

Applying Rawls in a Globalizing World

"[P]olitical philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus being ideological in Marx's sense. From time to time we must ask whether justice as fairness, or any other view, is ideological in this way; and if not, why not? Are the very basic ideas it uses ideological? How can we show they are not?"
-John Rawls

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Abstract

In this thesis I seek to answer the question whether a cosmopolitan interpretation of John Rawls' theory of justice as fairness is a reasonable alternative to the application of *The Law of Peoples* at the global level in light of the foundational commitments of a political theory of justice. Earlier attempts to construct a cosmopolitan theory of justice along the lines of Rawls' theory of justice as fairness predate both the idea of political liberalism as well as *The Law of Peoples*. The argument provided in this thesis paves the way for the construction of a cosmopolitan political theory of justice, which could provide the framework for the operation and evolution of global governance in the age of globalization.

In order to answer my question, Rawls' *The Law of Peoples* is presented first. Subsequently, I argue against the most controversial elements of and the arguments for this extension of the theory of justice to the global level and its deviations from justice as fairness. In *Justice as Fairness: A Restatement*, Rawls' explicit rejection of a cosmopolitan application of his theory is apparent in the specification of 'fundamental ideas' into 'particular conceptions'. More specifically, I argue that the limitation of the scope of applicability of justice as fairness is embodied in the specification of the conception of the person as a citizen and of society as a constitutional liberal democratic nation-state. Moreover, I argue that the conception of toleration, on which these specifications of fundamental ideas into particular conceptions ultimately rely, is disanalogous between the domestic and international context and incompatible with the foundational commitments of a political theory of justice in its latter use. Furthermore, I describe how 'democracy' can be understood as a 'fundamental idea' within a theory of justice, as opposed to merely a circumstance from which other fundamental ideas are derived. Finally, I outline two methods that could serve to specify a cosmopolitan conception of the person for a political theory of justice.

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1. Introduction

One of the great challenges of our time lies in providing a moral, political and legal framework that can serve to evaluate and guide the exercise of political power over people. Following the Second World War, the emergence of supra-national orders at the expense of the system of nation-states (as conceived since the peace treaty of Westphalia in 1648) emphasizes this challenge. The theory of justice as fairness, as articulated by the leading contemporary political philosopher John Rawls, has de facto set a standard that serves as a touchstone for all subsequent theorizing within this sphere.

The theory of justice as fairness originated from the spectrum of Liberal theories, but Rawls has recast and restated the arguments for the theory in order to avoid the deficiencies of the theory being embedded in Liberal theorizing. In doing so the philosopher departed from the path he previously envisioned for the theory, at the dismay of many supporters and mild critics alike. Particularly the unexpected manner in which Rawls chose to indirectly extend his theory to the global domain (as a foreign policy of a liberal people) in *The Law of Peoples*, supplanted cosmopolitan theories of justice along Rawlsian lines that aimed to construct a more direct extension of the theory to the global domain (by expanding the subjects and correspondingly the scope of justice).

The most notable attempts to construct a cosmopolitan theory of justice along Rawlsian lines (by Beitz and Pogge) predate the important distinction between a comprehensive moral doctrine and a political theory of justice that was introduced in *Political Liberalism*. While the fundamental ideas that underlie the domestic and cosmopolitan perspective on the political scope of the theory of justice are shared, their interpretation and specification into conceptions as well as how they are thought to relate to one another is of defining importance for determining both the scope and the content of justice.

Thus, this thesis will answer the question whether a cosmopolitan interpretation of justice as fairness is a reasonable alternative to the application of *The Law of Peoples* at the global level in light of the foundational commitments of a political theory of justice. If we regard Rawls' previously articulated argument for justice as fairness as conclusive, the burden of proof lies with Rawls for any deviations from it in his later articulations of the theory. Since Rawls' *The Law of Peoples* is articulated as a deviation from the default of the theory of justice as fairness (*mutatis mutandis* for the global level), the mutually compatible lines of argument that support the deviations are explicated first and then argued against. Additionally, the constraints to which 'fundamental ideas' are subjected in *Justice as Fairness: A Restatement* are examined, for Rawls' construction transforms them into 'particular conceptions' that narrow the scope of application of the theory, and it is argued that these constraints are incompatible with the foundational commitments of a political theory of justice.

The term 'reasonable', which is used in the research question, can be read in its 'regular' meaning as well as in a specific meaning within the Rawlsian framework. Within Rawls' theory of justice, the term 'reasonable' refers to an intersubjectivist criterion that ultimately determines what is 'right' (or 'just') within the political domain (as will be discussed in chapter 3.3). Throughout this thesis, the term 'reasonable' will be used in this latter sense to show that a cosmopolitan interpretation of justice as fairness can provide a 'just' alternative to Rawls' extension of his theory to the global level in *The Law of Peoples*.

In order to answer the research question, several sub-questions need to be answered. What is the practical context of the global level where the questions of justice arise? What does it mean for a theory of justice to be political, what is the added value of this idea and what limits does this idea specify for the structure and content of a theory of justice? How does Rawls extend justice to the global level in *The Law of Peoples* and what problems does his extension pose? Can justice as fairness be applied directly at the global level? Which specifications

of fundamental ideas into particular conceptions prevent such an application and are the constraints to which these ideas are subjected compatible with the framework of the idea of a political conception of justice? Could the fundamental ideas alternatively be specified into viable conceptions that support a cosmopolitan interpretation of justice as fairness?

These sub-questions are addressed as follows. First, assumptions regarding the practical context for a theory of justice at the global level are an important element underlying the theoretical disagreement between the proponents of a domestic and a cosmopolitan application of Rawls' theory of justice. The practical context specifies the playing field for a theory of justice and influences whether a theory is fit for its purpose. In order to understand this background against which questions of justice arise at the global level, chapter 2 presents the contour of the system of global governance as it exists today and juxtaposes it against Rawls' assumptions.

Subsequently, chapter 3 situates the theory of justice as fairness and the idea of political justice in the theoretical framework. This chapter describes how the idea of political justice fits in Rawls' theory and establishes what should be taken as the most recent, coherent and consistent formulation of the theory of justice as fairness as the most prominent example thereof. Furthermore, this chapter describes how Rawls constructs justice as the specification of the right for the limited domain of the political. Moreover, this chapter details how the idea of (intrinsic¹) reasonableness serves as an intersubjectivist criterion in this regard and how it operates to structure and specify the content of the political theory of justice as fairness.

Chapter 4 presents Rawls' account of global justice as described in *The Law of Peoples*, as the argument for this extension is provided in the form of deviations from justice as fairness and since the extension serves as the de facto standard for political theories at the global level. This chapter also discusses the

¹ Rawls 2001, p. 26

most controversial elements of Rawls' extension of justice to the global level in and the mutually compatible lines of argument he provides therefore.

Rawls explicitly rejected a cosmopolitan application of the theory of justice as fairness. Throughout Rawls theory, fundamental ideas become particular conceptions when their elements are specified in a particular way².

Correspondingly, Rawls' specification of fundamental ideas into particular conceptions reflects his rejection of a cosmopolitan interpretation and bars a cosmopolitan application of his theory. Thus, in chapter 5 the constraints to which the fundamental ideas are subjected in their specification into particular conceptions are examined and I argue that these constraints are incompatible with the foundational commitments of a political theory of justice.

Finally, in chapter 6 I argue how 'democracy' could alternatively be conceived to support a wider application of the theory of justice (which was framed with a democracy in mind), and two methods are outlined that could serve to specify the 'fundamental idea of free and equal persons' into a cosmopolitan conception of the person for the purpose of a political theory of justice.

Since the (Des)Cartesian paradigm-shift from the centrality of God and nature moved to the centrality of man, modern political theories hold as a primary precept the equality of the person. The paradigm-shift entailed that the model where (god-given) rules were discovered was replaced by a model where (man-made) rules were created and enforced by man. Against this background social contract reasoning originated and served to provide the foundation for the pre-existing communities as they evolved into nation-states. The significance of the paradigm-shift on political theorizing lies in the understanding of the institutional structure as malleable: "Political and social institutions could be

² Rawls 2001, p. 19

revised and reformed for the purpose of making peoples happier and more satisfied³.

According to another prominent contemporary political and legal philosopher, Ronald Dworkin, all modern political theories ultimately have the idea that each person matters equally at their core⁴. If modern political theories indeed share the same egalitarian plateau, such that they define the social, economic and political conditions under which persons are treated as equals, then according to Will Kymlicka "we might be able to show that one of the theories does a better job living up to the standard that they all recognize"⁵. If this is correct, the merits of modern political theories could be expressed in terms of their adherence to the principle of equality of persons. Both the domestic and the cosmopolitan interpretation of Rawls' theory of justice as fairness are unequivocally grounded in human equality and therefore can be compared according to this shared standard.

The foundational commitment to the equality of persons is apparent throughout Rawls' theory of justice. Most importantly for the topic of this thesis, are the manifestations of the commitment to equality in the principle of legitimacy and the reciprocal nature of reasonableness. While the principle of legitimacy establishes the *need* for persons to be treated equally whenever political power is exercised, the reciprocal nature of reasonableness establishes an objective standard that serves to specify *how* persons can treat each other equally in their collective exercise of that political power. Both the principle of legitimacy and the idea of reasonableness will therefore play an important part in the discussion of both the domestic and cosmopolitan interpretation of the theory of justice. Furthermore, since Rawls posits that moral and political theories need

³ Rawls 2002, p. 46

⁴ Kymlicka 2002, pp. 3-4

⁵ Kymlicka 2002, p.4

to be general and universal⁶, the universality of his formulation of his political theory of justice as fairness is examined.

Rawls' own view on the proper scope of (direct) application of his theory of justice can be summarized as that nation-states function as a fixed point and that we should determine what their citizens owe each other first⁷. Only after this has been established, the question on what persons owe to each other by virtue of their shared humanity is answered and effectively turns into the "responsibility of the state of which they are citizens"⁸. This view on the proper scope of application of a theory of justice can be explained in the light of the Cartesian paradigm shift and the corresponding need to reinvent the foundation and justification of the pre-existing communities in general and the Westphalian system of states in particular. Rawls' view on the proper scope of application of the theory of justice is shared by a type of liberalism which has come to be known as liberal nationalism.

In contrast, theories of justice that are devoted to the universal applicability of their principles are often described as cosmopolitan theories of justice. Within this category of theories, it is important to make a distinction in regard to the primary aim of the theories. *Institutional* cosmopolitanism aims to provide a conclusive account of how global governance should ideally be structured. A great number of empirical facts inherently have to be taken into account by such a theory and as a result any such inquiry lies far beyond the limits of this thesis. *Moral* cosmopolitanism on the other hand is explicitly restricted to the question what we owe to all other human beings and is agnostic about the institutionally most viable way to realize this aim.

The need for a political theory of justice at the global level in the age of globalization is increasingly dire, as more and more collective problems arise and

⁶ Rawls 2001, p. 87

⁷ Kymlicka 2002, p. 254

⁸ Boucher 2006, p. 24

need to be solved cooperatively at this level. Global problems calling for global solutions in this context are not limited to severe poverty, but include environmental problems such as global warming, as well as for instance the lack of proper regulatory institutions to manage the global economy within which all national economies are inescapably situated. Within the international system as it exists today, solutions to global problems such as these are often barred by the *prisoner's dilemma*⁹ that nation-states face and, consequently, negotiations frequently result in a deadlock, with potentially disastrous consequences.

A common way to solve this type of dilemma is to recognize that it is necessary for the parties to find a cooperative solution where the rationality of the whole (comparable to the *reasonable* in Rawls' terminology) overrides the rationality of individual members. For the global context this means that it is not unlikely that we will see an increasing tendency towards binding decision making procedures at the global level at the expense of national sovereignty. This underlines the increasing importance of a political theory of justice that can serve to evaluate the global institutional structure as it exists today and to provide guidance in how we should allow it to develop further.

⁹ The prisoner's dilemma is an example used in game theory that illustrates why two (or more) parties are unlikely to cooperate even if it is ostensibly in their collective best interest to do so.

2. Practical context

Before we continue with a closer look at questions regarding the direct scope of political justice, it is important to recognize the state of global governance within which these theoretical questions arise and within which the answers as found in Rawls' theory of justice pose real problems.

The legal reality of global institutions is a few steps ahead of overlapping consensus of ethical, political and legal theorizing on the issue. A telling example of this can be found in *Contemporary Political Philosophy*: "one [way to reduce global inequality] is to redistribute resources ... *of course*, the sort of global institutions which are needed to engage in this sort of international distribution do not yet exist"¹⁰ [italics added]. The absence of a system of global governance is a crucial empirical assumption underlying both Rawls' vision as expressed in *The Law of Peoples* as well as those authors that defend this particular extension of the theory of justice. Rawls usually refers to the absence of a "world state", while other sympathetic others have extended this claim much further. In defence of Rawls' *The Law of Peoples* Freeman for instance states: "I contend that [t]here is no global basic structure because there are no basic global institutions – no world state, no independent global legal order, no global property system [...] the rules that make global economic cooperation possible are national and they apply internationally only due to agreements among peoples"¹¹.

While the theoretical discussion on the desirability of a global institutional order continues, such a system of global governance has already (been) formed. Within this system of global governance, organizations known as the Bretton Woods institutions have taken on a role in which their core activity is to distribute primary social goods. Together they regulate amongst other things global trade and finances with pervasive regulative consequences in many other areas. The

¹⁰ Kymlicka 2002, p. 269

¹¹ Freeman 2006, p. 247

outcome of the distribution of social goods that they shape is determined in a moral vacuum, primarily by economical and political forces.

While theoretical discussion and empirical research on the question of *institutional* cosmopolitanism continues, the principles arising from *moral* cosmopolitanism could provide the framework for the operation and evolution of global governance. The term 'moral' in this terminology predates Rawls' theory of justice and does not preclude cosmopolitanism to be established on liberal political grounds. In this thesis, 'cosmopolitanism' will be referred to as moral cosmopolitanism in the Rawlsian sense of *political* cosmopolitanism. The term 'global justice' will be used to refer to questions of justice on a global scale and 'international justice' to refer to an approach to answer these questions within the Westphalian framework of nation-states. In contrast, the term 'cosmopolitan justice' will be used to refer to an approach to answer questions of global justice from a perspective whereby a person's political claims are valued equally, regardless of their nationality.

In order to understand the reality of the global institutional order as it exists today, we must look at its history. The Bretton Woods system dates back to 1944 when it was instituted to prevent nation-states from artificially increasing global competitiveness of export products by currency devaluations (in order to reduce balance of payment deficits). Prior to this, the so-called beggar-thy-neighbor-policies¹² resulted in a global economical downward spiral between the two World Wars that caused the Great Depression. Exchange rates were fixed and pegged to gold in order to restore confidence in the currencies. Post-1944, the system was to be governed by three institutions that would evolve into the IMF, the World Bank and the WTO. The fact that these Bretton Woods organizations were created by the necessity for governing global trade and finances shows how interdependent the economies of nation-states had become. It goes without

¹² Meeusen 2006, p. 380

saying that advances in technology and transportation since 1944 have increased the volume of global trade and finances significantly, further adding to this global interdependency.

In order to illustrate some of the shortcomings of this system as it exists today, the history of the IMF will be used as an example first. The IMF was set up to temporarily use its resources to allow nations to correct their balance of payments. The voting system within the IMF is not determined by a one-man-one-vote principle, nor a one-country-one-vote principle, but instead “the larger a country's quota in the IMF—determined broadly by its economic size—the more votes the country has, in addition to its basic votes”¹³. The IMF has been trying to redefine its mission since 1971 when President Nixon closed the Gold Window¹⁴, the result of which was that the currencies of the world would be allowed to float once again. Additionally, the oil price shock of 1973 induced the Petrodollar Recycling Strategy¹⁵, where the profits of oil producing nations were deposited in commercial banks and lent to oil consuming nations. Correspondingly, developed nations borrowing from the IMF would go from nearly half of the fund’s lending in 1975 to zero in the late 1980s¹⁶. In order to survive in this new economic reality, the role of the IMF changed from a primarily monetary organization to a development organization.

As a result of these changes, the developed nations no longer rely on the IMF for their financial policies and de facto regained the power that they had delegated to the IMF in 1944. The voting system did not change however, meaning that the developed nations, that would never borrow from the fund again, remained in firm control of the decision-making process. The United States alone controls an 18% share in the IMF’s voting system. Similarly, the United

¹³ International Monetary Fund 2006

¹⁴ Lehrman 1982, p. 134

¹⁵ Levinson 1999, p. 473

¹⁶ Rajan 2006, p. 2

States control 17% of the votes in the World Bank and appoints its president¹⁷.

The voting mechanisms in these international organizations are de facto determined by brute political and economical power, not in terms of a conception of international justice that can be said to be legitimate in the eyes of those who are affected by the political and economical decisions that these organizations make.

As the IMF evolved into a development organization, conditions of structural reforms for borrowing nations grew. In determining what conditions should accompany the loans, the IMF was "hijacked by market fundamentalists"¹⁸ during the 1980s, according to Nobel Prize winner and former vice president and chief economist of the World Bank Joseph Stiglitz. Their policies focusing on one single path to development, known as Washington Consensus policies¹⁹, are often regarded as primarily aimed at satisfying developed nations' and particularly multinational companies' desire to gain market access in developing nations. The IMF's conditions to allow for free capital flows before granting loans to developing nations without adequate monitoring systems particularly have been blamed as the cause for (the scope of) financial crises in the last two decades²⁰.

The IMF as it exists today is a development organization, whose core activity is allocating primary social goods in the international domain in the form of access to currency reserves and the cost of success access²¹. Because trade

¹⁷ Fischer 1998

¹⁸ Ayogu 2005, p. 152

¹⁹ The term Washington Consensus was first coined by John Williamson in 1989, and includes conditions such as fiscal discipline, tax reform, financial and trade liberalization, privatization and favorable terms for foreign direct investment.

²⁰ The failure of the developed nation's ability to take the needs of individuals in lesser developed nations into account as ends in themselves, as they pushed for the free movement of capital in the global market, is illustrated by the remarks of the former US secretary of the treasury Robert Rubin (responsible for extending free trade to the free movement of capital). In a 1998 press release he stated that "despite vast global economic growth over the past decade, half the people of the world still live in poverty and that is a problem not only for the nations with high poverty rates but for all of us. The developing nations are our markets for the future, and their economic well-being promotes our economic well-being" (Kristof 1999, Rubin 1998).

²¹ Garcia 2007, p. 475

currencies are an exhaustible resource, the IMF influences their relative value and the market's determination of which currencies are hard and which are soft. This determination reflects "a complex blend of natural and social inequalities, including [...] the arbitrary distribution of natural resources [...] and colonial legacy of the global economic system"²².

Similarly, the World Bank as it exists today is a development organization, whose core activity is allocating primary social goods in the international domain in the form of development capital and the terms of access to such capital. The available supply of development capital reflects "a complex blend of natural and social inequalities [including a nation's] natural resource endowment [...] history [and] policies"²³.

