The moral consciousness that is necessary for the stability of society is not a result of disciplining, but a result of the self-reinforcement of living in society. Rawls establishes a society that can only be presented *as if* it is a voluntary choice and this ‘as if’ is a very literal ‘as if.’ But one also can see the authority of society as a radicalizing of the idea of autonomy which we discussed in Chapter 1. If, as Rawls tells us, justice cannot be founded on metaphysical claims, nor in the development of a world-spirit, but has to rest in the autonomously choosing human individual, then the only locus of authority and normativity can be the human individual itself—and this human individual is necessarily an individual in relation with other human individuals. Thus the actual living together of people is the place where deontological principles and the normativity of a practice are safeguarded. That amounts to saying that the mediation between Kant and Hegel and between individual and society takes place via the political aspect of human life.

Retreat on the political

Justice as fairness, as a political conception, appears to be a move which the time in which we live demands. After the linguistic turn, the attention of philosophical analysis has shifted more and more to communication and the discursive activities through which people order their own and their shared life. I would like to call this a shift to the *political* aspect of people’s existence. That needs some explanation. What I want to stress in using the label ‘political’ is the inherent pluralism concerning life-orientations that exists in Western societies. The label ‘political’ carries with it more the connotation that an agreement has to be made between people with diverse beliefs and convictions, than does the label ‘social’. The label ‘social’ (here I follow the analysis of John Dewey—see Chapter 1) has a strong connection with the idea of community proper. But the question is whether society

as we know it can be, or should be, a community proper. The political is directly connected with the public, and the nature of the 'public community' is what we are analyzing.

Politics, as I want to define it for the purpose of this study, is both the most general process in which this shaping of human life takes place, as well as the result of this process. It is a process that involves planning of actions, weighing of possible consequences and arguing for or against possible lines of action. In that sense, politics is involved in most human activities. For example, planning the household budget in order to pay various bills and to leave room for other activities as vacation, trips etc., involves the mutual adjusting of desires and possibilities within certain limits (financial limits, number of holidays, duties relating to work in specific periods, etc.). Unfortunately, the term 'politics' also has a bad connotation and is usually associated with some cunning plans or activity to push one's own ideas. This negative sound of the word is for a large part due to the tricks and treacheries involved in the political activity of running a government. Though these bad connotations are obvious enough, this should not withhold us from seeing the political element in other human activities. The term 'politics' grasps, more than terms like communication and discourse, that different opinions are involved: It is acting in the face of conflicting opinions and possible or real resistance.

Politics as a result of the actual carrying out of a designed plan becomes identifiable as a characteristic line of action. We can talk about Christian democratic, social democratic or liberal politics. Different nationalities have different styles of politics as well. There are identifiable Canadian, Dutch, German politics, etc.

So considered, politics is part of most human activity and also the activity that unites people in society. That makes the place of a political conception in a pluralist society so important. People can differ up to the point of incommensurability of religious and moral beliefs—even to the extent that some people do not have religious beliefs or can be questioned whether or not they have moral principles. But these differences notwithstanding, they *all* take part in the political process of giving shape to the society in which they are living. This is a quite inclusive statement on my part: Even the people who are disillusioned with politics or think that 'they' will not listen to the people anyway, are still taking part in this process once they talk and argue about their point of view at work or in the pub.

So, once we have said that the human being as human being is part of some society, we have at the same time stated that he is connected

with all other human beings through his participation in, or at least fundamental interest, in the political process of this society.

The new importance Rawls has given to politics and political conceptions of morality is found in his attempt to outline how, based on this activity common to all human beings, one can develop a morality that can be supported by all mankind. The idea is that people will differ regarding religious, moral and philosophical questions *and* that there is no religious, moral or philosophical method to settle these questions in a manner acceptable to everyone. Despite these enduring differences people still live together in society and cooperate with each other. The idea is then that there is an actual consensus amongst people with different convictions and beliefs, and Rawls tries to outline the content of the very consensus which has shown to be enduring and successful in time. It is then not strange that he finds this content in the liberal society that, roughly speaking, has developed in the West since the Seventeenth Century.

So far this is the general scheme underlying TJ and which we analyzed in full detail in PART ONE. With this strategy, Rawls avoids two problems that have plagued former theories about the political life of human beings: (1) The problem of defining what rationality is, and (2) the idea that the ordering of society has to rest upon some true morality or an idea of the absolute. Let us look into both problems somewhat further.

(1) The avoidance of a substantial definition of rationality is something which gradually developed in Rawls's thinking. The general critique of TJ was that Rawls, via the original position, developed a theory that rested upon individuals who calculated their self-interest. Rationality, then, would be the use of instrumental reason for calculating which means would best enhance my own interest. George Grant has formulated this critique very forcefully in his *English Speaking Justice*, which appeared shortly after TJ. As we have seen, Rawls has stressed more and more that the original position is an argumentative device and does not yield substantive anthropological or metaphysical conclusions about human beings. In the articles subsequent to TJ, he shows that the principles of justice are not exclusively rational because self-interested persons in the original position would choose them, but because those principles are rational in the light of a common order of reasons that is part of society's culture. And in my analysis I found grounds to go one step further and said that the argument of calculated self-interest as employed in the original position gives a reasonable argument in a society where a fair number of people consider themselves as such self-interested persons. The argument of self-inter-

est is a *practical* device without any systematic implications regarding human beings.

Rawls claims that rational is what men agree to what rational is, and that roughly equals Habermas's conception of rationality, *i.e.*, rational is what can be supported by arguments in a discourse. But this idea is quite different from the idea of rationality of Kant and Hegel. Kant made it the object of his thinking to define what rationality itself is. For Rawls the question is: What does it mean to be rational? Though Kant is important for Rawls because of the moral constructivism he developed—*i.e.*, practical reason being self-originating (autonomous) specifies a procedure to contract first principles that reflects our conception of moral personality—the conceptions of the person and society that Kant uses have their foundation in his transcendental idealism of the noumenal world. The conceptions of the person and society that Rawls needs must be intuitively given and implicit in the public political culture of a democratic society. That is, they are present in the history of its political thought and in the understanding and interpretation of its institutions and laws. Kant's moral intuitions are derived from the pure noumenal being that is not determined by any empirical and historical interpretations, but finds its final reference in the unchanging pure moral being of God (see Chapter 4).

That Rawls turns the Kantian morality upside down, taking as the origin the requirements of social morality and not the categorical imperative as an individual deliberation, has to do with the historical basis of the political conception. The 'monological' procedure of Kant's categorical imperative is not affected by historical development; it is instead a-historical. The moral intuitions that Rawls needs for his overlapping consensus have to be part of a way of life that exists over time. The moral intuitions of Rawls's theory have to be historical.

Regarding the historical bias of his account of justice, Rawls is similar to Hegel: Hegel tried to account for both the reference of rationality in the Absolute, as well as the historical development that is unrecognizably present in human affairs and human rationality. The ethical life or *Sitte* as second-willed-nature is nothing more—and nothing less—than the embodiment of the specific stage that the development of rationality has reached. Rawls takes over this second element of Hegel's thinking, that of the connection between rationality and a form of life or a practice, or, in other words, the idea that rationality is realized in a historically developed and situated community. Rawls's overlapping consensus relies upon a strong consciousness of 'we' who can endorse certain principles because we see the rationality of these principles and are therefore sensitive to the

arguments that spring from these rational principles. It says nothing about the rationality of this historically grown way of life, other than a reference to its historical success. For Rawls, rationality is not something that has to be realized—after all, he is against dominant ends—for free and equal citizens *are* rational and do not have to *become* rational. This means not so much an endorsement of the uncoercive power of the best argument, but, rather, that people have an inherent capability to define what rational argument is, and that they will hold at least those convictions for which can be rationally argued. Once there is no Absolute as final reference for the rationality of one's convictions, the agreement reached by free, equal and autonomous—and thus rational—people is the standard for what is rational. So, what rationality is, is subject to the agreement among rational people; the content of rationality is left to what people agree to after rational argument, and thus does not need to be defined *a priori*.

(2) Something similar can be said about the second presupposition, that of the denial of an *a priori* true morality. The idea of rationality set forth by Rawls already denies an *a priori* reference, so there is no reference, consequently, for morality, other than what is contained in the historical form of life in which some form of rationality flourishes. To order society according to rational principles, and to define rationality as the order of reasons that is mutually recognized in a society, takes away the burden of giving a substantive definition of morality *a priori*.

Why is this an important achievement for Rawls? Despite the different attempts to formulate some inclusive or even comprehensive philosophical theory of rationality on which it would be possible to found a rational morality, Western society still shows a diversity of moral and philosophical convictions. The time is gone when science and philosophy could easily pass by this phenomenon by declaring moral questions not susceptible to rational treatment. Rawls wants to expose a unity in people's moral convictions, without declaring their diverse moral convictions irrational from the onset. Rather, only after a procedure has been designed and effectuated can we decide which views are irrational and not fit for rational (dis-)agreement.

Given the plurality of moral, religious and philosophical convictions, and given the assumption that one cannot declare any of them irrational *a priori*, where is a platform to be found to begin this procedure, or to find those principles that unite people? Rawls finds these principles in the living together of individuals, and in the political activity of people. Only the morality inherent to a shared activity that

has shown to be able to endure over time can be the starting-point from where to work out a more complete morality that eventually will reconcile people with diverse philosophical and moral beliefs. The basic principles of morality, then, are not found in some transcendent morality, or in some reference to an absolute, but in what has been developed in the actual living together of people. Simply stated: If we want to know how people with diverse beliefs can live together, we have to look at how they actually do it. I would like to call this move a retreat on the political. This the retreat on the political sets the stage for the moral discourse.

