

Rawls' political conception of rights and liberties An unliberal but pragmatic approach to the problems of harmonisation and globalisation

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Introduction: The nature of human rights is political, not metaphysical

The title of this introduction contains an obvious reference to Rawls' 1985 lecture 'Justice as Fairness: Political not Metaphysical'.² A discussion of Rawls' work in a volume of papers that were presented on a 'Conference on Epistemology and Methodology of Comparative Law' should not come as a surprise. Together with academics such as Ronald Dworkin and Jürgen Habermas, Rawls has established himself at the forefront of constitutional democratic thinking. The constitutional protection of rights is a theme common to their work. Recently Cornelia Schneider has tested Dworkin's and Habermas' model of democracy and found out that Dworkin's model is too focused on the American constitutional system, and therefore fails to provide a model of universal validity.³

Our intention is not to explore the differences and similarities between Rawls on the one hand and Dworkin and Habermas on the other. Rather we wish to limit ourselves to an outline of Rawls' theory of rights and liberties and to identify the potential of his theory for legal analysis and legal comparison in a modern world, wherein many look for a basic common legal language, with common legal principles and legal concepts. We are attracted to Rawls' work because the focus is on tolerance and respect for other societies, not on universalisation.

In 'Justice as Fairness: Political not Metaphysical' Rawls distinguishes political and metaphysical concepts of justice. Both are moral theories, but the latter one refers to a comprehensive, general, substantial and 'naturalistic' world-view,⁵ whereas the former is

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² John Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs*, Vol. 14 (1985), No. 3, 223-251

³ Cornelia Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy', *UCL Jurisprudence Review*, 2000, 101-121. Habermas' approach, and in particular his principle of 'unsaturated rights', is more capable of living up to the challenges of the modern, open world. He proposes a certain basic pattern of democracy, which includes the protection of rights, but does not insist on specific manifestations of it. Habermas refrains from offering a catalogue of specific rights to avoid becoming too overly focussed on a certain model which could not have universal validity. A discussion of human or basic rights should be of an abstract nature. Political systems can interpret them and give them concrete shape in the way which is most appropriate for their individual circumstances.

⁴ Rawls regards a moral theory to be comprehensive when it satisfies the following conditions. First it must apply to a wide range of subjects. This is what makes it general. It becomes comprehensive "when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our non-political conduct..." Cf. John Rawls *Political Liberalism*, New York: Columbia University Press, 1993, 175

of a more restrained nature. A political concept of justice has three distinctive features. It is a moral conception worked out for a specific subject. This subject can be local justice, domestic justice or global justice.⁶ By accepting a political conception of justice, a person does not commit him/herself to a deeper comprehensive theory or doctrine. Thirdly, it is a conception that cannot be found everywhere, since it has its basis in certain fundamental ideas latently present in the public political culture of a democratic society.⁷

Rawls' political conception of justice is historically embedded and constructivist. So-called *basic liberties* play a great role in this conception. They are part of the fundamental ideas that are familiar to all and are drawn from public political culture of a democratic society 'that has worked reasonably well over a considerable period'.⁸ Rawls sees the basic liberties as the constitutional essentials of domestic (or Western) justice, since they provide for the central elements of the overlapping consensus between reasonable people with different moral, political and religious backgrounds in Western regimes. In his later work, Rawls will turn his view to global justice. This time *human rights* form an important cornerstone in his construction. Rawls attempts to define a concept of human rights that is free from ethical or normative content, with the aim to enable 'decent states' to coexist in a global world.

This paper focuses on the political dimension of 'human rights' and 'basic liberties' (the two terms do not coincide). How 'political' are these rights and liberties, and, how 'human' ('natural' or 'metaphysical')? Part I contains examples of the 'political' use of human rights in Europe. Part II outlines Rawls' political perspective upon rights and liberties and adds an internal critique of Rawls' theory of basic liberties and human rights. Differences between his older and more recent work will be highlighted. Rawls started within the liberty paradigm, but slowly embraced the rights paradigm. In his later work the idea of rights became closely connected with his view on moral persons. We contend that this connection contradicts the idea that the nature of 'basic rights and liberties' or human rights should be political. Moreover, the connection leads to a significant but troublesome reduction of 'truly basic liberties and rights'. In the sphere of global justice a similar operation is carried out. Parallel to his reduction of 'truly basic liberties and rights', there is again a reduction of liberties and rights. Our conclusion (Part III) underlines the overall pragmatic, but illiberal outlook of Rawls' theory. Globalisation within the western world and on world level becomes synonym with liberty-impoverishment.

Part I. Some facts about the political use of human rights in Europe

Thinking in terms of rights

⁵ Rawls regards a moral theory to be comprehensive when it satisfies the following conditions. First it must apply to a wide range of subjects. This is what makes it general. It becomes comprehensive "when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our non-political conduct...." Cf. John Rawls *Political Liberalism*, New York: Columbia University Press, 1993, 175

⁶ In the case of domestic justice, the subject is the basic structure of a democratic society. *Infra*.

⁷ According to Rawls there are (at least three) fundamental ideas underlying a democratic society (*Political Liberalism*, 175). Next to the 'central organising idea' is that of "society as a fair system of cooperation over time, from one generation to the next.", there is the idea of "a well-ordered society as a society effectively regulated by a political conception of justice" and the idea of citizens as free and equal persons. (*Political Liberalism*, 14).

⁸ John Rawls, *Justice as Fairness. A Restatement*. Cambridge: Harvard UP, 2001, § 11.3.

Rawls has a way of warming up when writing books or articles: often he starts out by summing up 'facts' (about Western democracies) or 'characteristics' (about the task of political philosophy). Lets us follow his example and summarise some 'facts' about European use of human rights that have drawn our attention in past decades. In one way or another all these examples show that human rights are first a human fabric of things used to serve explicit or hidden 'political' agenda's.

First, it should be stressed that legal scholars in Europe have devoted much energy in transforming or translating liberty questions into questions of 'human rights'. One of the advantages of this 'rights approach' is purely strategic: it facilitates the bringing of cases before the European Court of Human Rights, a Court that is considered to have higher legal status.⁹ Also, the process of elevating liberty related issues to a more international level is expected to create more distance. Further from home, these issues are better identified and the weight of legislation infringing on liberties is put aside.¹⁰ For instance, the European Court has given priority to the right of workers to strike, whereas the French constitutional court gave priority to the right to property. Also, the European Court has elaborated a doctrine bridging the traditional gap between individual liberties and socio-economic social rights.¹¹

There are however more reasons to think in terms of rights. It is rightly observed that the concept of human rights in legal practice is closely linked to the concept of subjective rights.¹² Lawyers do like the idea of subjective rights. They think these offer better protection than 'liberty' or 'liberties'.¹³ Partly, on the level of jurisprudence, Wesley Hohfeld can be held responsible for this.¹⁴ In his famous division of rights,¹⁵ there is no specific legal response to a 'liberty right'. When I sing in my bath there is no legal duty for others. Freedman rightly observes that although liberty-rights do not demand duties to

⁹ "L'intérêt de raisonner en termes de droits de l'Homme est que cela peut permettre de s'adresser à une juridiction internationale qui, comme déjà dans d'autres domaines, pourrait bien faire preuve de suffisamment d'audace pour accorder aux travailleurs français une protection efficace de leurs droits fondamentaux" (Marc Richevaux, 'Droits de l'Homme et protection des droits des travailleurs', *Droit Social*, 1998, No. 12, (854-856), 854).

¹⁰ "Les tribunaux français ont une vision si hexagonale du droit qu'ils en arrivent à considérer *a priori* notre législation comme étant, par nature, au-dessus de tous soupçons. Pour nos juges, elle est bien supérieure de tous normes fixés par la Convention européenne des droits de l'Homme et les autres traités internationaux" (Marc Richevaux, *l.c.*, 855).

¹¹ Marc Richevaux, *l.c.*, 856: "Si l'Europe des marchands et déjà faite, l'Europe sociale est à peine ébauchée. Les travailleurs pourraient puiser les éléments de sa construction dans des recours fréquents à la Cour européenne des droits de l'Homme. Celle-ci, qui a déjà à son actif une oeuvre importante de protections des droits de l'Homme, aurait ainsi la possibilité de transformer en réalité concrète l'indivisibilité des libertés individuelles et des droits économiques et sociaux, qui ne fut longtemps qu'un sujet de polémique".

¹² A.-J., Arnaud, *Entre modernité et mondialisation. Cinq leçons d'histoire de la philosophie du droit et de l'Etat*, Paris, Librairie Générale de Droit et de Jurisprudence, 1998, 79.

¹³ E.g. Olivier De Schutter 'La vie privée entre droit de la personnalité et liberté', *Revue Trim. Droits des Hommes*, 1999, 828-863; Erna Guldix, 'De positie en de handhaving van persoonslijheidsrechten in het Belgisch privaatrecht', *Tijdschrift voor Privaatrecht*, 1999, Vol. 36, No. 4. This position is discussed and criticized in: Serge Gutwirth *Privacy and the information age*, Lanham/Boulder/New York/Oxford, Rowman & Littlefield Publ., 2002, 33-48; Koen Lemmens, 'The Protection of Privacy between a Rights-Based and a Freedom-Based Approach: What the Swiss Example can teach us', elsewhere in this volume; and François Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussel/Parijs, Bruylant/L.G.D.J., 1990, 849 p.

¹⁴ W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven, Yale University Press, 1923 reprinted as W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Westport, Greenwood Press Publishers, 1978, 114p.

¹⁵ Hohfeld divides rights into four categories of relationships between a right-bearer x and a right-addressee y, and explains them by their corresponding correlatives. (1) x has a liberty (or privilege) to do A - when x has no duty towards y not to do A, and y has a 'no-right' towards x (Singing in the bath is an example); (2) x claims A from y - and y has a duty towards x to do A (For instance, provide food or protection); (3) x has a power to bring about a certain consequence for y (An example would be a policeman requesting to see the license of a speeding driver, who is thus under a liability), and (4) x has immunity - when y lacks the authority to bring about a certain consequence for x and is thus under a disability (For instance, elderly people may be immune from being drafted into the army).

enable their exercise, they demand duties of another kind, namely abstention from intervention in the exercise of a liberty.¹⁶ Hohfeld does not identify this correlate as a *duty*, but instead defines it as a *no-right*. In doing so he refuses to endorse the view that liberties exist in social networks. It is then maintained that a liberty is an entirely atomistic right to act, or desist from acting, without reference to anything else.¹⁷ Hohfeld's scheme is said to be 'neutral',¹⁸ but this is a unfortunate statement, since his scheme undeniably leads to preference for 'claims' or 'subjective rights' entailing a duty on other persons. Many authors have tried to extend the Hohfeldian analysis to non-legal rights or have defended the thesis that liberties, also, can entail duties, viz. a duty of non-interference.¹⁹ This approach merits all our attention. Undeniably in European law, a right defining liberty often offers greater protection than the liberty itself.²⁰ The harm principle as a yardstick for measuring wrongful infringements on liberty is replaced by a more formal criterion,²¹ and *ad hoc* balancing is replaced by categorical balancing.²² Nevertheless, when law through rights does not protect liberty interests, there is still protection available (mainly offered by common tort law)²³. Hence, and contrary to Hohfeldian understanding, rights are not indispensable to protect liberty.

Rights contribute to penal inflation

The aforementioned process of reasoning in terms of human rights is not without its drawbacks. There are signals that the European Court through its case law indirectly encourages member states to use criminal law and criminal sanctions to tackle issues

¹⁶ M. Freedon *Rights*, Milton Keynes, Open University Press, 1991, 77-78.

¹⁷ M. Freedon *o.c.*, 78-79. Freedon adds: "It is possible to insist that all rights, liberty-rights as well as claim-rights, have related duties when adopting a different ideological vantage point that introduces a far more sociable view of human relations. What disturbs those who query the usefulness of the strict correlatively thesis from rights to duties is the possibility that, if applied on a wide scale, it will generalize the obligations that correspond to any right. This generality may relate both to the nature of the attached duties and to the rights-upholders (or duty-bearers). Take my liberty-right to wear jeans. What duties do others have with respect to that right? Clearly, the basic duty not to interfere with my right to wear them. But what about the duty to supply me with them or at least to make them available for me? The issue of the appropriate right-upholders applies not only to liberty-rights but to claim-rights that are fundamental human rights. If my starving neighbor has a right to subsistence, does he have it against me in particular? And if not, are we talking about rights *in rem*, against the world. Is there such a thing as a right that no one in particular has a duty to honor?". This passage is followed by arguments for the recognition of the more diffuse duties that are generated by human rights.

¹⁸ M. Kramer, 'Rights without Trimmings', in M. Kramer, N. Simmonds and H. Steiner (eds.), *A Debate over Rights*, Oxford, Clarendon Press, 1998, 12.

¹⁹ R. Flathman, *The Practice of Rights*, Cambridge, Cambridge University Press, 1976; M. Freedon, *o.c.*, 76-82; C. Wellman, *A Theory of Rights*, Totowa, Rowman & Allanheld, 1985, 35-80. Following Wesley Hohfeld, Wellman divides the concept of rights into claims, privileges, powers, and immunities. X has a claim against Y if Y must do something for X. For example, a debt is a legal claim in the sense that Y must repay the debt to X. X enjoys a privilege in regard to Y if Y cannot stop X from performing some action. For example, X has the legal privilege to cut the grass in his or her yard, and neighbor Y has no legal means to prevent X's action. The right to make use of our own property is a legal privilege or a "liberty". These terms also have their Hohfeldian "jural opposites." If X has a claim against Y, then Y has a duty in regard to X. If X enjoys a privilege or liberty in regard to Y, then Y has a no-claim in regard to X. Powers and immunities are also easily defined and they also entail their own jural opposites. X has a legal power over Y if X can do something to change Y's legal status. Judges have the power-right to marry, or to grant a divorce to a man and woman (thereby changing the legal status of the couple). X has a legal immunity in regard to Y if Y is unable to perform any action that changes X's legal status. One person does not have the ability to sell another one's property, or to terminate someone else's rights to personal property. We all enjoy the legal immunity that prevents others from disposing of our personal property. Hohfeld's jural opposites for powers and immunities are liabilities and disabilities, respectively. For Hohfeld, "claim" is the most accurate legal translation of "right," because a right implies a duty, and duties are most closely associated with claims. Hohfeld argues that legal rights are legal claims, exclusively. Wellman goes beyond Hohfeld to argue that any particular right may accurately be said to exhibit the characteristics of any one of these four dimensions. Following Wellman, it seems to make sense to say that legal rights can be divided into four categories: claim-rights, liberty-rights, power-rights, and immunity rights.

²⁰ "Que la liberté devienne un droit, la protection en sort renforcée" (Jacques Ravanais, annotation to Cour de Cassation (Fr.), 5 March 1997, *Recueil Dalloz*, (Cahier Jurisprudence), 1998, vol. 34, (474-476), 475).