Finally, the influence and scope of World Trade Organization (and the underlying treaties) should not be underestimated. According to its own data, the WTO consists of 150 members and accounts for 97% of global trade²⁴. The voting mechanism is formally based on a one-country-one-vote principle, but actual votes have never been taken. The decision-making process within the WTO takes place through multiple rounds between groups of countries. The relative market sizes of these (groups of) countries de facto determine the bargaining power that they can exercise during the negotiations. According to Steinberg, this model favours both Europe and the United States and bars Pareto improvement²⁵. Consequently, regulations that favour affluent countries, regarding subsidies, tariffs, quotas, anti-dumping duties and export credits are enforced in many of the sectors in which developing countries are best able to compete. According to the United Nations Conference of Trade and Development (UNCTAD), the developing countries could export \$700 billion more per year if rich countries did

²² Garcia 2007, p. 475

²³ Garcia 2007, p. 476

²⁴ WTO 2010

²⁵ Steinberg 2002, pp. 339-374

more to open up their markets²⁶. To put this figure in perspective: it far exceeds the amount (\$38 billion annually) that would be necessary to eradicate the most severe poverty worldwide²⁷.

The Bretton Woods organizations that regulate and shape global trade and finance are part of the fuller picture of the circumstances of justice in the global institutional order. As Pogge has repeatedly argued, various other factors in the form of positive law (or the notable absence thereof) additionally determine the circumstances of justice at this level. More specifically Pogge refers to the international resource, borrowing, treaty and arms privileges²⁸.

Anyone who effectively exercises power within a country is internationally regarded as entitled to sell the country's natural resources, to borrow funds in the country's name and to bind the present and future population in the form of international treaties. These privileges are even granted when those who exercise effective power within a country acquired and exercise their power in indisputable violation of the country's own constitution or international human rights norms. While virtually every developed system of law has restrictions to prevent the transfer of ownership from someone who illegitimately exercises power over a good to a third party who is aware of that fact, the global institutional sphere notably lacks regulation in this area.

The international arms-trade further aggravates the situation. The top five largest exporters of arms include four out of the five permanent members of the United Nations Security Council. Existing regulations do not hold countries accountable for what is done with the weapons they sell. As a result, these arms are sold to, or find their way, to unconstitutional, illegitimate and oppressive regimes that pay for them using the privileges described above. The poignant

²⁶ Pogge 2008, p. 20

²⁷ Pogge 2008, p. 105

²⁸ Pogge 2007, p. 51

consequence is that people are oppressed by means for which they will have to pay the bill.

Taken together these privileges constitute a strong incentive for coup attempts and help illegitimate regimes to retain their power. The effect is in fact so strong, that having a bigger natural resources sector correlates with lower rates of economic growth for developing nations, an effect which has been called the Dutch Disease²⁹. These circumstances are not natural in any sense; they are the result of a basic structure that is a reflection of a variety of man-made regulatory systems and institutions, which is fuelled and sustained by rational motives of (governments of) the countries that have the most bargaining power within them.

Although the nature of the global institutional order is fragmented, the vast body of this supra-national order extends even further than has been described here. Notable other institutions and norms that shape the global order and limit national sovereignty and accordingly the exercise of political power by governments as traditionally understood include the United Nations, the Vienna Convention on the Law of Treaties, the Geneva Conventions, the International Court of Justice, the International Labor Organization, International Criminal Tribunals and the International Criminal Court, human rights treaties, international humanitarian law as well as customary international law and more specifically *ius cogens* (peremptory norms) prohibiting acts such as slavery, genocide and crimes against humanity.

Recognizing that a global institutional order has emerged, whose decisions influence the lives of the entire community of human beings and the distribution of social goods, benefits and burdens between them and their ability to live their lives according to their conception of the good, should cause us to (re)consider the foundation that supports this order. Because the "key normative assumption

²⁹ Pogge 2002, p. 114

underlying a Rawlsian account of inequality is that differences in natural endowments and consequently differences in the allocation of social goods are unmerited [...] or in Rawls' terms morally arbitrary"³⁰, his theory of justice seems particularly well suited for the issue at hand and could provide guidance in how to remedy inequality at this level.

Rawls' characterization of the global domain stands in stark contrast to the global institutional order as it has been described here. One of the crucial assumptions underlying Rawls' Law of Peoples is that he believes that "the causes of wealth of a people [...] lie in their political culture and [...] the traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues"³¹. He adds to this claim by stating: "I would further conjecture that there is no society anywhere in the world – except for marginal cases – with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered"³². From these assumptions, Rawls moves towards two normative conclusions. Since he regards a society's wealth as dependant on internal factors, he concludes that arbitrary distributional inequalities within the global domain are not a matter of (global or) international justice and that it consequently would be wrong to transfer resources from affluent to impoverished nations³³.

Thomas Pogge refers to these assumptions that explain the causes of severe poverty merely in terms that are domestic to the societies within which they occur as *explanatory nationalism* and describes it as "the most harmful dogma ever conceived"³⁴. He underlines that if explanatory nationalism is explicitly repudiated, it would cause us to think about "whether it is permissible

³⁰ Garcia 1999, p. 129

³¹ Rawls 1999, p. 108

³² Rawls 1999, p. 108

³³ Miller 2006, p. 193

³⁴ Pogge 2006, p. 217

for the affluent states (in collaboration with the ruling “elites” of many poor countries) to impose a global institutional order designed so that it foreseeably reproduces avoidable human rights deficits on a truly horrendous scale”³⁵.

Reevaluating the further causes of the occurrence of severe poverty could lead us to understand the global institutional order as rules and institutions that can be designed and redesigned to serve the (political) ends specified including those of political liberalism. Such a re-evaluation is analogous to Rawls’ description of the idea of liberal democratic peace and the movement towards democracy in the eighteenth century: “the social order was no longer viewed as fixed: political and social institutions could be revised and reformed for the purpose of making peoples happier and more satisfied”³⁶.

To sum up: in this chapter I discussed the current state of global governance, since assumptions concerning the practical context at this level play an important part in the theoretical disagreement between proponents of a domestic and cosmopolitan interpretation of Rawls’ theory of justice. I tried to make clear that a comprehensive system of global governance exists and that it serves to distribute primary social goods between all human beings. Given the key normative assumption underlying a Rawlsian account of inequality, namely, that differences in natural endowments in general and the allocation of social goods in particular are morally arbitrary, Rawls’ theory of justice seems particularly well suited to remedy unmerited inequality at the global level. Rawls, however, rejected a direct application of his theory of justice as fairness at this level, based on empirical assumptions that have been described as explanatory nationalism, amongst other reasons. If these assumptions are repudiated, the system of global governance needs to be re-evaluated in the light of the questions of global justice that arise.

³⁵ Pogge 2006, p. 220

³⁶ Rawls 1999, p. 46

3. Theoretical framework

3.1. John Rawls through the years

At the dawn of John Rawls' career in political philosophy in the 1950s and 1960s, the debate in the political realm was dominated by logical positivists who were generally relativistic about values and utilitarians when it came to making decisions on policy³⁷. These mostly Anglo-American philosophers saw only two meaningful types of enquiry; either "empirical investigations into matters of fact" or "conceptual discussions of the meanings and uses of terms"³⁸. As a specific form of philosophy, political philosophy was dismissively regarded merely as a form of conceptual analysis, or even as a pseudo-science making only pseudo-statements³⁹. From the perspective of these logical positivists, the ideas of past philosophers ranging from Aristotle and Plato to Rousseau and Kant were based on a false notion about which philosophy could sensibly speak⁴⁰.

Against this backdrop Rawls published *A Theory of Justice* in 1971. In his preface to the book as well as in its first revision, Rawls outlines his desire to work out a conception of justice that provides a "reasonably systematic alternative to utilitarianism"⁴¹. The main defect in the latter theory, according to Rawls, is the inability of utilitarianism to properly protect basic rights and liberties of citizens as free and equal persons. In *A Theory of Justice*, Rawls lays the foundations for a conception of justice he describes as 'justice as fairness', which he at that time saw as a philosophical conception for a constitutional democracy. The conception Rawls proposed, was a remarkable reconciliation of both liberty and equality, two values that have long divided liberals and egalitarians.

³⁷ Nussbaum 2001, p. 2

³⁸ Nussbaum 2001, p. 2

³⁹ Carnap 1932, pp. 60-81

⁴⁰ Nussbaum 2001, p. 2

⁴¹ Rawls 1971, p. xi

Both liberalism and egalitarianism seem to share the basis of a principle of equal moral worth of persons, however they differ significantly in the way they attempt to ensure this equality of moral worth. On the one hand, liberalism emphasizes individual liberties and rights, limited government and private property⁴².

Proponents of this type of liberalism include Smith and Locke. On the other hand, egalitarianism argues that liberalism's emphasis on *formal* equality before the law does not extend far enough to properly ensure any kind of real equality of moral worth, and thus, according to some egalitarians such as Marx, a government should therefore strive to guarantee the *material* equality of its citizens.

Rawls' commitment to both liberal and egalitarian values is reflected in his theory in the form of the two principles of justice. The first principle is a proviso that aims to guarantee the maximum amount of liberty, arguing that every person has an equal claim to the most extensive scheme of equal basic liberties compatible with a similar scheme for all. The second principle is a reflection on Rawls' commitment to egalitarianism, stating that "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity"⁴³. While the first principle is fairly straight forward and has been met with remarkably little criticism, the second principle faced opposition from the different sides in the debate and needs a much more elaborate defense.

In contrast, Rawls' conception of justice as fairness in *A Theory of Justice* is strongly committed to both individual rights and liberties and an egalitarian ideal of fair distribution⁴⁴. Rawls explains that the purpose of the theory of justice is to carry "to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant"⁴⁵. Rawls' theory of justice is

⁴² Crowder 2002, p.22

⁴³ Rawls 1971, p. 302

⁴⁴ Cohen 2004, p. 114

⁴⁵ Rawls 1971, p. 10

essentially a contract-based theory, where what is 'right' and 'wrong' ultimately depends on what "[institutions and principles] free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"⁴⁶. Rawls' describes this as 'the original position' that corresponds to 'the state of nature' in earlier contract-based theories. Unlike some of his predecessors in this specific branch of moral theory, Rawls does not regard the original position as an actual historical state of affairs and acknowledges that it is a purely hypothetical thought device.

The way in which Rawls sets up the original position is of paramount significance for the shape of the rest of the theory as well as the conception of justice to which it leads. One of the essential features is the 'veil of ignorance', a limitation on the knowledge one has in the original position (a situation of imperfect information). The limitations on the knowledge in the original position are introduced to reflect the arbitrariness from the moral point of view of certain natural, social and historical circumstances. More specifically, "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like [...] the parties do not know their conceptions of the good or their special psychological propensities"⁴⁷. Thus the parties are similarly situated in a way that is meant to be fair to them as moral persons. Using the veil of ignorance, limitations on knowledge are introduced in the original position that model a situation in which the parties are expected to make 'reasonable' judgments instead of 'rational' judgments in Rawls' terminology. The former approximates what we would describe as an 'objective' judgment, while the latter approximates a 'subjective' judgment. A more elaborate discussion of the difference in the usage of both terms can be found in chapter 3.3.

⁴⁶ Rawls 1971, p. 10

⁴⁷ Rawls 1971, p. 137

Another important feature of the original position is the object of the agreement, namely a constitutional framework that comprises fundamental principles for just social institutions. Social institutions in this sense includes a wider range of 'institutions' than one might expect. Rawls employs this term to include the political constitution and the basic economic and social arrangements. Taken together, this framework serves to "define men's rights and duties and influence[s] their life prospects, what they can expect to be and how well they can hope to do"⁴⁸. The reason that Rawls takes this structure as the primary object of agreement is because "its effects are so profound and present from the start" and because the structure inherently contains "various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as economic and social circumstances"⁴⁹.

The original position as a whole can be regarded as modeling the moral person or purity of heart, which Rawls mentions in the last sentence of *A Theory of Justice*: "purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view"⁵⁰. The model consists of two parts; the first is "the description of people in the hypothetical situation of choosing principles for living together ... [in which] they are imagined as rational [and] self-interested ... roughly equal in capacity [and who have] needs that can be met more effectively by cooperation than by noncooperation"⁵¹. The second part of the model consists of the veil of ignorance and its limitations on the knowledge of the parties in the original position. The veil of ignorance "supplies purity of heart, in the form of a morally decent impartiality toward the projects of others. Rawls's idea is that, where social justice is in question, real people should always try to choose without being biased in the direction of their own special

⁴⁸ Rawls 1971, p. 6

⁴⁹ Rawls 1971, p. 7

⁵⁰ Rawls 1971, p. 514

⁵¹ Nussbaum 2001, p. 4

interests"⁵². In other words, the veil of ignorance is the 'moral' part of the original position, which is meant to approximate impartiality better than would be possible if one would try to make a moral judgment under conditions of full information, including one's personal bias.

When Rawls first proposed his conception of justice as fairness in *A Theory of Justice*, he described it as to be part of a more general and comprehensive moral theory that was dubbed *rightness as fairness* or *goodness as rationality*. By describing his theory of justice in this way, it became particularly vulnerable to the accusation that it was 'just another' reasonable comprehensive moral doctrine within the spectrum of Liberalism, that is, simply another moral point of view one may or may not share. Numerous authors opposed the conception of justice that Rawls proposed on precisely these grounds. The substantial impact of this criticism was reflected in his later work by a strong commitment to avoid any accusations of moral bias in the restatements of his theory and to better accommodate the pluralism of moral values.

In his next book, *Political Liberalism*, Rawls modified his conception of the theory of justice to challenge the abovementioned accusation. While *A Theory of Justice* primarily deals with justice, *Political Liberalism* deals with questions of legitimacy and tolerance, that addresses "under what conditions will someone properly accept law as legitimate, even if he differs with it, even if he thinks it unjust"⁵³. More importantly for the purpose of my thesis, however, Rawls draws a crucial distinction that would have a lasting impact on his presentation of the theory of justice: comprehensive moral theories on the one hand and a political conception of justice on the other. According to Rawls, a comprehensive moral theory is general and therefore applies to a wide range of subjects; it becomes a comprehensive moral theory when "it includes conceptions of what is of value in

⁵² Nussbaum 2001, p. 4

⁵³ Freeman 2003, p. 317

human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct”⁵⁴. In contrast, a political conception of justice is a specific form of a “moral conception worked out for a specific subject”⁵⁵, namely the basic structure of society. Two additional features characterize a political conception of justice. First, in order to accept such a conception, one does not have to commit oneself to any underlying (comprehensive) moral theory or doctrine; and second, that the conception is based on certain fundamental ideas that are “latent in the public culture of a democratic society”⁵⁶.

By making this fundamental distinction between comprehensive moral theories and a political conception of justice, Rawls placed his conception of justice above the arguing parties so to speak. Rawls rephrased the central question about the content of justice to reflect what still could be agreed upon with regard to politics in general and the content of justice more specifically, even in the face of disagreement between parties on matters such as values and virtues. By tying the political conception of justice to fundamental ideas that are latent in the public culture of a democratic society, Rawls ensured that his theory would not only be reasonable, but also that it would also be mostly uncontroversial and compatible with the views of a great number of comprehensive moral theories. In other words, Rawls constructed a basic structure that is compatible with the theory of justice that could potentially count on broad support from society as a whole.

The book *Political Liberalism* and the remodeled conception of justice as fairness as a purely political concept it contained were nonetheless met with substantial criticism from (former) supporters and critics alike. Some supporters of *A Theory of Justice* worried that Rawls’ concerns with legitimacy and stability had resulted in “a slighting of economic justice and the plight of the worst-off,

⁵⁴ Rawls 1993, p. 175

⁵⁵ Rawls 1993, p. 175

⁵⁶ Vaggalis 2009

which was central in [A] *Theory of Justice*⁵⁷ while others remarked that “the egalitarian commitment of *A Theory of Justice* does not survive the movement to *Political Liberalism* ... [Rawls] is wrong ... to suppose that his new commitment to political liberalism is compatible with his older commitments to the original position and equality⁵⁸. Still others worried that the movement of justice as fairness to a political conception, had been at a significant cost to its relevance as a political theory, by limiting itself to societies that were already liberal⁵⁹. Given the fact that the ‘worst-off’ (in absolute terms) in the world generally do not tend to be citizens of a liberal constitutional democracies, this criticism was a significant blow to one of the primary aims of justice as fairness, namely, Rawls’ attempt in one unified theory to account for the arbitrariness from the moral point of view of certain natural, social and historical circumstances.

In 1993 Rawls published a short article with the name “The Law of Peoples” that would later be joined with *The Idea of Public Reason Revisited* to form a book under the name of the former. The aim of the article and the book was to show “how the content of a Law of Peoples might be developed out of a liberal idea of justice similar to, but more general than, the idea I call justice as fairness⁶⁰. In this book, Rawls attempted to extend his theory of justice to the international realm.

One of the most notable departures from his earlier theory was the choice of the actor or subject in the original position. In his earlier work, this fundamental place was reserved for the ‘person’ or the ‘citizen’ as a more specific conception thereof in the context of a given society. In *The Law of Peoples* however, Rawls opted in favour of ‘peoples’ over ‘persons’ or ‘citizens’ as subjects in the original position.

⁵⁷ Holmes 1993, p. 39

⁵⁸ Ackerman 1994, p. 374

⁵⁹ Williams 1993, p. 7

⁶⁰ Rawls 1999, p. 3

According to Rawls, representatives of peoples are the logical subjects in the original position where principles for the Society of Peoples⁶¹ (the international realm understood in a specific way) are at stake. The increasing role of a particular conception of tolerance in Rawls' later work was reflected by the fact that these peoples need not be liberal; he opted for the concept of 'decent hierarchical peoples' in favor of a concept that was oriented more towards principles traditionally associated with a constitutional liberal democracy. In the international context, and given the previous constraints on the form of the original position, Rawls claims that this process yields eight guiding principles. The resulting principles range from those ensuring the freedom, independence and equality of the different peoples to the duty to observe treaties and to observe human rights.

One of the most fundamental concepts in Rawls' theory of justice is the idea of free and equal persons. Their fundamental equality is rooted in Rawls' theory in persons having two moral powers⁶², a capacity for a sense of justice and a capacity for a conception of the good, that are taken as defining the idea of a 'moral person'. From this basis, Rawls moves towards the fundamental freedom and equality of peoples. When making the analogy between the moral agency of a 'person' or a 'citizen' to a 'people' one has to be careful not to commit a fallacy of composition⁶³, because a collection of moral persons cannot *ipso facto* be regarded as a moral entity or to possess similar moral qualities to moral persons. The question whether Rawls' position in *The Law of Peoples* suffices to do justice to the fundamental equality and freedom of persons by treating them as a whole collected in different peoples will be discussed further in chapter 4.2.