Justice as a *political* conception—a conception that functions in the living together of people—can only find its origin in this public life. As I have argued, this does not limit the conception in its workings—once established, it will affect the individual's private identity, only not via some definition of this private identity *a priori*, but based on what people publicly can agree upon.

The ultimate normative standard is not the moral law, grounded in the will of God, as it was with Kant, nor the relation to the absolute, known in the self-revelation of Spirit, as with Hegel, but the state of affairs in a discourse between free and rational people. But what right does such a political consensus have to overrule other moral and religious convictions? A possible argument could be the historical success of the content of this consensus. But does that establish anything more than that certain systematic claims have to yield for a practical convenience of reaching consensus? Dissent with a public consensus does not necessarily prove the falsity of the dissenting opinion. But some sort of conclusion about the falsity of dissenting opinions is deemed necessary in Rawls's overlapping consensus. As we have seen, this consensus is more than a *modus vivendi*, a situation where people leave certain issues unsettled because neither party can win the argument, and the common (practical) interest in a well-ordered society makes them refrain from further discussion for the time being. The overlapping consensus, however, is supposed to start *there*, but then gain more and more support so that people in the end actually agree on the content of their consensus in the light of their own reasons, and reformulate their respective private convictions to conform with that to which they publicly adhere to. The public overlapping consensus reduces the different and opposing moral, religious and philosophical doctrines to partial doctrines, *i.e.*, doctrines that can only affect the private identity of individuals.

Social pressure

Allow me put things in a different light: The ideas of an overlapping consensus and a discursive ethics give a systematic place to *social pressure*. Norms are not empirical *sense data* but social phenomena which exist in the social life of people.¹ Discussion, dissent, agreement, and communication are the means with which this social life is constituted and by which it is continued. This communicative aspect is prior to the settlement of social institutions, which are the more fixed and enduring embodiments of social life.

Using the term ‘social pressure’ can lead to misunderstandings. At least, most people get startled once they read the concept, but this is part of the effect I intend. Social pressure is quite often seen as a menace, a hindrance for individual realization and a conservative force that resists change. Most importantly, it is seen as the force which will eliminate individual diversity and lead to a uniform society. On the other hand, the effects of social pressure are also stabilizing on our social life—it takes away the burden of finding out our own rules, and it makes the conduct of us and other people to some degree predictable.

Social pressure is never an isolated social phenomenon. Though it may seem that the pressure to conform ‘floats in the air’, this pressure is ultimately carried by the individuals who form the social group of which we are a part (but I do not want to individualize this). The moment we begin to experience the social pressure as a menace coincides with the moment we start to disagree with the beliefs and convictions that support the established way of life in the group of which we are a part. (Note that this is reinforced when we find out that many people around us agree with us but still hold the old rules because ‘that is how we do things’ or because they are afraid what other people will say.) This means that there is an intimate connection between what we experience as a menace and what we individually think. On this note social pressure is not an objective phenomenon (even not for a view from nowhere). Let me extend this a step further. In the interpretation of social pressure I am giving, it depends on us what we experience as a menace. Rather than we being victim of some undefined social pressure, we ourselves create the social pressure—we choose whose opinions we value and whose opinions we see as a menace for what we want to achieve.

1. This is a general problem with norms. Even if we believe in some absolute reference such as God’s laws, it is *we* who have to respond to these norms. If we do not do that, it needs some interference from God, for example through a prophet, to make us see our mistake. On our own, we will not turn back to these norms.

Due to our ‘private’ convictions we have preferences for which people we see as a menace. We do not want to be in agreement with our social environment as an end-in-itself. Our individuality will lead to conflicts, and many a time we will not refrain from seeking conflict. But as long as we basically agree with other people, we will see the conflicts we have with them as a process of edification in which both we and the other people will learn from one another. The conflict becomes painful when we do not agree anymore with the fundamental ideas in our social environment. Conflict then loses its edificatory quality and deteriorates into a fight for winning the argument—often with the result of breaking the ties with our social surroundings.

The influence other people exert on me is dependent upon my giving them this power, or perhaps, my not denying them that power. For as long as the person I am and want to be harmonizes with the identity I have among my fellows, and with the identity of the group of which I am a part, the formative and edificatory processes which shape my person are in harmony. I am formed both by what I personally develop and by what other people around me have as influence on me—and *vice versa*: The other people are also shaped by me. In this situation of harmony, there is no question of group-pressure against individual desires. This is, of course, an ideal picture. Actually, most people know the experience of swimming against the stream, even in groups with which one has a strong personal identification. Harmony and conflict are continuous realities. The question is how far the conflict can be allowed to grow before the elastic band breaks. Or, to say it in a manner closer to the present study, what kind of harmony should remain so that conflicts do not grow to schism, but instead keep an edifying character.

This account of the workings of social pressure is clearly well-suited to social circles such as work, church communities, family, and smaller local communities. The claim of discursive theories, however, is not very different in principle, only in scope. The truth-bearing, edificatory qualities of the community of discourse or the overlapping consensus rests upon the idea that we as humans agree, or cannot rationally *disagree*, with certain basic premises about our life as human beings. Be it that we all need primary goods, be it that we all have a fundamental interest in an undistorted communication in which only the force of the best argument settles the dispute: The idea is that as the human beings we are, we cannot disagree with these premises, so that all claims upon us, resulting from this conviction, are not a menace to our self-realization and our life-plan, but are of edifying quality for the human being we are.

In the case of smaller social circles, the content of the harmony is relatively easy to determine. It is love in marital relations, the common interest in good working conditions in a labor union, the creed in a church community, artistic performance in an orchestra. In all these and other social circles there is some character specific and internal to the activities within that circle that functions as the focal point of harmony in case of conflict. Our entering these circles or groups means, in the first place, that we want to contribute to, or realize, this character. Let us call these social circles practices, and the character as the internal goal. People, then, form their personality through participation in those practices they value for these internal goals, and not through participation in practices which serve other, external ends. Work, for example, might be something one does just in order to make a living. Then one does not identify oneself with one's work. There will be another practice with which one identifies oneself: One does not want to be seen as a good office-clerk, but as a good elder in church, a member of the model-train club, *etc.* If there is no such practice for identification, the person will experience his life as senseless—and that experience can be that of either the employed or the unemployed.

People participate in different practices and those practices will be ordered in a certain way. Some will be considered more important than others. Most likely there is one that is seen as the most constitutive for one's identity; changes of or within this practice will be experienced as changes in one's identity. Within this practice, the bonds are so strong that conflicts can escalate, but that every possible effort is made to restore harmony; for if conflict were to result in a break with that practice, the person would lose his identity. But however serious these changes may be, there remains the possibility of change in this most fundamental practice. The example of conversion to a religion is a powerful example.

The claim that discursive political theories, such as Rawls's, make, is that life in society, or cooperation with just anybody, is the highest and ultimate practice for people. In TJ, Rawls describes society as existing of social unions, and society itself as a social union in which participation is an end-in-itself. In other words, all the social unions or practices people participate in, be it family, work, church, clubs *etc.*, are no ends in themselves; only society is participated in because of the inherent good of cooperation. And this, then, puts society as most constitutive for a person's identity: No practice is so constitutive for a person's identity as is society, a person can more easily endure changes in his other practices (like Saul becoming Paul) than changes in his being part of society. Being a cooperative member of society is the first

virtue of individuals—and this means more than a circular restatement of individuals as free and equal citizens, it is a statement about the foremost and constitutive identity human beings have.

The claim made by Rawls is thus that the political life is the highest form of life because it is the most basic to human beings. The ideal of the *polis* is reproduced in Rawls's theory, not by reference to some ideal or final end that is the fulfillment of human life, but as the very identity of people upon which life in society rests. The question for political theory is neither what virtues are necessary for this life in the *polis* (as it was for Aristotle), nor how this ideal can be restored (as by Hegel), but how we can eliminate the distortions that have blurred our sight of this ongoing practice of man. Because being human means partaking of political practice and finding one's identity herein, all practices which are not part of this practice, or that do not reach the same level of general acceptance and endorsement as the political practice, must yield to the political practice and be relocated to the private field; they can only mean something for the partial (*i.e.*, private) identity of persons. Their full identity is constituted by the public, general practice of the participation in society. And as there is some madness involved in using people for private purposes, all those that develop convictions that were allocated to the private field into a full, public practice, can be labeled 'mad', even though their ideas may not be irrational.

Unified subjectivity and particularity

If a person's identity is most fundamentally determined by being member of society, and if there is no change possible in the individual's public and fundamental identity, is not the parochialism we saw appearing in Rawls's theory reproduced at the end of the retreat on the political? Other practices might well be rational, but they are more likely to be considered *mad*. They are mad because they are not in line with the communal identity of free and equal citizens that underlies the practice of justice as fairness. The rationality of justice as fairness is then still limited to those who agree with certain basic assumptions. Though one can hold that this rationality is ingrained in our Western public political culture and has shown its viability in history, it is still a rationality for a certain tradition and it loses convincing power beyond the limits of the group that can say "we, free and equal citizens." It seems to be the price Rawls has to pay when he wants to connect rationality with a consensus-oriented practice of discussion. For Rawls does not *per se establish* a consensus, he wants to *extend* an already

existing consensus. In order to do so, he must take away those issues that cause conflict. What is left, is the foundation of a political conception of justice that yields a common order of reasons for further elaboration in time. The existing consensus becomes the order of reason that is normative for the rationality of future contributions. But this means that rationality is not an instrument to convince the dissenters, but a tool for building a new world. The question whether the order of reasons itself is rational cannot be asked. Fundamental dissent with this order of reasons is, then, not a matter of rational discussion, but of sanity. It is for this reason that Rawls no longer advances a universal theory of justice, but only one for Western democracies. I do not believe that this result is necessarily connected with the discursive theory Rawls proposes. But a discursive theory does contain this danger. I would like to end this chapter by returning, for a moment, to Habermas's discursive theory. Rawls's and Habermas's theories have many points in common—the most basic being the idea of a reconciliatory power of a freed reason—and as Habermas's theory is more elaborate it will be clearer how the danger of parochialism is hard to overcome in a consensus-oriented moral theory.

