

DFM Strauss

The mixed legacy underlying Rawls's *Theory of justice*

“Indeed, I must disclaim any originality for the views I put forward. The leading ideas are classical and well-known.”

(Rawls 1999a: xviii)

Summary

The *Theory of justice* advanced by Rawls must be understood within the context of factual legal approaches (such as *positivism* and *pragmatism*) that eliminated normative considerations. By contrast, Rawls argues for an account of the role of normative legal principles by proceeding from an idea introduced during the Enlightenment, namely that of a *social contract*. However, the way in which he speaks about *law*, *morality* and *virtues* clearly demonstrates his indebtedness to Ancient Greek and Medieval conceptions as well. His assumption is that it is possible for normal human beings to arrive at a rational consensus by assuming that these individuals not only do have a normative (moral) awareness but that they are also capable to take distance from their factual societal position and relations (the veil of ignorance) in order to be open to moral principles acceptable to every normally developed human being. This article sets out to investigate the historical roots of the idea of a just society by contrasting the classical Greek and Medieval ideals with that of modern approaches since the Renaissance, particularly the account found in natural law theories about the supposed *social contract* lying at the foundation of an ordered and just society. The open-ended problems present within this legacy — particularly regarding the inherent shortcomings of both *atomistic* and *holistic* orientations implicit in the mainstream views on being human and on the place of the latter within human society and the state — are then related to the mixed assumptions underlying Rawls's theory at a basic level. It will be argued that although his *intention* is to advocate the basic elements of a constitutional democracy, this aim is threatened by the latent *holistic* undertones accompanying his entire theory.

Opsomming

Die gemengde erfenis onderliggend aan Rawls se teorie van geregtigheid

Rawls se werk, *A theory of justice*, moet verstaan word vanuit die konteks van feitlike benaderings tot die regs wetenskap (soos die *positivisme* en *pragmatisme*). Hierdie denkrigtings het alle normatiewe oorwegings ge-elimineer. Rawls daarenteen argumenteer dat rekening gehou moet word met normatiewe regs beginsels deur uit te gaan van 'n idee wat gedurende die Verligting na vore gekom het, naamlik die sogenoemde sosiale kontrak. Nogtans demonstreer die wyse waarop hy oor *reg*, *moraliteit* en *deugde* praat tegelyk sy afhanklikheid antieke Griekse en Middeleeuse opvattinge. Sy aanname is dat dit vir normale mense moontlik is om tot 'n rasionele konsensus te kom deur te aanvaar dat

hierdie individue nie alleen oor 'n morele besef beskik nie maar dat hulle ook daartoe in staat is om afstand te neem van hul feitlike sosiale posisie en relasies (die kleed van onwetendheid) sodat hulle ontvanklik kan wees vir morele beginsels wat aanvaarbaar is vir elke ontwikkelde mens. Die artikel begin deur die historiese wortels van die idee van 'n regverdige samelewing te ondersoek deur die kontrastering van die klassieke Griekse en Middeleeuse ideale met moderne benaderinge sedert die Renaissance, in die besonder die verantwoording wat te vinde is in die teorieë oor die veronderstelde sosiale kontrak wat vermeend ten grondslag lê aan 'n geordende en regverdige samelewing. Die onopgeslote probleme van hierdie tradisie, in die besonder rakende die tekortkominge wat aanwesig is beide in atomistiese en holistiese oriëntasies soos ingebed in die hoofstroom sieninge van mens-wees en die plek van die mens in die menslike samelewing en die staat word dan in verband gebring met die gemengde aannames wat onderliggend is aan Rawls se teorie op 'n basiese vlak. Die bedoeling is om te argumenteer dat alhoewel Rawls die *intensie* besit om die basiese elemente van 'n konstitusionele demokrasie te propageer, hierdie doelstelling bedreig word deur die latente *holistiese* ondertone wat sy ganse teorie vergesel.

1. Introduction

Through the publication of his influential book, *A theory of justice*, John Rawls at once integrated a number of related perspectives in social, political and legal philosophy. This article sets out to understand Rawls's thought in terms of his indebtedness to conflicting intellectual traditions.

2. The normative basis of law

During the 19th and early 20th centuries various trends within social and legal philosophy attempted to strip society of all normative considerations and to reduce it entirely into *a-normative factual* processes. Legal positivism and legal pragmatism are examples of such a *factual* approach.¹ In the case of legal positivism the intellectual tradition operative in it goes back to Somlo² and Austin,³ and the views of the latter are dependent upon Bentham and the absolutistic concept of sovereignty developed by Jean Bodin in its dependence upon the state-absolutist theory of law explained by Hobbes in his well-known work *Leviathan*.⁴

Particularly Bentham's idea, namely that the *normative* issues of positive morality are not relevant within the domain of a general theory of law, exerted an influence on Austin. In his reaction to these trends of thought Rawls, amongst others, is particularly indebted to the views on (*moral*) *autonomy* (and the so-called *categorical imperative*) advanced by Immanuel Kant (1724-1801). Yet where he distinguishes between *political autonomy* ("the legal independence and assured integrity of citizens and their sharing equally with others in the exercise of political power") and *moral autonomy* (it "characterizes a certain way

1 Cf. Hommes 1981: 318-319.

2 Felix Somlo (1873-1920) published his *Juristic grundlehre* in 1917. His thought was influenced by that of John Austin.

3 John Austin (1790-1861) is known for his work from 1832; the *Province of justice determined* and also through his *Lectures on jurisprudence or the philosophy of positive law* (posthumously published in 1863).