While *The Law of Peoples* can offer some practical guidance for decision-making within the status quo of the international realm that is dominated by

⁶¹ Rawls 1999, p. 23

⁶² Rawls 2001, pp. 18-19

⁶³ The *fallacy of composition* is committed when a conclusion is drawn about a whole based on the features of its constituents when, in fact, no or insufficient justification is provided for the inference.

nation-states, numerous authors objected to the fact that the “highly progressive principles of *A Theory of Justice* were replaced in the international realm by ‘timid’ principles from a vanished ‘Westphalian world’”⁶⁴. Some authors such as Buchanan and Tan have gone as far as calling *The Law of Peoples* a “betrayal of liberalism”⁶⁵, and “blatantly inconsistent”⁶⁶ with Rawls’ treatment of illiberal minorities in his previous work *Political Liberalism*. Consequently Rawls has been charged with “philosophical incoherence”⁶⁷.

In defense of Rawls, it should be noted that many years had passed since he began his work in the field of political philosophy and, given the amount of feedback from other philosophers he received during these years, the theory of justice as fairness may have been prone to theories superfluous to his own. Yet, in the light of the criticism that Rawls’ later work in particular has been met with, the question remains if the direction that Rawls followed led him to the most coherent and consistent version of the theory of justice as fairness, or if certain choices led him to deviate from this path.

A year before the death of John Rawls in November 2002, *Justice as Fairness: A Restatement* was published. The book originated as part of the lectures in political philosophy that Rawls taught during the 1980s at Harvard University. Initially they were supplied as an addition to *A Theory of Justice* to correct the mistakes Rawls believed he had made in his previous work and to fill the lacunae he had left therein. As time and the comprehensiveness of the content of the lectures progressed, they “were presented on their own, as a more or less complete restatement of the theory of justice as fairness”⁶⁸. The revision

⁶⁴ Wenar 2005, p. 23

⁶⁵ Buchanan 2002, pp. 697-721

⁶⁶ Tan 1998, p. 283

⁶⁷ Caney 2002, p. 106

⁶⁸ Unfortunately, Rawls was unable to revise the manuscript further in the 1990s due to illness, after the publication of *Political Liberalism* and *The Law of Peoples* (which originated as part VI of this restatement). Erin Kelly edited the manuscript further to produce the book as it exists today, while trying to keep “revisions ... to

additionally includes key parts of the theory of justice, such as the basic arguments for the two principles of justice as well as their formulation and content. In the preface, Rawls describes the two aims he has for the work. The first was to “rectify the more serious faults in *A Theory of Justice* that have obscured the main ideas of justice as fairness”, the other was to “connect into one unified statement the conception of justice presented in *Theory* and the main ideas found in my essays beginning with 1974”⁶⁹. Thus, Rawls attempted to recast the presentation of and the argument for justice as fairness in the light of his insights into the difference between political and comprehensive theories.

Given the place of *Justice as Fairness: A Restatement* in Rawls’ oeuvre, it can be regarded as the most coherent presentation of and arguments for his theory of justice, that is consistent with his insights after the original publication of *A Theory of Justice*. Consequently, for the purpose of this thesis, the *Restatement* will be regarded as the most authoritative and up to date version of his theory of justice, the arguments therefore and presentation thereof.

3.2. The priority of right over good

One of the central pillars for Rawls’ theory of justice is the priority of *right* over *good*. The terms right and good are generally used with a specific meaning in (moral) philosophy. Ordinarily the terms *right* and *wrong* are used to describe a judgment from a moral point of view (the deontic status⁷⁰) in regard to a specific *action*. In contrast, the *good* is ordinarily described in this context in combination with the words fundamental or *intrinsic*, that is to say something being good or valuable *in itself* or it is used in regard to the (moral) character of a *person*⁷¹.

How the two terms connect within the philosophical context, can best be

a minimum ... [taking] care ... not to alter the substance of what Rawls wrote”. Perhaps even more importantly, “all changes were made with the author’s knowledge” (Rawls 2001, p. xii).

⁶⁹ Rawls 2001, p. xv

⁷⁰ Timmons 2002, p. 12

⁷¹ Timmons 2002, p. 8

explained using an example. In classical utilitarian moral theory, (human) happiness is said to be what is intrinsically good or valuable. The rightness or wrongness (or deontic status) of an action is in turn determined by the amount of (positive or negative) intrinsic value (namely happiness) it produces. More generally, moral theories tend to provide a *theory of right conduct* that accounts for the nature of right and wrong in terms of a *theory of value* that specifies what is valuable or good⁷².

In his theory of *justice as fairness*, Rawls' uses the terms right and good in another meaning for the specific context of the political domain. It is important to note the fact that Rawls' aim is not to provide a moral theory, but to provide a political theory, which implies that the meaning of the term *right* could perhaps vary between the different contexts even if they would share the same meaning of what constitutes a conception of the *good*.

The question what objectivity entails in regard to the good is a heavily debated topic in moral philosophy. Objectivity in a moral philosophical sense can be described as that the moral dimension exists independent of the ways we think about it or describe it⁷³. If there is such a thing as an objective answer to moral questions, in an epistemological sense, then one can be right or wrong in an absolute sense in one's moral judgments.

There are a great number of comprehensive moral doctrines that aim to provide a framework in order to provide objective answers to moral questions, as there are a great number of comprehensive moral doctrines that dispute the existence of objective answers to moral questions. Rawls characterizes the disagreement in this regard as incommensurable and irreconcilable but nonetheless often reasonable.

⁷² Timmons 2002, p. 11

⁷³ Glanzberg 2009

According to Rawls, this reasonable disagreement follows from the burdens of judgment that human beings face in their exercise of their powers of reason and judgment. The burdens refer to five obstacles that cause reasonable persons to reach reasonable but different normative conclusions. Firstly, empirical and scientific evidence is often conflicting and complex and consequently leads to different interpretations of the available data. Secondly, even if reasonable persons agree on what the relevant considerations are, they may disagree about their relative weight. Thirdly, all our normative concepts are to some extent vague and subject to 'hard cases'. This indeterminacy gives rise to a range within which reasonable persons must rely on their judgment and interpretation. Fourthly, how reasonable persons assess evidence and weigh normative values is shaped by the totality of their life experiences, which will inevitably differ from person to person. Lastly, there will often be different kinds of normative considerations to take into account which makes it all the more difficult to reach an overall conclusion⁷⁴. These obstacles prevent conscientious and fully reasonable persons from arriving at the same normative (including both moral and political) conclusion even after free and open discussion⁷⁵. The recognition of reasonable disagreement is designated by Rawls as the 'fact of reasonable pluralism'. Rawls goes on to link the fact of reasonable pluralism (of comprehensive doctrines) with the 'fact of oppression', which he describes as:

[The] general fact [...] that a continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power, with all its official crimes and the inevitable brutality and cruelties, followed by the corruption of religion, philosophy, and science. If we say a political society is a community when it is united in affirming one and the same comprehensive doctrine, then the oppressive use of state

⁷⁴ Rawls 2001, p. 37

⁷⁵ Rawls 2001, p. 38

power with these attendant evils is necessary to maintain political community.⁷⁶

By formulating the fact of oppression the way he does in *Justice as Fairness: A Restatement*, Rawls clearly regards as a moral truism that maintaining a shared adherence to one comprehensive doctrine by use of oppressive state power is morally wrong.

Recognizing the inevitability of reasonable disagreement between reasonable persons (the fact of reasonable pluralism) does not imply that there are no 'objective' answers to normative questions according to Rawls. Instead it underlines the fact that there are many difficulties involved in reaching agreement in moral and political matters⁷⁷. Rawls firmly believes that within a well-ordered society reasonable persons can nonetheless agree on a political conception of justice (as fairness) that can be affirmed by a reasonable overlapping consensus. The overlapping consensus ensures that the political conception can be supported by various incommensurable and irreconcilable comprehensive religious, philosophical and moral doctrines and can endure from one generation to the next. Rawls regards this as "the most reasonable basis of political and social unity available to citizens of a democratic society"⁷⁸.

In Rawls' approach, objectivity is defined in terms of intersubjectivity. In its weakest form intersubjectivity refers to a state of agreement or convergence between multiple subjective descriptions. In a slightly stronger form the term refers to descriptions that are commonly shared⁷⁹. Intersubjectivity in this sense is related to the way Rawls employs principles that can be found within political culture of a society in his theory of justice. If one concedes the existence of 'objective' facts in this special sense and that these could in principle be known,

⁷⁶ Rawls 2001, p. 34

⁷⁷ Rawls 2001, p. 36

⁷⁸ Rawls 2001, p. 32

⁷⁹ Davidson 2001, p. 83

this still leaves the problem of determining which party has 'found' these facts in a situation where two (or more) people *reasonably* disagree on their content and relation. In other words, there is no way to determine what is *right* without a consensus on what constitutes (un)reasonable (dis)agreement. It has been argued that the term 'reasonable' serves within Rawls' theory of justice as "a public, social and in this sense intersubjectivist criterion"⁸⁰. If the content of the term 'reasonable' can convincingly be established, this criterion can serve to determine what constitutes (un)reasonable (dis)agreement and ultimately what is right (or *just* in Rawls' terminology for the political domain).

When one concedes that there are multiple conceptions of the right and the good that people can reasonable hold in moral matters, the question that remains as to what this means for the attempt to define what is right when it comes to governing the interaction between people and, consequently, what justice entails in any given society. The answer that Rawls provides to this question is a major contribution to political philosophy, for in amending his theory over the years not to present a comprehensive moral theory in the abovementioned sense but to present a political conception of justice, Rawls aims to answer the question of what *right* constitutes specifically for the political domain.

By approaching the question of what is right for this particular domain, the question is no longer encapsulated by any particular comprehensive moral doctrine and transcends to an overarching principle. This novel solution to an old problem avoids the pitfalls that many comprehensive moral doctrines and theorists before him have faced.

A key point where Rawls' theory of justice succeeds where others before him have failed is on the issue of impartiality, which is closely related to the issue of objectivity. Over the course of history many have tried to articulate 'impartial' points of view, such as the impartial spectator, the detached and disinterested

⁸⁰ Rasmussen 2004, p. 193

observer, the view from nowhere, et cetera. The authors that proposed these views aimed to provide us with a moral point of view, from which one could ideally make right judgments. These authors have faced many objections to their endeavors, most notably because their theories tend to give little or no weight to relational properties that play an important role in broadly shared convictions on how one should act towards others. This objection for instance tends to be a major problem for moral theories such as consequentialism and utilitarianism. When a question of distributive justice arises and one is faced with a situation in which one can either feed his own child or relative, or choose to feed a distant stranger whose situation is more dire, these theories demand that one would feed the latter. This demand faces serious psychological opposition and goes against most peoples considered moral beliefs.

Unlike a parent, who could be said to be under a specific duty to be partial to his children for a variety of reasons, (a representative of) the state is under the specific duty to be impartial and to value the claims of those governed equally. If a question of distributive justice arises before a judge or a tax officer, it would go against most people's considered moral beliefs for them to give any kind of special importance to their near and dear. The demand of impartiality for actions by (or in the name of) the state, is closely connected to the legitimacy of state actions; political power is the collective coercive power of all the equal and free persons who are governed by that political power.

Throughout Rawls' theory, the term *reasonable* reflects his view of *impartiality* (of looking through the veil of ignorance in the original position) and can be understood as defining *objectivity* specifically for the political domain. As such, impartiality operates as a stepping-stone for Rawls' theory of justice in a way such that it cannot operate within the context of particular comprehensive moral theories that aim to provide moral guidance to individuals with regard to their actions towards one another.

3.3. The rational and the reasonable

Throughout the theory of justice Rawls employs the terms rational and reasonable that he regards as basic and complementary ideas that enter into the (central organizing) idea of society as a fair system of social cooperation⁸¹. In his argument, Rawls uses Sibley's distinction of rational and the reasonable as the basis for reasoning about and within the structure of justice⁸². Sibley hypothesizes that within the term 'reason', one can make a basic distinction between 'rational' and 'reasonable' behavior and motives.

For instance, two persons, A and B, have an equal claim to a certain sum of money. If A is in a position to keep all the money to himself, thereby disregarding B's claim, he could be characterized as acting selfishly. Assuming that A is driven by the egoistic motive to maximize his own welfare, the decision in itself would *not* be *irrational* in the sense of unintelligent, unless the decision would have other adverse effects on A's specified end. From a moral point of view (in the sense of an objective, impartial or standard view) A's decision can be characterized as *unreasonable* towards B, assuming A's awareness of B's equal claim to the money. This goes to show that the terms rational and reasonable are not synonymous in their usage⁸³.

According to Sibley, when the term *rational* is used in regard to conduct, it implies that one is acting in accordance with his informed awareness of the ends one is proposing to achieve and how they affect other ends of the self and others. In the case of conflict, one selects the course of action that best realizes their own ends given their relative value based on informed reflection, experience and evidence⁸⁴. Rationality in this sense is thus an intellectual virtue, according to Sibley, that is exercised without being swayed by emotional influences. In contrast, acting *reasonably* means that one takes into account the ends of others,

⁸¹ Rawls 2001, p. 7

⁸² Rawls 2001, p. 7 footnote 6

⁸³ Sibley 1953, pp. 555-556

⁸⁴ Sibley 1953, pp. 555-556

not according to how they promote the ends of the self, but by putting them on par with the ends of the self as a disinterested impartial spectator⁸⁵. Acting reasonably towards one another in this sense is thus a moral virtue, where one is prepared to be disinterestedly influenced. In order to act reasonably in this sense, one must “justify [his] conduct in terms of some principle capable of being appealed to by all parties concerned, some principle from which we can reason in common”⁸⁶. The rational and the reasonable reflect the distinction that Kant makes between treating people as mere means to an end or as ends in themselves. The concept of reasonableness is tied to the notion of equity and foreshadows the content of Rawls’ principle of reciprocity and the idea of public reason⁸⁷.

Given the important place of the reasonable within the theory of justice and the consequences it entails for the theory, it is important to recall how Rawls uses Sibley’s distinction between the rational and the reasonable to articulate the underlying argument regarding the reasonable (in the sense of *legitimate*) exercise of political power from *Political Liberalism*:

- (1) Reasonable persons do not all affirm the same comprehensive doctrine.
This is said to be a consequence of the burdens of judgment.
- (2) Many reasonable doctrines are affirmed, not all of which can be true or right (as judged from within a comprehensive doctrine).
- (3) It is not unreasonable to affirm any one of the reasonable comprehensive doctrines.
- (4) Others who affirm reasonable doctrines different from ours are, we grant, reasonable also, and certainly not for that reason unreasonable.
- (5) In going beyond recognizing the reasonableness of a doctrine and affirming our belief in it, we are not being unreasonable.

⁸⁵ Sibley 1953, p. 556

⁸⁶ Sibley 1953, p. 557

⁸⁷ Sibley 1953, p. 558

(6) Reasonable persons think it unreasonable to use political power, should they possess it, to repress other doctrines that are reasonable yet different from their own⁸⁸.

The (summary of) the argument (points 1-5) in no way relies on concepts that are restricted to any particular society and so neither should its conclusion (point 6). Additionally, Rawls uses these concepts for his description of what is expected of reasonable persons within the political realm:

[R]easonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them.⁸⁹

A very mundane example of how we deal with the rational and the reasonable in the context of a distribution would be the cutting of a cake. If the person who gets to cut the cake is also allowed to take the first pick, a strong (rational) incentive exists to cut the cake into unequal parts and to pick the largest piece. The unwritten rule to deal with this problem is to let the person who cuts the cake pick last. In effect, this channels the rational motive into a reasonable motive and results in an egalitarian outcome; a strong (reasonable) incentive now exists to cut the cake into as equal parts as possible, because the last choice will presumably be the smallest piece of cake⁹⁰.

⁸⁸ Rawls 1999, p. 176

⁸⁹ Rawls 2001, p. 7

⁹⁰ The rationale behind the incentive to cut the cake into equal parts when one gets the last pick is described in game theory. The term to describe such a situation is a *zero-sum game*, meaning that the gain of one person is the loss of the other. The rationale of how to deal with such a situation was described in

In determining what constitutes the most fair (reasonable) distribution of social goods within any given community, we face a similar problem as to when we are asked to cut a cake, although it is admittedly much more complex. When determining what constitutes the most fair distribution, we are also influenced by self-serving motives, or as Miller puts it “people will tend to endorse the view of justice which, if implemented would work to their relative advantage”⁹¹. The tendency to pursue self-serving motives can even be fully unintentional, because what we value simply does not necessarily coincide with what others people value. The great importance of Rawls’ theory of justice lies in his answer for solving this distributional puzzle for the organization of the state, a puzzle which Kant already described as:

[The] good organization of the state (which does lie in man’s power), whereby the powers of each selfish inclination are so arranged in opposition that one moderates or destroys the ruinous effect of the other. The consequence for reason is the same as if none of them existed, and man is forced to be a good citizen even if not morally a good person. The problem of organizing a state, however hard it may seem, can be solved even for a race of devils, if only they are intelligent. The problem is: “Given a multitude of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions”⁹²

1928 by Von Neumann, using the minimax or alternatively maximin theorem. These respectively refer to *minimizing* the *maximum* loss and *maximizing* the *minimum* win (Von Neumann, 1928, pp. 295-320).

⁹¹ Miller 1992, p. 585

⁹² Kant 1795, 1st supplement p. 2

In order to provide a solution to this puzzle, Rawls constructs the *original position* from which the principles of justice are to be chosen. The original position in Rawls' theory corresponds to the state of nature in other social-contract theories presented in a specific way. Decisions are made behind a *veil of ignorance*, which is described as a situation of imperfect information and excludes factors that are arbitrary from a moral point of view, including one's place in the final distribution. Taken together, these concepts form a thought experiment (or expository device) for channeling *rational* self-interested motives into *reasonable* claims that are compatible with reasonable claims from any other position within a given distribution⁹³, much like the cake-cutting example.

The original position is presented as a particular view on the ideal circumstances for the selection of principles of justice if members of a community are to draw up a fair social contract to govern them. Even though the idea of a social contract has proven to be fruitful over the centuries, as Dworkin says, it is "either historically absurd (if it is based on an actual agreement) or morally insignificant (if it is based on hypothetical agreement)"⁹⁴. There is another way to interpret the significance of the original position and its veil of ignorance, which Rawls employs and Dworkin endorses, namely to use it "as a device for teasing out the implications of certain moral premises concerning people's moral equality"⁹⁵. In a simulated original position researchers found that "in every case the introduction of imperfect information seems to have harnessed the self-interest of the subjects and allowed them to reach unanimous consensus on a principle of distributive justice"⁹⁶ throughout a variety of cultural and temporal contexts, affirming Rawls' theory.

Rawls argues for two principles that he believes follow naturally from employing his decision-making mechanism. The first principle grants everyone

⁹³ Kymlicka 2002, p. 65

⁹⁴ Kymlicka 2002, p. 61

⁹⁵ Kymlicka 2002, p. 61

⁹⁶ Frohlich 1987, p. 628

the right to the most extensive scheme of equal rights and liberties compatible with a similar system for all⁹⁷. The second principle is a reflection of the maximin theorem and ensures that social and economic inequalities are arranged to the benefit of the least advantaged and that both political offices and positions are open to all under conditions of the fair equality of opportunity⁹⁸. Even though Rawls' intended for this decision-making mechanism to be employed within nation-states, subsequent chapters will argue that it can be applied to any political structure including the global. Its ascribed role as a purely hypothetical device, that is meant to tease out the implications of certain premises concerning people's fundamental equality, prefigures the arbitrariness of limiting its application to any one particular political structure. A broader applicability of the thought-device would oppose Rawls' extension of his theory of justice to the global domain, because as Barry, Beitz and others have argued, "there is no reason to think that the content of the principles would change as a result of enlarging the scope of the original position"⁹⁹.