The problem with a consensus-oriented moral theory is that *ideal* conditions for a discourse cannot guarantee the truth of particular, *actual* discourses. In relation to this problem, Alessandro Ferrara distinguishes between a *strong* and a *weak* interpretation of the ideal speech situation. The strong interpretation would state that the ideal speech situation is characterized by a complete equality of expressive chances. In this strong interpretation, participants are considered as “pure rational beings” and it would be “hard to imagine how they would, if in possession of the same data, come to different conclusions at all” (Ferrara 1987, p. 52). In the weak interpretation, this claim is modified to allow differences between individuals in expressive capacities, motivation, etc. But this interpretation leaves an existing consensus resistant to innovative ideas and mostly in favor of the *status quo*, for the force of arguments is then admittedly not exclusively its rational content. Ferrara points, in this context, to Paul Feyerabend's *Against Method*, which shows that the consensus in science at certain crucial periods sides mostly with the conservative forces (*id.*). Though this weak interpretation would leave more room for different practices next to ‘our’ Western democracy, and would be more consistent with Habermas's later interpretation of the ideal speech situation as a presupposition for a discourse and not as the anticipation or end-product aimed at in real discourses, I believe the strong interpretation must be the one intended by both Habermas and Rawls. The underlying

assumption of Habermas's conception is the unity of reason. Following this assumption all diversity in expressive competence that would hinder the formation of a consensus based upon the best argument is seen as a distortion of the speech situation. Symmetry, or the interchangeability of roles in the dialogue, is a presupposition of the discourse. This would mean that the participants do not differ from one another, but all respond to the one subjectivity of the competent speaker. (*cf.* Raes 1984, p. 300). Besides, the criterion for the best argument is the discourse itself: the established consensus is normative for future contributions and therefore this consensus has to be rational in the strong sense in order for it not to lead to oppression by other than rational motives.

Habermas wants to rehabilitate the idea of reason so that it neither incorporates the totalitarian characteristics of an *instrumental* or third person reason which freezes everything, itself included, to object (*Gegenstand*); nor the totalitarian characteristics of an *inclusive* reason which in the end triumphs as unity over all distinctions (phDM, p. 395). The alternative to this subjective idea of reason is the differentiated (between first, second and third person) idea of communicative reason which is immanent in social life (phDM, p. 366, 367).

But according to the critique of Benhabib, this differentiated reason could still be seen as the reason of one reconciled subject, and this one subject aims at, what I would call, a final or infinite rational consensus, a consensus against which no future refutations can be made. As Albrecht Wellmer in *Ethik und Dialog* points out, Habermas's consensus theory of truth in relation to moral reasoning only makes sense under the assumption of such an infinite rational consensus (Wellmer 1986, p. 76ff). The problem is that the idea of a consensus reached by an argumentation cannot be equated with the idea of a consensus against which no future refutations can be made (Wellmer 1986, p. 80). The relation between these two ideas must be established in some way.

To establish this connection, Habermas leans on Karl-Otto Apel's conception of a community of argumentation (*Kommunikationsgemeinschaft*—see Habermas 1986c, p. 23). But as Wellmer argues, if this idea is not to be empty—*i.e.*, stating something more than that the rationality of an actual consensus rests upon grounds that are subject to this actual consensus—it seems to suggest (Wellmer 1986, p. 82—transl. JFG):

a future place of final and absolute truth ... the idea of a language in which not only science would have come to its

destination, but also humanity would have become completely transparent for itself.²

But that would, in the end, mean that in this place there is no need to reach a consensus or truth anymore, and thus that this place is beyond the plurality and disagreement of everyday life. This idea of a complete transparency would, in the end, mean that, in the conception of the ideal community of argumentation, the plurality of the participants is cancelled in favor of the singularity of a self-reconciled, transcendental subject that dwells *in* the truth (Wellmer 1986, p. 91).

In this interpretation of the discourse, individual particularity is only possible when it goes back to, and is supported by, a unified multiplicity. Underneath the many must be a *one*. This unified subject underneath is not only truth-revealing, but also reconciliatory and redemptive. The Augustinian ideal of a redeemed community comes back in modern thought, not as a community beyond and apart from this world, but as the innerworldly presupposition and anticipation of a final place where all our differences are reconciled.

The community being one of reconciliation and redemption, it is hard to see how this community of understanding can be of political significance. It seems to restate what most programs after the Enlightenment have stated—that there *is* one single way of life that belongs to the human dignity. But the political discourse which confronts us in Western society, however, is characterized by a pluralism and perhaps incommensurability of perspectives. The idea of a reconciled subject as guarantee for a rational consensus makes the idea of a community of argumentation politically ineffective. The alternative is to keep the whole project of establishing a rational consensus an ‘innerworldly’ procedure. Habermas proposes something like this in his PhD when he points to the idea of universality as an idea where ideal and real community of understanding are melted together. The idea of a community of understanding establishes the possibility that, in one individual thought or norm, some content is captured that is the truth of unconditionally all individuals, *i.e.*, a universal content. No longer is there a separation *between* individuals as in Augustine’s two cities, or *within* individuals, as in Kant’s noumenal and phenomenal world, but our *actual* communication is an approaching, and realization, of this universal community in and amongst us. In the *here-and-now, space*

2. “einen zukünftigen Ort endgültiger und absoluter Wahrheit ... die Idee einer letzten Sprache, in der nicht nur die Wissenschaft an ihr Ende gekommen, sondern auch die Menschheit sich selbst vollkommen transparent geworden wäre.”

and time are eradicated in the innerworldly transcendence of universal validity (phDM p. 375).

Though the political significance of this community is perhaps maintained in this way, the idea of a plurality of participants is again cancelled. It is hard to see that this 'innerworldly transcendence', in establishing the rationality and truth of its consensus, can refer to anything other than the existing (rational) consensus: The *participants themselves* have to recognize the rationality of present and future contributions, and they can do so only in the light of their *existing* insights. Habermas, and with him Rawls, must in the end take refuge in the idea that if a procedure is rational, the content of the agreement will be rational too. It is the conviction that *if* people are honest and *if* people do not make mistakes in their reasoning, truth will reveal itself in the discourse that people have. The profound side of this is that actually this 'if' must be presupposed in our daily mundane communication; the naïve side is that it simplifies politics to a humanly independent self-revelation of reason. That we have to begin with assuming the truthfulness of people's expressions is not equivalent to the actual truth-revealing quality and rationality of human speech: It then has to be settled whether or not the free use of reason will indeed have the effect of overcoming all possible distortions in human speech.

If this has to be settled *in this world*, the outcome will be the paradox that the more we can evaluate our discourse as rational, the more invulnerable the consensus will be against present and future refutations or new points of view. The margins for disagreement will become smaller and smaller, until at last dissent is not seen as the result of irrationality, but more likely as madness. For if the consensus reached is rational and the discourse is open and free, disagreement can only strike us as a result of insanity.

At this point, the reconciled subject that first in its political impotency appeared beyond actual discourses, is now the end-result of the growing consensus in the actual discourse itself. The result will be one unified and universal reason. And if rationality is procedural and the criteria for being rational are innerworldly, *i.e.*, this procedure itself, then growth in rationality will also lead to the elevation to a final truth of whatever content with which we started. Remember that both Rawls and Habermas take existing intuitions about morality as their starting-point. This final truth, with the force of having been rationally concluded, will be totalitarian, eradicating all individuality in the one universal individual. At the end of the thorough rationalization of our actions, we are in Hegel's night in which all cows are black. Truth-finding reason as self-definition and limited to innerworldliness does away

with all distinctions. When man creates out of his self-defining autonomy, he makes everything the same.

In this way, a 'Grand Theory' has been erected, but this 'Grand Theory' eradicates all plurality that exists and replaces it with one single best life. The price for settling this 'Grand Theory' is that the question "What is the best life" can no longer be asked, because it would involve doubting the established consensus about moral rules, and this doubt has been equated to being mad.

A theory that wants to found moral principles on a consensus tends to devour the pluralism that makes the establishing of a consensus both necessary and problematic. Rawls saw that there was no consensus possible between existing religious, moral and philosophical convictions. In a political conception, he saw a way to reach a consensus without infringements on the individual's freedom to design his own plan of life. But in making this political consensus the universal platform on which people could reach consensus and the critical judge of 'private' convictions, he arrives at a final stage where the different religious, moral and philosophical convictions are cancelled and degraded to the individual's private madness. Only what is accountable for on the platform of public reason is allowed as contribution to the growing consensus, and this public consensus sets the ultimate limits of what the individual's plan of life may contain.

Only for a human subject that is limited to the *here-and-now* world can political consensus be a final reconciliation between diverse religious, moral and philosophical convictions and beliefs. But the only argument for holding that the human individual is limited to inner-worldliness is that one cannot reach (political) consensus over what goes beyond the here-and-now. For the religious person, there is the undeniable reality of the here-and-now transcending relation with God. A political consensus cannot decide over the rationality or truth of this conviction, but will, at times, meet with disagreement about what public effects this conviction will or may yield. If justice has to rest upon consensus and not upon compromise, then the religious conviction has to disappear if it disagrees with justice. But the reason for its disappearance is not the irrationality of the conviction, nor the falsity of it, but the inconvenience of its consequences for a political consensus.