4 Hobbes 1651.

of life and reflection, critically examining our deepest ends and ideals, as in Mill's ideal of individuality") he disqualifies the latter as a "political value."⁵

Rawls seems to be in search of the *normative meaning* of (sets of) *legal principles* in the sense that such principles lay at the foundation of social practices. Because Rawls rejects the metaphysical foundation which Kant provided for his idea of morality (in the context of what Kant has called the domain of *practical reason*), he had to find an alternative foundation for his belief in *normative legal principles*. He does that on the basis of the conviction that it is possible for normal human beings to arrive at a *rational consensus* and *agreement* and also by assuming that these individuals both have a normative (moral) awareness and that they have the capacity to take distance from their factual societal position and relations within society in order to be open to moral principles acceptable ("reasonable") to every normal human being.

From the outset it is clear that the relationship between and the distinctness of *law* and *morality* is implicated in the stance Rawls takes.⁶ We intend to explore key elements of the historical background of the idea of a "social contract" since Rawls actually advanced a *mixed* position by incorporating also Greek and Medieval views in his post-Renaissance stance.

3. Conflicting views of society

Ancient Greek political theory by and large was dominated by a view of human society and the state that opted for an all-encompassing societal whole within which the human being can acquire the *good life* and can thus be brought to *moral perfection*. The *Politeia* of Plato⁷ and the "organologically" emerging state of Aristotle⁸ both elevated the Greek city state (*polis*) to this totalitarian level — viewed as the all-embracing whole of society. During the Medieval period this legacy was incorporated into a new unified (ecclesiastical) culture which superimposed upon the state the (Roman Catholic) church that was supposed to transform temporal moral perfection into eternal bliss. At the same time it established the Medieval ideal of the perfect society (*societas perfecta*).⁹

5 See his explanation in his 1997 article "The idea of public reason revisited", contained in Rawls 1999a:586: "Whatever we may think of autonomy as a purely moral value, it fails to satisfy, given reasonable pluralism, the constraint of reciprocity, as many citizens, for example, those holding certain religious doctrines, may reject it. Thus moral autonomy is not a political value, whereas political autonomy is."

6 Already in 1964 Rawls discussed this relationship in an article on "Legal obligation and the duty of fair play" (see Rawls 1999a: 117 ff.).

7 Cf. Plato 436 ff.

8 In Chapter I of Book I of his work on politics, Aristotle phrases it as follows: "Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good" (Aristotle 1252a1 ff. = Aristotle 2001: 1126).

9 We shall return to this view later.

The late-Scholastic nominalistic movement challenged this legacy and eventually led to an alternative (modern) approach inspired by the natural scientific ideal to analyze everything in the universe, including human society, in terms of its supposed “simplest elements” (i.e., the *individuals*).¹⁰

4. Justice as moral virtue in the thought of Rawls

When Rawls states on the opening page of his *Theory of justice* that “[J]ustice is the first virtue of social institutions”¹¹ and that it is the “most important virtue of institutions,”¹² key elements of the classical legacy are continued: “[B]eing first virtues of human activities, truth and justice are uncompromising.”¹³

Similar to Aristotle’s view “that people do act with a view to obtaining what they think good for them” Rawls also emphasizes that in pursuing their ends people “each prefer a larger to a lesser share.”¹⁴ Furthermore, the “basic structure of society” is seen as the “primary subject of justice.”¹⁵ Although justice is supposed to be a (moral) *virtue* — analogous to the views of Plato and Aristotle — Rawls also emphasizes the requirement of a “public conception of justice.”¹⁶ It is striking that from the outset of his argument Rawls interchangeably uses expressions such as “principles of justice” and “conceptions of justice”.¹⁷ One conception of justice may therefore be “preferable to another” when “its broader consequences are more desirable.”¹⁸ One may think that *different* conceptions of justice ought to be measured against the yardstick of a *unique and fundamental principle* (or: *principles*) of justice, but this won’t help, because Rawls holds the view that there are indeed different sets of principles of justice. Many ambiguities attach to Rawls’s exposition, for next to a *public* conception of justice he also speaks about “social justice,”¹⁹ “principles of justice” that “would regulate a well-ordered society”²⁰ and about a “perfectly just society.”²¹

An important indebtedness to the views of Aristotle²² is found in the position taken by Rawls with regard to the “parties” participating in the social contract envisaged by him, for he explicitly says that “we may think of the parties

10 Cf. Dooyeweerd, 1997-I: 190 ff., 216 ff.

11 Rawls 1978: 1; Rawls 1999: 6.

12 Rawls 1978: 6; Rawls 1999: 6.

13 Rawls 1978: 2; Rawls 1999: 4.

14 Rawls 1978: 2; Rawls 1999: 4.

15 Rawls 1999: 1, 7, 9, 10, etc.

16 Rawls 1978: 2. A kingdom belongs to the king, but the state by definition is a concern of the public (a *res publica*). (A more detailed analysis of the ancient Greek idea of the state is found in Strauss 2005.)

17 Rawls 1993: 3ff.

18 Rawls 1999: 6.

19 Rawls 1994: 4, 6, etc.

20 Rawls 1999: 8.

21 Rawls 1999: 308, 418.

22 Regarding the view of the family as “germ-cell” of society — cf. Aristotle 1252b-12 ff. = Aristotle 2001: 1128-1129.

as heads of families”²³ — in the 1999 edition it reads: “we can assume that they are heads of families”.²⁴

The other side of the Greek coin harbours an implicit emphasis on *arbitrary subjectivity* and in that respect proves to be directly relevant for the position taken by Rawls with regard to the “social contract.” His argument indeed constantly borders upon the abyss of human *arbitrariness* because *justice* is supposed to be the *outcome* of an (inter-) subjective reasonable (and fair) account. Within Greek culture, through the position taken by Callicles and Protagoras, this element of political and legal thinking became known as *nominalism*.²⁵ Protagoras considered the human being as the measure of all things,²⁶ and with the Sophists he claimed that *legal customs* and *law* are completely *arbitrary*.

