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Two Principles of Justice in the Philosophy of John Rawls and Libertarian Critique of Robert
Nozick

by Driton Sylva

Département de philosophie Faculté des Arts et Sciences

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Abstract

This work consists of an attempt to ground the rationality that is inherent to the theories of justice espoused by John Rawls and Robert Nozick; it does so by treating the foundational arguments for their principles of justice. The aim here is to contrast both of these foundations by first mapping the logic of Rawls' core arguments, which will then lead us to his basic political concepts: social justice, the principle of equality, rights and the distribution shares within a wider social contract. We will then contrast these concepts with those that Nozick introduces in his counter-argument. By presenting and developing such a contrast, we will show that there exists fundamental ambiguities that underpin both liberal and libertarian theories; as a result, many of the concepts presented earlier will be called back into question.

Key Words

Justice as fairness

Distribution of justice

Theory of justice

Utilitarianism

Libertarianism

Liberalism

Liberal political theory

Principles of justice

Two principles of justice

Principle of the average utility

Lexical order

Least advantaged

Dichotomy rule

Original position

Veil of ignorance

Principles for institutions

Distribution of goods

State

Idea of good

Morality

Negative and positive arguments

Nozick's critiques of the principles

Sustainability of the principles of justice

Nozick's critique of the theory of justice

Résumé

Ce travail a pour but de formuler une base sur laquelle peut être établie la rationalité inhérente des théories de la justice proposées par John Rawls et Robert Nozick. Cette base sera donc construite à travers une analyse des arguments fondamentaux qui forment les deux théories respectives. L'objectif est d'établir un contraste entre ces fondements en présentant premièrement la logique qui structure l'argumentaire de Rawls; ceci va nous amener à présenter les concepts fondamentaux de sa théorie, comme la justice sociale, le principe d'égalité, le droit et la distribution de biens lors d'un contrat social. Dans un deuxième temps, on va pouvoir les opposer à ceux introduits par Nozick dans son contre-argument. En présentant l'opposition entre les deux théories, on va démontrer dans quelle mesure le Libéralisme et le Libertarisme sont constitués par des ambiguïtés fondamentales; finalement, ceci fera appel à une remise en questions des concepts présentés plus tôt.

Mots Clés

La justice comme l'équité

La distribution de la justice

La théorie de la justice

L'utilitarisme

Le libertarisme

Le libéralisme

La théorie politique libérale

Les principes de justice

Les deux principes de justice

Le principe d'utilité moyenne

L'ordre lexical

Le moins favorisé

La règle de dichotomie

La position initiale

La voile d'ignorance

Les principes pour les institutions

La distribution des biens

L'État

L'idée du bien

La moralité

Les arguments positifs et négatifs

La critique de Nozick des principes

La durabilité des principes

La critique de Nozick de la théorie de la justice

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Introduction

The first intention of this research was to attempt a philosophical journey through the work of John Rawls, which, besides trying to understand the foundations of the principles of justice through his theory, would also allow me to also sketch possible pathways towards a more substantial (liberal) theory of justice. It is through such pathways that we can consequently determine whether or not it is possible for such a theory to be simultaneously enlarged in scope and deepened in context, for these are two necessary qualifications for the employability of such a theory in wider political contexts. To open new pathways inside of a systematic theory requires a particular type of operation due to the closed nature of such a system: the “opening” must thus come from inside. For this to happen, one must pay attention to the theory's internal ambiguities in order to then depart from them without having to depart from the entirety of the system. The location and delimitation of such ambiguities are the object of my second intention: Robert Nozick's (libertarian) critique of Rawls' difference principle will be the main ambiguity that I shall expose. The core substance of this research will be the exposition of the arguments and counter-arguments that constitute this ambiguity. The reason for this is that, despite the fact that both thinkers start from a similar set of general premises that are endemic to liberal thought, the principles that they consequently establish are radically different. Both of these philosophical journeys will be analyzed in parallel, and we shall see that the authors' methodological choices are what allows for a growing differentiation to occur as their respective journeys progress.

In order to map out such different trajectories, we must be able to recognize the institutions which both thinkers encounter during the elaboration of their respective theories of justice: confronting their productions with the objectivity of such institutions will allow for each thinker to be individuated within the context of a common world. For Rawls, *Justice as Fairness* (hereafter JF) aims to describe a just arrangement of the major political and social institutions of a liberal society: the political constitution, the legal system, the economy, the family, and so on. Consequently, issues of justice and efficiency will be discussed under circumstances that Rawls foresaw as imposed by the “background” of cultural heritage that grounds our social and political conceptions of governance. This “society-as-it-is-given” cannot be escaped or changed entirely, but can be efficiently and justly arranged according to the precepts of a just society that regulates the principles of justice within a wider theory. As a theory, JF thus has its grounds in the objectivity