However, why must justice be founded upon consensus? It seems to me that this involves a conflation of two quite different statements: First, that it has moral worth to be a cooperating member of society and to strive for justice; second, that our being member of society and our striving for justice should be moral acts in themselves. The first is

a statement that can be endorsed by people with different convictions and it has no serious consequences when some people just go along without seeing its the moral worth. The second statement needs the support of each individual's moral conviction, and thus by some consensus on a universal, or at least political, moral conception of justice. But that consensus can only lead to the eradication of the plurality that is inherent to a society of human beings, and thus would mean the end of politics. We do not need such a consensus, however, for our society to be just. Though we cannot leave society, neither are we captives of society, nor is our society our one and ultimate point of identification. Political life is a continuous connection of disagreements, and consensus is always a temporary phenomenon. Most of all, consensus, in the way in which Rawls and Habermas elaborate it, is not wanted on the political field because it would imply that there is no critical point of view possible over and against the settled public reason. If there were no such critical point of view, it would not only lead to the end of politics, but also to the end of morality.

CHAPTER 9

Justice without Consensus

WHY SHOULD JUSTICE be founded on an ‘overlapping consensus’? This question was raised after we realized in the last chapter that a political conception of justice founded on an overlapping consensus could only be understood as a moral act in its own right. When Rawls wants a *modus vivendi* to develop into an overlapping consensus, he is claiming that the initial reasons of convenience, expediency or maybe morality of some of the participants in the *modus vivendi* should develop into a moral endorsement by *all* participants. Everyone’s participation must become moral participation. It is the hope that formality can generate morality. As Kant put it, even a group of criminals can establish a just society, and this would be their first step on the road to morality. I have argued that, although this establishing of justice can begin as a political conception in which each participant endorses the principles of justice from his own (moral) point of view, the overlapping consensus can only gain strength if the individual moral reasons for abiding with justice become, or are replaced with, public reasons. That means that this morality develops into an autonomous moral conviction. The fundamental principles of a universal morality—so runs the ideal behind the ‘overlapping consen-

sus’—are found in those principles we share with one another. In that way we *have* established a reconciliation between conflicting religious, moral and philosophical convictions. Being unable to find common ground on these issues, we have finally recognized that in our political activity lies the seed for the unity for which we have been looking.

At the end of the argument in Chapter 8, we concluded with the serious suspicion that if the public reason is the final judge for morality, the established consensus will not only eradicate the individual differences that lead to conflict, but, moreover, will make the consensus immune to critical reflection. What is then the difference between a political reconciliation and a reconciliation based on religious, moral or philosophical convictions? In all those cases there is a unifying conception that is normative for those who live under it. The only advantage of this political reconciliation as proposed by Rawls seems to be that we, free and equal citizens, feel more at ease with this conception than with the religious, moral or philosophical conceptions we know and tend to reject publicly (and perhaps also privately).

In reply to this I have claimed that the political field is bound to be characterized by disagreements. I now wish to elaborate on this statement. I shall argue that the idea that a *modus vivendi* must develop into an overlapping consensus goes back to a ‘politicism’, *i.e.*, an absolutization of the political activity of people. This ‘politicism’ shows itself in the conviction that society *is*, or should be, a *community proper*, *i.e.* a bond of people who agree upon, and endorse, some basic and comprehensive moral rules in their *communal* way of life. It is the idea that society should be characterized by a strong moral consensus. In reply to this, I will argue that a political consensus is not a moral conception that is independent of a comprehensive view and that also our public conceptions need a critical assessment that cannot be contained in the political activity itself.

Politicism

The proposition of a normative consensus underlying our political activity rests upon the conflation of society with ‘community’ or community proper.¹ This conflation consists of assuming that the same consensual endorsement of moral rules which exists in a community is also characteristic of society—it is the idea that society is the first embodiment of morality. This is understandable when we realize that

1. See Chapter 1 for my definition of the idea of community proper.

being a cooperative participant in society can be (and in my opinion should be) described as a moral demand, and that morality always involves participating in some *activity*. So, what is the relation between morality and a certain practice?

Indeed, morality should show in our actions, and our actions are a necessary part of morality (this is the truth of Hegel's *Sitte*). Morality and ethics can only flourish when there is some consensus about the basic principles of morality. Consensus about the basic rules of morality creates a practice with its own authority. Part of being moral is: To participate in a practice that is valued for its own sake or as an end-in-itself. The inherent normativity of such a practice accounts also for its existence in time. One could call a normative practice, as just described, *praxis*, but for reasons that will become clear in the following, I would like to stay away from the more comprehensive connotations of the concept of a *praxis*. The idea of such a practice dates back to Aristotle, but still shows its explanatory force in current political thinking. To Rawls and Habermas—the characters in this study who use the idea of a practice as underlying their normative theory—one can add Alasdair MacIntyre, Hannah Arendt and Richard Rorty. For most, more or less voluntarily chosen bonds between people, the idea of a practice is a forceful way of accounting for the existence and flourishing of human life. The idea of a practice shows both the diversity in human relations caused by the individuality of each human person, as well as the ways individuality is shaped by participating in practices. Participation in a practice is formative or edificatory for the human being.

Different practices have their own normativity. At home we cannot be the manager we are at our work; at work we cannot behave like the elder we are in church; as an elder in church we cannot behave like we do among our friends at the pub, toward friends in the pub we do not behave as we would toward our parents; and toward our parents we do not behave like we do toward our spouse. Still, all our participating is done by the same person and people would normally recognize us in each of these circles. And to some extent the specific 'atmosphere' in all these circles would change when we are no longer there—we play a part in, and give shape to, the interaction which exists in the group of which we are a part.

The limitation of the concept of a practice is that it cannot account for its own normativity—the idea of a practice presupposes some normative content. This becomes problematic when we analyze human society as a practice, for here it is still to be settled which rules should be normative for society. This has been one of the central problems in

this study. Richard Bernstein gives a clear assessment of this problem in what he calls the “modern (or postmodern) paradox concerning the prospects of human *praxis*—that the type of solidarity, communicative interaction, dialogue and judgment required for the concrete realization of praxis already presupposes incipient forms of the community life that such praxis seeks to foster” (Bernstein 1989, p. 175). It is right that Bernstein calls this problem the paradox of *modernity*, for it is Hegel who first analyzed and defined this problem as one to be solved by the modern attitude; and we saw it still present in John Dewey’s question of how the ‘Great Society’ could become a ‘Great Community’.

I would like to refer to this paradox as the problem of society. Community (in the sense of community proper) is a practice in which people all agree upon the basic rules of this practice. Community exists where people accept some inherent normativity as binding for their living together and as ultimately determining their identity. The problem of society is whether society should be considered as a community, and if so, how society can become a community. It is this question that was derived from the analysis of Dewey and which functioned as a guideline for this study. It is the question behind Rawls’s theory of the overlapping consensus, which runs: How can people be brought to agree and accept the rules that make society a well-ordered society? This is a problem because, unlike the circles such as family, work and friendship—which we ‘naturally’ grow into during our lifetime and which are partially, but directly, formed by our presence—society is just present, unaffected by our existence. It is not only that my presence does not seem to change much in society, the ties that bind me to society are also different from other ties—it is neither the biological and ‘educational’ ties with my family, nor the responsible choice that makes me part of circles such as work, friendship, and even church. Society is indeed not optional for us: We cannot leave like we can leave work, friends, church or even our family. But neither does our consensus have direct influence on our membership of society or on the way society is run. Society would exist without our individual consensus, whereas even a church as social institution would disappear when nobody agreed to its constituting belief.

With or without our consent, society has its influence upon us, but this influence is indirect. Its influence is mediated via other people and other social circles. If someone wants to change society then this can only happen via the people who make up society. People must be willing to change: There is no switch which can set society into another gear.

Society having this influence upon our lives, we have a fundamental interest in the shape of society. Whatever we want to change must then be supported by people we do not know, we might not particularly care for and who may not have the same views as we. It seems, then, that some consensus about the principles for the ordering of society should be the aim, but this still leaves us with the question to what extent I am bound by decisions made by people I do not know, I might not care for and who may not have the same opinions and aims I have. But what can be the basis of this consensus? The answer of the 'overlapping consensus' implies that we form a communal practice with other members of society and that the reconciliation through free public reason has its own normativity for our public and private participating in this practice.

Does Rawls's 'overlapping consensus' solve what Bernstein called the paradox of modernity? After our journey through John Rawls's theory, there is the idea that in the overlapping consensus we are merely asked to *accept* some normativity without being given any other argument than that we have agreed to this normativity or that we could have agreed to it. In trying to meet the pluralism of fundamental convictions that endangers a necessary consensus about principles of justice, Rawls goes back to elaborate a consensus that presumably has existed for some time. He seems to forget that the current pluralism of moral, philosophical and religious convictions puts this very consensus in jeopardy. Rawls's theory is thus caught in the paradox Bernstein describes: The community upon which his theory builds is the one which is not self-evident. Rather than explaining how community is possible, Rawls assumes that community is already present in society.

Political theory considers society as a community because it realizes that morality is carried by the consensus of a community. In line with this conviction, Rawls considers society as a community and thus makes society the locus of morality. The Rawlsian society is described as a practice which comprises human plurality and which forms the encompassing practice of all human life. This society is an end-in-itself since it is described as the exclusive place for all our acting and deliberating. And if society is a practice in the manner described, then being moral is primarily: Being a cooperative member of society. It is *not* that some morality demands us—for whatever reasons—to be cooperating members of society, but, rather, that morality itself consists of participating in society and that nothing can go beyond this first determination of morality. Society is the moral horizon for the individual, and the locus of morality. It is not enough that we recognize the moral worth of being

member of society out of our *own* reason, we also must endorse the morality of being a cooperative member of society for *its own sake*.