Although Protagoras proceeds from a *nominalistic individualistic*²⁷ starting point, his conception of the state does not acknowledge any *materia*²⁸ boundaries or limits for the *competence* (the *jural power*) of the state — even morality and religion are viewed as products of the existence of the state. This tension between matter and form kept alive the question whether or not *law* and *justice* (in a

23 Rawls 1978: 128, 146.

24 Rawls 1999: 111. The organic view of human society, such as it is found in Aristotle's philosophy, influenced Andries Treurnicht via Abraham Kuyper. Kuyper defended the notion of “organisch kiesrecht” (“the organic right to vote”) restricting this right to the heads of the families only. In 1969 Treurnicht once wrote in the editorial column of the newspaper “Hoofstad” about a tax issue in France. The question was whether or not the father of self-supporting children still living at home should pay tax on behalf of them. Treurnicht opted for “organic tax paying” — the father should pay for all of them!

25 In opposition to realist views, accepting universality, the nominalist holds that concrete reality (outside the human mind) is populated solely by individual entities, stripped from every form of universality. Plato (Gorgias 482e ff.) ascribes to Callicles the doctrine that might is right (see also Copleston 2001: 94).

26 Diels-Kranz II, 263; Protagoras, B. Fragm. 1:

πάντων χρημάτων μέτρον ἐστὶν ἄνθρωπος, τῶν μὲν ὄντων ὡς ἔσται, τῶν δὲ οὐκ ὄντων ὡς οὐκ ἔσται. (“Of all things the measure is the human being, of [things] that are, how they are, of those that are not, how they are not.”). This conviction anticipates the modern (Renaissance and post-Renaissance ideal) of human autonomy, found amongst others in the thought of Rousseau, Kant and Rawls (see Rawls 1978:13). In the case of the views of Protagoras it is only the polis, as bearer of the Greek motive of form and harmony, that is capable of supplying the human being with a cultural garb through education and obedience to positive laws — thus demonstrating the primacy of this form motive in the thought of Protagoras (cf. Dooyeweerd 2003: 113).

27 We can describe individualism (atomism) as the view that wants to explain society and societal institutions purely in terms of the interaction between individuals. Universalism (holism), by contrast, postulates some or other all-encompassing societal whole or totality (or: system with its subsystems) (see Strauss 2000 and 2002).

28 The term “material” is here used to refer to the inner nature or the inner structural principle of the state. It is usually distinguished from a “formal” view. The latter does not intend to account for structural differences or inherently limited spheres of competence. Rousseau, for example, advocated the idea of a just state in a formal sense, but materially fell back into a totalitarian and absolutistic theory of the state. Hobbes defended a totalitarian and absolutistic theory in both a formal and a material sense.

jural sense) are based on an *eternal (world) order*. Protagoras and the Sophists indeed claimed the opposite, for according to this trend of thought legal customs and law were seen as being completely *arbitrary*, merely serving what people considered to be in their interest.²⁹ One may ask the question to what extent the theory of rational deliberation in Rawls and that of communicative consensus in Habermas, mediated by modern nominalism, still wrestles with the same problem as the Sophists?

In following Augustine the Roman Catholic tradition eventually appreciated the church as a *perfect society* superior to the state. Thus Augustine actually laid the foundation for the basic motive of medieval culture, the motive of *nature* and *grace*. This motive was brought to a unique synthesis in the thought of Thomas Aquinas (1225-1274).

The invasion of the Germanic tribes eventually caused the final collapse of the western part of the Roman Empire in AD 476 — although the Eastern part lasted until 1453. To the latter part we owe the phenomenal codification of classical Roman law by Justinian — accomplished between 528 and 534 (what later became known as the *Corpus Juris Civilis*) — a *jural* legacy that largely disintegrated in the Western part. The initial Roman idea of a holy empire (*sacrum imperium*) was continued in the Byzantine Empire, and since Charlemagne (800) and his successors, it returned in the shape of the above-mentioned idea of the *Corpus Christianum* as the *perfect society (societas perfecta)*.

5. The holistic undertones of Rawls's "Political Liberalism"

Insofar as Rawls's theory aims at establishing principles of social justice sufficient to "provide a way of assigning rights and duties in the basic institutions of society" and aspires to "define the appropriate distribution of the benefits and burdens of social co-operation"³⁰ it is clearly meant to include *society as a whole*. The effect is that no well-defined boundary lines are visible when it comes to the employed *terminology*, because "society" and "state" often exchange roles, and society itself is also frequently depicted as being "democratic"³¹ — explaining references to the "citizens" of "society" (and not merely the "state") and to a "a democratic society of free and equal citizens."³²

29 It is mainly due to the assumption of "universal reason" that modern (and Enlightenment) views of the social contract appears to be affected to a lesser degree by *arbitrariness*. Yet, if the ultimate justification of "justice" remains dependent upon some or other form of "collective subjectivity" (for example the *agreement* supposed to be reached in the original "social contract"), we simply have exchanged individual arbitrariness for *collective* arbitrariness. Rawls does not defend a notion of justice flowing from "self-evident premises," for its justification ought to integrate into a "coherent view" many supporting "considerations" (1978:21).

30 Rawls 1994: 4.

31 See Rawls 1996: 10, 13, 15, 24-25, 30, 33, 36, 38, 40-43, 61, 65, 70, 79, 90, 95, 134, 136, 154, 175, 177, 198, 205-206, 214, 221, 223, 243, 292, 303, 307, 320, 335, 344, 346, 369, 376, 387, 390, 414, 418, 424, 432; and Rawls 1999: 249, 280, 320, 326, 335.