²¹ "la sanction est fondée sur la violation du droit de demandeur, quel que soit le comportement du défendeur" (ibid).

²² Ibid with ref. to the work of François Rigaux.

²³ Cf. the doctorate in law of Koen Lemmens, *La presse et la protection juridique de l'individu : attention aux chiens de garde ! Pour un exercice responsable de la liberté de presse à l'aune de la Convention européenne des droits de l'homme et du droit belge*, defended at the European University Institute, Florence, on March 7, 2003.

such as domestic violence and other infringements of criminal law.²⁴ This evolution suggests that the European case law is contributing to a process of increasing penal inflation in many European countries. Hence, there is a hidden political agenda at work, in full contrast with the existing official rhetoric in European institutions (Council of Europe, European Union) and European countries advocating the use of imprisonment as a last resort and to stimulate non-custodial sanctions and measures²⁵. This is not only a conflict of principles. The idea of criminal law as a last resort is very respectful of liberty and should be taken seriously in a human rights perspective, especially in the light of highly critical studies on the dependence on criminal law and institutions of criminal justice by feminists and new social movements, embracing agendas of penalty with goals of amelioration and empowerment.²⁶

Rights protecting firms

A third fact, deals with the object of human rights. Do they only protect humans? Under the Convention the answer is clearly 'no'. Quite generally it is assumed that the rights from the treaty could for a part be applicable to artificial persons.²⁷ The Convention states that the Court can receive appeals from any natural person, any (non governmental) organisation or any private group, which claims to be the victim of a violation of one of its treaty rights. The institutions of the Convention have accepted the admissibility of appeals from churches,²⁸ syndicates,²⁹ companies³⁰ and political parties.³¹ Originally a restrictive interpretation of the question as to which treaty rights non-natural persons can appeal to, was defended: not all rights pertaining to natural persons could be successfully invoked by artificial legal persons.³² However, with respect to some articles, like article 9 and 10 ECHR an evolution has occurred, leading towards a more flexible interpretation,

²⁴ See Françoise Tulkens & Sébastien Van Droogenbroeck, 'La Cour européenne des droits de l'homme depuis 1980. Bilan et orientations' in : *En toch beweegt het recht*, W. DEBEUCKELAERE & D. VOORHOOF (eds.), *Tegenspraak-cahier 23*, Brugge, Die Keure, 2003, 219-220. The authors convincingly argue that the horizontal effect of the Convention generates positive obligations for the States that are now compelled to take measures in order to ensure the respect of the fundamental rights in interindividual (or horizontal) relationships. This seems to put the principle of the subsidiarity of criminal law (criminal law as the *ultima ratio*) under pressure, for the *absence* of a penal enforcement of a right might be reproached to the state.

²⁵ See Antoine Garapon & Denis Salas, *La République pénalisée*, Paris, Hachette, 1996, 140 p.; David Garland, *The culture of control. Crime and social order in contemporary society*, Oxford U.P., 2001, 307 p. and Serge Gutwirth & Paul De Hert, 'Grondslagetheoretische variaties op de grens tussen het strafrecht en het burgerlijk recht. Perspectieven op schuld-, risico- en strafrechtelijke aansprakelijkheid, slachtofferclaims, buitengerechtelijke afdoening en *restorative justice*' [Theoretical variations about the border of of criminal and civil law. Perspectives upon civil-, risk- and criminal liability, claims of victims, extra-judicial conflict resolution and restorative justice], *De weging van 't Hart. Idealen, waarden en taken van het strafrecht*, K. Boonen, C.P.M. Cleiren, R. Foqué & Th. A. de Roos, Deventer, Kluwer, 2002, 121-170

²⁶ See Laureen Snider, 'Towards safer societies. Punishment, masculinities and violence against women' *British Journal of Criminology*, Vol. 38, No. 1, Winter 1998, 1-39. Snider seeks to look beyond criminalisation models to examine what is known about building less violent societies, at the macro, middle and micro levels. She argues that criminalisation is a flawed strategy for dealing with male violence against women and criticizes the logic that has led feminists and other progressive social movements to mis-identify penalty as synonymous with social control. Focusing on wife assault and battery, Snider points out that strategies of criminalisation have benefited privileged white women at the expense of women of colour, aboriginal and immigrant women. Attention should be paid to the construction, roots and maintenance of hegemonic masculinity. Overall it is argued that effective social control of aberrant behaviour must be sought outside criminal justice institutions, and that the feminist and progressive focus should shift towards examining how to create less violent people (particularly men), families, communities and societies.

²⁷ A. Van Strien, 'Rechtspersonen en mensenrechten. De gelding van mensenrechten voor rechtspersonen in het strafprocesrecht', *RM Themis*, 1996 7; H. Golsong, 'La Convention européenne des Droits de l'Homme et les Personnes morales', in *Les droits de l'homme et les personnes morales*, Brussel, 1970, 15-33.

²⁸ ECRM, Scientology-kerk v. Swende, 5 May 1979, nr. 7805, D.R., vol. 16, 76.

²⁹ ECRM, National Syndicate of the Belgian Police v. Belgium, appeal nr. 4464-70, Rec. 39, 26.

³⁰ ECRM, Company X against Austria, 13 December 1979, appeal nr. 7897-77, D.R., vol. 18, 31.

³¹ ECRM, Liberal Party v. United Kingdom, appeal nr. 8765-79, D.R., vol. 21, 211.

³² G. Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Aix-en-Provence en Paris, Presses Universitaires d'Aix-Marseille en Economica, 1989, 59.

allowing firms, groups and other artificial persons to call upon these articles.³³ Concerning the right to the respect of private life and the right to protection of the house contained in article 8 ECHR, the restrictive interpretation remained.³⁴ However, in *Stes Colas Est et autres v. France*³⁵ the European Court rejected the view that the constitutional right on protection of the house only applies to private houses. Referring to the judgement *Niemietz v. Germany* from 1992³⁶ the Court noted that the French treaty-term *domicile* in article 8 ECHR is of a larger meaning than the English *home* and therefore also can apply to the office of a person with a liberal profession.³⁷ In a former judgement, the Court already held right to have the house protected also to apply to buildings in which a person lives and also has the social seat of his company.³⁸ In the *Stes Colas Est* case there is a reference to this previous judgement. The idea is supplemented with the consideration about the practice and necessity to consider the European Treaty as a living instrument that should be interpreted in light of actual needs.³⁹

An ethical or political basis for rights?

Very often it is said that human rights have a strong ethical footing. They are not about biological individual human beings, but about something more. Some legal texts on human rights emphasise the development of the 'person'.⁴⁰ Other texts hold that human

³³ G. Cohen-Jonathan, *o.c.*, 457, 476, 482 & 487.

³⁴ See. ECRM, Julien Mersch and others v. Luxemburg, 10 May 1985, No. 10439/83, 10440/83, 10441/83, 10452/83, 10512/83 & 10513/83; ECRM, Brüggemann and Scheuten v. Germany, 12 July 1977, No. 6959/75, *D.R.*, vol. 10, 101. In a decision from 1995 it is said that: "Unlike Article 9, Article 8 of the Convention has more an individual than a collective character, the essential object of Article 8 of the Convention being to protect the individual against arbitrary action by the public authorities" (ECRM, Eglise de scientologie de Paris v. France, 9 January 1995, No. 19509/92).

³⁵ ECHR, *Stés Colas et autres v. France*, 16 April 2002, via <http://www.echr.coe.int> (The judgment is available only in French). The applicants are Colas Est, Colas Ouest and Sacer, which are road construction companies in Colmar, Mérygnac and Boulogne-Billancourt (France). They were investigated in 1985 as part of an administrative inquiry in which investigators from the Directorate General for Competition, Consumer Affairs and Repression of Fraud investigated 56 companies simultaneously and seized several thousand documents from which they ascertained that illicit agreements had been made in respect of certain contracts. The investigating officers entered the premises of the applicant companies pursuant to the provisions of Order no. 45-1484 of 30 June 1945. On the basis of the seized documents the Minister for the Economy, Finance and Privatisation referred the matter to the Competition Council, which fined the applicants for engaging in illegal practices. The applicants appealed to the Paris Court of Appeal challenging the lawfulness of the searches and seizures, which had been effected without a warrant. The Court of Appeal fined the first applicant five million francs, the second applicant three million francs and the third applicant six million francs. The Court of Cassation dismissed their appeals. Relying on Article 8 of the Convention (right to respect for home), the applicants submitted that the searches and seizures, which had been conducted by the investigating officers without any supervision or restriction, amounted to trespass against their "home".

³⁶ ECHR, *Niemietz v. Germany*, 16 December 1992, *Série A*, vol. 251-B.

³⁷ ECHR, *Stés Colas et autres*, § 40 with ref. to ECHR, *Niemietz v. Germany*, §30.

³⁸ "the Government accepted that there had been an interference with the exercise of the applicant's right to respect for his 'private life' and 'home'. (...) The Court sees no reason to differ on (...) these points" (ECHR, *Ian Chappell v. United Kingdom*, 30 March 1989, *Série A*, vol. 152-A, § 51).

³⁹ ECHR, *Stés Colas et autres*, § 41. The Court held that the time had come to acknowledge that in certain circumstances the rights guaranteed by Article 8 of the Convention could be construed as including the right to respect for a company's head office, branch office or place of business. The Court found that the investigators had entered the applicants' premises without a warrant, which amounted to trespass against their "home". The relevant legislation and practice did not provide adequate or sufficient guarantees against abuse. The Court considered that at the material time the relevant authority had had very wide powers and that it had intervened without a magistrate's warrant and without a senior police officer being present. The Court held unanimously that there had been a violation of Article 8 and awarded each applicant EUR 5,000 for non-pecuniary damage and 6,700 to Colas Est, EUR 10,200 to Colas Ouest and EUR 4,400 to Sacer for costs and expenses.

⁴⁰ For instance, the German Constitution holds that 'Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.' (Article 2.1). The overall tone of International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, also centers around the notion of 'person'. Article 10 holds that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" and Article 16 of the Covenant holds that "Everyone shall have the right to recognition everywhere as a person before the law".

rights are based on 'human dignity'. The dignity of the human person is not only a fundamental right in itself but seemingly also constitutes the ultimate basis of fundamental rights.⁴¹

Without any doubt, this protection of 'something more' by human rights serves legitimate purposes,⁴² but it may lead to a conception of human rights too restricted to be of universal validity. It is questionable whether the notion of *personhood* in the German constitution has many affinities with a conception of *personhood* existing within, for instance, African or Asian societies where there is less emphasis on the individual. In certain African tribes there is no existence of a person outside the group. Does this mean that there can be no protection of human rights in such a society? What is wrong with extending protection beyond individual biological human beings? The same question of universal validity can be asked about the use of 'human dignity' as an ethical notion, borrowed from Christianity.⁴³ Within the Western World there is no consensus on the necessity of this notion,⁴⁴ so why export it to other cultures?

How fundamental is this ethical basis for human rights? We are not convinced. As noted above, some texts do not refer to ethical notions, whereas other texts remain rather vague. The International Covenant on Civil and Political Rights subordinates human rights protection to the concept of inherent dignity of the human person,⁴⁵ but some of the rights of the Covenant are directly linked to the individual human being.⁴⁶

The case law of the European courts, especially the *Stes Colas Est et autres v. France*-judgement, granting European privacy (and related) rights to firms, stress the political function of human rights. The essential protective function of these rights lies primarily in restricting the power of the state.⁴⁷ This 'political' function of rights explains why basic texts on fundamental or human rights grow longer in welfare states (the delimitation of state powers is more complex), and also explains why other, than human actors can enjoy legal protection.⁴⁸

Part II. Human rights as a part of the objective order of law

Three levels of justice: local, domestic and global

⁴¹ The 1948 Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, enshrined this principle in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' A same idea is contained in the European Charter of the European Union (*infra*) and the German Constitution. Article 1.1 of the German Constitution states that: 'Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.'

⁴² It results from a footing on 'human dignity' that none of the rights laid down in a text may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights. It must therefore be respected, even where a right is restricted.

⁴³ See A. Klink & C. Klop; 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P. Cliteur and others (eds.), *It ain't necessarily so.*, Kluwer, Leiden, 2001, (107-126), 112.

⁴⁴ More 'liberal' constitutions such as the Belgian and Dutch Constitution do not acknowledge values such as human dignity.

⁴⁵ "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person"

⁴⁶ Article 6: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

⁴⁷ Of course other functions are not excluded. See the paper of Mireille Hildebrandt, elsewhere in this volume. See also: Cornelia Schneider, *l.c.*, 118.

⁴⁸ To avoid confusion we could easily make a distinction between civil liberties or fundamental rights (rights considered to be fundamental in a given political society) and fundamental human rights (i.e., a right for all humans, where ever in the world).

In 1971, Rawls' *A Theory of Justice* sought to determine general principles for measuring the nature of justice and the proper goals, as determined by reason, which a well ordered society should observe in order to maximise benefits to individuals. Justice, Rawls claims, consists of those principles people would agree to under conditions of fairness and equality (hence leading on to the concept of "justice as fairness"). According to Rawls, a well-ordered society, one that that can commend itself to impartial critical scrutiny, will be ordered according to two principles. First, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all.⁴⁹

Justice as fairness is conceived as a political concept independent of controversial philosophical, moral and religious doctrines. Rawls believes that rational people will unanimously adopt his principles of justice if their reasoning is based on general considerations, without knowing anything about their own personal situation, cultural background or belief. The first principles are constituted by a procedure of construction without appeal to prior moral facts. Although it is undeniable that there is some specific conception of the person at work in Rawls' political constructivism,⁵⁰ persons do not ascend to the original position or the constitutional convention to discuss the nature of man and the meaning of personhood. Rather, they agree upon the fundamental terms of their association. Amongst others this implies setting up a legal system, defining the basic structure within which the pursuit of all other activities takes place.⁵¹

Rawls' characterisation of his theory as political has an important consequence for the scope of these two principles of justice: they only cover the 'basic structure' of society,⁵² and regulate only those institutions directly whose regulation is needed to bring about a just distribution of rights, opportunities, and wealth.⁵³ They do not regulate institutions that are irrelevant to the distribution of these goods and do not apply directly to the internal life of the many associations within society, "the family among them".⁵⁴ Rawls' original theory does not apply to questions of 'local' justice. Equally it does not apply to questions of 'global justice'. One cannot assume in advance, Rawls notes, that the reasonable and just principles for the basic structure are also reasonable and just for these two other levels of justice.

Consensus and thoughtful discussion in the amended theory of justice as fairness

Rawls' theory has undergone an important evolution and in many ways his position after 1980 became more prudent and more sensible for problems such as political stability and

⁴⁹ Our conception of justice, Rawls contends, "is constituted by principles we would agree to live by under fair conditions, in particular: 1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others (the Liberty Principle). 2. Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (the Difference Principle)". Cf. *A Theory of Justice*, § 46.

⁵⁰ *Infra*. See also: William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (New York: Cambridge University Press, 1991) p. 136, 138.