In this chapter we have seen how the tension between egoism and altruism can be balanced on the scales of the Rawlsian conception of reasonableness. The Rawlsian notion of reasonableness was traced back to the distinction that was introduced by Sibley, between the ideas of the rational and the reasonable. Rational conduct is described by Sibley as acting in accordance with one's informed awareness in order to realize one's own ends. Reasonable conduct, in contrast, is described as putting the ends of others on par with one's own ends as a disinterested impartial spectator that is prepared to be disinterestedly influenced. In order to act reasonably in this sense, one's conduct needs to be justified in terms of some principle that is capable of being appealed to by all parties concerned.

⁹⁷ Kymlicka 2002, p. 56

⁹⁸ Kymlicka 2002, p. 56

⁹⁹ Garcia 2007, p. 466

Rawls' theory of justice provides a framework within which the exercise of political power can be justified in terms of principles that are capable of being appealed to by all parties concerned in the above-mentioned sense. Legitimacy within the Rawlsian framework is to be understood as the reasonable exercise of power, which bars reasonable persons from using political power to repress other doctrines that are reasonable yet different from their own. The framework solves the puzzle of how to reasonably distribute social goods within any given community by using the conceptions of the original position and the veil of ignorance. Together these channel rational self-interested motives into reasonable claims, which are compatible with reasonable claims from any other position with a given distribution, for the political domain. In the subsequent text, it will be argued that this thought-device can be applied to any political structure within which a reasonable distribution of goods is warranted and that restricting its application within certain nation-states is arbitrary.

4. Global governance within the framework of the Law of Peoples

Having situated Rawls' theory of justice as fairness in political philosophy and having discussed the foundational ideas underlying Rawls' theory of justice, I will now move on to discuss Rawls' extension of his theory to the global level. In the first section of this chapter, Rawls' *The Law of Peoples* is presented as well as the most significant deviations therein from his previous articulation of the theory of justice as fairness. In the second section of this chapter, some of the most controversial deviations of *The Law of Peoples* from the theory of justice as fairness are detailed and the mutually compatible lines of argument that support these deviations are explicated and argued against. If it is conceded that the deviations in *The Law of Peoples* from justice as fairness are unwarranted, the question arises if a wider application of the theory of justice as fairness is possible, which will be discussed in chapter 5.

4.1. Rawls on global justice in *The Law of Peoples*

The question as to what justice entails in the global domain is one upon which Rawls reflected publicly only late in his career. His first attempt to do so publicly dates back to a 1993 lecture entitled *The Law of Peoples*¹⁰⁰. Unsatisfied by his own attempt to cover so many issues in one lecture, Rawls continued to develop the international aspect of his theory of justice, culminating into a manuscript that was conjoined with *The Idea of Public Reason Revisited* to form the book *The Law of Peoples*¹⁰¹. Together they represent Rawls' reflections "on how reasonable citizens and peoples might live together peacefully in a just world"¹⁰².

The extension of Rawls' theory to the global level in the form of *The Law of Peoples* is motivated by two main ideas. The first is that according to Rawls the great evils of human history, ranging from (political) oppression to poverty and

¹⁰⁰ Rawls 1999, p. v

¹⁰¹ Rawls 1999, p. v

¹⁰² Rawls 1999, p. vi

genocide, follow from political injustice. The second idea is that by establishing just basic institutions and by following just social policies, Rawls believes these great evils of human history can be eliminated in the future¹⁰³. Rawls' vision as to what is possible in political matters is shared with Rousseau *Du Contrat Social*, which argues that "men [should be] taken as they are and laws as they might be"¹⁰⁴. This combination of both realism and idealism is what Rawls himself calls the idea of a 'realistic utopia'. In Rawls' theory, this idea of a realistic utopia sets limits to the reasonable exercise of power based on the political right and justice¹⁰⁵.

Paramount to comprehending Rawls' reflections on global justice is recognizing the proper place he sees for *The Law of Peoples*; his theory of international justice is an extension of Rawls' theory of justice as fairness for a constitutional liberal democratic state. By choosing to develop *The Law of Peoples* as an extension of justice as fairness as applied to a particular nation-state, Rawls sets out to work out the "ideals and principles of the *foreign policy* of a reasonably just *liberal* people"¹⁰⁶ [italicized in Rawls' original text] as he explicitly emphasizes in the introduction of the book¹⁰⁷. This focus on outlining a foreign policy for a liberal people is implicit throughout *The Law of Peoples* and is a remarkable departure from his previous aim to formulate a political theory of justice (a theory of *right* for the political domain) in his theory of justice as fairness.

In order to argue that questions of global justice should be approached as questions of foreign policy of a constitutional liberal democratic nation-state, Rawls grounds his argument in Kant's influential essay *Zum ewigen Frieden* (Perpetual Peace) and the idea of *foedus pacificum* that it contains. This term

¹⁰³ Rawls 1999, pp. 6-7

¹⁰⁴ Rousseau 1762, book I (tr. Cole)

¹⁰⁵ Rawls 1999, p. 6

¹⁰⁶ Rawls 1999, p. 10

¹⁰⁷ Throughout the *Law of Peoples* the terminology of "applying the original position at the second level" is often used with the same meaning.

translates to "league of peace" and refers to a league of states that does not diminish the power of the state but serves the "maintenance and security of the freedom of the state itself and of other states in league with it"¹⁰⁸. Rawls interprets *Zum ewigen Frieden* and the idea of *foedus pacificum* therein to mean that one should begin by establishing the right mode of government for a nation-state based on the idea of the social contract in general and his theory of justice as fairness more specifically. Subsequently, justice can then be extended to the global level using a second original position at this level made up by (representatives of) 'peoples' that meet certain criteria¹⁰⁹.

Rawls' sets up his extension of the theory of justice to the global level as follows. First, he describes how the original position (as used in justice as fairness) should be adjusted to apply to the international setting and what the content of an agreement between liberal democratic peoples would be. Subsequently, Rawls extends this agreement to what he calls 'decent peoples' and argues that both liberal and decent peoples would agree to the same content for the Law of the Peoples.

One of the most important, and most disputed, adjustments to Rawls' previous theory is his move from defining (representatives of) persons as the appropriate parties (or actors) in the original position to defining (representatives

¹⁰⁸ Kant 1795, Section II, art. 2 (tr. Humphrey)

The role Kant envisaged for a league of states is much akin to the role the United Nations plays in the global domain in our time and age, although the United Nations constrains the power of the state much more extensively than Kant thought possible a little over two hundred years ago based on the international domain at the time.

¹⁰⁹ Rawls' interpretation of *Zum ewigen Frieden* can be argued to misrepresent the aim of the original text. The article was written in Prussia while it was at war with France following the French Revolution. In the article, Kant describes the international domain as a state of war that precludes the *institutional* realization of his *moral* cosmopolitan commitments. Nonetheless, Kant postulates the proviso that "all men who can reciprocally influence each other must stand under some civil constitution" and distinguishes three phases of public law, that is, "civil law, the law of nations and [ultimately] the law of world citizenship". When applied to our globalized world, in which goods and services, labor and capital, information and technology, increasingly cross national borders in a way where our level of social involvement across these borders has led us to the reality of a globalized economy; it is in fact hard infer anything from Kant's postulate but a plea for an international civil constitutional framework to safeguard justice for all.

of) *peoples* as the appropriate parties for the global level specifically. In other words all the potential claims we have towards other human beings outside of our national borders are absorbed by and transferred to (governments representing) a people. The term 'peoples' is explicitly disassociated from the term 'states' as traditionally conceived by Rawls¹¹⁰. *The Law of Peoples* lacks clear definitions of both terms, but Rawls mentions a number of features that distinguish 'peoples' from 'states'¹¹¹. 'Peoples' have three basic features: the institutional feature of having (at least) a 'decent' government, the cultural feature of being united by common sympathies and the feature of having a moral nature in the sense of a shared and "firm attachment to a political (moral) conception of right and justice"¹¹².

In contrast to states, peoples lack traditional sovereignty from Rawls' perspective¹¹³, since they derive their sovereign rights and duties directly from a Law of Peoples¹¹⁴. Another important difference that Rawls makes between peoples and states is that (liberal) peoples "limit their basic interests as required by the reasonable"¹¹⁵, in contrast to (governments of) states which are motivated by rational motives. Here the terms 'reasonable' and 'rational' are used in a way familiar to Rawls theory of justice as fairness¹¹⁶. However, by disassociating peoples from states in this way, one can question who would qualify to be described as a people as opposed to a state. Furthermore it raises the troublesome question as to what the value is of a theory about peoples in a world characterized by states if the content of both terms does not coincide.

¹¹⁰ Rawls 1999, p. 27

¹¹¹ Rawls 1999, p. 27

¹¹² Rawls 1999, p. 23

¹¹³ Rawls 1999, p. 25

¹¹⁴ Rawls 1999, p. 27

¹¹⁵ Rawls 1999, p. 29

¹¹⁶ Rawls 1999, p. 35

Presumably, the idea of peoples sets a standard for which nation-states should strive¹¹⁷.

At the outset of *The Law of Peoples*, Rawls describes five possible types of societies: reasonable liberal peoples, decent peoples, outlaw states, societies burdened by unfavorable conditions and, lastly, benevolent absolutisms. *Reasonable liberal peoples* and *decent peoples* form what Rawls calls *well-ordered peoples*, in the sense that they both have (at least) a 'decent' consultation hierarchy that legitimizes the exercise of political power over their members. Since the latter three, *outlaw states*, *burdened* and *benevolent absolutisms*, deny their members a meaningful role in the making of political decisions, they are not represented in the veil of ignorance reasoning at the second level of application of the original position¹¹⁸. Consequently, the political claims of all those who are ruled by a government lacking political legitimization for the exercise of its coercive power (thus are not well-ordered in Rawlsian sense) are void from the perspective of *The Law of Peoples*.

Rawls introduces the concept of a 'decent hierarchical structure' as setting a lower threshold for legitimacy than its counterpart 'reasonable', with the toleration of a certain type of society in mind. In order to arrive at the conclusion that a non-liberal but nonetheless 'decent' people could exist and that they would accept the same principles, Rawls provides his readers with the imagined example of a nonliberal but 'decent' Muslim people called "Kazanistan"¹¹⁹. Political power governing this imagined people is exercised internally in accordance with human rights and externally in a non-aggressive manner towards other peoples. An additional and crucial assumption that Rawls makes (and defends throughout *The Law of Peoples*) about the exercise of political power by Kazanistan, is that its

¹¹⁷ Tan 2006, pp. 77-79

¹¹⁸ Rawls 1999, p. 4

¹¹⁹ Rawls 1999, p. 5

Rawls has been hesitant to point out a contemporary example of his conception of a 'decent' hierarchical (associationist) state and has granted that there may very well be none other than his hypothetical sketch of Kazanistan.

consultation hierarchy is 'decent'. The content of the term 'decent' is not deduced in any way, but gains its content from the way in which it is used and developed within its particular context¹²⁰. For Rawls, 'decent' in the context of the exercise of political power in *The Law of Peoples* is meant to refer to the hierarchical structure of societies that are associationist in form and also satisfy a number of criteria¹²¹. According to Rawls, members of associationist societies "are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy"¹²².

The introduction of a lower threshold of legitimacy in the form of a 'decent' hierarchical structure begs the question if any top-down representation of persons (merely) as members of groups indeed provides sufficient legitimization for the exercise of political power over all citizens in the face of possible dissent versus this very manner of political representation. Chapter 5.4 will argue that the introduction of this lower threshold of legitimacy relies on a pre-theoretical notion of tolerance which is incompatible with both Rawls' domestic notion of tolerance and the constraints of justice.

After arguing for using peoples instead of persons or states as the actors in the second original position and having described the differences this choice implies for the way in which the original position is set up, Rawls proceeds to state the principles of justice in the global setting. These principles are largely an adaptation of familiar and traditional principles from international law that guarantee the equality amongst peoples¹²³. More specifically, Rawls defines eight principles concerning peoples, ranging from the obligation to observe treaties and undertakings to the right of self-defense (of a people) to the obligation to

¹²⁰ Rawls 1999, p. 67

¹²¹ Rawls 1999, p. 64

¹²² Rawls 1999, p. 64

¹²³ Rawls 1999, pp. 35-36

“observe certain specified restrictions in the conduct of war”¹²⁴. In support of these eight principles of justice amongst peoples, Rawls points similar lists of principles of international law and then goes on to provide specific reasons that support the different principles. For Rawls, the main point of these principles as a whole is that “free and independent well-ordered peoples are ready to recognize certain basic principles of political justice as governing their conduct”¹²⁵. The parties that would represent these well-ordered peoples would make a selection from different formulations of these principles in an original position at the second level to establish a Law of Peoples¹²⁶.

In this section, we saw how Rawls envisioned his theory of justice could be extended to the global domain in the form of *The Law of Peoples*. The extension is motivated by the idea that the great evils of human history follow from political injustice and that by establishing just basic institutions and by following just social policies, these great evils can be eliminated in the future. For Rawls, the extension of his theory to the global is based upon the foreign policy of a reasonably just liberal people, which is a remarkable departure from his previous work in which the formulation of a theory of right formed the basis for his political theory of justice.

In contrast to his earlier work, where citizens were the actors in the domestic sphere, in *The Law of Peoples* ‘peoples’ are ascribed the role of the actor. The term peoples is introduced as a separate term, and sets a standard for nation-states to strive for in their conduct towards one another. According to Rawls two types of people satisfy the necessary threshold of legitimacy, that is, a ‘decent’ consultation hierarchy for ‘decent’ peoples and a ‘reasonable’ consultation hierarchy for ‘liberal’ peoples. The introduction of a ‘decent’ consultation hierarchy effectively lowers the minimum threshold of legitimacy in comparison to Rawls’

¹²⁴ Rawls 1999, p. 37

¹²⁵ Rawls 1999, p. 37

¹²⁶ Rawls 1999, p. 38

previous work. Rawls argues that in extending the theory of justice to the global domain both 'decent' peoples and liberal peoples would agree to the same eight principles to govern their conduct towards each other. Rawls' extension of his theory is not without criticism, however. The following chapter examines the most controversial elements of *The Law of Peoples* and the lines of argument Rawls provides for its deviations from justice as fairness.

4.2. *The Law of Peoples and the cosmopolitan perspective*

If we assume that Rawls' previous argument for justice as fairness is conclusive (at least for the domestic context), then the burden of proof lies with Rawls for the deviations he makes from it in *The Law of Peoples*. In the twenty years between the publication of *A Theory of Justice* and *The Law of Peoples*, authors such as Beitz and Pogge¹²⁷ attempted to extend Rawls' ideas to the global domain and were unpleasantly surprised by Rawls' departure from many of the ideas that were central to *A Theory of Justice*. In this section, some of *The Law of Peoples'* most controversial deviations from Rawls' previous theory will be discussed, as well as the four mutually compatible lines of argument that are offered to support them.

Possibly the most controversial element of *The Law of Peoples* is the fact that it envisages peoples, rather than individuals, as the object of justice and, consequently, as the parties in the original position at the global level. Many authors, including Tan and Pettit, have tried to unravel the assumptions that Rawls makes about the nature of societies that support his contested position, or as Pettit describes it, Rawls' "ontology of peoples"¹²⁸. According to Tan 'peoples' in Rawls' theory are to be understood as idealized nation-states. Peoples as nation-states are twice idealized in this sense, as they possess both a moral and a

¹²⁷ Beitz 1971, Pogge 1990

¹²⁸ Pettit 2006, p. 38

cultural character¹²⁹. By ascribing a moral character to peoples, Rawls assumes that peoples are capable of moral agency in a way that parallels the psychology of an individual moral agent and as such can be argued to rely on a fallacy of composition (as previously mentioned and) as I will show below.

In Rawls' theory, a government is regarded as the "political organization"¹³⁰ as well as the "representative and effective agent of a people"¹³¹ in the international domain. According to Pettit, a people in Rawls' theory "will exist as an agent on the domestic and international fronts [...] only if the government acts appropriately in its representative role [...] if the government acts *ultra vires*, then the people are no longer present, no longer represented, in what is said or done"¹³². This means that when members of any given (well-ordered) society come together, in the (imagined) first original position, or when they choose their government and justify their claims towards one another through public reason, their rational motives are channeled into reasonable motives *towards one another*, satisfying the principle of reciprocity only amongst themselves.

Since no parties outside of the bordered society take part in the *first* original position or are regarded by Rawls to be parties to which the bounds of public reason apply, rational motives are not channeled into reasonable motives when it comes to dealing with those outside of the nation's borders. In contemporary democracies, this self-serving inclination is evident in the behavior of various parties that constitute the government since they will only need to justify their (previously exercised as well as proposed) policies to their national constituencies. As a result, governments of well-ordered peoples have no reason to act reasonably (as opposed to rationally) in the international domain. Even if a government were to act on the basis of reasonable motives in the international

¹²⁹ Tan 2006, pp. 77-79

¹³⁰ Rawls 1999, p. 26

¹³¹ Rawls 1999, p. 38

¹³² Pettit 2006, p. 43

domain, it could be said to act *ultra vires* (beyond its powers) and therefore could no longer be regarded as the representative of a people. In fact, in Pettit's understanding of Rawls, a representative government is constitutive for a people and if a government acts *ultra vires* it would mean that a 'people' would cease to exist as such.

A related problem occurs with one of the principles that Rawls proposes in *The Law of Peoples*, which specifies the duty of peoples to "assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime"¹³³. The principle has been criticized for not having sufficient support within the international order, as well as within Rawls' own theory. Admittedly, it would truly be a remarkable sign of altruism, if such a principle would be adopted by rational parties using veil of ignorance reasoning in an original position at the *second* level in which peoples living under unfavorable conditions (or are otherwise not well-ordered) do not partake.

These observations help support the argument that Rawls commits a fallacy of composition in the analogy between the capacity of 'peoples' to act on 'reasonable' grounds and the capacity of individuals to act on 'reasonable' grounds (by exercising their moral character for political purposes). The ontology of 'peoples' is therefore at odds with the basic conditions for specifying a realistic utopia; namely *taking men as they are and laws as they might be*. Throughout chapter 5, the defects in Rawls' argument are exposed that undermine the realization of the motive that is reflected by this principle; additionally, an alternative way of looking at this issue is provided that may be more just.

Another notorious principle that Rawls prescribes is that peoples are to honor human rights, and more specifically, what he takes to be as the honored human rights. Most notably, Rawls rejects or limits the inclusion of what have

¹³³ Rawls 1999, p. 37

been called 'liberal' rights, namely the *equal* liberty of conscience, freedom of religion and thought¹³⁴ and political representation. According to Buchanan, there are four mutually compatible lines of argument that together support Rawls' argument for *The Law of Peoples* and his account of human rights therein. Buchanan distinguishes them as the Political Conception Argument, the Associationist Argument, the Cooperation Argument and the Functionalist Argument¹³⁵.