However, this idea of society as the final practice as safeguarding morality is impossible. It rests upon an absolutization of the political aspects of our acts—it is a ‘politicism’. This ‘politicism’ holds that because we seem able to agree on some rules despite other apparently pervasive differences between us, these differences themselves are not as divisive as they appear, and are subject to a further mediation and reconciliation in the light of our consensus. Such a ‘politicism’ is fed by the hope that a political agreement can wipe out other disagreements since a political agreement is an agreement about some basic human conceptions. It is fed by the conviction that there *are* no pervasive differences between people, but only contingent diversities resulting from the ‘burdens of reason’.

The consensus about the rules in society is comparable with the consensus that I described as characteristic for a community. The fundamental difference between these two types of consensus is that the *content* of the consensus in a community is not dependent upon the consensus itself. For example, a church-community is formed by a consensus about some faith, but the content of this faith is *not* dependent upon the consensus of the community. The political agreement in the ‘overlapping consensus’, however, makes the content of the consensus itself subject to consensus. Thus it tries to reconcile and solve our moral, philosophical and religious conflicts through a political process. In this political process it must conclude that the problems connected with these conflicts are essentially non-problems because they are nothing more than individual diversions from a common platform of understanding. Going back to the basics, so to say, will show that we do not disagree fundamentally. Against this idea of the political process I will forward that politics is the field where we deal with our pervasive and irreconcilable conflicts without being able to provide a conclusive solution. The conflicts that (can) arise in the political field find their origin in the non-consensual foundation of all our moral convictions and principles. These convictions cannot be corrected by a political consensus.

Rawls’s ‘politicism’ consists of his trying to solve our moral, philosophical and religious disputes by both formulating a conception of justice that is independent of these conflicting convictions, as well as making this political agreement the first concretization of morality. Thus, for Rawls, the idea of morality finds its proper origin in the political activity of people. However, politics cannot decide about our moral, philosophical and religious disputes since these disputes rest

upon grounds which are not subject to consensus. And even justice as main concept of morality is determined by some non-consensual contents. Morality cannot depend for its content upon what we agree. Therefore, justice cannot be the first principles of morality, but is itself subject to critique from a moral point of view. This is what Rawls overlooks in his political conception. I will illustrate this with some elaborations on the place of justice in morality. Subsequently, I will point out that there is a need for a critical distance from our participating society and that this critical distance resists attempts to make cooperative membership of society the first principles of an independent morality.

The place of justice in morality

In Rawls's theory, justice is the central concept in morality. Before principles of justice are formulated, there is no idea of moral value. This, in short, is the message of the priority of the right over the good. In Chapter 2, I criticized Rawls's analysis and tried to show that there is some prior morality to his principles of justice as well. I would like to extend this argument somewhat. In Rawls's theory, this prior morality was identified with the historical bias for the (overlapping) consensus that exists in Western liberal democracies. Similar to Habermas's idea of an ethical discussion underlying principles of justice, the overlapping consensus contains an agreement on principles of morality preceding the formulation of principles of justice. From this basic moral perspective, the decision about the idea of justice is made. For one, the idea that people decide to share one another's fate—which is Rawls's moral point of view—cannot be the *outcome* of principles of justice, neither can it result from a choice in the original position. The idea has to have some appeal prior to that in order to be of influence, since it formulates some moral attitude underlying a concretization in a conception of justice; it has no argumentative force beyond that. For Rawls's theory, this would mean that if the original position were to be an *argument* for the morality of sharing one another's fate, then this argument would only appeal to people who believe that they are autonomous, self-interested choosers, and that the eventual inequalities in society are contingent facts. That would mean that the argument is not convincing for people who do not believe either one, or both of these statements. But the idea of an overlapping consensus is intended to make possible a consensus on principles of justice independent of such specific (moral) conceptions

of human beings. The problem with this consensus is that it itself relies upon an *acceptance* rather than an argument for a specific morality. It relies upon existing practices, rather than beginning from scratch.

Justice is the realization of a moral idea and not the reverse. But this does not mean that it is as limited as the ethics we hold for our personal life. Being a virtue of social institutions, justice is a concern for an ordering of society that applies generally to all members of a society. It is an ordering for all people, irrespective of their personal morality and the specific practice in which they find their identity, and it also needs the approval of people with different moral points of view. But does it need consensus about its morality?

Justice does not stand on its own. As I mentioned in Chapter 2, a conception of justice also promotes some particular arrangement of society and a way of life. I wish to refer to these more particular ideals as *ethical* ideals (this parallels the distinction between morality and ethics by Hegel, and the idea of a concrete practice as it was part of the political mediation in Rawls's theory as I described it in Chapters 7 and 8). There is a mutual dependency between the conceptions of justice and ethical ideals. The idea of mercy can clarify what I mean: Without laws, an idea of mercy would be unintelligible, but it can only be understood in its full meaning within the context of some ethics. In defining what is right, the law also defines what mercy is, but the law itself cannot decide when mercy has to take priority over right; only one's ethical principle can judge that. From a more comprehensive perspective, we can also judge a law as unjust if it cannot give way to mercy.²

A conception of justice is formulated taking other normative aspects into consideration. The force of a conception of justice is that it is easier to agree upon than on the ethical aspects of our life. It is more likely that we settle upon rules that govern the making of commercial contracts than upon the idea of distributive justice. Consensus on what mercy means will, again, be more difficult to reach since it involves further ethical deliberation. Unlike a conception of distributive justice—which we can analyze without commitment from an 'original position'—the realization of an idea of mercy springs directly from our ideas about the human being and what is due to this being, and is guided by our deliberations on these issues—there is no uncommitted idea of mercy. Whenever we want to extend the agreement upon an idea of justice, we will meet disagreements concerning what is due to human beings.

2. A further elaboration on the interplay of the different normative aspects of human acts can be found in Herman Dooyeweerd's *A New Critique of Theoretical Thought*.

The step Rawls is making is his expecting that, based on an agreement on justice, people will overcome their differences in ethical insights. That step means that Rawls has a *belief* in certain moral and ethical ideas which are not argued for in his theory. My criticism is not that Rawls is doing what he accuses others of doing—this would be begging the question, for I doubt whether there will ever be a fully convincing argument for certain moral ideals. What is happening is that Rawls, in making the principles of justice an ethical device in its own right, does not lift his own theory above the competition with other moral, philosophical or religious doctrines. The normative content of the overlapping consensus rests upon what a specific group of people (*i.e.*, Western democratic citizens) actually agree upon. Future participants have to take positions *vis-à-vis* this agreement, in the same way as they will have to take position in relation to moral, philosophical and religious doctrines. One can wonder whether the normativity of the overlapping consensus can, in the end, defend itself by means other than coercion or by labeling certain ideas as mad. But what if the dissenting opinions have the majority? The ideal of a social consensus, whether it is Rawls's overlapping consensus or Habermas's free speech, is a direct danger for its own existence because it closes its eyes to the roots of the very differences between moral and philosophical points of view it tries to reconcile.

The critical distance

The closed-mindedness of consensus theories lies in their political character. As we saw with Rawls—and the same can be said of Habermas—the argument for an overlapping consensus is a political argument, not a metaphysical or philosophical one. The argument is a critical reflection on my individual moral point of view in the light of the political need to establish a well-ordered society. Out of that reflection emerges a more general idea, an idea of justice that is not tied in with *my* particular moral point of view. But when this idea of justice is presented as a consensus about a morality itself and becomes normative for the further development of society and individual, the possibility of critical reflection on society is lost. The private can be critically evaluated, but not the public, because this public side is the general and critical moral point of view itself.

Against this consensus is no critical distance possible. Contributions must be consistent with the existing *status quo*. Anarchism and subversion will end up in prison or the madhouse. The paradox of

tolerance is that it can only endure by intolerance—this cheap truth comes to the surface after we have reached and exercised consensus to the point where tolerance has become our fetish. To ‘de-fetish’ the values Western society stands for, and to strengthen it against its own consensus, we have to regain this critical distance to our social life.

Before Galileo, people lived on a flat earth and in a round world; or, better said: On a finite earth and in an infinite world. This is the story Augustine tells us in the tale of the two cities: The earthly city as finite in place and time, the heavenly city as infinite, not bound to one place, not afflicted by the changing times. Galileo, then, did more than discover a round earth: The earth also became infinite, as the surface of a ball is ‘infinite’ in the sense of unlimited, and as the planet earth is only a small part of the immense universe; and the world in which people lived became flat, finite in time and space: human existence became an existence in itself, limited to human society, a phase in a development, and would most likely end somewhere in the near future on the gigantic cosmic timescale.

Augustine’s tale of the two cities meant, among other things, a critical distance toward human society. All earthly kingdoms, even if the king were a Christian, were nests of corruption in his eyes; only because it had the majority and the royal power behind it, did the law count as justice and the rule of the robber as injustice (*City of God*, Book 4, Chapter IV). Over and against these earthly kingdoms the heavenly kingdom unfolded itself as a personal and communal haven. The individual is both personally member of this kingdom—and knows itself to be a member even when surrounded by enemies—as well as citizen, embraced by this community. The individual leads a dual private and public life. It is this idea of a critical reflection on the public life that gradually disappears, putting all the force of critical reflection on the private life of individuals. Kant is the last to capture some of this reflection when he distinguishes between a moral and ethical commonwealth, but the focal point of his thinking is the critique of one’s personal and more private deliberations: If there are two worlds of which men are part, then this is primarily the individualized duality that we are phenomenal and noumenal beings. Being a noumenal being—being clothed with autonomy—my personal actions must represent the universal laws. Subsequently, it is hard to see how one can conceive of a *noumenal society*.

With Hegel, the critical reflection on society has become a completely innerworldly, ‘flat’ endeavor. Society develops in time; the critical attitude consists in knowing what the time demands, or knowing what realization of Spirit is the current one. The redemptive

community that for Augustine existed 'above' the actual community of people, appears now as a beacon 'ahead on' humanity's path. Human society becomes the community where men find meaning through a self-redemptive process, for if there is no redemption *above* society, then society itself must be the redemptive community. Society is the moral horizon for the individual.