⁵¹ *A Theory of Justice*, § 38

⁵² The basic structure of society is the background political and social framework of a society; it is the way in which the main political and social institutions of society fit together into one system of social cooperation over time. Cf. *A Theory of Justice*, § 2; John Rawls, *Justice as Fairness. A Restatement*. Cambridge: Harvard UP, 2001, § 4.

⁵³ "The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of economy (...), as well as the family in some form, all belong to the basic structure" (*Justice as Fairness. A Restatement*, § 4)

⁵⁴ John Rawls, 'The Idea of Public Reason Revisited' reprinted in *The Law of Peoples* (Cambridge: Harvard University Press, 1999), p. 158

pluralism.⁵⁵ Rawls preserved his spectacular thought-experiment proposed in *A Theory of Justice*, making use of the 'veil of ignorance' by parties placed in 'original position',⁵⁶ but he added many restrictions. As he presents his theory from the nineteen eighties on, 'justice as fairness' is an exposition of the Western, especially American consensus.⁵⁷ It is not 'metaphysical' but 'political': as far as possible it avoids philosophical questions (e.g. what is the a-historical nature of man?, what is the nature of the human subject?, what motivates moral behaviour? and what is the sense of human life?). A political conception tries to draw solely upon basic intuitive ideas (necessary to regulate the basic structure) that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation.⁵⁸

In a sense Rawls proposes to do away with philosophical inquiries about an independent metaphysical and moral order when elaborating a political conception of justice, since they do not provide for workable and generally accepted fundamentals. We should limit ourselves to accepted opinions, such as the belief in tolerance and the rejection of slavery. The ideas that are implicit in these positions can ground a coherent concept of justice. "That there are such ideas in their public culture is taken as a fact about democratic societies".⁵⁹ This restriction of scope clearly shows the pragmatist nature of Rawls' theory.⁶⁰ These shared values are the focus of what Rawls calls the 'overlapping consensus'.⁶¹ The necessity of an overlapping consensus arises because those with different comprehensive moral views must seek some common ground for reaching consensus about principles of justice. The actual circumstances of living in a democratic society then provide individuals with the motivation for accepting a political conception of justice that is not in conflict with one another's comprehensive views.⁶² Justice as fairness is a valid candidate for gaining the support of a reasonable overlapping consensus, since: (a) its requirements are limited to a society's basic structure; (b) its acceptance presupposes no particular comprehensive view; and (c) its fundamental ideas are familiar and drawn from the public political culture.⁶³ Clearly these three features do

⁵⁵ We follow Paul Ricoeur's comprehension of Rawlsian evolution. See Paul Ricoeur, *Le Juste*, Ed. Esprit, Paris, 1995, 99-120.

⁵⁶ In this position, all parties know the benefits and disadvantages that will flow from a particular distribution of those goods of a particular choice of principles of justice, but a veil of ignorance exists for the parties. Neither party in the original position knows their specific place in that future arrangement. Reason should prevail to bring the parties to agree to an arrangement that maximizes the benefits to all.

⁵⁷ Critical of this movement away from Kant's universal conception of public reason: Onora O'Neill, 'Political Liberalism and Public Reason: A Critical Notice of John Rawls' *Political Liberalism*', *The Philosophical Review*, 1997, Vol. 106, No. 3, 411-428.

⁵⁸ John Rawls, 'Justice as Fairness: Political not Metaphysical', 225.

⁵⁹ *Justice as Fairness. A Restatement*, § 9.1.

⁶⁰ Contrary to, for instance, Dworkin's work, one cannot find in Rawls' work a defense of universal rights. Sceptical about metaphysical explanations for the existence of such rights, Rawls will depart from local, cultural premises. Our idea about 'right' or 'just' depends on the group or culture we live in. Rawls' (reduced) theory relies on working up the shared values of freedom and equality that he presumes are shared among citizens in Western society into more determinate principles to govern society. Cf. Richard Rorty, 'The Priority of Democracy to Philosophy', in Alan Malachowski (ed.), *Reading Rorty: Critical Responses to Philosophy and the Mirror of Nature (and Beyond)*, Oxford, Basil Blackwell, 1990, 279-302. We use the Dutch translation: 'De voorrang van democratie op filosofie', in *Solidariteit of objectiviteit. Drie filosofische essays*, Amsterdam, Boom, (1998) 1990, 76-112, 83.

⁶¹ It is possible and necessary to respond to the 'fact' of pluralism, Rawls holds, for persons with conflicting, but reasonable comprehensive views to agree that the political conception of justice should be the account of justice that is most compatible with their own views. As such the political conception would then be the object of an overlapping consensus about justice. Cf. John Rawls *Political Liberalism*, 15. Since democracies cannot and may not use state power, with its attendant cruelties and corruptions of civic and cultural life, to eradicate diversity, "we look for a political conception of justice that can gain the support of a reasonable overlapping consensus to serve as a public basis of justification" (*Justice as Fairness. A Restatement*, § 11.5.). An overlapping consensus "consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself." (John Rawls *Political Liberalism*, 15)

⁶² John Rawls *Political Liberalism*, 134.

⁶³ *Justice as Fairness. A Restatement*, § 11.2.

not guarantee absolute success, but they may overcome scepticism founded in doctrines such as those of Kant and Mill and religious views that support the basic liberties.⁶⁴

The foregoing (principles found and chosen in the original position through the overlapping consensus) is still insufficient to solve the problem of stability in pluralist societies. Although we cannot avoid starting from some consensus on institutionalised norms that are generally accepted, there is a limit to this consensus. Indeed, norms are not absolute or universal and the persons in the overlapping consensus start from within their own comprehensive view and draw on the religious, philosophical and moral grounds it provides.⁶⁵ Something more is needed to reach agreement on matters of political justice. Rawls' method of public justification⁶⁶ and the connected method of reflective equilibrium, based on an examination of alternatives and the elimination of doubt,⁶⁷ are devised to keep the dialogue between persons with different comprehensive world-views open. Citizens can find a balance between intuitions on the desirability of certain consequences of certain actions and intuitions about general principles. Reflective equilibrium is reached when a person reviews his judgements after having weighed different arguments and leading conceptions of political justice found in our philosophical traditions and in relation to scientific theories of human nature and society in order to establish what seems 'most reasonable to us'.⁶⁸ Political principles no longer need extra-political (metaphysical) foundations. The method does not rule out the possibility of a minimal core of moral principles that could be established through critical dialogue between different cultures. On the contrary, practical agreement on matters of political justice is only to be achieved through this capacity of revision.⁶⁹ Rawls' method creates the possibility of a society having only one method for resolving socio-political disputes: the quest for a reflective equilibrium.⁷⁰

A Theory of Justice already contained references to the *reflective equilibrium*,⁷¹ but, especially in conjunction with the notion of overlapping consensus, it gained a new meaning in Rawls' later work.⁷² In order to face the problem of stability, Rawls renders his theory more dynamic: consensus and thoughtful discussion supplement the abstract

⁶⁴ Ibid.

⁶⁵ All men have two moral powers, Rawls hold: (1) a capacity for an effective sense of justice and (2) a capacity to form, to revise and to rationally pursue a conception of the good. This capacity for reason and this sense of justice allows us to make considered judgments, viz. judgments given under conditions in which our capacity for judgment is most likely to have been fully exercised and not affected by disturbing influences. But considered judgments can differ and even our own judgments are sometimes in conflict with one another. "Justice as fairness regards all our judgments, whatever their level of generality (...) as capable of having for us, as reasonable and rational, a certain intrinsic reasonableness. Yet since we are of divided mind and our judgments conflict with those of other people, some of these judgments must eventually be revised, suspended, or withdrawn, if the practical aim of reaching reasonable agreements on matters of political justice is to be achieved" (*Justice as Fairness. A Restatement*, § 10.2).

⁶⁶ See *Justice as Fairness. A Restatement*, § 9.4. ("political liberalism neither accepts nor rejects any particular comprehensive doctrine, moral or religious. (...) It uses a different idea, that of public justification, and seeks to moderate divisive political conflicts and to specify the conditions of fair and social cooperation between citizens. To realize this aim we try to work up, from the fundamental ideas implicit in the political culture, a public basis of justification that all citizens as reasonable and rational can endorse from within their own comprehensive doctrines. If this is achieved, we have an overlapping consensus of reasonable doctrines, and with it, the political conception affirmed in reflective equilibrium")

⁶⁷ *Justice as Fairness. A Restatement*, § 10.1.

⁶⁸ Terry Hoy, 'Rawls' Concept Of Justice As Political: A Defense Against Critics', Via <http://www.bu.edu/wcp/Papers/Poli/PoliHoy.htm>, 6p.

⁶⁹ *Justice as Fairness. A Restatement*, § 10.2

⁷⁰ Richard Rorty, *I.c.*, 86.

⁷¹ *A Theory of Justice*, § 9.

⁷² See Rawls' discussion of wide and narrow reflective equilibrium, absent in *Theory of Justice*, in *Justice as Fairness. A Restatement*, § 10.3.

hypothesis of decision-making behind the veil of ignorance.⁷³ The overlapping consensus, Rawls specifies, is not a consensus simply on the acceptance of a certain authority, or simply on compliance with certain institutional arrangements. In order better to understand the idea of an overlapping consensus Rawls contrasts it with another way of reaching agreement on a political conception, that of a *modus vivendi*. A social consensus based upon a *modus vivendi* is reached when the various parties find it to be in their own self-interest to abide by the conditions of a contract or a treaty. The overlapping consensus differs in two crucial respects from a *modus vivendi*. First the object of the consensus is a moral conception. And second, an overlapping consensus is affirmed on moral grounds, not on those of self-interest.⁷⁴ The solution to the problem of stability is found in the convergence of the various moral and religious views, each of which accepts the political conception from within their own comprehensive views.⁷⁵

The overlapping consensus on human rights in domestic justice

We do not wish to go into the debate over whether a political conception of justice is possible,⁷⁶ but wish to outline the central position of rights and liberties in this conception. Human rights and liberties such as political liberties and freedom of thought are essential for the development and full exercise of the two moral powers that man possess as opposed to animals.⁷⁷ Liberty of conscience and freedom of association enable citizens to develop and exercise their moral powers in forming, revising and rationally pursuing their own conceptions of the good.⁷⁸

⁷³ The insistence on the overlapping consensus should be understood in the same way. Its insertion puts less weight on the decision-making process in the original position. It is an appeal to experience and it expresses the belief that behind the many incompatible world-views in Western society, there is shared adherence in some crucial political ideas. Comp. with Richard Rorty, *l.c.*, 86, footnote 21. This author suggests that the whole of Rawls' work could be saved without having to make use of the 'original position'-technique.

⁷⁴ *Political Liberalism*, 147. Rawls' distinction between 'reasonable' and 'rational' and the idea of a consensus that is more than a *modus vivendi*, also figures in *The Law of Peoples*, § 2 and 5.

⁷⁵ "For all those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical and moral grounds it provides". Cf. *Political Liberalism*, 147; *Justice as Fairness. A Restatement*, § 58. Rawls has been largely criticized on the grounds that this freestanding, non-metaphysical conception is unable to provide an adequate justification for political principles. Many authors agree that something more is required if such principles are to be recognized as valid. E.g. Joseph Raz, 'Facing Diversity: The Case of Epistemic Abstinence', *Philosophy and Public Affairs*, 1990, Vol. 19, 3-46; Jurgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism', *Journal of Philosophy*, 1995, Vol. 92, March, 109-180; Jean Hampton, 'Should Political Philosophy Be Done Without Metaphysics?', *Ethics*, 1989, July, 791-814; Peter Steinberger, 'The Impossibility of a Political Conception', *The Journal of Politics*, 2000, Vol. 62, (febr.), No. 1, 147-165. With regard to the overlapping consensus, Steinberger sees a contradiction between Rawls' argument that the political conception is accepted by reasonable people 'from within their own comprehensive views' and the argument that the consensus should be more than a *modus vivendi*, leaving aside the comprehensive views that have existed or still exist (Peter Steinberger, *l.c.*, 150). A possible reply to this argument can be found in: Terry Hoy, 'Rawls' Concept Of Justice As Political: A Defense Against Critics', Via <http://www.bu.edu/wcp/Papers/Poli/PoliHoy.htm>, 6p.

⁷⁶ Not everyone is convinced that the Rawlsian methods and concepts are workable. See the preceding footnote. Steinberger, for instance, criticizes the added value of Rawlsian concepts such as the *overlapping consensus* and the insistence on *reasonable* people following *reasonable* comprehensive doctrines (Peter Steinberger, *l.c.*, 156). Fundamentally, he criticizes Rawls' reliance on claims with a highly metaphysical character (truth claims). The argument for the difference principle, for instance, involves some sort of theory of metaphysical luck, a view on natural life as a sort of lottery generating inequality. A strict Calvinist, Steinberger holds, believing that there is no such thing as a lottery but only Divine election, would therefore have great difficulty accepting the justice of the difference principle (Peter Steinberger, *l.c.*, 155) Rawls would demand a pragmatic or 'reasonable' Calvinist to adjust his or her view so as to accommodate justice as fairness, but this would be turning Calvinist theology on its head. The analysis shows that Rawls' liberalism is necessarily based on a structure of truth, like any other philosophy of politics. For a defense of Rawls' attempt to avoid philosophical discussion: Rorty, *l.c.*, 86-101.

⁷⁷ We saw that the concept of reflective equilibrium presupposes two moral powers, a capacity for reason and a sense of justice. The existence of these powers is included in the idea of free and equal persons.

⁷⁸ *Justice as Fairness. A Restatement*, § 13.4.

Human rights and liberties not only restrict the power of the state, but also empower citizens (or individuals) to participate in the political system.⁷⁹ This important function explains why, within the Western political tradition, it may not be too hard to find an overlapping consensus on the importance of basic liberties. They are part of the fundamental ideas that are familiar and are drawn from public political culture of a democratic society 'that has worked reasonably well over a considerable period'.⁸⁰ These rights and liberties are not only instrumental to the building of Rawlsian citizenship (*infra*), they are also an important kind of 'primary goods'.⁸¹ The first kind of primary goods that Rawls actually identifies are 'basic rights and liberties': "*freedom of thought and liberty of conscience, and the rest*".⁸²

Rawls' theory shows a high priority for liberty. Basic liberties are primary social goods and henceforth stand central in the basic structure.⁸³ They are one of the first things a just society should distribute equally,⁸⁴ and are things that every rational man is presumed to want.⁸⁵ Moreover, the serial ordering of principles⁸⁶ expresses an underlying preference among primary social goods: claims of basic liberties are to be satisfied first.⁸⁷ Although not absolute, liberties have a special status;⁸⁸ they are related to the 'higher-order interests'.⁸⁹ *Liberty*, rather than wealth (once the minimum is assured) is what we most need to be a person rationally forming, revising and pursuing ends, or a 'plan of life'. Self-esteem is an important primary good, and 'the basis for self-esteem in a just society is

⁷⁹ See Cornelia Schneider, *l.c.*, 118 with reference to Charles Larmore ('The Foundations of Modern Democracy: Some Remarks on Dworkin and Habermas', *European Journal of Philosophy*, Vol. 3, 1995, No. 1, (55), 65) who has observed that 'individual rights serve, not to protect us against the collective will, but rather to protect the means necessary for creating a collective will'.