The Political Conception Argument aligns itself with the previously made distinction between comprehensives (moral) doctrines and political liberalism. In contrast to the dominant view of philosophy and human rights theory, Rawls takes this distinction to mean that human rights cannot be grounded in common characteristics such as moral and intellectual powers or interests of human beings because they could *reasonably* be rejected as parochial by 'decent' hierarchical peoples¹³⁶. As Buchanan underlines, there is nothing parochial about (securing) common human interests if they indeed exist, and establishes that there are common human interests that transcend particular societies, cultures and doctrines such as avoiding torture or violent death and having enough food to eat¹³⁷.

The Associationist Argument plays a crucial role in Rawls' later work in general and in *The Law of Peoples* in particular. Rawls states that within an associationist society "persons [are seen] first as members of groups"¹³⁸, which is thought to mean that there is no more "fundamental conception of an individual's good that is not tied to her being a member of this or that group within society"¹³⁹. Furthermore, Rawls regards it as *intolerant* to impose anything including human rights upon such a society, if it can reject the imposition on

¹³⁴ Rawls 1999, p. 65

¹³⁵ Buchanan 2006, pp. 151-152

¹³⁶ Rawls 2002, p. 68

¹³⁷ Buchanan 2006, p. 159

¹³⁸ Rawls 1999, p. 68

¹³⁹ Buchanan 2006, p. 157

reasonable grounds. This claim that liberal toleration extends to these non-liberal societies is one of the more controversial claims in *The Law of Peoples* and deals with the deep-rooted question how to balance individual liberty and toleration of diversity (more specifically, the intolerant)¹⁴⁰. In order to evaluate Rawls' argument adequately, it is necessary to specify the bounds of tolerance as well as what these bounds imply for what constitutes (un)reasonable rejection. This question will be returned to in more detail in chapter 5.4.

The Cooperation Argument is Rawls' attempt to free human rights from their moral content by interpreting them as "necessary conditions of any system of social cooperation"¹⁴¹ and, consequently, derives them from the idea of cooperation. Buchanan breaks down the argument as follows: if a society is regarded as a cooperative association from the perspective of *The Law of Peoples*, it is immune from intervention. For a society to be regarded as a cooperative association, and not based on force, it needs to exemplify a common good conception of justice. In order to do this, a society needs to respect Rawls' list of human rights. The rights themselves are constructed in such a way that if any given society respects them they are immune from external intervention. Accordingly, Rawls sketches a very limited list of human rights whose violation gives rise to the possibility (arguably even the political duty) of intervention¹⁴².

An argument along these lines faces several problems, for instance, that human rights that are derived from this view are merely instrumental, that is, that they are necessary to prevent intervention in any given society. This contrasts with our considered convictions about what human rights are and why they matter. The Cooperation Argument in fact collapses into a (peculiar) conception of basic human interests, according to Buchanan. The significance of the difference between a scheme of cooperation and a command system based on force must be explained in terms of how it affects human beings, unless Rawls is

¹⁴⁰ Tan 2006, p. 76

¹⁴¹ Rawls 1999, p. 68

¹⁴² Buchanan 2006, p. 163

interpreted as saying that protecting human rights matters only instrumentally insofar as they guarantee that a *society* has a certain characteristic for its own sake rather than for how it affects human beings¹⁴³.

Lastly, the Functionalist Argument illustrates the role Rawls envisions for human rights. According to Rawls, human rights are those rights that can provide grounds for external intervention¹⁴⁴. It is important to recall here that, for Rawls, the second original position is meant to determine the *foreign policy* of a liberal democracy. By regarding *The Law of Peoples* as the articulation of a foreign policy, and by correspondingly tying together the concept (of the violation) of human rights and external intervention, Rawls fails to express a distinction between *making* a judgment and *acting* on a judgment. This inadvertence fails to recognize that (military) intervention is not necessarily the best way to protect human rights or even a permissible course of action depending on the circumstances of the case¹⁴⁵. Furthermore, the rights excluded from Rawls' list of human rights include the equal liberty of conscience. Given Rawls' perspective on the function of human rights, it is not surprising that both the number and content of human rights is minimal. An expansion of the human rights list to include *equal* rights and liberties would provide direct grounds for external (ultimately military) intervention in associationist societies by liberal peoples. This observation helps to explain Rawls' insistence on excluding equal rights and liberties from his human rights account, as from his perspective violations of a Law of Peoples ultimately provide grounds for just war.

In contrast, the aim of a cosmopolitan theory of justice would not be to formulate a foreign policy but rather to formulate a political theory of right for the global level. Within such a theory, as well as in the adaptation of its principles to an appropriate institutional cosmopolitan framework, the important distinction between making a judgment and acting on a judgment could be recognized to

¹⁴³ Buchanan 2006, p. 158

¹⁴⁴ Rawls 1999, p. 27, 42, 79. See also Buchanan 2006, p. 165

¹⁴⁵ Tan, 2006, p. 91

avoid the risks over over-intervention, while preserving the possibility of external intervention in the face of massive violations of human rights or genocide.

In this section, the most controversial elements of *The Law of Peoples* were discussed, as well as the lines of argument that support Rawls' deviations from his domestic application of justice as fairness. Most notably, the choice of peoples over individuals for the second original position as well as Rawls' corresponding ontology of peoples was examined. In this context, I argued that since no parties outside of a bordered society take place in the *first* original position, there is no reason to assume that a government has a capacity analogous to a moral person to act reasonably (as opposed to rationally) in the international domain. Moreover, since only 'decent' and liberal peoples take part in the *second* original position, there is no reason to assume that these peoples would agree upon a duty to assist peoples living under unfavorable conditions. This means that the assumed parallel between the moral agency of an individual moral agent and the moral character of a "people" is flawed, at least in the way that the concept of peoples is used in *The Law of Peoples*.

Furthermore, four mutually compatible lines of argument in *The Law of Peoples* were discussed, that support Rawls' deviations from his previous theory and for his account of human rights. Both the Political Conception and the Associationist Argument are meant to show that the specification of common human characteristics for the sake of a theory of justice or for an account of human rights could *reasonably* be rejected by associationist societies and is therefore *intolerant*. However, this idea that underlies both arguments is disputed throughout chapter 5 and in the chapters 5.4 and 6.1 more specifically.

The Argument from Cooperation and the Functionalist Argument are meant to provide an alternative basis for a theory of justice and an account of human rights within the international domain. With regard to the Argument from Cooperation, it was pointed out that the instrumental role Rawls ascribes to

human rights stands in stark contrast to our 'considered moral beliefs' in regard to human rights. Furthermore, it was argued that human rights cannot convincingly be accounted for independently of how they affect human beings. The Functionalist Argument is grounded in a peculiar notion of the role of human rights, that is, as a list of rights whose violation give rise to grounds for external intervention. The argument fails to make any distinction between making a judgment and acting on a judgment. This failure can be explained in the light of the fact that Rawls regards the second original position as a way to articulate the foreign policy of a (liberal) people.

Given the problems that were described with *The Law of Peoples* and the lines of argument that Rawls provided for its deviations from justice as fairness, one can ask whether a cosmopolitan interpretation of Rawls' theory of justice as fairness can serve as a reasonable alternative for specifying a framework for global governance. Thus, the next chapter examines which conceptions contained in justice as fairness prevent a global application of the theory and whether this limitation of its scope is merited in light of the foundational commitments of a political theory of justice.

5. Global governance within the framework of justice as fairness

This chapter examines the universality of justice as fairness as a political theory of justice. Rawls' specification of 'fundamental ideas' into 'particular conceptions' within *Justice as Fairness: A Restatement*, reflects his rejection of a cosmopolitan application of his theory of justice. This specification of the fundamental ideas, that bars a cosmopolitan application of the theory, is evaluated in light of the requirement for moral and political philosophy of first principles to be general and universal, which Rawls affirms. Furthermore, the specification of the principles is discussed in light of the other foundational commitments of a political theory of justice, most notably, its nature as a free-standing view and its commitment to equality and reasonability. If it is conceded that the specification of fundamental ideas in the Rawls' theory of justice unwarrantedly narrows the scope of its application, the implications of the theory of justice as fairness could have a much wider scope than Rawls himself originally anticipated

5.1. Justice as fairness and the cosmopolitan perspective

In *Justice as Fairness: A Restatement*, Rawls seeks to construct a purely political conception of justice. He contrasts his political conception of justice with conceptions of justice that originate from comprehensive moral doctrines, so that his theory operates at a higher level - above the parties, so to speak. According to Rawls, his theory of justice as fairness is the path to justice for all (who are free) in the light of a number of facts that he calls the circumstances of justice.

Since the political theory of justice as fairness is framed to operate at a higher level of abstraction and irrespective of any particular comprehensive moral doctrine, one would assume that its maxims are universal under the condition that it applies to human beings who are free to form and revise their own conception of the good according to which they ascribe value within their own lives. Unless a convincing argument is provided from within a theory to hold

otherwise, the universality of a theory is a formal constraint (or at least regarded as such for theories rooted in Kant's philosophy¹⁴⁶, of which Rawls' theory of justice as fairness is an example). On the issue of the universality of his theory, Rawls states the following:

[I]t is a commonplace of moral philosophy to require first principles to be general and universal. Principles are general when it is possible to state them without the use of proper names or rigged definite descriptions. They are universal when they can be applied without inconsistency or self-defeating incoherence *to all moral agents*, in our case, *to all citizens in the society in question* [...] citizens are represented solely as free and equal persons [in the original position, thus] by situating the parties symmetrically, the original position respects the basic precept of formal equality, or Sidgwick's principle of equity: those similar in all relevant respects are to be treated similarly. With this precept satisfied, the original position is fair.¹⁴⁷ [italics added]

The (italicized) phrase regarding the universality of Rawls' theory of justice begs the question whether the terms 'citizens' and 'society' are 'proper names' or 'rigged definite descriptions' and whether the principles of justice can be applied to them without 'inconsistency or self-defeating incoherence'. At first glance it appears that the move from the term 'all moral agents' to the term 'all citizens' without further argument relies on committing a logical fallacy of equivocation. This fallacy occurs "when a word with two or more meanings is used in the development of a particular argument ... [it] occurs particularly in arguments involving words that have a multiplicity of meanings"¹⁴⁸. In order to determine whether a fallacy is committed, it is necessary "to give accurate and specific

¹⁴⁶ Sypnowich 2006, p. 59

¹⁴⁷ Rawls 2001, p. 87

¹⁴⁸ Huber 2006, p. 164

definitions of terms, and carefully [examine if] in one place the definition of the terms was different from the definition in another"¹⁴⁹. The subsequent section therefore carefully examines the way in which Rawls specifies the 'fundamental idea' of free and equal persons into a 'particular conception' of the citizen.

5.2. The conception of the person within Justice as Fairness

In section 7 of *Justice as Fairness: A Restatement*, Rawls develops the 'fundamental idea' of free and equal persons into a 'particular conception' of the citizen. In this paragraph Rawls starts from the notion that persons generally have what he calls "two moral powers". The first is the *capacity for a sense of justice*, which is defined as the capacity "to understand, to apply and to act from [...] the principles of political justice that specify the fair terms of social cooperation"¹⁵⁰. The second is the *capacity for a conception of the good*, which is defined as the capacity "to have, to revise, and rationally to pursue a conception of the good"¹⁵¹. Rawls adds that "in saying that persons are regarded as having the two moral powers, we are saying that they have the requisite capacities not only to engage in mutually beneficial social cooperation over a complete life but also to be moved to honor its fair terms for their own sake. In *A Theory of Justice*, these two powers are taken as defining "*moral persons*"¹⁵² [italics added]. In *Justice as Fairness: A Restatement*, Rawls states that "to characterize the person, we must add to these concepts those used to formulate the power of reason, inference, and judgment". Taken together these moral powers are regarded by Rawls "as the basis of equality"¹⁵³.

After the moral person (which is generally regarded as encompassed by the broader notion of moral agent, which may or may not include further moral

¹⁴⁹ Huber 2006, p. 164

¹⁵⁰ Rawls 2001, pp. 18-19

¹⁵¹ Rawls 2001, p. 19

¹⁵² Rawls 2001, p. 19

¹⁵³ Rawls 2001, pp. 20-21

agents such as groups or other species) is defined, Rawls' argument takes a remarkable turn when he stresses that the "idea of the person, when specified into a conception of the person, belongs to a political conception [which means that it] is meant as both normative and political, not metaphysical or psychological"¹⁵⁴ and that "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"¹⁵⁵. While it is commendable that for the purpose of political theory, Rawls aims to define the person independently of metaphysical or psychological influences, it is unclear why said definition should be normative as opposed to descriptive or positive.

According to Rawls, the normative and political content of the concept of a *person* can be worked up from "the way [in which] *citizens* are regarded in the public political culture of a democratic society, in its basic political texts (constitutions and declarations of human rights)"¹⁵⁶ [italics added]. One can question the ease with which Rawls moves from the concept of a 'person' to a 'citizen' here and object on logical grounds that the moral equality of *persons qua persons* cannot support an extension of the theory to the moral equality of *persons qua citizens* (even if it could support an extension to the moral equality of *citizens qua persons*). In moving from the fundamental moral equality of a 'person' (as a person) to the fundamental equality of a (person as a) 'citizen' in Justice as Fairness, a fallacy of equivocation¹⁵⁷ is therefore arguably committed.

Given Rawls' aim of justice as fairness to provide a political theory of justice, the choice for a normative basis over a positive (or descriptive) basis for the conception of the person is somewhat puzzling. In order to understand this choice, one has to take into account the role that Rawls envisages for the concept

¹⁵⁴ Rawls 2001, p. 19

¹⁵⁵ Rawls 2001, p. 24

¹⁵⁶ Rawls 2001, p. 19

¹⁵⁷ This *fallacy of equivocation* is committed when different meanings of the same word(s) are used in different senses in the same context.

of the person, namely, “[that] in specifying the central organizing idea of society as a fair system of cooperation, we use the companion idea of free and equal persons as those who can play the role of fully cooperating members”¹⁵⁸. In other words, the conception of the person in justice as fairness is tailored to and limited by the pre-existing (central organizing) idea of society as a fair system of cooperation. In doing so, Rawls does as many liberal theories have done before him, according to Black: “what begins as a theory about the moral equality of *persons* typically ends up as a theory of the moral equality of *citizens*”¹⁵⁹.

In order to determine whether the specification of the idea of free and equal persons into a particular conception of the citizen oversteps the boundaries of a logical argument, in that it relies on a fallacy of equivocation, it is necessary to examine if the corresponding limitation of the central organizing idea of society as a fair system of cooperation is sufficiently supported. Accordingly, the following section therefore examines whether the specification of the central organizing idea of society as a fair system of cooperation into the particular conception of a liberal democratic nation-state is warranted.

5.3. The conception of a society, a community, a people and the state

The idea of society as a fair system of cooperation over time from one generation to the next is the most fundamental idea in the conception of justice as fairness¹⁶⁰, and is therefore used as the central organizing idea. The role of the principles of justice (as part of a political conception of justice) “is to specify the fair terms [for this system of] social cooperation”¹⁶¹ between free and equal persons. Together, they provide a response to what Rawls regards as the fundamental question of political philosophy for a constitutional democratic

¹⁵⁸ Rawls 2001, p. 24

¹⁵⁹ Kymlicka 2002, p. 254

¹⁶⁰ Rawls 2001, p. 5

¹⁶¹ Rawls 2001, p. 7

regime: "what is the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens regarded as free and equal and as both reasonable and rational, and ... as normal and fully cooperating members of society over a complete life, from one generation to the next"¹⁶².

Yet, what constitutes a society in this sense according to Rawls? First, a clarification needs to be made between the terms 'society' and 'community', in fact Rawls states that it is essential to distinguish between the idea of a democratic political society and that of a(n ethical) community. Rawls defines a community as a "body of persons united in affirming the same comprehensive or partially comprehensive, doctrine"¹⁶³, which he contrast with a society, as traditionally conceived, in the light of the 'fact of reasonable pluralism' conjoined with the 'fact of oppression' and the incompatibility with basic democratic liberties of the latter. A democratic society as a political society explicitly excludes the possibility of a 'confessional' (or associationist) society, which is a consequence of "taking the moral powers as the basis of political equality"¹⁶⁴. Having made the distinction between a (democratic) 'society' and a 'community', Rawls employs the term 'society' as synonymous for a democratic nation-state for the purpose of the theory of justice.

Rawls' choice to both start and limit the inquiry to 'society' in this particular sense is explained in §5 of *Justice as Fairness*, where Rawls states that:

[W]e shall not discuss the important question of the just relation between peoples, nor how the extension of justice as fairness to these relations illustrates the way in which it is suitably universal. I assume Kant's view ("Perpetual Peace" (1795)) is correct and that a world government would be either an oppressive global despotism or a fragile empire torn by frequent civil wars as separate regions and cultures tried to win their

¹⁶² Rawls 2001, pp. 7-8

¹⁶³ Rawls 2001, p. 21

¹⁶⁴ Rawls 2001, p. 21

political autonomy ... A just world order is perhaps best seen as a society of peoples, each people maintaining a well-ordered and decent political (domestic) regime, not necessarily democratic but fully respecting basic human rights.¹⁶⁵

Consequently Rawls postpones the question of justice between peoples until:

[W]e have an account of political justice for a well-ordered democratic society. Observe, though, that beginning with the justice of the basic structure does not imply that we cannot revise our account for a democratic society ... in view of what justice between peoples turns out to require. The two parts of a more complete political conception ... can be adjusted to each other in the course of working them out.¹⁶⁶

The fact that Rawls regards the international community as a society of peoples is an odd feature of his vision of and argument for the appropriate scope of his theory of justice, especially given the distinction that he has made between a society and a community. Even though the term 'peoples' is introduced as a third and distinct term, by regarding the Westphalian system of nation-states ('societies') as a society (presumably in the sense of a collection) of 'peoples' Rawls equates the concepts 'societies' and 'peoples'.

This, in turn, implies that either 'people' does not equate with 'community' or that the distinction between 'society' and 'community' does not apply outside the context of a democratic regime. Both the content of the concept 'people' in ordinary speech as well as the way in which Rawls utilizes the term 'people' in his theory, seem to imply that a 'people' are to be regarded as a 'community' united in affirming a common good view of justice, at least outside the specific context

¹⁶⁵ Rawls 2001, p. 13

¹⁶⁶ Rawls 2001, p. 14

of a democratic society. Presumably this means that Rawls regards the idea that an associationist people “[affirm] the same comprehensive or partially comprehensive, doctrine¹⁶⁷” (as a community), as well as a corresponding common good view of justice as the basis for why such a nation (society) does not necessarily have to be a democracy.

Previously in this thesis, it was argued that the specification of the fundamental idea of free and equal persons into a particular conception of the citizen is tailored to and limited by their ascribed role as members of the central organizing idea of society as a fair system of cooperation. Correspondingly, Rawls restricts the application of this central organizing idea and consequently the theory of justice to liberal democratic societies, because he believes a broader application of the idea would fail express ‘due toleration’ for other acceptable of ordering society in general and that of associationist societies more specifically¹⁶⁸.