Through this development the nature of the *public* changes. As long as there is a community of redemption opposed to society, public life is characterized by a plurality of communal lives—there is, after all, not one positive community that can claim authority over the totality of life. For the early Christians until the time Augustine was writing, this resulted in an opposition and conflict with the existing state. The church-community was a subversive danger for the existing state. In the Middle-Ages the purest realization of this public life might have existed. The Middle-Ages are a stage where different communities tried to settle their authority: Church and state, guild and city, monasteries and church. In this struggle, the goal was not so much to win the argument, but more to limit each authority to the proper field and leave society to the interplay of these authoritative communities. The central issue was more how to—and who can—best govern individuals, than how to rule society.³

When society becomes the moral horizon for the individual, society also becomes the authoritative community for men. Public life is, then, no longer the interplay of communities, but strictly the visible side of individual life. The conflict of authority is then not a conflict that touches the individual mediated via his belonging to one or more communities, but touches the individual directly. The individual must personally resolve this conflict. Society as a community has the characteristics of a normative practice; it will then be left to the individual to agree to and accept, this normativity and to settle conflicts with other practices in such a way that the basic loyalty to society as encompassing practice is not endangered. When the individual has to solve these conflicts between authorities exclusively on the stage of society, there is nothing onto which he can fall back. The different communities of which the individual is a part still make their claims, but nothing beyond the conflicts in society can resolve the conflict. Role conflict becomes a permanent condition in the individual's life; the individual stands naked before society.

The idea that society has to come close to a community itself, or even be the encompassing community, is partly due to the mistaken view that society has once been a *Gemeinschaft*. It was Ferdinand Tönnies

3. For this argument I am indebted to R. Nisbet's *Community and Power*.

who characterized ideal-typically the development of Western society as the transition from *Gemeinschaft* to *Gesellschaft*, thus giving his own interpretation of the process in which Max Weber saw the development of bureaucratic, formally organized, impersonal relations between people. But rather than seeing this as a transition in the character of social ties, we should interpret it as a shift concerning which kind of relations are the more important for people. Thus the shift from *Gemeinschaft* to *Gesellschaft* is better seen as a process in which impersonal, formal relations gain more influence and importance for people, next to and beyond the personal ‘*Gemeinschaft*’ relations that remain. Thus, *Gemeinschaft* is only one aspect of social life and it does not characterize the whole of people’s social existence. Subsequently, *Gesellschaft* is not something modern, but has always been an aspect of social life, only less obvious and not directly present in most people’s existence. However, cities have always been the epitome of the *Gesellschaft*-life in society. Modernization of society will then imply the encroachment of these impersonal relations through all parts of society, or, to say it in terms consistent with John Dewey’s analysis, the formation of a *public* field. This public field is then characterized by impersonal relations, the presence of indirect consequences of individual acts, and the existence of different communities (or *Gemeinschaften*).⁴

Weber, Tönnies and Dewey were more or less afflicted by the heroic homesickness for *Gemeinschaft* of the turn of the century when the gains and losses of progress and rationalization became disturbingly clear. Their thoughts on society were either directed at strategies to compensate for the loss in community (Weber) or strategies that could restore the idea of community (Dewey), but one can wonder whether they were not homesick for, or anticipating to, a situation that had never existed. Political theory was put on the wrong path and tried to come to terms with modernity through this dual feeling of being homesick and anticipating a true human community. The close distance, emotional openness and consensus that characterized the local community had to be brought to society or the state. But society has never been itself a community, but a conglomerate of communities. State and public life—the influence and the sphere of influence—are characterized by impersonality and a lack of community. This is most visibly shown in the person of the head-of-state. Whether he is king or

4. It is interesting to read, in relation to this, Richard Sennet’s *The Fall of Public Man*, because he blames the disappearance of the public life precisely on this attempt to define the public life of people in terms of a community life. For him, sociability and public life do not grow out of intimate, personal contact, but are rightly characterized through impersonal contacts, as one has in city-life (cf. Sennet 1977, p. 294-300, 337-340).

president, his personal life does not—and ought not—matter for his performance on the job. So, whether he likes alcohol, has two or four children, smoked marijuana in school, whether he is a pleasant conversationalist; these are things which are unimportant for the running of the country, and there is no need to know these things.

In this view a difference or split between the public and the private is not denied, so what is then the difference from Rawls's view? Since the public field is not seen as a community, but rather as existing of communities, there is not the need for an overlapping consensus underlying the public order. Though public acts, especially those of government-officials, should take into consideration the ideas and the consensus in the public field, this consensus is in itself not normative for present or future contributions to the discussion. Dissent is seen as an enduring condition in the public field. There will be a consensus about a procedure, and this consensus might well include the Rawlsian principles, but the procedural or political consensus does not take the place of, or take priority over, other (*i.e.*, metaphysical, philosophical and religious) views. The rules and the content of the public rules will be open to reconsideration in the light of whatever point of view. No one point of view can take priority over, and become judge of, other points of view. The public field itself will be characterized by the interplay of different points of view because the political process cannot settle the non-consensual differences that make their claims on the public field. That makes compromise, rather than consensus, the basis of a political agreement. The participants realize that for the establishing of an 'innerworldly' public conception of justice, *all* have to compromise and no one can claim absolute authority. In a very basic sense, toleration is still the foundation for such a compromise—toleration not as leaving one another free to have one's own convictions out of relativism or skepticism, but as tolerating opinions and convictions which you know to be false. The political agreement as a basic compromise is not a moral ideal in its own right, but a moral demand from within a wider morality. This comprehensive morality keeps a critical distance from the agreement. When politics cannot settle all our fundamental differences, it cannot be critical to our fundamental convictions, but has to be looked upon critically itself. If toleration is thus ingrained in a morality, a *modus vivendi* will not be a wait-state until absolute power can be grabbed, but an enduring basis for cooperation.

Society in pluralism

Political agreement is possible, but it is not our first and final concretization of morality. Behind the consensus is an enduring dissent; the agreement does not yield any promises for the existence of dissent or consensus in the future. The challenge for political theory is not how such a political agreement can grow into an 'overlapping consensus', but how to provide for a framework of society where different communities can develop and form again a public space. To look for a normative consensus in society is to put people in search of a community in a place where the inherent plurality of lifeplans systematically prevents the formation of a community. Thus, instead of giving back to people a sense of community on the level of society, the process of the disappearance of society as a community is brought to its final end.

Communities are characterized by consensus; consensus about the fundamental rules in the communal life establishes a *practice*. Therefore consensus has an important place in political theory. Society seen as a community rests upon the illusionary idea that a consensus about the basic rules as in a *practice* is possible in society. During the Middle-Ages, people had the conviction that people would *disagree* because they were human: What makes us human is the ability to err. Now, the conviction is that because we are human beings we can reach *consensus*. The force of philosophical analysis is applied to make this consensus possible, and settle an enduring agreement. Anything that could cause dissent is seen as contingent and must be eliminated. Justice as fairness as a political conception is exactly this bowing down before the throne of consensus. This fall leads to a stripping away of any individuality. Any ties that do not fall under those of society are then considered morally contingent for the person and eventually replaceable if they become a danger to the consensus in society. The idea of a social union leaves the individual free to be himself as long as his personal loyalties do not overrule the loyalty to the community of society.

Justice as fairness is then not so much a remedial virtue, but a clinical virtue: Its application will wipe out the circumstances that made its formulation necessary. However, the proper idea of justice is: To settle conflicts between people while leaving the roots of conflict in existence. It takes as its rule the fact that because people are human they will likely disagree. The public field consists of people living different communal lives, without any of these communities being in a position to win over the other. Each community has to define its limits

of authority time and time again. Of course there will be consensus about a conception of justice, but this will not be an overlapping consensus. It will be a dynamic, working consensus—its content will vary according to the different communities that take part, and according to the authority these communities (*i.e.*, the people living in them) will claim on their account. Its content will not be fixed once and for all by the contingent starting-point in a specific society.

Pluralism is inherent to human society: Human identity cannot find its final embodiment in *one* positive community. The limit of political theory is that human individuality escapes the limits of any positive community. It is tempting to think of society as the ultimate community; that would at least reconcile the necessary (being member of society) with the voluntary (our plan of life). But society is a fact of life with which we have to deal with in our morality. Human beings are bound to society, but not limited to it. How we rule society, *i.e.*, how we administer justice, reflects the moral consciousness we share with the community of which we are a part. There is no independent, autonomous morality in the field of society. If we reject Hegel's conception of the state—and there are good reasons not to take over his conception—we must see this rejection as a rejection of the idea that we can embody some universal morality on the field of society. The morality that is incorporated in our conception of justice is not an independent morality but a result of the communal moralities that participate in society. Of course this morality will be more firmly established when there is a wider agreement regarding its content among the different communities. This does not make justice an independent concept—justice is inherently connected with the morality of individuals. Justice is that typically moral concept that looks over the borders of the own community.