32 Rawls 1996: 30.

Rawls does not deviate significantly from the medieval tradition by applying, as noted, the idea of “social justice” to its “primary subject”, namely the “basic structure of society.”³³ Implicitly this entire mode of speech entails certain *holistic*³⁴ assumptions — to which we shall return below.

Surely this does not exhaust the scope of his indebtedness to historical reflections on the nature of state and society, because the disintegration of the medieval synthesis gave birth to a new spirit that resulted in the known social *contract theories*. The crucial question is what happened to the seemingly firmly established power of the Roman Catholic Church that it gave way to alternative and even radically opposed (atomistic) views of society?

To understand this transition it must be kept in mind that the increasing political power claims of the church during the high Middle Ages were based upon its relatively *differentiated* position, which enabled it to integrate the relatively *undifferentiated* sub-structures of medieval society under its umbrella. Where the state was supposed to carry human beings to their highest *natural* aim in life, namely moral *goodness*, the church had to elevate them to their supertemporal perfection, *eternal bliss*.³⁵

6. The new motive underlying theories of the “Social Contract”

In spite of its formidable background the realistic metaphysics³⁶ of Thomas Aquinas had to face a new challenge, since by the beginning of the 14th century a controversy emerged regarding the epistemic status of *universality*. The opposition between realism and *nominalism* that, as we have noted, already emerged in Greek antiquity, once again surfaced and succeeded to dominate the scene — but this time *nominalism* left the battlefield victoriously.

William of Ockham (1290-1350) advocated the view that universals only have a *subjective* existence — encompassing both our words (*voces*) and general concepts (*conceptus*). Universals are simply *substitutes*, referring in a signifying way to the *multiplicity of truly existing individual* things.³⁷ This nominalistic movement provided the starting-point for modern (political) philosophy. It succeeded in emancipating the modern mind from the authority of church belief and the Pope. In the transition to the Renaissance and to modernity various *individualistic* (*atomistic*) theories of human society and the state emerged — theories denying the reality of supra-individual communities. Initially, as in the case of Machiavelli

33 Rawls 1999: 7.

34 Or *universalistic* assumption, see note 9 above.

35 This view remained alive until the 20th century. In the papal encyclical, *Quadragesimo anno* (15 May 1931), it is still explicitly stated: “Surely the church does not only have the task to bring the human person merely to a transient and deficient happiness, for it must carry a person to eternal bliss” (cf. Schnatz 1973: 403).

36 The philosophical subdiscipline investigating the origin and supposed “essence” of reality has acquired the name “metaphysics” ever since Aristotle treated these problems in his work with that name.

37 See Zuidema 1936: 298; Copleston 1985-III: 58.

(1469-1527), Bodin (1530-1596), and Hobbes (1588-1679), the result of this transformation was explicit *totalitarian*³⁸ theories.³⁹ However, gradually various thinkers attempted to develop a theory of state and law capable to account for guaranteeing the various rights and freedoms of citizens, that is, theories of the “just state” (“regstaatsteorie”). Yet in accordance with the modern spirit of the Renaissance the human being is now considered to be *autonomous*, in the literal sense of *being-a-law-unto-itself*. The equivalent of *individual autonomy* is found in the *collective autonomy* of the “people” as citizens of the state, subjected solely to their own will (and in this sense still *auto-nomous*).⁴⁰

Rawls holds the view that a “society satisfying the principles of justice as fairness” is constituted by “members [who] are autonomous and the obligations they recognize self-imposed.”⁴¹ In his account of the meaning of the “general will” already Rousseau explicitly articulated this idea of autonomy by saying that “freedom is obedience to a law which we have prescribed to ourselves.”⁴²

Rawls definitely wants to continue the social contract theories of modernity that are built upon this idea of *autonomy*.

What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant.⁴³

7. The Cape Horn of political philosophy

With the exception of Callicles and the nominalistic movement in early Greek philosophy, the subsequent development of social and political theory did not manage to liberate itself from a *holistic* (universalistic) understanding of society and the state. It was only during the resumed entrance of nominalistic ideas — by the beginning of the 14th century — that this legacy of assuming some or other largest societal whole (be it the state or the church) was challenged. Since this process gave birth to the rise of *atomistic* (individualistic) theories of the state and human society, the all-permeating influence and difference between these two theoretical stances (viz., atomism and holism) requires a critical assessment.

Yet in the transition from the late medieval period to the modern era much more is involved than a mere switch from *holism* to *atomism*, for as we have just

38 Krüger points out that the process of secularization during this transitional period resulted in a transposition of the power of God almighty to the supposed all-powerful state — an idea already introduced by Ockham and subsequently followed up by Bodin and Hobbes (Krüger 1966: 52).

39 In German, Dutch, and Afrikaans the appropriate designation is “magstaat” (literally: “power-state”). For the lack of a better descriptive translational equivalent, we will sometimes employ the phrase “power-state.” By contrast, what is known as a “regstaat,” will sometimes be transliterated with the phrase: “just state.”

40 The Greek word *autos* means *self* and the word *nomos* means *law*.

41 Rawls 1978: 13; Rawls 1999: 12; cf. also Freeman 2003a: 8.

42 Rousseau 1975: 247.

43 Rawls 1999: xviii; Preface.

pointed out here we witness the rise of the modern *ideal of an autonomously free human personality*. During the Renaissance a new *life and world view* emerged. Its distinctive trait is that it affirms the *autonomy* of the human person, in the sense of being a *law for itself*. It is also echoed in Locke's idea that human beings share a "royal" equality: "[F]or all being kings as much as he, every man his equal."⁴⁴

A new motive of *logical creation* characterises this *autonomy ideal* and the first manifestations of the modern *natural science ideal*. It also entails what eventually has become known as *constructivism*.