In this section, multiple ideas and conceptions of social cooperation that tie into the central organizing idea were discussed, most notably, a society (in the sense of a nation-state), a community and a people. Rawls makes an explicit distinction between the idea of a democratic society and that of a(n ethical) community in the light of reasonable pluralism and political legitimacy. In characterizing the international community as a society of peoples, Rawls equates the borders of the concepts of societies and peoples, if the theory is to have any practical application.

The principle of political legitimacy follows from two facts, that is reasonable pluralism and the fact that political power is regarded as the collective power of free and equal citizens¹⁶⁹. If *any* society (nation-state) and the corresponding idea of a people, is regarded as distinct from a(n ethical) community, then the (‘liberal’) principle of political legitimacy extends equally to

¹⁶⁷ Rawls 2001, p. 21

¹⁶⁸ Rawls 1999, pp. 59-60

¹⁶⁹ Rawls 2001, p. 40

so-called 'decent' hierarchical societies that are united in affirming a comprehensive doctrine and its corresponding common good view of justice, in the light of these facts. If the principle of political legitimacy extends to every society equally, then the specification of the central organizing idea of society as a system of fair cooperation into the particular conception of a liberal democratic society unwarrantedly narrows the scope of application of the theory of justice as fairness. Moreover this would implicate that the specification of the fundamental idea of free and equal persons into the particular conception of a citizen of a liberal democratic society is insufficiently supported.

The possibility remains that Rawls' distinction between a society and community is limited to democratic liberal societies and does not apply outside this specific context. The question that needs to be answered then, is whether the distinction between the concepts of society and community indeed does not apply outside of the context of a democratic society. Rawls' answer to the question whether any nation-state can be regarded as a(n ethical) community, is bound to a particular conception of toleration. The question touches upon a difficulty with which Rawls has struggled throughout his work, that is the toleration of the intolerant¹⁷⁰, or alternatively what can be required¹⁷⁰ on the basis of democratic principles from undemocratic groups both in the national and international context.

5.4. The conception of toleration and the conception of the self

According to Rawls toleration is both something owed domestically to other individuals as well as owed internationally to other societies. In his theory of justice, the idea of toleration is not limited to nonintervention, but also explicitly

¹⁷⁰ Rawls 1971, p. 34

includes noncriticism¹⁷¹. This, of course, is paradoxical in the sense that it gives the conditions for the acceptance of the unacceptable.

One way to reason about and to practice toleration is to regard it as an *institutional* virtue; in other words, it does not deal directly with personal attitudes of persons versus each other, but operates as principle within the basic structure of society. The institutional principle of toleration limits what individuals may impose on one another through their collective coercive power. Such an understanding of toleration is consistent with Rawls' overall framework¹⁷². When regarded as an institutional virtue, toleration balances the moral powers of being capable of both a conception of the good and a sense of justice when "individuals endorse and support institutional arrangements that protect reasonable ways of life or practices or attitudes that they also find objectionable according to their particular idea of the good"¹⁷³.

Over the years, the content of the conception of toleration changed significantly in Rawls' theory. In his later work, Rawls takes the stance that as long as undemocratic groups respect a minimum subset of democratically orientated principles (such as limited set of human rights), they cannot reasonably be required to uphold a more comprehensive set of democratic principles. Within the context of a domestic society, ecclesiastical governance, for example, is not required to be fully democratic, even though the "principles of justice do impose certain essential constraints [namely that they] cannot practice effective intolerance since, as the principles of justice require, public law does not recognize heresy and apostasy as crimes"¹⁷⁴.

Beitz raised the question whether Rawls' deviation from the path he originally set for justice as fairness can be explained in terms of a commitment 'pre-theoretical' notion of toleration. According to Beitz, Rawls takes as a

¹⁷¹ Tan 2006, p. 81

¹⁷² Tan 2006, p. 81

¹⁷³ Tan 2006, p. 82

¹⁷⁴ Rawls 2001, p. 93, p. 164

desideratum the idea that associationist societies deserve toleration as a fixed point that any theory of justice has to accommodate. As Beitz points out, however, the conception of toleration is embedded in the theory of justice and, accordingly, justice should set the limits of toleration and not the other way around¹⁷⁵. Associationist or 'decent' societies are, by definition, governed according to a particular comprehensive moral doctrine and a corresponding common good view of justice. From the perspective of a domestic application of political liberalism, the corresponding hierarchical structure is intolerant towards members of an associationist society that affirm conflicting comprehensive moral doctrines. In the subsequent text, the question if associationist societies themselves are nonetheless 'due' toleration in the international domain is reflected upon. This raises the further question if the idea that associationist societies are 'due toleration' fits within a reasonable conception of toleration, which is addressed below.

The core issue of tolerating the intolerant can be traced back to conflicting conceptions of the self and corresponding questions regarding the freedom of conscience. Liberalism is sometimes regarded as "an extension of the principle of religious tolerance [which in the West] has taken a specific form – that is the idea of individual freedom of conscience"¹⁷⁶. The view of the self that accompanies this idea has been described by Rawls as follows:

[A]s free persons, citizens recognize one another as having the moral power to have a conception of the good. This means that they do not view themselves as inevitably tied to the pursuit of the particular conception of the good and its final ends which they espouse at any given time. Instead, as citizens, they are regarded as, in general, capable of revising and changing this conception on reasonable and rational grounds. Thus it is

¹⁷⁵ Tan 2006, p. 89

Beitz 2000, p. 681

¹⁷⁶ Kymlicka 2002, p. 230

held to be permissible for citizens to stand apart from conception of the good and to survey and assess their various final ends.¹⁷⁷

Communitarians, such as Taylor and Sandel, have objected to Rawls' view of the self on the basis that it disregards the reality that "the self is 'embedded' or 'situated' in existing social practices, that we cannot always stand back and opt out of them"¹⁷⁸. These conflicting views of the self depend on assumptions regarding how people relate to their final ends (of their conceptions of the good). From the liberal perspective, people form their final ends and can rationally revise them; from the communitarian perspective, people discover their final ends and are constituted by them¹⁷⁹. In his later work, Rawls attempts to incorporate the communitarian criticisms, by introducing the concept of 'decent' (associationist, communitarian or confessional) societies as a legitimate alternative to liberal democratic societies.

These two views of the self further clash on questions of dissent, heresy and apostasy; these are all questions, of course, regarding the freedom of conscience. The very existence of dissent, heresy and apostasy presupposes that (religious) beliefs are "seen as subject to revision in accordance with deliberative reason"¹⁸⁰, and their presence is not restricted to liberal societies. If communitarians admit that "the person can re-examine [his] ends – even the ends constitutive of [the] self – then [they] have failed to justify communitarian politics"¹⁸¹. To deny that people can rationally re-examine their final relies on the empirical rejection of the occurrence of dissent, heresy and apostasy in communitarian (associationist) societies.

The idea that 'decent' societies can be regarded as communities united in affirming the same comprehensive moral doctrine and a corresponding common

¹⁷⁷ Kymlicka 2002, p. 215, Rawls 1980, p. 544

¹⁷⁸ Kymlicka 2002, p. 221

¹⁷⁹ Kymlicka 2002, p. 225

¹⁸⁰ Kymlicka 2002, p. 232

¹⁸¹ Kymlicka 2002, p. 227

good view of justice is a remarkable idealization. Nations governed according to Islamic law, such as Iran, are often regarded as the prototype for what Rawls classifies as 'decent' societies (confessional or associationist nation-states). The unrest following the disputed 2009 presidential elections in Iran indicates that conflicting comprehensive doctrines also exist within these societies and that the *fact of reasonable pluralism* is not restricted to democratic societies. In the aftermath of the elections, the Iranian government violently suppressed the peaceful demonstrations against alleged voting fraud. This oppressive use of state power (with its attendant evils) therefore could be seen as necessary to maintain the political unity of the confessional state. This example shows that Rawls' *fact of oppression* does not only characterize societies that are democratic, and, moreover, that dissent is not limited to a liberal democratic society either. Dissent originates from what Rawls calls the 'burdens of judgment'; that is, reasonable disagreement between persons over conceptions of the good. As Tan eloquently states, "To assume away the fact of dissent is to assume away the relevance or 'usefulness' of the subject of justice"¹⁸². The relevance of examples such as that of Iran for the purpose of political theory is underlined by Rawls: "[S]hould the facts of history, supported by the reasoning of political and social thought, show that hierarchical regimes are always, or nearly always, oppressive and deny human rights, the case for liberal democracy is made"¹⁸³.

The theoretical and institutional virtue of toleration has different implications if the subjects worthy of toleration are not regarded as peoples in the sense of idealized nation-states, but as people in the sense of individual human beings. As Kymlicka concludes, "once we agree that individuals are capable of questioning and rejecting the value of the community's way of life, then the attempt to discourage such questioning through a 'politics of the common good'

¹⁸² Tan 2006, p. 85

¹⁸³ Rawls 1999, p. 79

seems an unjustified restriction on people's self-determination"¹⁸⁴. This implies that individuals should be granted a sphere of personal freedom of conscience that allows them to rationally revise their conception of the good *if* they wish to do so. Even though this in itself does not settle the fiercely debated question of how people relate to their final ends, it establishes a margin of individual freedom (autonomy) within which people are free to determine for themselves how they relate to their own ends. Within political liberalism, this margin of individual freedom is protected by the equal right to freedom of conscience and freedom of religion.

The principal reason why Rawls rejects a cosmopolitan interpretation along with a global application of justice as fairness justice in *The Law of Peoples* is because he believes that a theory of justice in which individuals are of ultimate concern (in that they guarantee equal rights and liberties to individuals) is something to which 'decent' non-liberal societies could *reasonably* object. According to Rawls, a cosmopolitan application of his theory of justice as fairness would "fail to express *due toleration* for other acceptable ways (if such there are as I assume) of ordering society"¹⁸⁵ [italics added]. Rawls states that this use of toleration in the international domain is analogous to the "political liberal ideal of tolerating non-liberal but reasonable [...] comprehensive views within a democratic society"¹⁸⁶.

The supposed analogy between Rawls' domestic and international application of the concept of reasonable toleration is skewed. The inconsistency in the application that exists within *The Law of Peoples* becomes apparent when Rawls provides his account of public reason for a domestic society:

¹⁸⁴ Kymlicka 2002, p. 228

¹⁸⁵ Rawls 1999, p. 59

¹⁸⁶ Tan 2006, p. 88

*[A]ll reasonable doctrines affirm [...] a society with its corresponding political institutions: equal basic rights and liberties for all citizens including liberty of conscience and the freedom of religion [...] comprehensive doctrines that cannot support such a democratic society are not reasonable.*¹⁸⁷ [italics added]

If the reasonableness of a (comprehensive moral) doctrine depends on the question whether or not it supports equal basic rights and liberties (including the liberty of conscience) within a domestic society, so too should the reasonableness of a (comprehensive moral) doctrine in the international domain.

Correspondingly, when a (comprehensive moral) doctrine does not affirm the equal liberty of conscience it should therefore be qualified as unreasonable from the perspective of political liberalism regardless of the level where the dilemma occurs. When a society is governed according to an *unreasonable* (comprehensive moral) doctrine and a corresponding common good view of justice, it cannot object to the obligation to affirm equal rights and liberties on *reasonable* grounds, nor is it 'due toleration' in this regard.

In defense of Rawls, it must be noted that he does attempt to provide room for dissent in the face of pluralism, even within what he calls 'decent' societies. Rawls envisions that within such a society, citizens would be able to express political dissent through their group's representatives and that all government officials have a corresponding duty to "take dissent seriously"¹⁸⁸ as well as to give a conscientious reply to it as long as dissent "stays within the basic framework of the common good idea of justice"¹⁸⁹. According to Rawls, failing to take dissent seriously would mean that "we would have not a decent consultation hierarchy, but a paternalistic regime"¹⁹⁰.

¹⁸⁷ Rawls 1999, pp. 172-173

¹⁸⁸ Rawls 1999, p. 72

¹⁸⁹ Rawls 1999, p. 72

¹⁹⁰ Rawls 1999, p. 72

A conflict occurs if citizens within such a regime want to exercise dissent against the basic framework of the society that they consider unjust. A contemporary example of such dissent includes the struggle of women who want to challenge their subordinate political position so that they can be represented equally within the political system. Similarly, the struggle of minority groups in general for equal (political) rights around the world is far from complete. By theoretically barring this type of dissent in associationist societies, Rawls undermines the position of those who strive for their political representation as free and equal members of society, which is at the core of justice as fairness. Additionally, this effectively bars the possibility to move from a 'decent' society to a higher threshold of legitimacy (a 'reasonable' society) by political means. Associationist regimes that do not allow this type of dissent, that do not affirm the equal right to liberty of conscience and political representation are not 'taking dissent seriously'. Therefore the consultation hierarchy of associationist societies is not 'decent', let alone 'reasonable', and should be regarded as paternalistic regimes without a sufficiently legitimate consultation hierarchy from the perspective of political liberalism.

This section addressed the paradoxical nature of the conception of toleration as it deals with the acceptance of the unacceptable. Toleration can be realized by regarding it as an institutional virtue that limits what individuals may impose on each other through their collective power. Since the concept of toleration is embedded in the theory of justice, the question must be raised whether the idea that associationist (or alternatively 'decent', communitarian or confessional) societies are 'due toleration' fits within a reasonable conception of toleration.

Two conflicting conceptions of the self were discussed, since they play an important role in the specification of the conception of toleration. It was argued that the very existence of the notions of dissent, heresy and apostasy

presupposes that even final ends that are thought to be constitutive of the self can be revised on reasonable and rational grounds. Furthermore, it was suggested that the occurrence of dissent is neither tied to any specific type of society, nor are the facts of pluralism and oppression, and that they extend to 'decent' societies as well. If it is conceded that individuals can revise their final ends, then enforcing politics of the common good (as exemplified in 'decent' societies) according to one particular comprehensive moral doctrine cannot be justified.

Subsequently, the principal reason why Rawls rejects a cosmopolitan interpretation of justice as fairness was reflected upon. Rawls believes that a broader application of justice as fairness, which guarantees equal rights and liberties and thereby takes persons as the unit of ultimate concern, would fail to express 'due toleration' to 'decent' societies because they could 'reasonably' object to its application. It was argued that the supposed analogy between the domestic and international application of the conception of toleration is skewed. If all reasonable (comprehensive moral) doctrines need to affirm equal rights and liberties, including the liberty of conscience and political representation, in order to be reasonable on the domestic level, so should (comprehensive moral) doctrines on the international level from the perspective of political liberalism.

When measured against the standard of justice in the form of a reasonable conception of toleration, 'decent' societies are 'unreasonable' in their denial of the equality of liberty of conscience and of political representation. A society that does not affirm equal rights and liberties (such as the equal right to liberty of conscience and political representation) is not exercising its political power legitimately and therefore is not 'due toleration' in this regard.

Even though Rawls aims to provide some room for dissent in 'decent' societies, the dissent he envisions is specifically limited to stay within the basic framework of a common good conception of justice. This bars persons and groups from challenging their subordinate political position within 'decent' societies, and

therefore bars the possibility of moving to a higher level of legitimacy (a 'reasonable' consultation hierarchy) by political means within the framework of justice. When dissent against the political structure of a 'decent' society is explicitly barred, the concept of dissent is not taken seriously and consequently such a society fails to uphold even the lower threshold of legitimacy (a 'decent' consultation hierarchy) that Rawls introduced in *The Law of Peoples*.

Given the occurrence of dissent as well as the fact of pluralism and of oppression that characterize even associationist societies, it was argued that it is a mistake (or at least an unwarranted idealization) to regard these societies as ethical communities. As demonstrated, this means that the principle of political legitimacy extends to these societies equally as it does to liberal democratic societies. The principle of legitimacy specifies that political power is legitimate only when it is exercised in accordance with "a constitution [...] the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason"¹⁹¹.

The theory of justice as fairness specifies the framework (for which a constitution serves as the backbone) within which political power can be exercised legitimately. The conclusion that associationist societies do not have a sufficiently legitimate political structure refutes Rawls' principal objection to a cosmopolitan application of his theory of justice. If the principle of political legitimacy extends to every society equally, then the specification of the central organizing idea of society as a system of fair cooperation into a particular conception of a liberal democratic society unwarrantedly narrows the scope of application of the theory of justice as fairness. Moreover, this means that the corresponding specification of the fundamental idea of free and equal persons into a particular conception of a citizen of a liberal democratic society is insufficiently supported. This, in turn,

¹⁹¹ Rawls 2001, p. 41

means that the implications of Justice as Fairness could have a much wider scope than Rawls' himself originally anticipated, as I will show in the next chapter.

6. Towards a cosmopolitan conception of justice as fairness

Having argued that the scope of justice as fairness is unwarrantedly narrowed by the specification of fundamental ideas in *Justice as Fairness: A Restatement*, I will now describe how two fundamental ideas could alternatively be conceived for the specification of conceptions within a cosmopolitan political theory of justice. In the first section, I argue that 'democracy' is not merely an arbitrary mode of government from which the central organizing idea is derived, but that it can be understood as an idea that is parallel to the central organizing idea. In the second section, I will outline two different methods that could serve to specify a cosmopolitan conception of the person.

6.1. *The idea of democracy and the principle of legitimacy*

As we have seen, according to Rawls, the most fundamental idea in justice as fairness, which he thus used as the central organizing idea, is that of society as a fair system of social cooperation over time from one generation to the next¹⁹². Like other fundamental ideas in the theory of justice, the central organizing idea is "worked up [from] the public political culture of a democratic society"¹⁹³. While the public culture of a democratic society thus serves as the *source* of the fundamental ideas in the theory of justice, their *justification* is offered in terms of their reasonableness. Within the theory of justice, Rawls specifies the central organizing idea into a particular conception of a (liberal) democratic nation-state. This section argues that in contrast to its apparent use in Rawls' theory, 'democracy' could be understood as embodying an idea that is parallel to the central organizing idea, as opposed to an arbitrary mode of government from which it is derived. When understood in this sense, the factual existence of a democratic mode of government is no longer regarded as a pre-condition for the applicability of the political theory of justice as fairness.

¹⁹² Rawls 2001, p. 5

¹⁹³ Rawls 2001, p. 5

In *Justice as Fairness: A Restatement*, Rawls states that his theory is “framed for democracy”¹⁹⁴, but it is difficult to interpret this notion as democracy has different meanings to different people. Before moving on to what I can conceive as its two meanings, the etymology is dealt with first. The original meaning can be traced back to its Greek origins; it is a composite of the terms *demos* (people) and *kratos* (power) and therefore is often described as the *power of the people*¹⁹⁵. The core of what democracy entails is parallel to what Rawls calls the principle of legitimacy: “Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason”¹⁹⁶. In other words, the power of any political authority is legitimized by the implicit or hypothetical consent of those who are governed by this power. This is not to say that all citizens must consent to any particular government, but that all citizens can reasonably be expected to consent to the system of government (consisting of all *secondary rules* that are in effect, in Hart’s terminology) itself on the basis that it is *just* (in the familiar sense, as used by Rawls).