When I speak of *justice without consensus*, I do not want to deny that human beings are capable of consensus. What I want to stress is that any consensus on a political conception of justice must be open to future criticism and reconsideration. The agreement on principles of justice is not reached in a historical, cultural and moral vacuum. The agreement is connected to concrete human beings with specific communal identities—in Rawls's case, justice is tailored to the needs of Western democratic citizens. Rawls is right as long as he claims that presently most or all citizens in Western democracies can, on their own terms, agree to the principles of justice he formulates. Rawls is *not* correct when he connects to this the expectancy that, in the overlapping consensus, the existing controversies in Western society will be removed from the political agenda and perhaps be eliminated. Owing to,

generally, the 'burdens of reason', Rawls sees a pluralism of life plans and moral, religious and philosophical convictions coming into existence. In the 'overlapping consensus' Rawls sees a way of removing these controversies from the political agenda. Subsequently, the 'overlapping consensus' canalizes existing, future, and perhaps persistent controversies by setting the limits of reasonable disagreements. In this way he immunizes the public consensus from critique and by making the use of free public reason the judge for future conflicts, uniformity—and not plurality—will appear at the end of Rawls's theory. The 'burdens of reason' apply to both private and public reason, so we have to be critical of both. Only if we believe that all differences between human individuals are morally contingent to what people are, and that what we share is the only acceptable platform for morality, can we join the path of the 'overlapping consensus'. But, uniformity, and not plurality, will appear at the end of this path.

The ultimate limit for the political is that there are disputes which cannot be settled in the political field and which cannot be taken away from the political field. One problem, for instance, that cannot be resolved by a political consensus is when a human individual becomes, and when he ceases to be, the bearer of the rights and liberties he has in our society. Only compromise, and no political consensus, can decide over the margins of human life. Since what we 'publicly' endorse is intimately connected with that to which we 'privately' adhere, this conflict cannot be resolved in the political field. The tale of the two cities of Augustine tells us that humanity does not rest in itself and that no society can be the final judge over our moral achievements.

In human history vice precedes prior to virtue. Given the 'burdens of reason', a public consensus as an end-in-itself is more likely to be a vice than a virtue: Focussing on what we can build together, it closes our eyes to a critical assessment of the building under construction. Under the rule of a public consensus, we might think that we can regain paradise; we are most likely to forget that it was not that humanity *left* paradise, but that humanity was *thrown out* of paradise.

Dutch Summary

Het hoofdthema van deze studie is een tot nu toe relatief onderbelicht aspect van John Rawls' invloedrijke theorie van rechtvaardigheid, namelijk de relatie die hij legt tussen individu en maatschappij. In de formulering van Rawls' theorie in *A Theory of Justice* komen een aantal problemen rond deze relatie naar voren. Deze problemen zijn terug te voeren op de twee verschillende argumenten voor de principes van rechtvaardigheid die Rawls in TJ hanteert. Enerzijds gaat hij ervan uit dat morele principes berusten op een vrijwillige keuze van individuen. Dit argument vindt zijn uitdrukking in de idee van de 'oorspronkelijke toestand' waarin individuen van achter een 'sluier van onwetendheid' bepaalde principes van rechtvaardigheid kiezen. Anderzijds is Rawls' uitgangspunt dat een mens leven zich in de maatschappij afspeelt en dat mensen niet kunnen kiezen *niet* tot een maatschappij te behoren. Rawls' beschrijving van de maatschappij lijkt een vrijwillige en vrije keuze voor principes van rechtvaardigheid uit te sluiten: De principes van rechtvaardigheid regelen een verdeling van die goederen die mensen primair nodig hebben in de maatschappij waarin zij moeten leven.

Verdere bestudering van Rawls' theorie doet het vermoeden rijzen dat achter de vrije keuze in de oorspronkelijke toestand een veel fundamentele, maar voorhands niet geëxpliciteerde keuze voor een bepaalde moraliteit en voor een belichaming van die moraliteit in een bepaalde maatschappij schuil gaat. Dit vermoeden wordt bevestigd als Rawls aan het eind van TJ terloops opmerkt dat bepaalde overtuigingen die mensen hebben weliswaar kunnen worden toegeschreven aan een rationele keuze, maar *ons* irrationeel of waanzinnig voorkomen. De vraag die dan naar voren komt is op wie dat 'ons' slaat, en waarop diegenen die onder dit 'ons' vallen zich baseren als zij bepaalde overtuigingen voor waanzinnig verslijten.

Rawls' theorie is mede bedoeld om individu en maatschappij met elkaar te verzoenen. Rawls wil een pluraliteit van levensdoelinden en overtuigingen erkennen. Zijn theorie van rechtvaardigheid wil laten zien dat we, ondanks de verschillen die er tussen mensen zijn, kunnen samenwerken en dat ook feitelijk al eeuwen doen. Toch ziet Rawls de verzoening tussen individu en maatschappij als een probleem in de liberale traditie. Zoals hij het ziet, staan in de liberale traditie twee theoretische benaderingen tegenover elkaar. Allereerst is dat de aan John Locke verwante traditie waarin de nadruk ligt op de individuele vrijheidsrechten van de persoon. Daarnaast is er de aan Jean-Jacques Rousseau verwante traditie waarin de waarde van het publieke leven voorop staat. In de onderhavige studie worden deze twee tradities van individuele en sociale rechten verbonden met respectievelijk Immanuel Kant en Georg Wilhelm Friedrich Hegel.

Meer dan Locke en Rousseau zijn Kant en Hegel fundamenteel voor de theorie die Rawls ontwikkelt. Wat Rawls met Kant verbindt is dat voor Rawls de principes van rechtvaardigheid morele principes zijn die op een autonome keuze van individuen teruggaan. Wat Rawls met Hegel verbindt is de idee van een belichaming van morele principes in het concrete maatschappelijke leven. Alleen via Hegels filosofie, zo argumenteer ik in deze studie, kan de latere ontwikkeling bij Rawls van de ‘overlappende consensus’ begrepen worden.

Naast een theorie over een rechtvaardige maatschappelijke ordening is TJ vooral een theorie over de fundering van morele principes. De fundering die Rawls geeft is modern in de zin van niet-metafysisch. De alledaagse werkelijkheid van coöpererende en elkaar tegenwerkende individuen is het uitgangspunt voor Rawls.

De principes van rechtvaardigheid die Rawls formuleert, worden allereerst gepresenteerd als een keuze in een oorspronkelijke toestand waarin individuen alle kennis omtrent hun positie in de maatschappij waarin zij zullen leven ontzegd is. Dat zij moeten kiezen staat voor Rawls vast: Dat men in een maatschappij zal leven en hoe die maatschappij werkt behoort *wel* tot de kennis van de individuen. Dat zij zullen kiezen voor principes van rechtvaardigheid maakt Rawls aannemelijk met hulp van de ‘magere theorie van het goede’. Die magere theorie stelt dat iedereen, ongeacht wat hij of zij in het leven wil bereiken, bepaalde goederen nodig heeft, namelijk de primaire goederen (vrijheid, inkomen, welstand). De individuen in de oorspronkelijke toestand hebben daardoor de motivatie om tot een overeenstemming over principes van rechtvaardigheid te komen, alswel erkennen zij dat dit hun eigen belang dient.

De argumentatie rond de ‘magere theorie van het goede’ leidt echter tot het volgende probleem (hoofdstuk 2): Nadat Rawls eerst gesteld heeft dat de principes van rechtvaardigheid acceptabel moeten zijn vanuit een moreel standpunt, wordt in verband met de ‘magere theorie van het goede’ gesteld dat eerst nadat de principes van rechtvaardigheid geformuleerd zijn er van een moreel standpunt kan worden gesproken. In Hoofdstuk 2 argumenteer ik dat achter Rawls’ deontologische prioriteit van het terechte over het goed (the right and the good) een prioriteit van een idee van moreel goed verondersteld kan en moet worden. De principes van het terechte worden niet in een moreel vacuum geformuleerd.

Individen zijn in Rawls’ theorie minder vrij hun leven in te richten dan het aanvankelijk lijkt. Het verwerkelijken van de eigen capaciteiten mag dan volgens het ‘Aristotelisch principe’ dat Rawls definieert van fundamenteel belang zijn voor de identiteit van het individu, deze verwerkelijking moet wel plaatsvinden binnen het kader van de maatschappij als ‘social

union of social unions'. Het levensplan van het individu is een plan binnen het plan van de maatschappij.

In hoofdstuk 3 laat ik zien dat onder invloed van Rawls' idee van de maatschappij de principes van rechtvaardigheid een meer omvattende taak krijgen: Zij zijn niet slechts bedoeld om het samenleven van mensen die feitelijk verschillende doeleinden en capaciteiten hebben, mogelijk te maken, zij definiëren ook een verzoening tussen verschillende religies en morele overtuigingen. De principes van rechtvaardigheid worden volgens Rawls gedragen door een 'overlappende consensus', d.i., een consensus over morele principes die vanuit verschillende religieuze en morele overtuigingen onderschreven worden. Rawls spreekt hier van een verzoening door een vrije publieke rede. Mensen hebben, zo argumenteert Rawls, een publieke identiteit en een privé identiteit. Vanuit hun publieke identiteit kunnen zij bepaalde principes voor hun samenleven onderschrijven, onafhankelijk van hun privé identiteit. De 'overlappende consensus' onderbouwt een schema waarbinnen de publieke discussie over de uitwerking van de principes van rechtvaardigheid wordt gevoerd. Binnen de 'overlappende consensus' ontstaat een complex van gedeelde methoden tot kennisverwerving en een gemeenschappelijk fonds van kennis als onderdeel van een traditie van politiek denken. De 'overlappende consensus' leidt tot een opvatting van rationaliteit waarin alleen die bijdragen rationeel genoemd kunnen worden die beantwoorden aan de publieke overeenstemming over wat rationele bijdragen zijn.

Ondanks de sterke scheiding die Rawls maakt tussen privé en publieke identiteit, heeft de 'overlappende consensus' wel degelijk invloed op de privé identiteit van mensen. Niet alleen zullen onder de 'overlappende consensus' bepaalde overtuigingen verdwijnen omdat zij niet genoeg aanhang vergaren, in gevallen van een botsing tussen de publieke rede en de individuele overtuiging zullen mensen ook eerder geneigd (moeten) zijn hun individuele overtuigingen bij te stellen. Deze prioriteit van de publieke rede stelt ons voor de volgende vragen. (1) Hoe is deze prioriteit te rijmen met de idee van een autonome individuele keuze voor morele principes in de zin van Kant? (2) Hoe verhoudt zich Rawls' beschrijving van de maatschappij als een 'social union of social unions' tot een organicistische maatschappij-opvatting die hij bij Hegel ziet. (3) Waarop berust de normerende kracht van de 'overlappende consensus'?