Since the Renaissance, modern thought has explored various options in its attempt (rationally) to *reconstruct* reality — varying from "moving body" (the basic denominator chosen by Hobbes — seventeenth century), "to perceive" (Berkeley — eighteenth century), "sensations" (Kant — eighteenth century), and "sense-data" (Ayer — twentieth century) — to mention a few philosophers. From this atomistic legacy Rawls inherited his affinity for the idea of the social contract — with the effect that his political philosophy embodies an attempt simultaneously to remain faithful both to the traditional holistic views and the atomistic modern views.

Similar to the totalitarian views of Plato and Aristotle and of medieval scholasticism, one finds that Rawls also treats human society as an inclusive *whole* (or *system*) with its subordinate *parts*. He refers to different "aspects of the social system" and he speaks about "citizens of a just society" as well as — as we have noted — about a "democratic society"⁴⁵ — implicitly suggesting the notion that society *as such* is an encompassing *totality*. These phrases occur in spite of the fact that at the same time he accentuates *basic rights* both in the *public domain* and in respect of *personal freedom*.⁴⁶

Does that imply that the implicit totalitarian consequences of a universalistic understanding of *society* as an encompassing *whole* are *balanced* by the *atomistic* (individualistic) inclination of traditional views of basic human rights in terms of *social contract theories*? This question can only be answered by looking at the basic assumptions of the social contract theories in order to establish whether or not theories such as these indeed succeeded to transcend the totalitarian outcome of the initial modern theories of the "power-state" — such as those found in the thought of Machiavelli (1469-1527) and Hobbes (1588-1679).

Dooyeweerd speaks in this regard about the new *humanistic* basic motive of nature and *freedom*.⁴⁷ The nature motive is embodied in the ideal of an *all-encompassing natural science* capable of explaining whatever there is in natural scientific categories — such as cause and effect: causality — while the freedom motive manifested itself in the ideal of the *autonomous human personality*. Although

44 Locke 1690: 179.

45 See also Rawls 1980: 518 and 1999a: 186, 188, 226, 239, 262, 305-306, 310, 314, 319, 329, 332, 340, 355-356, 358, 384, 390-392.

46 See Rawls 1978: 61; and Rawls 1999: xii; 5, 10, 13, 84, 112, 129, 154, 172, 185, 210, 442-443, 470, 494.

47 Dooyeweerd 1997-II: 198 ff.

the personality ideal gave birth to the science ideal, the latter turned into a *Frankenstein*, challenging its maker, for if reality in its entirety is (atomistically) understood as being subjected to exact natural laws of cause and effect, then the human being is also reduced to becoming merely an atom among atoms, a cause among causes, and an effect among effects — fully causally determined, without any freedom!

Although the French thinker, Jean Bodin, first introduced the term “*sovereignty*” in order to capture the nature of governmental authority present within the state, the weak point of his theory is found in his conviction that the state, as such, disposes of an absolute and original competence to the formation of law — thus denying any original jural competence within non-political societal collectivities.⁴⁸

Within the undifferentiated structure of the late medieval “substructure” of society, governmental authority was still a *commercial* item, a *res in commercio*.⁴⁹ The sovereign lords disposed over it *freely*. When private persons or corporations took hold of it, it formed part of their *inviolable* rights. Governmental authority was not yet seen as a *public office*, called to serve the interests of the public (the *res publica*).⁵⁰ It was particularly the all-encompassing nature of the *guild system* that precluded the realisation of a genuine state organisation.

This relatively *undifferentiated* condition of European societies during the fourteenth, fifteenth and sixteenth centuries makes it understandable why Machiavelli and Hobbes did not succeed in transcending “power-state” theories. Yet the idea of a social contract ought to receive an equal blame for the totalitarian consequences of modern political theories, since according to the requirements of the modern natural science ideal — lying at the basis of theories of the social contract — also human society must be “reconstructed” in terms of its simplest “elements” or “atoms,” namely the *individuals*. The unity of the people in the conception of Hobbes is embodied in the all-powerful sovereign. When Rawls articulates his own version of the social contract he shows more affinity with the thought of Locke and Rousseau. In fact, with reference to Benjamin Constant, he portrays a fairly reliable picture of the similarities and differences between their political views:

Using the distinction drawn by Benjamin Constant between the liberties of the moderns and the liberties of the ancients, the tradition derived from Locke gives pride of place to the former, that is, to the liberties of civil life, especially freedom of thought and conscience, certain basic rights of the person, and of property and association; while the tradition descending from Rousseau assigns priority to the equal political liberties and values of public life, and views the civic liberties as subordinate.⁵¹

Yet did Rawls realize that both Locke and Rousseau, in spite of their attempts to secure human *freedom* and *equality* (respectively in a *civil legal* and a *public legal* sense) nonetheless did not succeed in identifying the *material boundaries*

48 Cf. Kelsen 1966: 15-16.

49 See Dooyeweerd 1997a: 105

50 In his own understanding of the “social contract” Rawls assigns an important place to the “public nature of political principles” (Rawls 1999: 15).

51 Rawls 1980: 519; Rawls 1999a: 305.

of governmental authority? According to Rousseau the social contract serves as the foundation of *all rights* in the new condition of the civil state.⁵²

The “veil of ignorance” serves a similar purpose in the social contract of Rawls, for on the one hand it (almost) strips every participating party from every possible societal tie,⁵³ and at the same time it serves as the basis for all the rights and duties within a “just society.” The position taken by Rawls at once accommodates an atomistic “contractual” view and a relatively holistic understanding of the *basic structure of society* — we shall return to this point below.