⁸⁰ *Justice as Fairness. A Restatement*, § 11.3.

⁸¹ Primary goods are things that every rational man is presumed to want. Cf. *A Theory of Justice*, § 11. Social primary goods, -(i) liberty, (ii) opportunity, (iii) positions of authority (iv) income and wealth, and (v) the bases of self-respect-, are to be distributed equally unless an unequal distribution of any or all of refers to things citizens need as free and equal persons living a complete life; they are no things it is simply rational to want or desire (*Justice as Fairness. A Restatement*, § 17.1 & 17.2). Next to these social primary goods, there are other 'natural' primary goods such as health and vigor, intelligence and imagination. Although their possession is influenced by the basic structure, they are not so directly under its control (*A Theory of Justice*, § 11).

⁸² *Justice as Fairness. A Restatement*, § 17.2. A more precise listing of these basic rights and liberties and a closer analysis is absent in *A Theory of Justice*. Rawls only briefly contends that they are 'roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom of arbitrary arrest and seizure as defined by the concept of the rule of law" (*A Theory of Justice*, § 11).

⁸³ We recall that primary goods are the object of a political conception of justice, which means that the two principles of justice (*above*) are to be applied on them (and them only): they are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. As their formulation suggests, Rawls contents, these principles presuppose that the social structure can be divided into two or more or less distinct parts. The second principle applies to those aspects of the social system that specify and establish social and economic inequalities, the first principle to those aspects that define and secure the equal liberties of citizenship. The basic rights and liberties are the object of the first principle. "These liberties are all required to be equal by the first principle, since citizen of a just society are to have the same basic rights" (*A Theory of Justice*, § 11).

⁸⁴ The first principle 'simply' requires that the constitutional rules defining these liberties, apply to everyone equally and that they allow the most extensive liberty compatible with the like liberty for all. (*A Theory of Justice*, § 11).

⁸⁵ In *A Theory of Justice*, § 36 Rawls holds that basic liberties such as freedom of speech, assemblage, conscience and thought are institutions 'required by the first principle'. With reference to Mill he offers a second justification: these basic liberties are also necessary if political affairs are to be conducted in a rational way.

⁸⁶ We recall Rawls famous serial ordering of principles with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages. (*A Theory of Justice*, § 11). This conception rules out any trade-off between liberty and other primary goods. For instance, it will not allow restriction of liberty for the sake of productivity. The priority of liberty means that claims of liberty are to be satisfied first (*A Theory of Justice*, § 39). However, it will allow the restriction of one liberty to enhance another liberty. 'Liberty can be restricted only for the sake of liberty itself'. See more in detail about legitimate limitations of liberty: *A Theory of Justice*, § 39.

⁸⁷ *A Theory of Justice*, § 11.

⁸⁸ John Rawls, 'The Basic Liberties and Their Priority', in S. MacMurrin (ed.), *The Tanner Lectures on Human Values*, Cambridge, Cambridge UP, 1982, 8-9.

⁸⁹ More in detail: R.J. Kilcullen, 'John Rawls: Liberty', 1996, via <http://www.humanities.mq.edu.au/Ockham/y64115.html>, 4p.

not... one's income share but the publicly affirmed distribution of fundamental rights and liberties',⁹⁰ 'the public affirmation of the status of equal citizenship'.⁹¹ To trade off equal liberty for income would diminish self-respect; those with less liberty would have to regard themselves as inferior in the public life of their society.

Why would people agree to this construction? Why should they accept the serial ordering? Why accept the first principle requiring basic liberties and allow the most extensive liberty? Rawls advances many arguments,⁹² but fundamentally he sees a desire for liberty at work,⁹³ and an opportunity for the adequate development and full exercise of the two powers of moral personality over a complete life.⁹⁴

Rawls' conception of moral personhood

Rawls' conception of moral personhood, introduced in *A Theory of Justice*, elaborated in his 1980 Dewey Lectures,⁹⁵ steadily gained importance throughout his work. Justice as fairness does not regard individual human beings (given by nature) but individual human persons (not given by nature) that are considered free and equal. Human persons are, according to Rawls, human moral agents that possess to the requisite minimum degree two fundamental moral powers: (1) a capacity for an effective sense of justice (the capacity to understand, apply and act from the principles of political justice) and (2) a capacity "to form, to revise, and rationally to pursue a conception of the good (of what is of value in human life)".⁹⁶ These two capacities, 'define' the moral person,⁹⁷ since they allow human beings to engage in mutually beneficial social cooperation over a complete life and to be moved to honour its fair terms for their own sake.

If there is something universal in Rawls' work, it must be this concept of personhood based on anthropological premises.⁹⁸ Human beings are essentially moral persons and as moral persons they are equal. Persons also have a capacity for social cooperation, that is they are capable of being normal and fully cooperating members of society over a complete life.

These two conceptions, the conceptions of the person and the associated conception of social cooperation, explain, according to Rawls, why parties in the original position are

⁹⁰ *A Theory of Justice*, § 82.

⁹¹ Ibid.

⁹² Part of the argument is presented as a fact: basic liberties are part of our political culture; an overlapping consensus about their importance is very likely.

⁹³ 'Under favourable circumstances the fundamental interest in determining our plan of life eventually assumes a prior place... [because of] the central place of the primary good of self-respect and the desire of human beings to express their nature in a free social union with others. Thus the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course' (*A Theory of Justice*, § 82). This desire is one of the guiding instruments when people placed in the original position chose a concept of justice. 'The supposition is that if the persons in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in their economic well-being, at least not once a certain level of wealth has been attained. It is only when social conditions do not allow the effective establishment of these rights that one can acknowledge their restriction. The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilisation so that in due course the equal freedoms can be enjoyed by all. Eventually there comes a time in the history of a well-ordered society beyond which the special form of the two principles takes over and holds from then on' (*A Theory of Justice*, § 82). When the obstacles that reduce the 'worth' of liberty are overcome there is 'a growing insistence upon the right to pursue our spiritual and cultural interests' (ibid).

⁹⁴ John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 7.

⁹⁵ John Rawls, 'Kantian Constructivism in Moral Theory' in *Journal of Philosophy*, Vol. 77 (1980), No. 9, 515-572.

⁹⁶ See for a definitive formulation: *Justice as Fairness. A Restatement*, § 7.

⁹⁷ *A Theory of Justice*, §§ 3-4.

⁹⁸ Jozef Van Bellingen, 'Gelijkheid in de *original position* bij J. Rawls en de *ideale spreksituatie* bij J. Habermas' in *Gelijkheid*, De Pauw F., Foriers P. & Perelman Ch. (Ed.), Publicaties van het centrum voor wijsbegeerte van het recht van de Vrije Universiteit Brussel, 1981, (235-271), 241.

willing to accept the first principle and agree to the priority of the basic liberties.⁹⁹ People have a sense of justice or a capacity for and disposition to being reasonable and thus find themselves able and inclined to propose and honour fair terms of cooperation with others.

The non-metaphysical nature of civil liberties and human rights

Once the principles of justice are chosen in the original position, there follow three further stages of implementation, as the parties move to a constitutional convention establishing rights of citizens, then to a legislative stage where the justice of laws and policies are considered, and finally to the stage of judicial interpretation of particular cases.¹⁰⁰ One of the first actions of this convention is to incorporate the basic liberties in a constitution in order to protect them.¹⁰¹ Nowhere in *A Theory of Justice* does Rawls say that the work of the convention *should* result in the drafting of a bill of rights or a chapter on human rights in the constitution.¹⁰² A political conception of justice does not imply a bill of rights,¹⁰³ certainly not an extensive one.¹⁰⁴ Also, next to the incorporation of the basic liberties, there is no absolute or pressing need to spell out 'the rights of man' or 'the rights of humans' in detail. There is no constitutional urge to work out an anthropological

⁹⁹ John Rawls, 'The Basic Liberties and Their Priority', 13 & 18.

¹⁰⁰ See the first Chapter of the second part ('Institutions') of *A Theory of Justice*. This four-stage sequence is 'evidently' needed to simplify the application of the two principles of justice. In each further stage specific questions are considered. "After having chosen the principles of justice, the veil of ignorance is partly lifted and the parties move to a constitutional convention to design a system for the constitutional powers of government and the basic rights of citizens" (*A Theory of Justice*, § 31). Note Rawls' use of the term basic rights.

¹⁰¹ "(T)he first problem is to design a just procedure. To do this the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties" (*A Theory of Justice*, § 31). This constitution, together with the two principles of justice, is a tool for orienting the work of the legislator (the third stage): statutes must satisfy not only the principles of justice, but whatever limits are laid down in the constitution. Rawls proposes an interesting division of labour between the second and the third stage, corresponding to the two parts of the basic structure: the first principle comes into play at the stage of the constitutional convention, the second principle at the stage of the legislature. Since the legislator has to respect constitutional constraints, this situation reflects the priority of the first principle (*A Theory of Justice*, § 31). This construction seems to suggest that not all interests can be uplifted to the constitutional level. Rawls apparently sees no room for such things as third or fourth generation human rights. The constitution should establish a secure common status of equal citizenship and realize political justice. Social justice is the prime task of the legislator who can develop social and economic policies aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity *and* is subject to the duty to maintain equal liberties.

¹⁰² "A bill of rights *may* remove certain liberties from majority regulation altogether, and the separation of powers with judicial review *may* slow down the pace of legislative change" (*A Theory of Justice*, § 37). The italics are added.

¹⁰³ One can even ask the question whether rights form an indispensable part of the basic structure. Are rights needed to bring about a just distribution of rights, opportunities, and wealth? Rawls' definition of the basic structure is not very precise. He obviously sees no harm in a general characterisation and makes no hard distinction between the institutions that make up the basic structure and those that do not. This 'loose characterisation of a rough idea' allows for flexibility in time. Depending on changing social circumstances it may even be possible that an institution could be part of the basic structure one day and not a part of it the next. The decision about what counts as part of the basic structure is made on instrumental grounds: would counting X as part of the basic structure enable us to meet the principles of justice? If so, it's in; if not, it's out. We would add the advantage of flexibility in space. For our judgements to be reasonable, they must usually be informed by an awareness of more specific, geographical circumstances. Especially in a historical perspective, but also in a comparative perspective, it cannot be excluded that (constitutional or social) systems without human rights still meet the principles of justice. Comp. *A Theory of Justice*, § 10. There is no ideal constitution; justice as fairness is not an account of how constitutional conventions actually proceed. According to Rawls the idea of a four-stage sequence is suggested by the United States Constitution and its history (cf. the first footnote of the second part of *A Theory of Justice* on political justice). We recall that the original 1789 Constitution contained no bill of rights, although the 1776 Declaration of Independence declared their foundational weight and several important rights, especially with regard to the rule of law, are contained in the various provisions of the Constitution. For example the prohibition of ex-post-facto law in article 1, section 9. An enumeration is contained in Alexander Hamilton, *The Federalist No. 84*, (1788), included in *The Federalist, A Commentary on the Constitution of the United States*, (1787-1788), intr. by E.M. Earle, New York, The Modern Library, s.d., 556-557. See also: P. Boon *Amerikaans staatsrecht*, Zwolle, W.E.J. Tjeenk Willink, 1992, 125-130.

¹⁰⁴ "The reason for this limit on the list of basic liberties is the special status of these liberties. Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority" (John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 10).

view on man in the second stage of justice as fairness. Regulating power and setting constraints on the work of the legislator are constitutional requirements.¹⁰⁵ Although more attention is paid to the problem of regulating the basic liberties in Rawls' later work,¹⁰⁶ there is throughout all of Rawls' work a concern for political consensus: keeping metaphysical values out of the constitutional work and a priority for the liberties contained in the first principle of justice.¹⁰⁷

The political, non-metaphysical, nature of the constitutional convention finds an echo in Rawls' *general description of liberty*.¹⁰⁸ It follows from this description that, not only humans, but also associations and states are agents capable of enjoying freedom, liberties and rights. Rights do not have a 'human' character *per se*. Firms and other associations can and may claim protection against limitations of their liberty. Just like the 'peoples'

¹⁰⁵ Rawls stresses the political function of the constitutional convention. A just constitution is one that rational delegates, subject to the restrictions of the second stage, would adopt for their society and in it a legislator can find guidance finding authorized ways to deal with questions of social and economic policy (*A Theory of Justice*, § 31 *in fine*). The idea that power should be checked can also be found in some of the pages in *A Theory of Justice* with a Hobbesian undertone. An effective penal machinery, Rawls contends, is needed to guarantee men's security to one another. At the same time, the risks of setting up such a coercive agency have to be minimized (*A Theory of Justice*, § 38). These paragraphs show that power, or rather the way to control it, is a central issue that stands high on the constitutional agenda. The constitution in a just society is about power and its limits, not about the nature of humans. Power can be exercised by other agents than human individuals. Private organisations can hamper schemes of cooperation and need to be controlled. But the way this control is exercised also needs to be controlled. This can be deduced from the priority rule. When people in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for whatever reason. On the contrary, they will seek to secure the free internal life of the various communities of interest in which persons and groups seek to achieve, in modes of social union consistent with equal liberty, the ends to which they are drawn (*A Theory of Justice*, § 82).

¹⁰⁶ Further specification of the basic liberties into a workable constitutional arrangement to regulate their use, becomes a primary task of the convention in Rawls' later work. See John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 11. The outcome of this work is not fixed: "the delegates to a constitutional convention, or the members of the legislature, must decide how the various liberties are to be specified so as to yield the best total system of equal liberty. They have to balance one liberty against another. The best arrangement of the several liberties depends upon the totality of limitations to which they are subject, upon how they hang together in the whole scheme by which they are defined" (*A Theory of Justice*, § 32). *A Theory of Justice* contains two colorful examples of the kind of arrangements that can be done (see *A Theory of Justice*, § 37 and § 39) In one arrangement political rights are limited to the advantage of those having superior wisdom and judgment. Admitting certain assumptions, plural voting may be perfectly just, Rawls contends with much reserve. In another arrangement less advantageous situations are accepted with regard to the rule of law, for the sake of efficiency. Arrangements of this kind are possible within justice as fairness, granted that arguments for restricting liberty proceed from the principle of liberty itself.

¹⁰⁷ The early Rawls would certainly oppose himself to extensive constitutions with a strong ethical footing (for instance, with references to the dignity of the person). For Rawls, parties must choose principles in light of the possibility that they might be anything from religious ascetics to atheistic libertines. The result is a regime of toleration, with strong protections for the freedom of individuals and associations to pursue different ends in life. The sense of justice should lead us not to want to impose our own conception of the human good on others against their will, even if we have the political power to do it by voting text with fundamental rights. Comprehensive values of religion and ultimate ends should be left to voluntary communal and personal pursuit. See on Rawls' method of avoidance, *infra*.