In order to test this contention, we have to ask ourselves the *foundational question*: that is, whether we are required to accept the obligations of legitimate law, either because we happen to be citizens of a democracy or because as human beings we recognize that law (understood as our collective coercive power) can only be exercised in accordance with what we deem to be reasonable for whomever is governed by this power to accept as well (as expressed by the criterion of reciprocity). In this context, it is important to note that, at its core, the commitment to democracy in Rawls’ work follows from this conception of political power, and not the other way around. Even though this is never stated

¹⁹⁴ Rawls 2001, p. 39

¹⁹⁵ Ober 2006, p. 1

¹⁹⁶ Rawls 2001, p. 41

explicitly by Rawls, the commitment to the legitimacy of law (even if weakened to the lower threshold of 'decent' rather than 'reasonable') is implicit in his description of the different types of societies in *The Law of Peoples* and, therefore, is logically prior to the concept of democracy in his theory of justice insofar as they are thought to differ.

The term 'democracy' can be interpreted as embodying two different meanings. First and foremost, the 'idea' of democracy embodies the ideal of a system of government within which those who are governed by political power are thought to be the source of this power and are, consequently, the ones to whom the exercise of political power should be justifiable. In this first sense, 'democracy' is on par with Rawls' principle of political legitimacy. The idea of 'democracy' can be understood in this sense as defining 'a fair system of cooperation' within the central organizing idea of society 'as a fair system of cooperation over time from one generation to the next'. Secondly, the term 'democracy' is used (by amongst others Rawls) as a 'particular conception' to describe constitutional liberal nation-states. When used in this sense, the term embodies a basic structure that attempts to legitimize the exercise of political power in a specific way within a specific context. The term democracy, at least in its foundational function to the theory of justice, should be understood in the first sense, because one can always sensibly ask: what constitutional liberal structure is more or the most democratic¹⁹⁷?

A difficulty that would face the theory of justice otherwise, is circumvented when Rawls' commitment to democracy is interpreted in light of the prior commitment to the legitimate exercise of power: since the theory of justice is meant as a theory of right for the specific domain of the political, its aim is to

¹⁹⁷ There is considerable variety between how different constitutional liberal structures attempt to realize the idea of democracy. While they generally share features such as the three-fold division of powers, they differ in how these powers are divided, legitimized and justified (for instance, through their various electoral procedures and checks and balances). Assuming that the goal of these structures is to realize the same ideal (defined as the 'idea' of or alternatively as political legitimacy), they can be compared according to this shared standard.

answer the question of what justice (the right) entails. However, if the theory of justice is merely derived from a description of what *is* (by regarding democracy as an arbitrary fact instead of as the right - or at least the most reasonable - form of government), what could the value of the resulting theory be for the question what *ought* to be?¹⁹⁸ In other words, the theory of right cannot be derived from nor built on the foundation of the concept of democracy, if democracy cannot be defended as being right in itself or by virtue of some other reason. Yet when the term is interpreted as the 'fundamental idea' of democracy, it can be defended as embodying the most *reasonable* institutional structure, as will be shown below.

In order for the theoretical core of the concept of democracy or Rawls' principle of legitimacy to have any practical value, it is inevitable that certain concessions have to be made in the translation of the ideal to a workable practice. For example, this means that the original idea of the collective will of those who are governed is generally translated to that of a majority rule in contemporary democracies. However, given the 'idea' of democracy is the basis for any practical form of democracy, majority rule in itself can hardly be described as sufficient to fulfill this task¹⁹⁹.

There is no universal consensus that democracy is the *right* form of government and it is not the only form of government that is being exercised. On the other hand, ever growing numbers support the claim of the universality of

¹⁹⁸ The problem that is described here is closely related to what is often referred to as the *is-ought* gap and *Hume's Guillotine*. In brief, Hume argued that prescriptive (or normative) statements cannot merely be derived from descriptive statements.

¹⁹⁹ As Amartya Sen notes, the demands of democracy are "complex ... [and] certainly include voting and respect for election results, but it also requires the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment. Even elections can be deeply defective if they occur without the different sides getting an adequate opportunity to present their respective cases, or without the electorate enjoying the freedom to obtain the news and to consider the views of competing protagonists. Democracy is a demanding system, and not just a mechanical condition (like majority rule) taken in isolation". (Sen 1999, p. 5)

democracy. The popular support for democracy cannot be regarded as sufficient to support its claim for universality by itself, because doing so would be an instance of committing the fallacy of the argumentum ad populum²⁰⁰. While in the moral sphere a broadly shared conclusion as such cannot be said to prove anything, when supplemented with arguments it is much harder to deny its relevance, particularly for the political and legal sphere²⁰¹. Within the particular context of political theory (in the form of social contract theorizing) popular support is embedded precisely in this type of reasoning.

A noteworthy attempt to provide *political* arguments for the universal claim of democracy is Amartya Sen's *Democracy as a Universal Value*. Sen provides three different kinds of justifications for this claim. First, Sen argues that political freedom is a part of human freedom in general and that the political and social participation to which democracy gives rise has *intrinsic value* for human beings. Secondly, according to Sen, democracy has *instrumental value* "in enhancing the hearing that people get in expressing and supporting their claims to political attention (including claims of economic needs)"²⁰². In support of this, he observes that "no substantial famine has ever occurred in any independent and democratic country with a relatively free press"²⁰³, especially given that, "famines are easy to prevent if there is a serious effort to do so, and a democratic government, facing elections and criticisms from opposition parties and independent newspapers, cannot help but make such an effort"²⁰⁴. Lastly, Sen points to the *constructive value* of democracy in exchange of information and views, the formation of values and the understanding and clarification of concepts such as needs, right and duties²⁰⁵.

²⁰⁰ Copi, 1982, p. 104

²⁰¹ Brom, 2003, pp. 4-5

²⁰² Sen 1999, pp. 2-5

²⁰³ Sen 1999, p. 4

²⁰⁴ Sen 1999, p. 4

²⁰⁵ Sen 1999, pp. 5-6

According to Sen, over the course of the twentieth century the idea of democracy has been “established as the “normal” form of government to which any nation is entitled – whether in Europe, America, Asia, or Africa”²⁰⁶. In contrast to the nineteenth century, where the discourse focused on the question if any given country was *fit* for democracy, the focus has shifted to a discourse where countries become fit *through* democracy²⁰⁷. Additionally, Sen stipulates that “universal consent is not required for something to be a universal value. Rather, the claim of a universal value is that people anywhere have reason to see it as valuable”²⁰⁸. This line of thought is very much related to Rawls’ implementation of implicit or hypothetical consent throughout the theory of justice. Sen concludes that “while democratic governance is not yet universally practiced, nor indeed uniformly accepted, in the general climate of world opinion, democratic governance has now achieved the status of being taken to be generally right. The ball is very much in the course of those who want to rubbish democracy to provide justification for that rejection”²⁰⁹. In this context, it is noteworthy that even governments that we might view as ‘undemocratic’ tend to go to great lengths to ‘prove’ that they receive popular support for their regimes.

Rawls, remarkably enough, articulates an argument against ‘decent’ associationist societies and adds to the argument for the idea of democracy, when he states that the separation of church (an example of an institution governed according to a comprehensive doctrine) and state is one of the main causes of the strength of democracy and the basis of peace among comprehensive doctrines, both religious and secular²¹⁰. Additionally, Rawls posits the empirical fact that reasonably just liberal democracies do not go to war against one another²¹¹.

²⁰⁶ Sen 1999, p. 2

²⁰⁷ Sen 1999, p. 2

²⁰⁸ Sen 1999, p. 6

²⁰⁹ Sen 1999, p. 2

²¹⁰ Rawls 1999, p. 167

²¹¹ Rawls 1999, p. 51

Furthermore, Rawls explicitly does not deny the possibility that “full democratic and liberal rights are necessary to prevent violations of human rights”²¹².

The argument that Amartya Sen presents for the idea of democracy satisfies the bounds of *public reason*. Public reason is understood as part of the idea of democracy itself²¹³, constituting the form of public justification wherein considerations in terms of right and wrong stemming from comprehensive doctrines are replaced by considerations originating from a shareable politically reasonable standard when ‘citizens’ address one another²¹⁴ (in turn satisfying the principle of reciprocity). As such, public reason establishes the kinds of reasons subjects can invoke when arguing for and justifying their claims within the political realm “when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions”²¹⁵. Public reason thus provides the reasonable framework within which claims related to the legitimate exercise of political power can be addressed, similarly to the function of the original position.

If it is conceded that democracy is to be understood as a fundamental idea of how political power can be exercised legitimately, as opposed to merely an arbitrary mode of government by which we happen to be (or not to be) governed, the theory of justice as fairness can free itself from the arbitrary geospatial constraints to which it has been subjected as a political theory for a particular kind of domestic society. Ideas such as intrinsic reasonableness, society as a fair system of cooperation, the principles of equity and reciprocity as well as companion ideas such as free and equal persons and public reason (all of which Rawls presents as fundamentally tied to a contemporary constitutional liberal

²¹² Rawls 1999, p. 75

²¹³ Rawls 1999, p. 131

²¹⁴ Rawls 1999, p. 171

²¹⁵ Rawls 1999, pp. 165-166

democratic nation-state) could thus serve their respective roles in evaluating any political system that is understood as the collective exercise of coercive power.

Given the existence of a system of global governance that exercises coercive political power over the distribution of rights, liberties and social goods amongst all human beings, this system too can be evaluated directly using the theory of justice as fairness. In evaluating the global political structure from the perspective of a theory that ultimately values the individual's ability to live their life according to his or her own conception of the good, it does not fail to express reasonable tolerance towards 'decent' associationist peoples, as argued in the previous chapter.

The reason for this is in fact twofold. Firstly, in chapter 5.4 we saw that a hierarchical structure of a 'decent' society by definition lacks equality of conscience and equal political participation²¹⁶ and, accordingly, violates the criterion of reciprocity upon which public reason is based²¹⁷. Comprehensive doctrines and their corresponding common good views of justice that cannot satisfy the criterion of reciprocity and its corresponding political institutions, such as equal basic rights and liberties including the liberty of conscience and equal political participation, are politically unreasonable in Rawls' terminology²¹⁸ and should be rejected as such according to the idea of reasonable toleration²¹⁹ from the perspective of political liberalism²²⁰. This refutes Rawls' primary objection against a cosmopolitan interpretation of his theory, namely that such a theory would fail to express 'due' toleration to 'decent' hierarchical peoples²²¹.

Secondly, the case for the preeminence²²² of a reasonably just democratic hierarchical structure over a 'decent' hierarchical structure can be made using

²¹⁶ Rawls 1999, p. 65

²¹⁷ Rawls 1999, p. 157

²¹⁸ Rawls 1999, p. 172

²¹⁹ Rawls 1999, p. 177

²²⁰ Rawls 1999, p. 173

²²¹ Rawls 1999, pp. 59-60

²²² Even though Rawls argues against a cosmopolitan interpretation of his theory, it is noteworthy that he states on various occasions that he believes a liberal

reasons that are compatible with public reason. Unless these reasons supporting the case for democracy can be rebutted through public reasons against it and in favor of another type of structure, they provide the theoretical support for democracy as being generally right, as Sen concludes.

In section 11 of *The Law of Peoples*, Rawls explicitly rejected the previous attempts of philosophers such as Barry, Beitz, Pogge and Richards to formulate a social contract theory from a cosmopolitan perspective, by formulating the following objection to their cosmopolitan endeavors:

[Cosmopolitan theories of justice amount] to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy. On this account, the foreign policy of a liberal people – which it is our concern to elaborate – will be to act gradually to shape all not yet liberal societies in a liberal direction [...] but this foreign policy simply assumes that only a liberal democratic society can be acceptable. Without trying to work out a reasonable liberal Law of Peoples, we cannot know that nonliberal societies cannot be acceptable. The possibility of a global original position does not show that, and we can't merely assume it.²²³

In contrast to Rawls' argument, cosmopolitan theories of justice need not 'simply assume' that only a liberal democratic can be acceptable, or limit their inquiry to defining a 'foreign policy' of a liberal people. Grounded in the fundamental equality and autonomy of human beings, cosmopolitan philosophers could argue for the criterion of reciprocity functioning as a prerequisite for the legitimate exercise of collective coercive political power over persons who share equally in that power, in the same manner that Rawls argues for it in the

constitutional democracy to be "superior" to other forms of society, because it adheres to the higher threshold of legitimacy. (for example Rawls 1999, p. 62)
²²³ Rawls 1999, pp. 82-83

domestic application of his theory and throughout *The Idea of Public Reason Revisited*. The answer to the question whether any given political structure is acceptable, then, rests not on an empty assumption of the superiority of institutional democracies, but on whether political power is reasonably exercised in accordance with our fundamental human equality.

6.2. Towards a cosmopolitan conception of the person

Next to the legitimacy argument provided in the previous section for a wider application of justice as fairness, I will present two methods that could support the construction of a cosmopolitan conception of the person for the purpose of a cosmopolitan interpretation of justice as fairness. As we have seen, in *Justice as Fairness: A Restatement*, the fundamental idea of 'free and equal persons' is specified into the particular conception of 'citizens' who can play the role of fully cooperating members in a (liberal) democratic society. In the previous chapter it was argued that the geospatial constraint embodied in Rawls' conception of the 'citizen' is unwarranted.

When this constraint is removed from the 'particular conception' of the person, what remains is the role of a 'particular conception' of the person in establishing what elements of the idea of the person are politically relevant for specifying a list of primary goods for a theory of justice²²⁴. The conception of the person is therefore entwined with that of 'primary goods' that are defined by Rawls as "what free and equal persons (as specified by the political conception) need as citizens"²²⁵, or more specifically, as the "various social conditions and all-purpose means that are generally necessary to enable [persons] adequately to develop and fully exercise their two moral powers"²²⁶.

²²⁴ Rawls 2001, p. 60

²²⁵ Rawls 2001, p. 60

²²⁶ Rawls 2001, p. 57

Rawls distinguishes two ways to proceed in specifying a list of primary goods: that is, either by looking at the various comprehensive doctrines within a society to specify an index of such goods as striking a fair balance between “what [persons] who affirm the opposing doctrines would need by way of institutional protections and all-purpose means”²²⁷, or by working up a political conception of primary goods in the hope that it can win the support of an overlapping consensus²²⁸. Rawls opts for the second method in *Justice as Fairness: A Restatement* for the specification of the idea of the person as well as the list of primary goods. However, as mentioned in chapter 5.2, this method raises the question whether a ‘normative’ conception is to be preferred over a ‘descriptive’ or ‘positive’ conception (if a specification along these lines is possible).

The content that needs to be ‘worked up’ for the specification of the idea of the person into a particular conception of the person to operate successfully in the theory of justice as fairness, consists of the relevant characteristics of the conception of the person for the specification of the list of primary goods. Correspondingly, in this section two approaches are outlined that could serve to specify the fundamental idea of persons as free and equal persons into a particular conception of the person for the purpose of (making interpersonal comparisons based on the specification of a list of primary goods within) a cosmopolitan political theory of justice.

The first method that could support the construction of a cosmopolitan conception of the person is parallel to the method of ‘working up’ a political conception that Rawls uses in *Justice as Fairness: A Restatement*. According to Rawls, the normative and political content of the concept of a person can be worked up from the way they are “regarded in the public political culture of a democratic society, in its *basic political texts* (*constitutions and declarations of*

²²⁷ Rawls 2001, p. 61

²²⁸ Rawls 2001, p. 61

human rights)”²²⁹ [italics added]. Given the fact that constitutions naturally originate from the political reality of the so-called Westphalian system of states²³⁰, they will tend to provide content for the conception of the person that supports the status quo of their characterization as ‘citizens’. The role that Rawls sees for political philosophy in general and justice as fairness in particular, however, transcends political reality:

[W]e view political philosophy as realistically utopian: that is, as probing the limits of practicable political possibility. Our hope for the future of our society rests on the belief that the social world allows at least a decent political order, so that a reasonable just, though not perfect, democratic regime is possible [...] [T]he limits of the possible are not given by the actual, for we can to a greater or lesser extent change political and social institutions, and much else.²³¹

When declarations of human rights, rather than constitutions, are used to work up the conception of the person, a more inclusive perspective on the conception of the person can be established because these declarations generally have a wider scope of application than constitutions do, considering humanity as a whole.

Out of all the declarations of human rights, the Universal Declaration of Human Rights (UDHR) that was adopted without dissent by the United Nations on December 10, 1948 is arguably the most influential of these declarations (and has been called the most ‘universal’)²³². The first line of the preamble reads “Whereas recognition of the *inherent dignity* and of the *equal and inalienable rights of all*

²²⁹ Rawls 2001, p. 19

²³⁰ Smouts 2001, p. 183

²³¹ Rawls 2001, pp. 4-5

²³² United Nations Human Rights 2009

The Universal Declaration of Human Rights even sets the Guinness World Record for Most Translated Document.

members of the human family is the foundation of *freedom, justice* and peace in the world" [italics added]. Its first article reads "*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" [italics added]. The fact that the UDHR is not a legally binding document²³³ does not negate the purpose that Rawls' envisions for declarations of human rights as providing content for the conception of the person in his theory.

The content that one can derive from (amongst others) the UDHR for a conception of the person for a political theory of justice is noticeably similar to a number of aspects that are part of Rawls' conception of the person as laid out in *Justice as Fairness: A Restatement*. Most notably, both Rawls and the UDHR recognize the inherent human dignity, both underline the fact that persons are free and equal beings and both give some sort of a description of their moral personhood. Rawls and the UDHR differ, however, on the scope of the conception of a person. While the UDHR is aimed at all human beings, Rawls limits the scope of his conception of a person to citizens in democratic nation-states. Throughout the previous chapter, it was argued that this restriction of the scope of application of justice as fairness is unwarranted and, consequently, the conception of the person could be worked up from the more inclusive source of declarations (and treaties) of human rights, rather than from constitutions of nation-states.

Another example of a 'basic political text' that deserves to be mentioned here as a possible source for the specification of a cosmopolitan conception of the person, is the International Criminal Court and the underlying Rome Statute (of the International Criminal Court). For the purpose of the ICC, individual persons are regarded as "the bearers of certain rights under international law, and they

²³³ Although the UDHR is not a legally binding document as such, it defines the meaning of the words 'fundamental freedoms' and 'human rights' in the United Nations Charter. Moreover it has been adopted in or influenced national constitutions since its own adoption, it serves as the foundation of numerous national and international laws and it is (in part) regarded as part of customary law by an increasing number of legal scholars.

can be held responsible for crimes under international law in ways that cut through the shield of state sovereignty²³⁴. This example shows that persons are increasingly regarded as the individual bearers of rights at the global level and could, therefore, be regarded as such for 'working up' a political conception of the person.