Particularly in the case of Rousseau the same ambiguity appears as soon as an account is given for *entering* into the social contract. Whereas Rousseau proceeds from an *individualistic (atomistic)* conception of the “state of nature,” the outcome of the contract manifests the contrary in the emergence of the (sovereign) *general will as a collective entity*. The individual person now participates in this entity as “an inseparable part of the whole.”⁵⁴ The immediate consequence of this whole-parts scheme is that the “state, with regard to its members, is master of all their goods through the social contract.”⁵⁵ In spite of his firm intention to secure public legal freedom and equality, Rousseau effectively substantiated just another form of *totalitarianism*, for he argues that those who do not obey the general will (supposedly their own will and the only way to be free), ought to be *forced* to be free.⁵⁶

8. Autonomy and constructivism

Society indeed functions for Rawls as the most comprehensive framework embracing the whole of human life. When he explicitly says that the choice of rational people “determines the principles of justice”⁵⁷ it is already clear that “principles of justice” are *subject* to the *constructive power* of human actors exercising their capacity to choose *freely*. The fundamental question is the following one: Are there basic principles to which human choices are *subject* or

52 Rousseau 1762: 249.

53 Except, as we have noted, that they remain “heads of families.”

54 Rousseau 1975: 244. On the same page Rousseau says: “Immediately the association produces, in the place of the particular person of every participant, a moral and collective body, composed out of just as many members as the voices of the gathering, which derives from this act its unity, communal self, life and will.” This position highlights the starting-point of the universalistic notion of a people, with its transpersonal “Volksggeist”, found in the post-Kantian freedom-idealism of Schelling (1775-1854), Fichte (1762-1814) and Hegel (1770-1831).

55 Rousseau 1975: 247. “Just as nature gives to every human being an absolute power over all its members, so the social contract endows the body politic with an absolute power over all its members; and it is this power which, directed by the general will, as I have said, bears the name of sovereignty.” (Rousseau 1975: 253).

56 “... ce qui ne signifie autre chose sinon qu'on le forcera à être libre” (Rousseau 1975: 246). Kant eventually realized that (state) law inherently entails (legal) force and this caused Derrida to confirm that “there is no law (loi) without enforceability” (Derrida 2002: 233).

57 Rawls 1978: 12.

are any and all “principles” always merely the *product (construction)* of rational human acts, whether or not embodied in consensus or an agreement?

In other words, are humans subject to principles that do not flow from the subjective activities of rational beings (individually or collectively), or are the “principles of justice” ultimately *human constructions*? Does this then mean that there are no supra-individual and non-arbitrary principles of justice? Moreover, if the only yardstick is found in the rational choices of human subjects, how does one bridge the gap from (individual) human subjectivity to “objectively binding” *communal* standards of justice? When the will of a single person governs the state it is assumed to be *tyrannical*. Why would the collective will (“general will”) of the “people” then not be tyrannical as well?

This problem is similar to the epistemological challenge flowing from the so-called Copernican turn in modern philosophy. Immanuel Kant (1724-1804) wrote about the difficulty involved in this turn, namely to explain how “*subjective conditions of thought* can have *objective validity*, that is, can furnish conditions of the possibility of all knowledge of objects.”⁵⁸ The equivalent of this problem within the domain of morality is given in the formulation of the categorical imperative.⁵⁹ We may repeat our question: are human conceptions of principles of justice and the choices made by human subjects themselves *subject* to a universal standard of justice, or is every possible principle of justice always “human-made”? Whereas the rational-ethical nature of humankind with its inborn “social drive” accounted for the existence of the state by *nature* in Aristotelian and Thomistic thought, modern humanism views the state as a human *construct*.⁶⁰

Because Kant assigns the *legislation to freedom* to the *general will*, it is, in principle, impossible for him to escape from the *totalitarian* and *absolutistic* consequences entailed in Rousseau’s (and Hobbes’) thought. What Hobbes assigned to the monarch Rousseau allocated to the *general will* — and in both instances the *sovereign* — albeit the monarch or the people — did not accept any *material* limits to its power. Rousseau and Kant at least tried to present a *formal* idea of the just state, but in a *material* sense they in principle adhered to the same totalitarian and absolutistic view found in Hobbes’ *Leviathan*.

58 Kant 1787 B: 122. In Kant’s thought the modern natural science ideal is limited to the categories of understanding while the latter are restricted to (the phenomena of) sensory experience. In a formal sense these categories are not derived *from* nature but are *prescribed to* nature in an *a priori* way (1783: para 36). Yet, primacy is actually given to the ideal of humankind as an ethical end-in-itself (*Selbstzweck*) — which does not leave any room for a *natural* “Ding an sich.” Reifying the moral function of the human personality into a “homo noumenon” unveils the metaphysical root of Kant’s philosophy in the *Critique of Practical Reason* (see Kant, 1788 A: 9-10 and Dooyeweerd 1997-I: 369-385).

59 “Handle so, daß die Maxime deines Willens jederzeit zugleich als Prinzip einer allgemeinen Gesetzgebung gelten könne“ (1788 A:54; § 54). (“Act in such a way that the maxim of your will could always simultaneously be valid as a universal legislation.”)

60 Talisse summarizes the difference: “Furthermore, on the liberal view, states do not exist by nature, as Aristotle held, but rather are human artifacts” (2001: 12).