¹⁰⁸ "Liberty can always be explained by a reference to three items: the agents who are free, the restrictions or limitations which they are free from, and what it is that they are free to do or not to do. Complete explanations of liberty provide the relevant information about these three things. Very often certain matters are clear from the context and a full explanation is unnecessary. The general description of liberty, then, has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so. Associations as well as natural persons may be free or not free, and constraints may range from duties and prohibitions defined by law to the coercive influences arising from public opinion and social pressure. For the most part I shall discuss liberty in connection with constitutional and legal restrictions. In these cases liberty is a certain structure of institutions, a certain system of public rules defining rights and duties. Set in this background, liberty always has the above three-part form. *Moreover, just as there are various kinds of agents who may be free -persons, associations, and states- so there are many kinds of conditions that constrain them and innumerable sorts of things that they are or are not free to do. In this sense there are many different liberties which on occasion it may be useful do distinguish.* Yet these distinctions can be made without introducing different senses of liberty.

Thus persons are at liberty to do something when they are free from certain constraints either to do or not to do it and when their doing it or not doing it is protected from interference by other persons. If, for example, we consider liberty of conscience as defined by law, then individuals have this liberty when they are free to pursue their moral, philosophical, or religious interests without legal restrictions requiring them to engage in any particular form of religious or other practice, and when other men have legal duty not to interfere. A rather intricate complex of rights and duties characterizes any particular liberty. Not only must it be permissible for individuals to do or not to do something, but government and other persons must have a legal duty not to obstruct. I shall not delineate these rights and duties in any detail, but shall suppose that we understand their nature well enough for our purposes" (*A Theory of Justice*, § 32). The italics are added.

(societies),¹⁰⁹ they form artificial corporate agents of the requisite moral nature, capable of making conflicting claims upon one another - claims the right resolution of which is a matter of justice.

The foregoing shows the positivistic nature of the outcome of the constitutional convention. It may look tempting to draw a distinction between *human rights* - universal rights derived from natural law which has evolved out of natural rights - and *civil rights* or *civil liberties*, - rights that the state has contracted with its citizens and are political in nature.¹¹⁰ In this context *human rights* are understood not as positivistic in the sense that the state has contracted a deal with its citizenry, but as natural in origin.¹¹¹ They are rights necessary in order for people to be able to survive in the world at large: the right to life; freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery, servitude, and forced labour; the right to free movement (mobility); and, the right to food and shelter.¹¹²

However, there is no basis on which to consider the basic liberties that Rawls identifies as *human rights*. Rawls does not speak of *human rights* in the context of domestic justice and he would certainly object to a natural law foundation for the basic liberties.¹¹³ In his last work, *The Law of Peoples*, published in 1999, the issue of human rights is considered in the context of global justice. No approximation is made between these rights and the basic liberties at the heart of the principles of justice in the context of the political project of domestic (Western) justice.

There are many interpretations possible of the minimal content of natural law. Hart, a defender of the natural law basis of law, discusses a range of interpretations, ranging from very attenuated (a right to survive) to more complex (for instance, the right to cultivation of the human intellect).¹¹⁴ In the line of thought of Hobbes and Hume, Hume singles out the goal of survival as the core essence of natural law, which results in a very limited list of human rights (*supra*). Rawls' list is longer and comprises rights that are not only conducive to survival.¹¹⁵ Rawls refutes all reference to natural law as a basis for his list.¹¹⁶ Human rights, Rawls contends, are just those rights possessed by all human beings by virtue of their compelling basic interest in or claim to genuine membership of one or another group of people. Rawls describes these rights as the 'necessary conditions of any

¹⁰⁹ See on this notion: John Rawls, *The Law of Peoples*, Cambridge: Harvard University Press, 1999, § 2.

¹¹⁰ Jonathan Black-Branch, 'The Evolution and Development of Human Rights and Civil Liberties', Chapter 1 in E. Shorts & Cl. De Than, *Civil Liberties. Legal Principles of Individual Freedom*, London, Sweet & Maxwell, 1998, 1-14.

¹¹¹ Jonathan Black-Branch, *l.c.*, with ref. to Hart's analysis of natural law and the minimal content of natural law in chapter IX of *The Concept of Law* (H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, (2d ed.), 1994.

¹¹² *Ibid.*

¹¹³ Basic liberties can only be given priority under 'reasonable favourable conditions', that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties. "These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well" (John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 11).

¹¹⁴ H.L.A. Hart, *o.c.*, 191-192.

¹¹⁵ These rights are, in Rawls' view, subsistence and security rights, certain liberty rights (freedom from slavery, serfdom, forced occupation, and a freedom of conscience sufficient to underwrite freedom of religious practice and thought), the right to personal property, and the right to formal justice and the rule of law (*The Law of Peoples*, 79).

¹¹⁶ The non-metaphysical nature of human rights is explicitly stated. "These rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some ways distinctive of Western political tradition and prejudicial to other cultures" (*The Law of Peoples*, 68).

system of social cooperation',¹¹⁷ and as a special class of urgent rights.¹¹⁸ They express the minimum social conditions that one must obtain if individual human beings are to realise themselves as human persons through social life with others, through belonging to a people. They are properly speaking the only human rights.

The political function of human rights

The Law of Peoples is a book about 'global justice' as opposed to 'domestic justice' (*supra*). This book tries to specify what kind of foreign policy liberal justice requires. How should political liberalism seriously address people outside the modern liberal consensus? Are we to reject all political systems that do not honour our basic liberties? Is trade possible with systems that do not acknowledge the Universal Declaration of Human Rights? Rawls addresses the issue in terms of 'peoples' (societies), not 'states' or 'individuals'. According to Rawls, the fundamental division is not between democratic and non-democratic societies (peoples) or liberal and non-liberal, but between decent and non-decent or outlaw peoples. Reasonable liberal peoples, that is societies that satisfy the criteria for a liberal democracy, should show respect for decent societies,¹¹⁹ but not for non-decent societies that violate human rights.

We have already discussed Rawls' list of human rights. It is a limited list, which implies that foreign liberal policy should not be as demanding as can be expected in relations between liberal democratic states.¹²⁰ Rawls' conception of human rights falls well short not only of liberal democratic principles of justice, but also of the Universal Declaration of Human Rights and contemporary human rights discourse and practice. But it is nevertheless a liberal conception and is so in several regards. Firstly, it tries and claims to be liberal without any metaphysical foundations.¹²¹ Secondly, it is more extensive than the list of human rights based on the natural law concept of survival (discussed *above*), especially where it includes typical liberal rights such as freedom of conscience. Thirdly, it is liberal in a sense that it calls for tolerance towards other systems or concepts of justice. Rawls is much more looking for a theory on human rights which takes account of the differences that exist between societies, without prejudicing the universal moral core of these rights. Rawls' political conception of human rights suggests a reason for the lack of human rights theories which do not depart from pluralism at the international level of

¹¹⁷ *The Law of Peoples*, 68

¹¹⁸ *The Law of Peoples*, 79.

¹¹⁹ The significant difference between reasonable and decent peoples is one of degree; decent peoples are capable of achieving that which exists in a liberal society, the problem being that electoral representation is not equal: one person does not necessarily equal one vote. As a result, such peoples may be seen as potentially liberal, only that the mechanisms are not in fully in place to realize this.

¹²⁰ On Rawls's account, there is no human right to democratic domestic institutions. There is also no human right, where there are democratic domestic institutions, to universal suffrage. Rawls tries to make a clear distinction between the basic rights of a human being and the rights that every citizen has in a constitutional democracy. The rights mentioned in article 3 to 18 in the Universal Declaration on Human Rights, are, following Rawls, human rights in the strict sense of the word (*The Law of Peoples*, 80). Rights that fall outside this core of basic rights, do not belong to the category of human rights. Human rights are a subset of liberal rights. It is clear that Rawls does not attach great value to the precise content of the Universal Declaration on Human Rights. This text, supplementing a list of traditional individual and political liberties, with rights such as those to social security (Article 22), to work (Article 23) and to rest and leisure (Article 24), does not contain any overlapping consensus envisaged by Rawls, but is only a *modus vivendi*. It is a compromise, not a basis.

¹²¹ Rawls' firm rejection of all ethical footing for this list (*supra*) can account for this. However, we are not wholly convinced by Rawls' assertion that his list does not depend on a comprehensive world-view. One can easily discern the typical Rawlsian concern for the need to develop as a moral person. The equality of humans as moral persons is the anthropological starting-point in *A Theory of Justice* and in *The Law of Peoples*. Humans are moral agents possessed to the requisite minimum degree of the two fundamental moral powers, are a complex social achievement. Essential to that achievement, on Rawls's view, is genuine belonging to a people, for individual human beings cannot collectively and fully constitute themselves as human persons apart from membership within a people. Cf. David A. Reidy, 'Peoples, Persons and Human Rights: Defending Rawls's View', via <http://web.utk.edu/~dreidy/rawlshumanrights.html> (consulted in 2002), 7p.

different societies each of which has its own language, culture, history and an all-embracing conception of justice.¹²² Rawls does not regard human rights so much as fundamental rights that should belong to every human being, but more as the minimum condition for the decency of modern societies. Human rights are primarily presented as part of the political relations between peoples. Peoples are to honour human rights. Political liberalism entails a degree of inter-societal toleration for differences in conceptions of justice, including some "decent" non-liberal conceptions.¹²³ However, tolerance has limits, and does not extend to outlaw societies that violate the most basic human rights of their subjects or engage in aggression against their neighbours. An outlaw state that violates human rights is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention.¹²⁴

After having highlighted the liberal aspects of Rawls' conception of human rights and its potential for legal understanding of rights in comparative law, we want to focus on the price paid by Rawls in terms of coherence and liberalism.

Part III. An internal critique of Rawls' theory of human rights

The liberty paradigm in Theory of Justice

With the notion of a *liberty paradigm*, which we oppose to the notion of a *rights paradigm*, a political view is characterised that departs from the interlinked ideas of freedom of the individual, liberalism and of government by consent.¹²⁵ Beccaria, Constant and Mill are typical exponents. In this liberal paradigm the public sphere is created by the general consent of free and equal subjects. Notwithstanding the fact that individuals are naturally free and private entities, the necessity for the creation of a collective state is readily accepted (precisely because this state must enable the concrete experience of this individual liberty). The justification for the state is often found in the fiction of a social contract, in which the individual contracts with the sovereign to give up a portion of his freedom in return for the security of civil society.¹²⁶ Under the social contract, power is conceived of as flowing up from the individual, rather than down through a natural hierarchy. The individual is the basic political unit. Free consent is the only legitimate foundation for any binding relationship. Government and other social actors cannot infringe upon liberty without a contractual basis or without consent, and this only when restrictions of liberty are needed for the sake of liberty. The state is the

¹²² These societies will have their own interpretation of rights that belong to their members and they will enforce these rights in their own way. In this it might occur that members of different societies will have different kind of rights. For instance, there is in practice no right on periodical paid holidays outside some Western states. In theory this does not say a lot on the universality of this right, but it does show that there is no consistent body of rights which can be applied everywhere in a consistent way. Such a demand would go against the principle of respect which underlies every theory on human rights. Rights can't be imposed upon societies in an abstract way. Every theory of human rights will have to take notice of the interests, beliefs and the identity of individuals and the values and way of live of communities. Without such sensitivity for the context in which rights have to function, a theory on human rights will lose its meaning.

¹²³ Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *The New Republic*, 1999, via www.thenewrepublic.com, 8p. sub VI

¹²⁴ *The Law of Peoples*, 81.

¹²⁵ Cf. P. De Hert & S. Gutwirth, 'Tussen vrijheid en grondrechten. Een paradigmastrijd met blijvende actualiteitswaarde' [Between freedom and rights. A paradigmatic strife with persistent actuality], *Nederlands Tijdschrift voor Rechtsfilosofie & Rechtstheorie* 2000/3, 205-214

¹²⁶ The contract method, absent in Mill's work, is not indispensable, but broadens the argument. In a strict understanding of this method, it should be assumed that the contractors do not give away their freedom. They contract in order to form government by consent.

servant of the individual, and not vice versa.¹²⁷ Human rights, viz. prerogatives for the citizens, are not likely to be needed in a system of liberty based on a reversal of principle. The prerogatives of the state, rather than these of the citizen must be outlined. Historically, the liberty paradigm had a brief moment of institutional glory at the end of the eighteenth century. The ideas behind it are clearly recognised in articles 4 and 5 of the French 1789 *Déclaration*¹²⁸ and in the work of Hamilton laying the foundation for the 1787 US Constitution. We recall that this constitution was originally conceived without a bill of rights. To Madison's question 'Is a bill of rights essential to liberty?'¹²⁹ Hamilton answers firmly 'no',¹³⁰ and he advances several arguments that taken together account for the core essence of the liberty paradigm.¹³¹ Wilson took a corresponding position on the protection of rights. A bill of rights was not necessary because the people could recall governmental powers at will: "Those who ordain and establish have the power, if they think proper, to repeal and annul. A proper attention to this principle may, perhaps, give ease to the minds of some who have heard so much concerning the necessity of a bill of rights".¹³² An additional argument focuses on popular sovereignty. Incorporating (comprehensive) values into the constitution would be detrimental to politics, since constitutions have higher legal value and bind the legislator.¹³³ Technically this implies that in legal systems with no flexible procedures to initiate constitutional amendment, the democratic process is seriously impeded.

There is a lot in the early Rawls, which brings him within the liberal liberty paradigm,¹³⁴ and Rawls' use of the contract doctrine can be easily framed within Hamilton's

¹²⁷ Luke Harris, 'The State, the Family and the Private Space: Reconstructing the Liberal Vision', *UCL Jurisprudence Review*, 2000, (278-300), 280-282.

¹²⁸ Article 4 reads as follows: "La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui; ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi".

Article 5 reads as follows: "La loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas".

¹²⁹ James Madison, *The Federalist No. 38*, (1788), included in *The Federalist, o.c.*, 240.

¹³⁰ Alexander Hamilton, *l.c.*, 555-567.

¹³¹ Some crucial rights against 'the favorite and most formidable instruments of tyranny', such as arbitrary imprisonment and the creation of crimes after the commission of the fact, are already explicitly contained in the 1787 Constitution and that should be enough, Hamilton held (A. Hamilton, *l.c.*, 557). But, he continues, there is also a matter of principle. History teaches us that bills of rights are no more than reservations of rights not surrendered to the government, and therefore, they have no place in constitutions based on the power of the people: "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations: We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America" (A. Hamilton, *l.c.*, 558. Italics in the quotation of the Declaration are in Hamilton's paper). Why should some rights be reserved, when the only matters that need to be discussed are the duties of the governmental institutions? Including a bill of rights is not only unnecessary, but would even be dangerous, since the provisions would contain various exceptions to powers not granted. Moreover, every enumeration of rights would offer a pretext to infringe them. Take for example, a provision stating that 'the liberty of the press shall not be restrained'. Not only is there no reason for such a provision (since no power is given by which restrictions may be imposed) but also it would be easy for people in power to hold that the provision in question implies that a power to prescribe proper regulations concerning it was intended to be vested in the national government (A. Hamilton, *l.c.*, 559).