The second method that could support the construction of a cosmopolitan conception of the person is based on the possibility that a 'descriptive' or 'positive' cosmopolitan conception of the person could serve to specify an index of primary goods, by striking a fair balance between what persons affirming opposing doctrines would need by way of institutional protections and all-purpose means. This would mean that the conception of the person could be specified in scientific (e.g. biological) terms as a member of the species *Homo Sapiens*²³⁵. From a biological point of view, human beings are very much alike; in fact at the genetic level every human being is 99.9% identical with every other human being (excluding identical twins)²³⁶. The 0.1% accumulated difference is what endows us all with our individuality²³⁷.

²³⁴ Stanford Encyclopedia of Philosophy 2006

²³⁵ Compared to the influential sources of political theory in general and social contract theory in particular, our understanding of ourselves from a biological point of view is fairly recent. Important authors such as Hobbes (1588-1679), Locke (1632-1704), Rousseau (1712-1778) and Kant (1724-1804) who shaped the debate in the political domain, all contemplated their theories before Charles Darwin and Alfred Russel Wallace unveiled their theories of evolution to the world in 1858. The theory of evolution, however, did not gain widespread acceptance until it was unified with what has been called the Modern Synthesis in the 1930s and 1940s. Therefore, it is not surprising that that the philosophical conception of the nature of human beings, and as political subjects specifically, generally does not reflect this scientific reality.

²³⁶ Shannon 2005, p. 16

²³⁷ Over the course of history the tiny and random changes that occur in our DNA, in conjunction with the process of natural selection, resulted in physical traits that were more suitable for local conditions for instance a lighter complexion for people who lived in areas where sunlight was scarce. Some of these superficial physical and biologically tiny changes in our DNA have resulted in what can hardly be described as anything other than grave injustice over the course of human history.

Given our remarkable similarity, which transcends the national and cultural borders that have arisen during the course of human history, it is not very surprising that we roughly share the same physical capabilities. Sen and Nussbaum have defined a specific branch of moral theory (known as the Capabilities Approach) that aims to describe the capabilities that all human beings share. The capabilities that they have described include life, bodily health and integrity, senses, imagination, thought, emotions, practical reason, affiliation, play and control over one's environment in a political and material sense²³⁸. These shared capabilities are not in themselves the culmination of what is to be valued in a human being's life, but are best regarded as the potential material pre-conditions for the realization of one's particular conception of the good. The fact that all human beings share these capabilities, favors a cosmopolitan interpretation of the theory of justice.

Our capabilities both enable and limit how we can act in general and in accordance with our conception of the good in particular and, thus, provide the spectrum of possibilities for human beings. Since all human beings tend to value different things in their lives to different degrees and, hence, tend to have different conceptions of the good, the way in which we (want to) utilize our capabilities will also differ. What we do share as human beings is the spectrum of possibilities within which we can discover or construe our particular conception of the good and, as such, the circumstances that are necessary in order to develop these capabilities are something worth defending. Capabilities in this sense thus set the stage for a meaningful interpretation and specification of the idea of the equality of opportunity in realizing one's conception of the good. Fair equality of opportunity, in turn, is an essential element in Rawlsian political theory as it is explicitly embedded in the second principle of justice.

Even though Rawls and Sen have critically discussed each others particular notions of human capabilities and the proper place for them, it is clear that both

²³⁸ Nussbaum 2002

authors underline the important place of human capabilities within a theory of justice. For Rawls, this means that human capabilities are essential to the specification of his notion of primary goods and to explain their propriety use²³⁹; they are therefore guaranteed a central place in his theory. According to Rawls, embedding human capabilities in the form of primary goods into the specification of the principles of justice in fact may be “as close as we can [come] to a just distribution of Sen’s effective freedoms”²⁴⁰. A ‘descriptive’ or ‘positive’ specification of the idea of free and equal persons into a cosmopolitan conception of the person could thus be realized within the Rawlsian framework by drawing on the work of Sen and Nussbaum in regard to the shared capabilities (or similar work in regard to basic human characteristics or interests) of human beings across national and cultural borders.

Rawls’ response to an attempt to specify the idea of the person in descriptive or positive terms would most likely have been that such a specification would be difficult (if not impossible) to reconcile with the nature of justice as fairness as a political theory. The reasoning behind this objection is that in determining what shared human capabilities (or alternatively characteristics or interests) are politically relevant, *normative* choices need to be made to which associationist societies can *reasonably* object. The second part of the objection has already been argued against, so only the first part of the objection will be discussed further here.

My response to this objection from a cosmopolitan perspective would be that, at least within the Rawlsian framework, it is not necessarily problematic if an attempt to establish a ‘descriptive’ or ‘positive’ conception of the person collapses into a ‘normative’ conception of the person, as long as it can be supported by an overlapping consensus and cannot reasonably be rejected (as Rawls’ own conception of the person in the domestic context is also argued for

²³⁹ Rawls 1999, p. 13

²⁴⁰ Rawls 1999, p. 13

along this line of argument). Perhaps a more elegant response to the objection could be that establishing human capabilities (or alternatively characteristics or interests) is not 'normative' if they indeed exist and are universally shared by all human beings²⁴¹. While there are considerable difficulties involved in establishing *what* human beings share universally, it is perhaps even more difficult to deny that some things *are* shared universally. At the very least, it would be difficult to deny that all human beings rely on water and food for their survival and the realization of their respective conceptions of the good²⁴² and, correspondingly, to argue that this is a 'normative' statement that can 'reasonably' be rejected.

Since the theory of justice as fairness serves to set a free market system within the framework of political and legal institutions²⁴³, further universal human interests (understood as pre-requisites for the realization of human capabilities) could perhaps be specified for a list of primary goods such as the (equality of) opportunity to a job or shelter. As the description of what is 'universally shared' is expanded, however, the risk of 'normative' elements entering the description increases.

One way to deal with this difficulty could be to establish the list of primary goods through public reason (which, as noted, serves the same function as the original position of channeling the rational into the reasonable). In this regard it may be promising to note that empirical research by Frohlich and Oppenheimer has shown that, in a simulated original position, persons throughout a variety of temporal and cultural settings unanimously agreed upon a distributive principle that (in great majority) maximizes the average with a specified floor constraint (a minimum for the worst-off in any given distribution)²⁴⁴. The fact that a floor

²⁴¹ Buchanan 2006, p. 159

²⁴² Even the specification of such a minimalistic idea of what is universally shared between human beings for the purpose of a cosmopolitan political theory of justice could have considerable implications for almost half of the world's population that live in circumstances of 'extreme poverty'.

²⁴³ Rawls 2001, p. 44

²⁴⁴ The experiment was originally conducted at three North American universities, but was repeated in a variety of cultural settings so that the results include

constraint could *reasonably* be agreed upon underlines the possibility that primary goods (that can be understood as the specification of a floor constraint) could similarly be agreed upon. Additionally, the finding that a much less demanding distributive principle of justice is agreed upon in a (simulated) original position than Rawls' specification of the 'difference principle', means that the (rational) resistance to a cosmopolitan application of justice as fairness could be less forceful than its criticism imagine.

A final objection that could be made against a more inclusive conception of the person for a cosmopolitan application of justice as fairness, is the charge that the social distance between persons across national borders is of such a magnitude that the requisite conditions for justice to be realized cannot be supported. In order to answer that charge, I will draw on some of Rawls' final written words first to establish that the bounds of possibility in regard to justice are less narrow than we might imagine²⁴⁵:

No doubt the requisite conditions [for justice] become more difficult to satisfy as societies become larger and the social distance between citizens becomes greater, but these differences, as great and inhibiting as they

preferences from "Manitoba [which] was the home of the only socialist government in North America at the time [and] Poland [which] was under a communist regime". In four experimental designs, 35 out of the 44 groups unanimously chose a principle which maximizes the average with a floor constraint, 7 out of the 44 groups unanimously chose a utilitarian principle. The 'difference principle' was not selected by any group. As the stakes of the distribution increase, the likelihood for a distributive principle that contains a floor constraint to be selected increases accordingly (Frohlich 1987, p. 629).

²⁴⁵ This formulation is based on a famous quote from Rousseau's *Du Contract Social* which was of defining importance for Rawls' specification of what is possible in regard to justice in the idea of a 'realistic utopia'. The original quote reads: "Les bornes du possible dans les choses morales sont moins étroites que nous ne pensons. Ce sont nos faiblesses, nos vices, nos préjugés qui les rétrécissent" and translates to "the bounds of possibility in moral matters are less narrow that we imagine. It is our weaknesses, our vices and our prejudices that confine them".

may be, do not affect the psychological principle [of reasonableness] involved in realizing the good of justice in a well-ordered society.²⁴⁶

In fact, as mentioned previously, a cosmopolitan political theory of justice is not only possible, it is necessary in the face of the collective problems that increasingly arise and need to be solved cooperatively at the global level in the face of globalization. Global problems calling for global solutions include severe poverty, environmental problems as well the lack of proper regulatory institutions to manage the global economy within which all national economies are inescapably situated. In order to defy the prisoner's dilemma in which nation-states find themselves in their multilateral dealings with one another when trying to solve these problems, it is likely that we will see a continuing tendency towards binding decision making procedures at the global level cutting through national sovereignty.

In our attempts to solve these problems that transcend national borders and potentially extend to every human being through supra-national political institutions, we should never fail to recognize our fundamental equality as human beings when exercising political power through these institutions. The social bond that connects us with one another in our political dealings follows from exactly that realization and is, according to Rawls, *constituted* by our "public political commitment to preserve the conditions that [our] equal relation requires"²⁴⁷. Consequently, our social bond is not merely defined (at least not within Rawlsian theory) by our willingness to extend justice to one another, but by the requirement of justice to do so²⁴⁸.

²⁴⁶ Rawls 2001, p. 201

²⁴⁷ Rawls 2001, p. 132

²⁴⁸ Rawls envisions that justice as fairness has a 'vital' educational role in this regard, that is, "the possibility that certain features of a political conception importantly affect the political sociology of the basic institutions that realize it [and that] those who grow in such a society will [...] see themselves as having certain basic rights and liberties, freedoms they can not only claim for themselves but freedoms they must also respect in others" (Rawls 2001, p. 146).

7. Conclusion

The aim of this thesis has been to provide an answer to the question whether a cosmopolitan interpretation of justice as fairness is a reasonable alternative to an application of *The Law of Peoples* at the global level in light of the foundational commitments of a political theory of justice.

Since assumptions regarding the circumstances for justice at the global level play an important part underlying the theoretical disagreement between the proponents of a domestic and a cosmopolitan interpretation of Rawls' theory of justice as fairness, chapter 2 sketched the contour of the system of global governance as it exists today. This chapter also contrasted this description with Rawls' empirical assumptions about the causes of inequality at the global level and the normative conclusions he draws based upon them.

Subsequently, in chapter 3, the theory of justice as fairness in general and the idea of a political theory of justice specifically were situated within Rawls' theory through the years. Likewise, Rawls' construction of justice as the specification of the right for the limited domain of the political was described. Furthermore, this chapter detailed how the distinction between rationality and (intrinsic) reasonability serves as an intersubjectivist criterion to structure and thus specifies the content of the political theory of justice as fairness.

Chapter 4 detailed Rawls' extension of his theory of justice to the global level in the form of *The Law of Peoples*, which serves as the de facto standard for political theory at the global level. In this chapter, the most controversial elements of his extension of his theory to the global level were described. Furthermore, the mutually compatible lines of argument that support the deviations from the political theory of justice as fairness were explicated and argued against.

The attempts of philosophers such as Beitz and Pogge to construct a cosmopolitan theory of justice along Rawlsian lines predate the important

introduction of the idea of political liberalism by Rawls. Following the specification of this essential idea, Rawls recast and restated the arguments for his political theory of justice as fairness in one unified statement, which was aimed to correct what he regarded as the most serious defects in his previous formulation thereof. Since Rawls explicitly rejected a cosmopolitan application of justice as fairness, the ideas and conceptions contained within it reflect this rejection. In order to assess whether a cosmopolitan interpretation of the restated theory of justice as fairness could serve as a reasonable alternative to *The Law of Peoples* in light of political liberalism, the constraints upon fundamental ideas of the theory were examined in chapter 5. Accordingly, this chapter argued that these constraints are incompatible with the bounds of the idea of political liberalism and the basic requirement of first principles to be general and universal.

In particular, the specification of the idea of free and equal persons into a particular conception of a 'citizen' of a (liberal) democratic society, was argued to be tailored to and limited by the central organizing idea of 'society' as a fair system of cooperation. Thus, it was argued that the movement from 'person' to 'citizen' oversteps the boundaries of a logical argument, unless the move is sufficiently supported by the corresponding argument that would limit the central organizing idea of society as a fair system of cooperation to the conception of a contemporary liberal democratic society.

The latter argument depends on multiple ideas and conceptions of social cooperation that tie into the central organizing idea as well as a particular conception of toleration for the global level. Rawls makes the explicit distinction between the idea of a (liberal) democratic society and that of a(n ethical) community in light of 'the fact of reasonable pluralism' and that of 'oppression', which lead to the principle of political legitimacy and the applicability of justice as fairness. As noted in the chapter, if the distinction applies to all societies and (ethical) communities, then the applicability of the principle of political legitimacy and consequently of the political theory of justice as fairness also extends to

these societies, including to so-called 'decent' hierarchical (associationist) societies. The idea that associationist societies could nonetheless be regarded as (ethical) communities relies on the empirical rejection of the occurrence of dissent in these societies. This remarkable idealization theoretically bars the struggle of persons that find themselves in subordinate political positions for their political representation as equal members in associationist societies.

Grounded in a particular conception of toleration, Rawls explicitly rejects the contention that the principle of legitimacy and the political theory of justice as fairness extends to associationist societies. It was argued that the supposed analogy between the domestic and international application of Rawls' conception of toleration is skewed and that associationist societies are 'unreasonable' in their denial of the equality of liberty of conscience and of political representation. Since justice sets the limits for the concept of toleration (and not the other way around) associationist societies are not 'due' toleration as Rawls asserts. Once it is conceded that a 'decent' hierarchical structure is insufficiently legitimate, the only threshold of legitimacy that remains is that of the 'reasonable' as reflected in the (liberal) principle of (political) legitimacy and extends to the exercise of political power in all societies.

If the principle of (reasonable) legitimacy sets the only standard of political legitimacy for the central organizing idea of society as a fair system of cooperation, the limitation of its applicability to a contemporary liberal democratic society is unwarranted. Moreover, since the theory of justice as fairness specifies the framework within which political power can be exercised in accordance with the principle of legitimacy, it could therefore be applied to all societies equally. Chapter 6 substantiated this claim and argued that the commitment to the legitimacy of law transcends the commitment to democracy in Rawls' theorizing insofar as they are thought to differ. Finally, two methods were offered that could support the construction of a reasonable alternative to Rawls' conception of the person as 'citizen', where persons are conceived as human beings that can play

the role of fully cooperating members within any society regarded as a fair system of cooperation over time from one generation to the next. The first method is similar to Rawls' method of 'working up' a political conception, except that declarations of human rights serve to provide the content for the conception of the person rather than constitutions. The second method aims to provide a 'descriptive' or 'positive' cosmopolitan conception of the person and strikes a fair balance between what persons affirming opposing doctrines would need by way of institutional protections and all-purpose means.

Amongst contemporary Western political philosophers and theorists there is a deep-seated reluctance to assert the universal validity of claims regarding justice, the necessity of political legitimacy of regimes and the protection of human rights. The paradoxical consequence is that the equality of those who are thereby safe-guarded in theory is trampled in practice. While the exercise of political power by governments in 'decent' associationist societies is externally tolerated and sanctioned, dissent by (collections of) individuals aimed at the strengthening of political legitimization and of the democratic process within these societies is not tolerated and (often violently) restricted. The reluctance to assert the universal validity of political liberalism from the Western perspective is also self-serving, for it excludes persons living under less fortunate circumstances from the protection of the two principles of justice as fairness, presumably for their own good. The typical response to a claim of universalism in regard to justice is quickly met by a charge of paternalism or, more specifically, of neo-colonialist imperialism of inherently Western values. The charge however may just as well be reversed; it may be that the unwarranted paternalism is exemplified in the very assumption that political legitimacy, basic human interests and human rights are inherently Western values.

As Rawls explicitly states in *The Law of Peoples*, the extension of his theory to the global domain is meant to articulate the ideals and principles for a

foreign policy of a reasonably just liberal people. In his construction of this policy, he employs concepts from his political theory of justice in a way that deviates from his previous theorizing. Perhaps the most important consequence of these deviations is that only well-ordered peoples take part in Rawls' second original position and, consequently, all political claims from those peoples and persons who are ruled by less legitimate governments are simply ignored in Rawls' account.

Even in the most benign interpretation of *The Law of Peoples* and even if contemporary examples of 'decent' hierarchical societies are thought to exist, a Law of Peoples would still be constructed from the perspective of what well-ordered peoples amongst themselves would agree to, while the coercive political power exercised in its name would govern all peoples and consequently all human beings. This constitutes a violation of the principle of political legitimacy as Rawls has formulated it on a truly massive scale. In the face of the circumstances that were described in chapter 2, such a theory will only lead to, and could even provide the theoretical underpinnings for, ever increasing formal and material inequality between the members of affluent and impoverished nations.

In contrast, by reinterpreting Rawls' theory of justice as a cosmopolitan theory of fairness that justifies the collective use of coercive political power, the theory can incorporate competing claims from all those who are governed by political power, regardless of the particular contextual scope, as well as provide guidance in reaching a just result. In doing so, the claims of all human beings can be incorporated when reasoning about the framework within which institutions of global governance exercise their power and are allowed to evolve. As numerous authors have argued, there is no reason to assume that the content of the principles of justice would change if the scope of the theory is extended. Consequently, human rights could be supported firmly by the first principle of justice, while the second principle could remedy the ever-increasing inequality between impoverished and affluent societies.

Since the cosmopolitan framework is drawn up from a perspective wherein all reasonable claims of those governed by political power are valued equally, such a framework is more *legitimate* in Rawls' sense, for all persons over whom political power is exercised can be thought to hypothetically agree to the framework on reasonable grounds. Moreover, since the reinterpretation of the theory of justice expands the boundaries to whom the global institutional framework should be fair, it effectively brings about more *justice* in the sense of fairness.

A moral cosmopolitan theory of justice is agnostic about the most institutionally viable way to realize its commitments, therefore, there is no incompatibility in these commitments being realized through nation-states in the foreseeable future. Nation-states are nonetheless thought to be instrumental in the realization of the moral cosmopolitan commitments and their actions should consequently be justifiable from the perspective of justice as fairness when they exercise political power at the global level. For the global institutional order to develop further within the framework of a cosmopolitan theory of justice, it is in fact imperative that the collective actions of nation-states can be justified in this way.

Finally, we should recall Dworkin's observation that all modern political theories share the same egalitarian plateau as well as Kymlicka's conjecture that political theories can be compared on the basis of how they adhere to the shared standard that they all recognize. As mentioned, the egalitarian plateau is described as the social, economic and political conditions that political theories strive for, with at its core the idea that each person matters equally and, accordingly, should be treated equally. If there indeed is such a standard, I hope to have shown that a cosmopolitan reinterpretation of justice as fairness for the global domain provides a reasonable ('just') alternative to *The Law of Peoples* if the equality of all human beings, as opposed to that of a select few, is taken into account.

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