Rawls simply continued this classical struggle with the assumptions of moral autonomy, because “somehow” he aims at finding “a suitable rendering of freedom and equality, and of their relative priority, rooted in the more fundamental notions of our political life and congenial to our conception of the person.”⁶¹ Note that the “pure procedural justice” employed in Rawls’s argument for the “original position” does not presuppose the prior existence of an “independent criterion of justice” — “what is just is defined by the outcome of the procedure itself.”⁶²

Rawls continues to use morality as the basket that contains both *law* and *ethics*. The “capacity to act from (and not merely in accordance with) the principles of justice” constitutes one “moral power” while the second moral power is the capacity to “pursue a conception of the good.”⁶³ The subtle contrast between “act from” and “merely in accordance with” relates to what Krasnoff designates as something distinctive about the notion of constructivism: “Another way of capturing the distinctiveness of con-structivism is to emphasize the idea that ethical truths are made, not found.”⁶⁴

9. Assessment

When Rawls explains his two “principles of justice” he at once aims both at constitutional and civil liberties on the one hand and socio-economic practices on the other.⁶⁵ On the next page he makes it clear that these principles “primarily apply ... to the basic structure of society.” Unfortunately this general and abstract point of departure does not leave any room for the *typical structural* differences between the various societal collectivities of a differentiated society. The mere fact that both the state and the other non-political spheres of society all participate in jural relations and in that sense are connected to considerations of justice does not say anything *specific* about their *distinctiveness*. The theoretical distinctions incorporated by Rawls in his account of justice are also not designed to account for this distinctiveness.⁶⁶

We have mentioned that the Greek-Medieval legacy influenced Rawls in various ways. This influence includes the uncritical application of the *whole-parts scheme* to society in its totality and also pertains to his view of *justice*

61 Rawls 1980: 520.

62 Rawls 1980: 523; Rawls 1999: 311.

63 Rawls 1980: 525.

64 See Krasnoff 1999: 389.

65 “The first statement of the two principles reads as follows. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.” (Rawls 1978: 60; cf. Rawls 1999: 220).

66 Wolff complains that the difficulty entailed in assessing the worth of Rawls’s “principles of justice” partly “stems from the fact that Rawls says little or nothing about the concrete facts of social, economic, and political reality” (Wolff 1977: 195). Therefore Wolff does not hesitate, on the same page, to conclude that Rawls’s theory of justice “can be placed historically in the tradition of utopian liberal political economy of the late nineteenth and early twentieth centuries.”

as a (moral) virtue. We also should not forget what he advanced in connection with the “heads of families” as the contracting parties.⁶⁷ In general Rawls considers the basic structure of society as the primary subject of justice.⁶⁸ This entails that he subsumes society in its totality to requirements of justice, as if the jural perspective *characterizes, qualifies or stamps* every societal institution and relationship.⁶⁹ His own explanation of the primary subject of justice reads:

For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions. Taken together as one scheme, the major institutions define men’s rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do.⁷⁰

But at least once he turns the relationship between “justice” and “society” upside down, namely when he states that a “theory of justice depends upon a theory of society.”⁷¹ In this regard his theorizing does not manage to move beyond the inherent limitations entailed in the traditional universalistic (holistic) theories of society: the encompassing whole of society determines all its parts in spite of his equally strong adherence to basic political and civil freedoms.

His political philosophy lacks a proper understanding of the many-sidedness of societal collectivities — the fact that every one of them has a function both in all the aspects of nature and in all the normative aspects of reality. A consequence of this shortcoming is that he is unable to realize that the distinction between the state and “social” and “economic” institutions is given in their distinctive *qualifying modal functions*. The state is qualified by the *jural* aspect, the business enterprise by the *economic* aspect and a club or voluntary association by the *social* aspect. This insight does not question the function of these social entities in all the other aspects of reality but actually supports it. The only provision is that one should realize that owing to the *universality* of a modal aspect every one of them “leaves room” for all possible kinds of entities to function within them. This means that a firm (economically qualified), the nuclear family (ethically qualified) and a club (socially qualified) all invariably function within the *jural*

67 For a criticism of the “Heads-of-Families Assumption,” see Brennan and Nogge 2000.

68 “Now I have said that the basic structure is the primary subject of justice” (Rawls, 1978: 84).

69 In the case of many societal institutions the jural focus does not play the guiding role in their existence, as it is the case with the state. Only the state acts on behalf of the *public interest* in its task to balance and harmonise the multiplicity of legal interests within its territory — every other non-political social form of life is guided by a *Leitmotif* different from the *jural*. But these forms of life do not *cease* to function within the jural dimension of reality as well, although this functioning merely constitutes a (private) *ius specificum*.

70 Rawls 1999: 6-7.

71 Rawls 1978: 62.

aspect of reality as well. The reason is that none of them is qualified by the jural aspect, for within a differentiated society it is only the state that is qualified by the jural aspect because it is a *public legal institution*.

The absence of these fundamental philosophical distinctions caused Rawls to end up in an inarticulate mode of speech with totalitarian undertones that contradict his sincere sentiments for a liberal democracy. The above-mentioned basic distinctions might have safeguarded him from talking about “democratic societies” and about the “citizens of society.”