¹³² James Wilson, Pennsylvania Convention, in *Documentary History of Ratification*, 2:383, 388 (28 November 1787). About the similarities and differences between Hamilton's and Wilson's analysis and about the general context of the debate about a bill of rights: Wayne Moore, *Constitutional Rights and Powers of the People*, Princeton, Princeton UP, (1996), 1998, (296p.) Chapter 3 and 4, esp. p. 111.

¹³³ The immunisation of issues by giving them the status of human rights, is also strongly criticized by Richard Bellamy, *Liberalism and Pluralism. Towards a Politics of Compromise*, London, Routledge, 1999, 245p. The second part of this work contains an alternative for the traditional Western model based on separation of powers and a bill of rights. The first part contains a critique of Rawls. It is our contention that the young Rawls was much closer to Bellamy, than is shown by the analysis of Bellamy. At the end of this chapter we will see that the later Rawls moves much more in line with the traditional model.

¹³⁴ The focus on the basic structure (and on nothing else) echoes the observation made by J. S. Mill that individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society (Mill, *On Liberty*, London 1985, p.141). Very much like *On Liberty*, *Theory of Justice* does not provide an explicit answer to the question what

conception of liberty and government by consent. In political liberalism, there is no such thing as a duty free (or a free from constraints) zone for the government. From the start, justice as fairness has inbuilt limitations, for instance regarding its scope.¹³⁵ The desire for liberty is the chief regulative interest, and explains why all forms of accumulation of power or use of power are assessed in the light of their impact on liberty. Hence, all actions of governmental agencies, also when directed against agents other than individuals, have to confirm to the two principles. There is no need to reduce the scope of the constitution to the protection of the liberties of individuals. "Associations as well as natural persons may be free or not free, and constraints may range from duties and prohibitions defined by law to the coercive influences arising from public opinion and social pressure".¹³⁶ The role of public opinion set aside, there should be a legal basis to constrain the liberties enjoyed by moral actors such as citizens and associations.

Although Rawls often speaks of 'basic rights and liberties', he actually has in mind mainly 'liberties'.¹³⁷ Liberty, for Rawls, is a complex of rights and duties defined by institutions. Rawls observation that "the various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere"¹³⁸ is very far from Hohfeld. In an important footnote he then acknowledges a strong link between liberties and duties, denied by Hohfeld.¹³⁹ No need, for Rawls, to rephrase his liberty thoughts in terms of rights, or to make any distinction. When he says 'basic rights' he means 'basic liberties', when he says 'rights' he means 'rights defining basic liberties'.

The rights-paradigm as a response to Hart's critique

Most of Rawls' work written after *A Theory of Justice* has been devoted to the elaboration and defence of the two principles of justice. Many critics considered them to be too indeterminate.¹⁴⁰ Hart in particular made a dual critique of Rawls' *A Theory of Justice*.¹⁴¹

is to be included in "liberty". There is seemingly no need to identify the components of liberty. Also, there is Rawls' notion of 'greatest equal liberty', meaning that liberty could only be restricted for the sake of liberty.

¹³⁵ We recall that the principles of justice have a limited reach. They do not apply to all social institutions, but regulate only those institutions whose regulation is needed to bring about a just distribution of rights, opportunities, and wealth. They won't regulate institutions that are irrelevant to the distribution of these things.

¹³⁶ *A Theory of Justice*, § 32.

¹³⁷ When discussing 'roughly' the *basic rights and liberties*, Rawls continues in the following terms: "These *liberties* are all required to have be equal by the first principle, since citizens of a just society are to have the same *basic rights*" (*A Theory of Justice*, § 11. The italics are ours).

¹³⁸ *A Theory of Justice*, § 38.

¹³⁹ "It may be disputed whether this view holds for all rights, for example, the right to pick up an unclaimed article. See Hart in *Philosophical Review*, vol. 64, p. 179. But perhaps it is true enough for our purposes here" (*A Theory of Justice*, § 38).

¹⁴⁰ More subtle is the argument that a broad interpretation of this term could endanger the social policies called for by the second principle. "If this term used in the first principle would be taken broadly so that it includes unrestricted economic liberty, the result would be extreme economic laissez-faire; but that is not what Rawls has in mind. The equal liberties that he thinks justice requires are personal and civil liberties, and basic political rights; they do not include unrestricted freedom of contract and disposition of property, or freedom from taxation for redistributive purposes. Cf. Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *The New Republic*, 1999, via www.thenewrepublic.com, 8p. Very often the critiques on *A Theory of Justice* are judged by traditional arguments against liberalism. This school of thought is refuted by its opponents because it is found to lack definite content with respect to the nature, distribution, and limits of the liberty it seeks to prioritize. The principles of liberty advocated, be it Mill's harm principle or Rawls' principle of equal liberty and his account of basic liberties or other formulations, are considered to be intractably vague and inherently controversial. Cf. J. Gray, *Liberalisms: Essays in Political Philosophy*, London, Routledge, 1989, 233 with ref.

¹⁴¹ H.L.A. Hart, 'Rawls on Liberty and Its Priority', in Hart, *Essays in Jurisprudence and Philosophy*, 232-238. Hart's critique was first published in N. Daniels (ed.), *Reading Rawls. Critical Studies of A Theory of Justice*, Oxford, Basil Blackwell, 1978, 230-253. Rawls' first reply is contained in: John Rawls, 'The Basic Liberties and Their Priority', in S. MacMurrin (ed.), *The Tanner Lectures on Human Values*, Cambridge, Cambridge UP, 1982, 1-88. Later responses are to be found in *Justice as Fairness. A Restatement*, § 32.3 and *Political Liberalism*, §§ 2, 3 and 9. See also Chandran Kukathas & Philip Pettit, *Rawls. A Theory of Justice and its Critics*, Stanford, Stanford UP, 1995, 130-131

According to Hart the grounds upon which the parties in the original position adopt the basic liberties and agree to their priority are not sufficiently explained.¹⁴² In response, Rawls stresses that the basic liberties and the grounds for their priority can be founded on the conception of the citizens as free and equal persons.

We already discussed anthropological premises behind Rawls' concept of personhood. Every human being has a capacity to act as a moral person. On these (anthropological) premises Rawls built his ('normative') idea of the equal citizen, viz. moral persons that are considered free and equal and willing to engage in mutually beneficial social cooperation over a complete life. Justice as fairness does not regard individual human beings (given by nature) but individual human persons (not given by nature) that are considered free and equal. Those who can take part in social cooperation over a complete life, and who are willing to honour the appropriate fair terms of cooperation, are regarded as equal citizens.¹⁴³ Rawls insists on the political nature of these concepts,¹⁴⁴ which are culturally produced.¹⁴⁵ His view of liberal democratic citizenship is of a normative nature. The source of liberal democratic moral ideals is to be found in the public culture of modern constitutional democracies. Amusing is his contention that a lot of this cultural production has taken place in human rights bills.¹⁴⁶ Legal arguments, not wholly plausible,¹⁴⁷ are used to introduce and give weight to a philosophical concept that must

¹⁴² See, John Rawls, 'The Basic Liberties and Their Priority', 13-18.

¹⁴³ John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 16.

¹⁴⁴ In a very short paragraph in *A Restatement*, Rawls discusses the four terms (free, equal, capacity for justice and capacity for the good) that are crucial for understanding his concept of personhood. Most of his attention goes to the notions 'free' and 'equal' ((about the meaning of 'free' and 'equal': *Justice as Fairness. A Restatement*, § 7.3 & 7.4) and how his 'normative' standpoint of liberal democratic citizenship can be most profitably understood. The accompanying powers are not to be taken as part of human nature or as universally present as faculties in all human beings. His idea of a person is not taken from metaphysics or the philosophy of mind, or from psychology, but belongs to a political conception of justice, that is, the conception of the person as citizen. John Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs, l.c.*, 240. The said powers are culturally produced in persons in order to enable those persons to be full participants in a liberal democratic political community. "I emphasize that the conception of the person as free and equal is a normative conception: it is given by our moral and political thought and practice, and it is studied by moral and political philosophy. Since ancient Greece, both in philosophy and in law, the concept of the person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties. As suits a political justice that views society as a fair system of cooperation, a citizen is someone who can be free and equal participant over a complete life. This conception of the person is not to be mistaken for the conception of a human being (a member of the species homo sapiens) as the latter might be specified in biology or psychology without the use of normative concepts of various kinds, including, for example, the concepts of the moral and political virtues" (*Justice as Fairness. A Restatement*, § 7.6.). Interesting is the example of slavery. Slavers are human beings who are not counted as sources of valid legal or social claims. "Slaves are, so to speak, socially dead: they are not recognized as persons at all" (*Justice as Fairness. A Restatement*, § 7.5.).

¹⁴⁵ We recall Rawls' insistence on the noncontroversial nature of the political conception of justice, having its basis in ideas that are "latent in the public political culture", one of which is precisely the idea of free and equal citizens (*Political Liberalism*, 14).

¹⁴⁶ Illustrative also is his contention that "the conception of the person is worked up from the way citizens are regarded in the public political cultural of a democratic society, in its basic political texts (constitutions and declarations of human rights) and in the historical tradition of the interpretation of those texts. For these interpretations we look not only to courts, political parties, and statesmen, but also to writers on constitutional law and jurisprudence, and to the more enduring writings of all kind that bear on a society's political society" (*Justice as Fairness. A Restatement*, § 7.2.)

¹⁴⁷ In our introduction we highlighted some basic political text, such as the German Constitution and International Covenant on Civil and Political Rights, that were centered around the notion of person. However, not all rights and liberties are linked to the notion of person (some protect the 'human being' or 'everyone'), and not all basic texts in the Western world have the same ethical content, as the German one, drafted after World-War II, with the atrocities of Hitler in mind. It is amusing in this regard to look at the 1984 Universal Declaration of Human Rights. Some of Rawls' intuitive ideas find a strong echo in the Preamble stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Nevertheless, there is talk of 'human beings' not 'persons' in the opening articles. Cf. *Article 1.*: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". *Article 2.*: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

enable Rawls to attempt to win the acceptance of his Western audience and especially of those who oppose a thin, political liberal concept of justice (*infra*).

Hart also pointed out an ambiguity in *A Theory of Justice* in which Rawls defended specific basic liberties and yet maintained a principle of greatest equal liberty in more general terms (holding that liberty could only be restricted for the sake of liberty). Hart's critique was politically neutral: he simply did not see how the notion of 'greatest equal liberty' was to be further specified in the three next stages of implementation (constitutional convention, legislator, judges). How could the first principle, understood as a principle of greatest equal liberty in more general terms, be of much use in this process. A coherent interpretation of *A Theory of Justice*, Hart noted, suggested that Rawls meant only to defend certain basic liberties and not liberty in general. Rawls concurred¹⁴⁸ and altered the formulation of the first principle of justice, making it look less an account of *liberty* and more an account of *liberties* or *rights*.¹⁴⁹ The departure from the liberty-paradigm in *A Theory of Justice* is clear.

Rawls, in response to Hart, not only selects basic liberties from others, but also introduces an additional criterion of significance, based on his concept of person and especially on the two moral powers that are implied in this concept.¹⁵⁰ Not all basic liberties are basic, Rawls seems to think, and even within the truly basic liberties there are differences. Some of the basic liberties are more valuable than others, and different liberties are valued for different reasons. Some have intrinsic value, while others such as the political liberties are valuable largely because they are instrumental in preserving other liberties.¹⁵¹ When basic liberties conflict, there is no need for balancing. The fully adequate scheme of the truly important basic liberties provides for all the answers.¹⁵² This

¹⁴⁸ He did not wish to defend the priority of liberty as such, but certain basic liberties. Wherever he used the phrase 'basic liberty' or simply 'liberty' in *A Theory of Justice*, he should have used 'basic liberties'. Not *liberty* but a specific list of basic liberties is to be considered as one to be specified further at the constitutional, legislative, and judicial stages (John Rawls, 'The Basic Liberties and Their Priority', 7). See also *Justice as Fairness. A Restatement*, § 32.3.: ("A serious defect in *Theory* is that its account of the basic liberties proposes two different and conflicting criteria, both unsatisfactory. One is to specify those liberties so as to achieve the most extensive scheme of the liberties (*Theory*, § 32, 37 and 39); the other tells us to take up the point of view of the rational representative equal citizen, and then to specify the scheme of liberties in the light of that citizen's rational interests as known at the relevant stage of the four-stage sequence (*Theory*, § 32 and 39). But (as Hart maintained) the idea of the extent of a basic liberty is useful only in the least important cases, and citizens' rational interests are not sufficiently explained in *Theory* to do the work asked of them).

¹⁴⁹ In *A Theory of Justice* Rawls states the first principle as follows: "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others". Later on in *A Theory* this principle receives its definitive formulation: "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" (*A Theory of Justice*, § 46). In his later work Rawls alters the beginning of the first principle by replacing the phrase "each person has an equal right" to "each person has an equal claim." He also replaces the phrase "the most extensive system of basic liberties" with the phrase "a fully adequate scheme of equal basic rights and liberties" (John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 5). Here is how the principles are stated in *Political Liberalism*: (1) Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal basic liberties, and only those liberties, are to be guaranteed their fair value. (2) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society. (*Political Liberalism*, 5-6).

¹⁵⁰ *Justice as Fairness. A Restatement*, § 32; John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 46-87.

¹⁵¹ In short this assessment has the following result: equal political liberties and freedom of thought are truly basic because they are instrumental to our sense of justice; liberty of conscience and freedom of association are truly basic because they are instrumental to the capacity for a conception of the good; the remaining basic liberties (the liberty and integrity -physical and psychological- of the person and the rights and liberties covered by the rule of law) are also important, but a bit less, since they are merely supporting liberties (*Political Liberalism*, 292-298; *Justice as Fairness. A Restatement*, § 32).