(1) Uit de confrontatie van Rawls' theorie met Kants wijsgerige ethiek (hoofdstuk 4) komt naar voren dat de individuen in de oorspronkelijke toestand geen autonome keuze maken, maar een algemeen-heteronome, namelijk een keuze gerelateerd aan hun gemeenschappelijke belang in de primaire goederen. De principes van rechtvaardigheid die Rawls formuleert kunnen wel als autonome principes beschouwd worden als zij aan een idee

van de maatschappij als doel in zichzelf zijn gerelateerd. Zoals bij Kant de inhoud van de categorische imperatief gegeven wordt door de mens als doel in zichzelf, waarbij de moraliteit van deze inhoud gegarandeerd wordt door een morele wereldheerser wiens wil ongekwalificeerd wet is, zo is bij Rawls de maatschappij als doel in zichzelf de autonome inhoud van de morele principes van rechtvaardigheid. Rawls zet Kant als het ware op zijn kop: hij gaat niet uit van individuele morele principes, maar geeft aan maatschappelijke principes de prioriteit. Het is daarbij, gezien de context die Kant aan zijn ethisch denken geeft, nog de vraag of Rawls zich voor deze prioriteit van het terechte over het goede wel op Kant kan beroepen.

(2) Ten aanzien van Hegel (hoofdstuk 5) blijkt dat Rawls met hem het uitgangspunt deelt van de ‘burgerlijke maatschappij’, d.i. de maatschappij als een ordening waarin individuen hun eigen belang zoveel mogelijk nastreven. Beiden hebben daarom een centrale plaats in hun politieke denken ingeruimd voor vraagstukken aangaande de verdeling van (schaarse) goederen. Voor het onderhavige onderzoek is echter vooral van belang hoe Rawls het probleem van de normativiteit en autoriteit van de maatschappelijke orde behandelt. Hoewel Rawls niet een organicistische maatschappij beschouwing als die van Hegel wil overnemen, blijkt er een genuanceerder beeld te bestaan. Enerzijds kan men vraagtekens zetten bij het strikte organicistische karakter van Hegels rechtsfilosofie (andere werken blijven hier buiten beschouwing), anderzijds leggen Hegel en Rawls beiden een sterk accent op een gedeelde praktijk (Rawls) of zedelijkheid (Hegel) als achtergrond van morele principes. Morele principes kunnen niet uitsluitend formeel geformuleerd worden, maar behoeven een belichaming in een concreet leven. Ten aanzien van deze idee van zedelijkheid komt het duidelijkst naar voren waarin Rawls en Hegel met elkaar verschillen. Voor Hegel is zedelijkheid de noodzakelijke belichaming van de ontwikkeling van de Geest, voor Rawls zou zo’n beschouwing de idee van rechtvaardigheid afhankelijk maken van een niet door mensen te beïnvloeden ontwikkeling. Zijn idee van een praktijk achter de formele moraliteit van de principes van rechtvaardigheid lijkt daarom vooral gebonden aan een historisch-cultureel lokaliseerbare maatschappij, namelijk de westerse democratie. Toch heeft moraliteit, ook bij Rawls, wel degelijk een universele strekking.

(3) Die universele strekking kan gerealiseerd worden door de idee van zedelijkheid rechtstreeks te koppelen aan het samenleven van mensen zelf (hoofdstuk 6). Op die wijze probeert Habermas de formaliteit van Kants morele principes te verbinden met het zedelijk leven van Hegel. Zijn benadering behelst een fundamentele kritiek van het heersende concept van rationaliteit in het westerse denken om zo plaats te maken voor een concept van morele rationaliteit. Habermas zoekt naar een dialogisch idee van

rationaliteit en concludeert dat een uitspraak rationeel is als die uitspraak met argumenten kan worden ondersteund in een discours. Deze benadering van Habermas leidt tot twee correcties op Rawls' benadering. Ten eerste zal Habermas ook de motieven en behoeften van de individuen in de oorspronkelijke toestand kritisch beschouwen aangezien die onder invloed van de heersende idee van doel-rationaliteit een verstoord beeld geven van de menselijke behoefte aan emancipatie. Rawls geeft met zijn primaire goederen al inhoud aan een discussie, zonder die inhoud aan een discours te onderwerpen. Ten tweede biedt zijn benadering een wijder perspectief aan een discursieve en procedurele benadering van het probleem van rechtvaardigheid. De noodzakelijke inhoud van de discussie is niet gerelateerd aan een specifieke bestaande maatschappij-vorm, zoals dat bij Rawls dreigt, maar aan de authentieke karakteristieken van de menselijke persoon zelf. Daarmee is de circulariteit die bij Rawls optreedt echter vervangen door het probleem dat de noodzaak van een dialoog bij Habermas door de mogelijkheid van een intersubjectieve overeenstemming wordt teniet gedaan: die overeenstemming lijkt slechts mogelijk door een met zichzelf verzoend subject te veronderstellen, een subject dat echter daarom geen dialoog hoeft aan te gaan.

Ten aanzien van Rawls' theorie van rechtvaardigheid kunnen we nu een aantal conclusies trekken (hoofdstuk 7 en 8).

Ten eerste, Rawls' theorie geeft een verslag van hoe binnen een bepaalde maatschappij opvatting een conceptie van rechtvaardigheid zich kan profileren. Hij gaat daarbij niet voorbij aan de gemeenschaps-identiteiten die mensen binnen die maatschappij hebben. Dit punt wordt onvoldoende gehonoreerd door de zogenaamde 'communitarian' kritiek. Wat Rawls probeert is aan te geven dat er ondanks die gemeenschapsbanden een gemeenschappelijke moraliteit kan worden onderschreven en dat die banden niet zo absoluut bepalend zijn voor de identiteit van het individu. Daarnaast is ook bij Rawls een bepaalde gemeenschaps-identiteit voorondersteld, namelijk die van 'wij, vrije en gelijke burgers'. Karakteristiek voor deze identiteit is de splitsing tussen publieke en privé-identiteit, waarbij de privé-identiteit onder kritiek staat van de publieke identiteit: wat iemand privé aanhangt mag niet tot conflicten leiden in het publieke; gebeurt dat wel, dan moet de privé-overtuiging worden aangepast.

Ten tweede, de bemiddeling tussen een kantiaanse formaliteit en een hegeliaanse zedelijkheid die Rawls beoogt kan niet als een bemiddeling via de idee van rationaliteit worden gezien, maar als een politieke bemiddeling. Als Rawls' bemiddeling slechts bestond uit een idee van rationaliteit, dan zou zijn theorie neerkomen op een verheffing van de toevallige rationaliteit van de liberale samenleving tot waarheid en zedelijkheid. Ik spreek daarom van een politieke bemiddeling omdat Rawls een voor rede vatbare ordening

wil bereiken temidden van de bestaande meningsverschillen. Rawls zoekt naar een ‘overlappende consensus’ in het politieke veld, namelijk in het veld waar wij met onze tegenstrijdige belangen en overtuigingen toch een idee van rechtvaardigheid realiseren. De realisatie van deze idee van rechtvaardigheid geschiedt in een publieke discussie.

Ten derde, noch Rawls, noch Habermas slagen erin deze publieke discussie uiteindelijk los te koppelen van een bepaalde historisch-cultureel bestaande stand van zaken. De idee van een consensus via een publieke discussie kan alleen maar naar die publieke discussie zelf verwijzen als het gaat om criteria te formuleren over wat toelaatbare bijdragen aan de discussie zijn. Enerzijds is er het geloof dat als mensen zich maar aan de regels houden, de rede zichzelf zal openbaren. Anderzijds blijft het problematisch voor zulke theorieën te verklaren hoe er nu verschil van mening kan ontstaan. Voor de werking van een discursieve theorie moet een met zichzelf verzoend subject of een volmaakt zelfinzicht verondersteld worden, maar dan is het de vraag hoe er ooit diversiteit kan optreden. De consensus als verwijzing naar zichzelf dreigt uiteindelijk alle pluraliteit te verscheuren in een volmaakte uniformiteit.

Ik besluit deze studie met een aantal conclusies. Allereerst voer ik aan dat Rawls’ theorie een ‘politicisme’ behelst als hij de politieke gemeenschap als ultieme autoriteit voor het menselijk leven ziet. Een politieke consensus kan niet uitgroeien tot een autonome moraal, onafhankelijk van bestaande, meer omvattende moralen. Hoewel rechtvaardigheid onderdeel is van een politieke moraal, is het geen opzichzelf staand moreel concept, maar ingebed in een bredere ethische context. Het is de moraliteit die buiten de gemeenschap kijkt en richtlijnen formuleert waar overeenstemming over fundamentele vraagstukken blijvend ontbreekt.

Ten tweede: Ook ons publieke handelen moet onder kritiek kunnen staan. Als het publieke het private kritiseert, waar is dan de kritiek van het publieke? Hoe omvattend het belang van politiek handelen is—en het is inderdaad wat Rawls zegt, dat we niet kunnen kiezen *niet* tot een maatschappij te behoren—het is niet de laatste werkelijkheid voor ons, nog de beslissende. Politiek is het veld waar we een oplossing zoeken voor onze conflicten, maar niet al onze conflicten die we op het politieke vlak hebben kunnen via politiek handelen worden opgelost. Dat maakt consensus een bijzonderheid en conflict en compromis regel. Vandaar: Rechtvaardigheid zonder consensus.

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