Furthermore, because of the lack of articulation present in Rawls's theory of justice, he does not account for the distinctive *institutional dimension* of the state. Habermas points out that Rawls does not clarify the relationship between *positive law* and *political justice*. Rawls focuses upon questions concerning the legitimacy of law without making the *institutional dimension* of law into a theme of his reflections. Habermas also mentions what he calls the intrinsic tension within law between facticity and the *validity of law* (*Rechtsgeltung*) — another dimension which Rawls did not observe either.⁷²

The limitations of the whole-parts scheme are also apparent when Rawls speaks about a “well-ordered society”⁷³ which is seen as “a form of social union,” in fact as “a social union of social unions.”⁷⁴ Suddenly it is clear that the “private life” of each individual human being becomes *subordinate* to the larger plan “realized” in “the public institutions of society.” The value of the abstract claim that “the constitutional order” should “realize the principles of justice” does not compensate for the implicitly holistic view of society threatening his entire theory, for in principle a holistic view eliminates the internal freedoms of all non-political institutions as well as the “subordinate” private sphere of the individual.⁷⁵

72 “Aber das Verhältnis von positivem Recht und politischer Gerechtigkeit bleibt ungeklärt. Rawls konzentriert sich auf Fragen der Legitimität des Rechts, ohne die Rechtsform als solche und damit die institutionelle Dimension des Rechts zu thematisieren. Das an der Rechtsgeltung Spezifische, die dem Recht selbst inwohnende Spannung von Faktizität und Geltung, kommt nicht in den Blick. Deshalb wird auch die externe Spannung zwischen dem Legitimitätsanspruch des Rechts und der sozialen Faktizität nicht unverkürzt wahrgenommen” (Habermas 1992: 88).

73 Rawls 1999: 7.

74 “The main idea is simply that a well-ordered society (corresponding to justice as fairness) is itself a form of social union. Indeed, it is a social union of social unions. Both characteristic features are present: the successful carrying out of just institutions is the shared final end of all the members of society, and these institutional forms are prized as good in themselves.” (Rawls 1978: 526; cf. Rawls 1999: 91-92, 462).

75 Rawls writes: “Thus the plan of each person is given a more ample and rich structure than it would otherwise have; it is adjusted to the plans of others by mutually acceptable principles. Everyone's more private life is so to speak a plan within a plan, this superordinate plan being realized in the public institutions of society. But this larger plan does not establish a dominant end, such as that of religious unity or the greatest excellence of culture, much less national power and prestige, to which the aims of all individuals and associations are subordinate. The regulative public intention is rather that the constitutional order should realize the principles of justice. And this collective activity, if the Aristotelian Principle is sound, must be experienced as a good” (1978: 528).

The atomistic (individualistic) tradition underlying the social contract approach of modern natural law theories ultimately entails similar totalitarian and absolutistic consequences. We have seen that its classical manifestation is found in the thought of Rousseau where the body politic acquired an absolute power of disposal over all its members — up to the point of *forcing* those who do not want to obey (their supposed *own* will) to be free. Article 6 of the *Declaration of the Rights of the Individual and the Citizen* embodies this view by saying: “Law is an expression of the general will.” Clearly, if law can only be an expression of the “general will” of the body politic, then there remains no room for the internal spheres of law peculiar to every societal collectivity distinct from the state — all spheres of law are then sacrificed to the all-mighty power of the state. We have to point out, however, that Rawls did not intend to promote a totalitarian view. He simply did not see through these totalitarian consequences of the holistic elements in his thought patterns.

Of course we must also concede that the atomistic tradition did contribute substantially to the historical development of the idea of personal human rights as well as to the idea of public equality and freedom. In spite of the problematic terminology of systems Rawls did capture most of the rights and liberties relevant for a meaningful account of the different legal spheres within a differentiated society where he writes:

They distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities. The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights.⁷⁶

This quotation indeed demonstrates his *mixed* approach, for the references to the “social system” and to the “citizens of a just society” rest upon his holistic affinities, whereas the “freedom of the person” reflects the (atomistic) human rights tradition. The presence of both holistic and atomistic elements in his thinking remains one of the prominent though *mixed* presuppositions of his theory of justice. One of its effects is that in his thought one does not find an articulated analysis of the “basic structure of society.”⁷⁷ The analysis of Fisk points out that the only “workable concept of a person is of an individual that is a member of some social arrangement or other.”⁷⁸ Yet the structure of *civil law* is such that within it people are considered by *disregarding* any societal ties (where individuals act as members of larger societal wholes) in order to safeguard the domain of *personal freedom* within societal interactions. Nonetheless

76 Rawls 1978: 61; Rawls 1999: 53.

77 Hommes is therefore fully justified in his assessment: “It remains, in spite of its rejection of meta-physical speculation, purely an abstract construction, independent of typical social relationships” (Hommes 1981: 323).

78 Fisk 1975: 70.

Rawls never attempted to investigate the uniqueness and mutual coherence of the spheres of public law (encompassing constitutional law, penal law, penal procedural law, administrative law, and the law of nations), civil private law and non-civil private law (the internal spheres of competence of those societal collectivities *distinct* from the state).⁷⁹

Another element of the mixed legacy present in his thought is given in the dilemma of modern *subjectivism*: how can the (collective) human person at once both be the *constructive author* and the *subject* of justice?⁸⁰ The modern ideal of autonomous freedom (exemplified in the thought of Rousseau, Kant, Rawls) actually *reified* the freedom of human subjects to give positive form (i.e., to *positivise*) pre-positive jural (and other) normative principles.⁸¹ Without the acknowledgement of such (universal and constant) principles, dependent on human intervention for making them valid, the extremes of *natural law* and *relativism* cannot be side-stepped. Finally, the undifferentiated way in which *justice* is seen as a (moral) virtue harbours the lack of sufficiently distinguishing between the jural and the ethical — but arguing this point in more detail will require a different study.

79 See Woldring 1998 for starting points of an alternative view on the relationship between state and society in the thought of the German legal scholar Althusius.

80 O'Neill remarks: "Constructivism for Kant, as for Rawls, begins with the thought that a plurality of diverse beings lacking antecedent coordination or knowledge of an independent order of moral values must *construct ethical principles* by which they are to live" (I am italicizing — DFMS, see O'Neill, 2003: 362).

81 That the formation of law is nothing but the juridical positivization of underlying principles is argued by Hommes (see Hommes, 1972: 355 ff.).

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