¹⁵² "Given this division of the basic liberties, the significance of a particular liberty is explained as follows: a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed exercise of the moral powers in one (or both) of the two fundamental cases. The more significant liberties mark out the central range of application of a particular basic liberty; and in cases of conflict we look for a way to accommodate the more significant liberties within the central range of each" (*Justice as Fairness. A Restatement*, § 32.5).

claim is followed by a demonstration with regard to free speech and the problem of libel¹⁵³ and with regard to property.¹⁵⁴

Strategic advantages and merits of Rawls' fully adequate scheme of the truly important basic liberties

Some authors have been dissatisfied about Rawls' failure to explain the changes to the first principle and how they affect his conception of justice.¹⁵⁵ There is however a clear logic behind all of Rawls' revision.¹⁵⁶ Most of Rawls' later work, including the revision of the first principle, should be understood as a pragmatic move¹⁵⁷ to meet criticism uttered by communitarians *and* legal scholars such as Hart. Indeed, the reformulation of the first principle and his use of a conception of citizenship offers many strategic advantages to Rawls. To list a few:

-with regard to Hart and others, their critique is met. By selecting important liberty interests (or liberties) and adding a criteria of significance,¹⁵⁸ justice as fairness now offers enough starting information for further specification in the three further stages of

¹⁵³ 'Libel and defamation of private persons (in contrast with political and other public figures) has no significance at all for the free use of public reason to judge and regulate the basic structure'. Therefore a different solution is conceivable (*Justice as Fairness. A Restatement*, § 32.5).

¹⁵⁴ The right to property forms a basic right, since it allows a sufficient material basis for personal independence and a sense of self-respect, both of which are essential for the adequate development and exercise of the moral powers. Wider conceptions of the right to property are not taken as basic, for instance, the right to private property in natural resources and means of production generally. These wider conceptions of property are not used because they are not necessary for the adequate development and full exercise of the moral powers, and so are not an essential social basis of self-respect (*Justice as Fairness. A Restatement*, § 32.6). They may, however, still be justified, Rawls note, depending on existing historical and social conditions, "the further specification of the rights to property is to be made at the legislative stage, assuming the basic rights and liberties are maintained. As a public political conception, justice as fairness is to provide a shared basis for weighing the case for and against various forms of property, including socialism. To do this, it tries to avoid prejudging, at the fundamental level of basic rights, the question of private property in the means of production. In that way perhaps discussion of this important question can proceed within a political conception of justice that can gain the support of an overlapping consensus" (*Justice as Fairness. A Restatement*, § 32.6). The demonstration with regard to property is of interest because it shows what kind of work (still) can be done by the legislator. It also shows that citizenship is not the only yardstick that Rawls uses for the significance of a particular liberty. Historical and social conditions also come into play. Cf. John Rawls, 'The Basic Liberties and Their Priority', *l.c.*, 11 & 48-49.

¹⁵⁵ "For example, does Rawls now acknowledge that there are certain rights and liberties that are more fundamental than others when he claims that the only the political liberties are to be given their fair value? What is his basis for determining that the political liberties have priority here?" (Ted Vaggalis, 'John Rawls' Political Liberalism' via http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/Rawls_pl.html, consulted December 2002, 3p.) See also Rex Martin, 'Rawls' New Theory of Justice', *Chicago-Kent Law Review*, 1994, Volume 69 (737-761), 745-7

¹⁵⁶ Chandran Kukathas & Philip Pettit, *Rawls. A Theory of Justice and its Critics*, Stanford, Stanford UP, 1995, 143-146. Rawls' shift from the rational (desirable) to the reasonable (feasible) is well-known, The later Rawls wants to find workable solutions for the problem of stability in a pluralist, American society. All his modifications after *A Theory of Justice*, including his idea of public justification (discussed above), together with his account of the (pragmatic) role that political philosophy should play (See *Justice as Fairness. A Restatement*, § 1), aim at stable social unity. Crucial to this goal is his 'method of avoidance', viz. a method establishing principles that do no challenge or reject competing comprehensive conceptions, but try to, as far as possible, to transcend and accommodate them. Kukathas and Pettit rightly question this 'unfortunate' turn: the divisive questions that Rawls wants to take off the political agenda are often those which people are most reluctant not to have addressed; the tactic of seeking to keep issues of the agenda does not always serve to conciliate, since it is distinctive of some of the least conciliatory comprehensive philosophies; it remains to be established that an overlapping consensus is necessary or sufficient for stability and social unity (Chandran Kukathas & Philip Pettit, *o.c.*, 149). See also Stephen Mulhall & Adam Swift, *Liberals & Communitarians*, Cambridge, Blackwell Publishers, (2d ed.), 1996, 363p. Central proposition in this work is that most changes in Rawls' position can be understood as providing him with responses precisely to the sorts of criticism which communitarians brought against the theory as originally formulated (see in particular page 2).

¹⁵⁷ There is an amusing page in Rawls' essay *The Basic Liberties and Their Priority* where this revision is carried through for the first time. 'As a philosopher I should not amuse myself with summing up basic liberties', Rawls seems to think, 'but if it helps to reach agreement between the parties in the original position, why not' (John Rawls, 'The Basic Liberties and Their Priority', 6-7).

¹⁵⁸ We saw that many critics considered the meaning of the principles of justice too indeterminate. An extensive liberty approach with regard to property and economic liberty, would result in extreme economic laissez-faire. Of course, this is not what Rawls meant, but it is not refuted explicitly in *A Theory of Justice*. The criterion of significance allows Rawls to conceptualise his position in the desired way.

implementation.¹⁵⁹ The result of the selection is known: "*freedom of thought and liberty of conscience, and the rest*". These are the truly 'cases' or liberties, which will enable the constitutional convention, the legislator and the judge to interpret the principles of justice;¹⁶⁰

-Rawls can operate this modification with a very simple reference to tradition and facts that are acceptable by all.¹⁶¹ This is crucial for his enterprise seeking social stability and an overlapping consensus, bypassing mere agreement.¹⁶² Reducing the list of protected liberty interests is but a small price for 'very urgent consensus';

-even within the liberal tradition the idea of rights-defining-liberty is very familiar. The loss in terms of protection of liberty interests that results from the replacement of a most extensive scheme of liberties by a scheme of certain basic rights is not immediately evident. On the contrary, bourgeois liberalism will not experience many difficulties with the actual list of rights that Rawls considers to be basic;

-with regard to communitarian and other non-liberal views, rejecting liberty from the core of the principles of justice, creates more distance from the classical liberal thinkers such as Mill.¹⁶³ Justice as fairness is about political liberalism, not about comprehensive liberalism.¹⁶⁴ The ideas of Kant and Mill extend beyond the political, and are therefore not suited for a political concept of justice.¹⁶⁵ Again this stand is not wholly incompatible with classical liberalism. Even such prominent liberal thinkers as Berlin, to whom there are references in Rawls' work,¹⁶⁶ hold that liberty, autonomy and individuality have to compete with other principles to which many have attached greater importance: happiness or equality, social justice, democracy, or other values.

Critical comment on Rawls' concept of citizenship

¹⁵⁹ "Since the basic liberties have a special status in view of their priority, we should count among them only truly essential liberties. (...) If there are many basic liberties, their specification into a coherent scheme securing the central range of application of each may prove too cumbersome. This leads us to ask what are the truly fundamental cases and to introduce a criterion of significance of a particular right or liberty. Otherwise we have no way of identifying a fully adequate scheme of basic liberties of the kind we seek". (*Justice as Fairness. A Restatement*, § 32.3).

¹⁶⁰ To serve Hart, Rawls not only selects basic liberties from others, but also introduces an additional criterion of significance, linked to his conception of moral personhood, that renders his theory rather complex. This will be the object of our next paragraph.

¹⁶¹ "Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bill of rights and declarations of the rights of man. The account of basic liberties follows this tradition" (John Rawls, 'The Basic Liberties and Their Priority', 6).

¹⁶² "Of course, it is too much to expect complete agreement on all political questions. The practicable aim is to narrow disagreement at least regarding the more divisive controversies, and in particular those that involve the constitutional essentials, for what is of greatest importance is consensus on those essentials (...). The point is that if a political conception of justice covers the constitutional essentials, it is already of enormous importance even if it has little to say about many economic and social issues that legislative bodies must consider. To resolve these it is often necessary to go outside that conception and the political values its principles express, and to invoke values and considerations it does not include. But so long there is firm agreement on the constitutional essentials, the hope is that political and social cooperation between free and equal citizens can be maintained" (*Justice as Fairness. A Restatement*, § 9.3.) This quote clearly shows that Rawls' theory became less a theory of the distribution of primary goods, but more a theory of the liberal freedoms. Cf. Kilcullen, 'John Rawls: Liberty', 1996, via <http://www.humanities.mq.edu.au/Ockham>, 4p.

¹⁶³ *A Theory of Justice* is full with influences indebted to Mill. For instance, Rawls' first characterisation of the first principle borrows undeniably from the harm principle that stands central in Mill's work. "The first principle simply requires that certain sort of rules, those defining basic liberties, apply to everyone equally and that they allow the most extensive liberty compatible with a like liberty for all. The only reason for circumscribing the rights defining liberty and making men's freedom less extensive than it might otherwise be is that these equal rights as institutionally defined would interfere with one another" (*A Theory of Justice*, § 11).

¹⁶⁴ *Justice as Fairness. A Restatement*, § 47.4. Rawls uses the example of extreme religious sects to illustrate the difference between comprehensive liberal answers and political liberal answers. For a critical account of this demonstration: Chandran Kukathas & Philip Pettit, *o.c.*, 140-141.

¹⁶⁵ Justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy (Kant) and individuality (Mill). "A society united on a form of utilitarianism, or on the moral views of Kant or Mill, would likewise require the oppressive sanctions of state power to remain so". (*Justice as Fairness. A Restatement*, § 11). On Rawls's objection against the liberalism on Kant, see Chandran Kukathas & Philip Pettit, *o.c.*, 139-141.

¹⁶⁶ See for instance the important reference to Berlin's essay 'The Pursuit of the Ideal' in *Justice as Fairness. A Restatement*, § 47.2.

We observed that Rawls refers not entirely correctly to legal history to introduce and give weight to his philosophical concept of citizenship. With this move Rawls seeks to win the acceptance of his Western audience and especially of those that oppose a thin, political liberal concept of justice.¹⁶⁷ In his essay *The Priority of Democracy to Philosophy* Richard Rorty makes fun of the philosophical inability, especially of communitarians, to think about problems of justice without invoking a comprehensive notion of personhood.¹⁶⁸ According to Rorty the resources latent in the political culture of liberal democracies seem to be all that is available, and so must be all that is required, to justify a liberal political system. Rorty appreciates Rawls' careful handling of the concept of citizenship,¹⁶⁹ and even claims that Rawls could have done without any citizen-concept to realise his project.¹⁷⁰ However this may be desirable (*infra*), we believe that Rorty's claim is only valid for the Rawls behind *A Theory of Justice*, not for the later Rawls. With regard to the opposition between the liberty and rights paradigm, Rawls' concept of citizenship is far more than an innocent optional adjunct to the Rawlsian project.¹⁷¹ In the following paragraphs we advance three arguments showing the illiberal consequences of the amended Rawlsian project.

First, there is the problem of popular sovereignty. The political conception of justice, elaborated in *A Theory of Justice*, did not imply a duty for the constitutional convention to dress a bill of rights. Its duty was to incorporate the principles of justice and to set constraints on the work of the legislator. Depending on the circumstances certain liberties were identified (out of the many),¹⁷² and several arrangements were possible. In *A Restatement*, Rawls on the contrary stresses the need for a fully adequate scheme of the truly important basic liberties. The paragraph about the basic right to property (*supra*) shows that the freedom of the constitutional convention is curtailed in a considerable way: "the further specification of the rights to property *is to be made at the legislative stage*, assuming the basic rights and liberties are maintained" (emphasis added). One could argue that the later Rawls allows for doing away completely with the constitutional convention, since there is not much left to do, but regulating the use of *the* basic

¹⁶⁷ At least one author sees in Rawls' idea of moral personhood, especially in its post-1980 conception of the normative standpoint of citizenship, an important new element of Rawls' liberal doctrine. Bridges sees in this move 'the teleological turn in postmodern liberal political philosophy' (Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good' 1997-2002, via <http://www.civsoc.com/reviews/review1c.html>, (4p.), 2-3). It is indeed not very difficult to recognize the specific substantive content of Rawls' concept, especially when he discusses the two moral powers. On the communitarian objections to the liberal concept of personhood, associated with Alasdair MacIntyre and Michael Sandel, according to which only a shared conception of the human good can justify a social order, and the kind of mutual respect based on fairness that Rawls proposes is not adequate to keep in check more comprehensive values, should they conflict: Stephen Mulhall & Adam Swift, *o.c.*, 10-13 & 192-198.

¹⁶⁸ Richard Rorty, *l.c.*, 86. See on Rorty's position: Stephen Mulhall & Adam Swift, *o.c.*, 259-275.

¹⁶⁹ "He does not *want* a 'complete deontological vision', one that would explain *why* we should give justice priority over our conception of the good. He is filling out the consequences of the claim that it is prior, not its presuppositions. Rawls is not interested in conditions for the identity of the self, but only in conditions for citizenship in a liberal society. (...) Rawls is not attempting a transcendental deduction of American liberalism of supplying philosophical foundations for democratic institutions, but simply trying to systematize the principles and intuitions typical of American liberalism" (Richard Rorty, *l.c.*, 92). See also Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good', *l.c.*, 2.

¹⁷⁰ Richard Rorty, *l.c.*, 91.

¹⁷¹ Comp. with Stephen Mulhall & Adam Swift, *o.c.*, 263.

¹⁷² "The adjustment of the complete scheme of liberty depends solely upon the definition and extend of the particular liberties. Of course, this scheme is always to be assessed from the standpoint of the representative equal citizen. From the perspective of the constitutional convention or the legislative stage (...) we are to ask which system it would be rational for him to prefer". (*A Theory of Justice*, § 32).

liberties.¹⁷³ Undeniably there is an insistence on a certain outcome of the constitutional convention. The scenario for political liberalism becomes more tightly circumscribed.

Secondly, there is a perfectionist flavour to Rawls' criteria of significance of each particular liberty. We return to the rights-oriented nature of the eighteenth century constitutions and human rights declarations. These documents, Isaiah Berlin notes, are no instruments to guarantee individual freedom by drawing frontiers against infringement, but they are documents containing the rules of reason to be found in nature, identified with individual freedom, on the assumption that only rational ends can be the true objects of a free man's real nature.¹⁷⁴ Rights are the indispensable tools for 'responsible human beings' needed in the ideal, rational society. Berlin's essay *Two Concepts of Liberty* contains a thorough critique of this perfectionist conception of rights.¹⁷⁵ For Berlin, western thought in ethics and politics has for more than two millennia mistaken virtue and knowledge (or reason) for freedom.¹⁷⁶ We believe that this kind of fallacy is inherent in rights-thinking¹⁷⁷ and Rawls seemingly had neglected Berlin's message. Not all

¹⁷³ The truly basic liberties are contained in the first principle and more controversial arrangements are to be discussed at the legislative, not the constitutional stage. The four-stage sequence could be reduced to a three stage sequence. This view on Rawls is however much too exaggerated. The difference is only a question of degree. Already in *A Theory of Justice* there were indications that the political decision-making process at the level of the constitutional convention should be oriented towards arrangement of the political liberties and 'certain' non-controversial 'civil liberties', whereas other liberties and issues that can be related to the second principle of justice are the object of the third, legislative sequence (see *A Theory of Justice*, § 31).

¹⁷⁴ "This is the thought and language of all the declarations of the rights of man in the eighteenth century, and of all those who look upon society as a design constructed according to the rational laws of the wise lawgiver, or of nature, of history, or of the Supreme Being" (Isaiah Berlin, *Two Concepts of Liberty*, (1958), included in *Four Essays on Liberty*, Oxford, Oxford University Press, 1969, 148).

¹⁷⁵ Isaiah Berlin 'Introduction' to *Four Essays on Liberty*, Oxford, Oxford University Press, 1969, xlv. According to Berlin, there is not only no consensus about the supreme ends of life, but also there is no consensus about what people should do with their liberty and what this term is supposed to be. He therefore rejects political and other doctrines that assume that freedom is more than just independence and hold that individuals are only free when they take part in the collective control over the common life. These theories erroneously assimilate liberty into morality and identify the higher self with institutions, churches, nations, races, states, classes, cultures, parties, and with vaguer entities, such as the common good, the general will, the enlightenment forces of society, etc. Berlin especially attacks rationalist assumptions about the empirical self that can be molded like nature can be mold by technical means (Isaiah Berlin, *Two Concepts of Liberty*, o.c., 146). "Rationality is knowing things and people for what they are: I must not use stones to make violins, nor try to make born violin players play flutes. If the universe is governed by reason, then there will be no need for coercion; a correctly planned life for all will coincide with full freedom -the freedom of rational self-direction- for all" (Berlin, *Two Concepts of Liberty*, o.c., 147). The common assumption of thinkers such as Spinoza, Locke, Kant, Hegel and (even) Montesquieu, together with many of their predecessors and the Jacobin and Communist after them, is that the rational ends of our true natures must coincide, or be made to coincide, 'however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process'. Freedom in this conception is not freedom to do what is irrational, or stupid, or wrong and the policy of forcing empirical selves into the right pattern is no tyranny, but liberation. Cf. "Thus Spinoza tells us that 'children, although they are coerced, are not slaves', because 'they obey orders given in their own interests', and that 'The subject of a true commonwealth is no slave, because the common interests must include his own.' Similarly, Locke says 'Where there is no law there is no freedom', because rational laws are directions to a man's 'proper interests' or 'general good'; and adds that since such laws are what 'hedges us from bogs and precipices' they 'ill deserve the name of confinement', and speaks of desires to escape from such laws as being irrational, forms of illicence', as 'brutish', and so on. Montesquieu, forgetting his liberal moments, speaks of political liberty as being not permission to do what we want, or even what the law allows, but only 'the power of doing what we ought to will', which Kant virtually repeats. Burke proclaims the individual's 'right' to be restrained in his own interest, because 'the presumed consent of every rational creature is in unison with the predisposed order of things" (Isaiah Berlin, *Two Concepts of Liberty*, o.c., 147-148).

¹⁷⁶ Isaiah Berlin, *Two Concepts of Liberty*, o.c., 154.. All these doctrines which define liberty as self-realisation, and then, prescribe on *a priori* or dogmatic grounds what liberty is, end up by defending liberty's opposite: despotism and the rule of experts (Isaiah Berlin, *Two Concepts of Liberty*, o.c., 153-154). Once people do not regard all ends as of equal value, there is no need to draw frontiers between individuals and the state or other individuals -"No one has ... rights against reason" (Fichte quoted by Isaiah Berlin, *Two Concepts of Liberty*, o.c., 151)-, but there is on the contrary need for education and compulsion (Isaiah Berlin *Two Concepts of Liberty*, o.c., 149). See also Serge Gutwirth, *Privacy and the information age*, Lanham/Boulder/New York/Oxford, Rowman & Littlefield Publ., 2002, 33-48

¹⁷⁷ Klink and Klop for instance applaud the ethical content of the recently adopted 'Charter of fundamental rights of the European Union', published in the *Official Journal of the European Communities*, C 364/1, 18 December 2000. These authors hold that, contrary to Rawls, fundamental texts should reflect the ethical values of societies. Active maintenance of values and moral education are two goals that should be pursued by the conventional convention (see A. Klink & C. Klop, 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P. Cliteur and others (eds.), *It ain't necessarily so.*, Kluger, Leiden, 2001, 107-126). Although many, as seen in Part One above, sympathise with the idea of rights, we believe that not all are

liberties are equal. Rawls knows how to distinguish them and to evaluate their importance. We are not free to act or think, until we infringe on the liberty of others. No, we have rights that are instrumental for our role as citizen. Rights are tools for citizenship. There seems to be an ambiguity between this stand and Rawls rejection of non-political values in the work of the constitutional convention.¹⁷⁸ Rawls should have better reflected about constitutional texts that depart from the individual human being, and not from derived notions such as *persons* or *human dignity*. Individuals possessed of liberty should be the starting point of political liberty. We are persons because we are free, not the other way around.¹⁷⁹

Thirdly, there is the problem of power. There are many definitions of liberalism. With Foucault¹⁸⁰ we consider a critical stand towards accumulation of power as the core essence of this political movement. Rawls' attachment to the concept of man as a moral person carries him away from liberalism. Rights are about empowering the individual to participate in liberal democracy, Rawls seems to think, while forgetting the first function of constitutional law, which is to restrict the powers of the state and other actors. Rawls' new approach is a step away from the contract method: in the name of personhood contractors now accept considerable curtailing of their initial liberty. Cutting away less basic liberties in an attempt to avoid controversy around the constitutional essentials,¹⁸¹ Rawls fails to see that the whole process of formulating liberties or rights defining liberties at the constitutional level is primarily meant to avoid unwanted restrictions of freedom.¹⁸²

aware of this more or less secret ethical agenda behind human rights full with nostalgia for a mythical past of harmonious communities. Did human rights become a religion?

¹⁷⁸ See on this Simon Clarke, 'Contractarianism, Liberal Neutrality, and Epistemology', *Political Studies*, 1999, Vol. XLVII, 627-642, in particular p. 641 "the principle of equal basic liberties lists a wide range of different liberties (...) which must be weighed and adjusted against each another, and which are of value for different reasons. Such a complex principle is surely just as subject to the burdens of judgement, and the difficulty of making an overall assessment - as any conception of the good. If any conception of the good could be reasonably rejected due to the burdens of judgement, it is difficult to see why the principle of equal liberties could not also be reasonably rejected".

¹⁷⁹ Comp. Jacques Mourgeon, 'Les droits de l'être humain, destructeurs de sa liberté', in *Territoires Liberté. Melanges en hommage au Doyen Yves Madiot*, Brussels, Bruylant, 2000, (391-407), 403: "En voulant remplacer l'initial (la liberté) par le dérive (la dignité) dont on ne sait ce qui fait la dignité de l'être humain, on me répond: sa qualité d'être humain. Et si je me demande qui fait sa qualité d'être humain, on me répond: sa dignité. Le cercle vicieux de la tautologie est parfait".

¹⁸⁰ Michel Foucault, *Résumé des cours. 1970-1982*, Paris, Julliard, 1989, 172p.

¹⁸¹ Whether Rawls's scheme of basic liberties can avoid controversy or can be deemed acceptable remains to be seen. Richard Bellamy discusses the problem of conflicting liberties such as freedom of expression and privacy and sees no solution for it within Rawls' analysis. Rawls' assumption that a consensus is more likely to emerge with regard to constitutional essentials than to social and economical issues is not realistic. For some, social and economical rights are as essential as individual liberty rights. There is little hope that a large majority can be found willing to exclude the question of private property and the means of production from the political agenda. In general, there is no indication that people or citizens are willing *not* to put controversial or 'less basic issues' on the constitutional agenda. Rights are the object of ethical or metaphysical battlegrounds. Richard Bellamy, *Liberalism and Pluralism. Towards a Politics of Compromise*, London, Routledge, 1999, 245p. Significant, for instance, is Raz's refutation of the idea of a right to liberty: "Such a right, if it exists, cannot capture our concern for liberty because it is indiscriminate. It protects equally the liberty to eat green ice-cream and to religious worship" (J. Raz, *The Morality of Freedom*, (1986), Oxford, Clarendon Press, 1988, 245-247). Rights, in this view, are ways to express values, to choose metaphysical of ethical values that should receive priority. Recognition of liberty cannot serve this enterprise. Some hold that liberty is too indiscriminate to be of any help for philosophical, ethical and political enterprises that seek to define the duties of the state and of the citizen and to define their relationship (D. Meuwissen, 'Reactie van D.H.M. Meuwissen op de brief van C.W. Maris', *Ars Aequi*, 1998, vol. 47, 673-677; M. Heirman, 'De mensenrechten: alleen het individu is universeel', in J. De Tavernier & D. Pollefeyt (eds.), *Heeft de traditie van de mensenrechten toekomst?*, Leuven, Acco, 1998, 29-30). Others consider liberty to be too detrimental for societal interests and gives way to a cold, atomic world without community spirit (D. Kommers, 'Can German Constitutionalism Serve as a Model for the United States?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1998, Vol. 22, 793).

¹⁸² In this respect Mill's harm criterion is far superior: it protects against unwanted restrictions of freedom (by governmental agents or by others) and in the same time allows settling conflicts of liberties. For instance, freedom of expression stops being legitimate in principle when there is harm to the liberty or privacy interest of others. We fail to see how the Rawlsian selection of basic liberties, combined with additional criterion of significance, would work in these cases. Amusingly, Rawls suggest at one place to supplement

Part IV. Concluding remarks

In the above paragraphs we have highlighted three illiberal aspects of Rawls' new conception of basic liberties. Nevertheless the Rawlsian apparatus is and remains a powerful tool for understanding current human rights practice, especially in Europe. His distinction between basic liberties and human rights should be taken more seriously and the problem of harmonisation should focus on basic liberties rather than on human rights. Rawls' general description of liberty provides an explanation for constitutional protection afforded to artificial (or legal) persons, such as commercial firms. His description of the four sequences shows that liberties, and not rights, are at the heart of a political and legal regime. The original position, amended with methods such as the reflective equilibrium explains why within the context of the Western world intercultural dialogue is possible at the level of the basic liberties, however different the respective world-views of the actors involved may be.

Basic liberties can play a special role in this. Within Europe, they trump differences of a more technical nature.¹⁸³ They are part of the fundamental intuitive ideas that exist in Western culture. Although there may be different interpretations and convictions as to their content, there exists an overlapping consensus about a minimal list of basic rights and liberties. Through the process of wide reflective equilibrium these initial convictions may be subject to modification.

On the level of epistemology, Rawls calls for prudence with the use of ethical or comprehensive values in constitutional issues. There is no reason to see progress in long or ethically inspired bills of rights.¹⁸⁴ Rawls' theory on basic liberties is based on a strong commitment to the controversial claim that certain political values of freedom and equality take precedence over divergent conceptions of the human good, and that these conceptions should not be allowed to overthrow the political fundamentals. The trump card-nature of basic liberties is a result of this non-neutral claim about the correct hierarchy among values for the purpose of determining the basic structure of society'.¹⁸⁵ All citizens must normally allow political goods to trump other goods. Apparently there is a strong temptation to introduce ethical values into constitutional law, in view of its hierarchical place in the legal system. The exclusion of non-political values has a more restricted scope than might appear. Rawls himself concedes that most political questions

his theory with a kind of harm criterion. "We hope that the liberties that are not counted as basic are satisfactorily allowed for by the general presumption against legal restrictions, once we hold that the burden of proof against those restrictions is to be decided by the other requirements of the two principles of justice" (*Justice as Fairness. A Restatement*, § 32.3).

¹⁸³ Ronald Dworkin, *Taking Rights Seriously*. New Impression with a Reply to Critics, London: Duckworth 1994 (first published 1977) p. xi: 'Individual rights are political trumps held by individuals' and p. xii: 'Legal rights may then be identified as an distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function'.

¹⁸⁴ Comp. A. Klink & C. Klop, 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P. Cliteur and others (eds.), *It ain't necessarily so.*, Kluwer, Leiden, 2001, 107-126. In this analysis of the 'Charter of fundamental rights of the European Union', the Rawlsian apparatus is applied to understand the strange mix of values in the Charter, such as solidarity, dignity, liberty, subsidiarity, borrowed from world views such as christianity, protestantism, humanism, liberalism. The authors conclude that the Charter cannot be understood as a product of one comprehensive world view, but should be understood as a product of an overlapping consensus, in a sense that is the result of a convergence of the various political, moral and religious views within our society. These authors also introduce the idea of a dynamic overlapping consensus (A. Klink & C. Klop, *l.c.*, 124). In part this new concept is necessary in view of their belief that bills with rights and liberties should not be restricted to the uncontroversial.. Apart from this perspective, that Rawls would certainly reject, it can be observed that the idea of dynamics is already contained in Rawls' notion of reflective equilibrium.

¹⁸⁵ Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *l.c.*, sub V.

do not concern these basic liberties,¹⁸⁶ but he is unable to draw a clear line between matters that concern basic justice and other matters.¹⁸⁷ Also he creates epistemological problems when introducing a concept of citizenship in his later work.

With regard to the debate, initiated by Legrand, in the sphere of comparative law, Rawls furnishes an example of philosophical thought free of pretensions to universality.¹⁸⁸ By emphasising the normative content of the Western concept of citizenship that he embraces, Rawls rules out any sort of universalist and essentialist tendencies. The principles of justice are not deduced from the universal natural human condition or from principles of pure practical reason. The source of liberal democratic moral ideals is to be found in the public culture of modern constitutional democracies. They are contingent products of history and their status is defined accordingly.¹⁸⁹ Unification or harmonisation of law in Europe is neither possible nor impossible, but historical and to be (or not to be) constructed. There is no unbridgeable normative gap between the different European legal cultures or traditions, nor is there a given and static common set of normative values from which harmonisation and unification will automatically follow. Harmonisation and unification are political projects, which should be built up upon an overlapping consensus. After that, every step will have an impact on the question whether and which further steps are possible and desirable. But no step at all is possible without an overlapping consensus on basic liberties. Such a consensus is absent in non-liberal states. No great value should be attached to the precise content of legal texts, such as the Universal Declaration on Human Rights, which do only contain a *modus vivendi*. These texts are compromises, not a solid basis for harmonisation. Greater value should therefore be attached to the political concept of human rights. Rawls interpretation of this concept (that goes beyond the notion of mere survival) and his insistence for respect for non-liberal, but decent societies has then, again, the advantage of modesty and respect.

¹⁸⁶ *Political Liberalism*, 214.

¹⁸⁷ Stephen Mulhall & Adam Swift, *o.c.*, 225.

¹⁸⁸ See also Stephen Mulhall & Adam Swift, *o.c.*, 19.

¹⁸⁹ Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good', *l.c.*, 2; Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *l.c.*, sub V. Both authors highlight the modesty of the Rawlsian position that does not express a judgement of value about other societies and their attachment to basic liberties and excludes arrogance. Liberal democratic moral ideals will continue to have adherents as long as those adherents continue to be persuaded of the desirability of liberal democracy as a form of political association and as a way of life.