of the world: it is concerned with matters that are unanimously recognized by the political community in question and aims to provide answers to the common problems that simultaneously hold the community together and trace lines of division within it. Because of this, JF goes beyond mere differentiation (difference 'in itself') and aims at understanding the common ground on which this differentiation takes place. In this sense, differentiation itself can only arise out of a situation in which its actors share something in common; in Rawls' case, this commonality is represented by the shared institutions in which actors cooperate. These institutions are shared in the sense that the actors must be able to relate to themselves on some sort of equal footing; if not, there is no possibility of a common ground that transcends the differences that arise from it. Because JF recognizes the right of the opponent to be different, it then mobilizes this difference as a resource that is beneficial to cooperation. JF bases its valuations on the principle of cooperation, prosperity, good trust and a highly qualitative life in which it would be possible to pursue our own good within the constraints that just principles allow and guarantee; this guarantee is provided by a social distribution that is meant to ensure that certain commonly-occurring contingencies do not prevent our individual efforts from "paying off". JF is not a theory that employs isolation or noncooperative schemes of communication as punishments for those who do not abide by its logic; on the other hand, it also refuses to abide by principles that arise from conditions of hatred and bigotry. It can do this by ensuring that the cooperation that occurs within its particular sphere is done from a position that abstracts from the conditions in which hate and bigotry can arise. For in order to be hateful or bigoted, one must direct himself towards the object of such hate: the other. In the original position, though, there is no other, as each actor possesses the same qualities; in this sense, equality is presupposed in order to ensure that any differentiation that arises from it does not destroy the soil from which it grew.

In Rawls's account of JF the relation between right and good is clear because Rawls is convinced that the right may differ from other precepts of the good. While the right and good are two different things that might not necessarily coexist, they are qualitatively differentiated even in contexts of perfect coexistence. As we will see later on, theories such as utilitarianism start with a differentiation between the right and the good, but then aim to establish a perfect coexistence between the two. Rawls innovation is found in the fact that his outright denial of the possibility of coexistence forces him to take a path that is wholly different from the rest of the tradition; instead of synthesis, he is looking for a balance. Robert Nozick once said that if JF as a theory is not

immediately accepted, then the discussion regarding how to refuse it as a theory will be long-lasting; this is precisely due to Rawls' innovative path, as its refutation would require us to tread this new path with him. Discussions went to the extent as to insist in reinterpretation of the theory of justice since isn't that what Rawls said for the principles of justice was wrong, but misunderstood and as consequence its criticism fundamentally mistaken (Pogge, 1989).

Along this path, Rawls' conception of social justice becomes engineered into an autonomous system: he tries to firmly delineate the *place* of basic liberties and freedoms in such a system and then, through a constitutional agreement, assist in the formulation of just principles upon which common institutions will be founded on (and thus implying people's duties and obligations to make sure that the systematic process is properly undertaken). As we will see, this aspect of his theory is what the first principle of justice will be concerned with. His theory is systematic in the sense that the second principle of justice will have to rationally satisfy the conditions of the first; both principles are thus balanced through the use of an ordering system that ties them together. Now that the second principle is grounded in its obligation to the precepts of the first, it can then regulate another sphere of society: the sphere of distribution. The role of the second principle in this sphere is the regulation of outcomes that may be influenced by arbitrary factors such as one's social status, inherent qualities, etc. Both of these principles can be tied together because Rawls considers cooperation as indivisible from other freedoms and rights, and for this reason principles that are to establish the basic structure of such a cooperation (the first principle) can be expanded in order to benefit the least privileged members of society (the second principle). Because the primary reason for the exchange of goods is our mutual benefit, in situations of extended cooperation the question of just distribution comes as off as secondary; by tying the foundation of cooperation (first principle) to the distribution of goods (second principle), Rawls aims to assure that mutual cooperation and just distribution arise from the same conditions and in consequence, balance each other in order to assure mutual stability. For example, in a corporation, the distribution of goods is not tied to the initial cooperation that has produced those goods, insofar as it is only a small fraction of the institution that determines that same distribution a posteriori; in this sense, the outcome of the cooperation was not distributed via cooperation, but coercion. It is for this reason that Rawls's JF awakened an interest in rethinking justice, its origin and foundations; this was necessary in the better understanding of the application and execution of rights and freedoms first, followed by laws. To what extent would it be possible that some

fundamental human rights will be protected from violation even when their protection entails possible risks to the system of justice itself (such as war)? What aspects of reason, moral or contractual, would guarantee that we will never come into such a conflict? And even if we happen to come into conflict, would it place agents in a position of possible criminality the moment they are set to respond to the reality of the conflict? In sum, what are the guarantees that liberal philosophy provides for the just resolution of the conflicts it might experience? Experience with the war in Kosovo and the legal vulnerabilities associated with a period of post-war state rebuilding, the civil war in Syria, deaths of the innocent migrants in the Europe, and recent political developments during the elections in the USA and the outcome they produced, made me reconsider some issues of justice from the standpoint of their origins. For it is only by understanding the origins of principles of justice that we will be able to have a better chance at determining whether they will succeed in the face of unexpected contingencies.

The goal of introducing Nozick's response to Rawls' project is to further expand the discussion of these origins; in other words, it will allow us to go deeper into the problem of reasons in regard to the formulation of principles of justice. Rawls' critique of Utilitarianism and Nozick's (Nozick, 1974) subsequent critique of Rawls open an arena where most of the possible reasons for principles of justice must be tried, and justifications thus are required for the lasting-power of the principles that are formed within this arena. This situation helps us figure out general ideas about justice and an overall overview of the notions and ideas of equality, right, justice and good, which often differ in content when analyzed separately and holistically; in other words, we will not properly conceive of these general ideas unless we relieve them of some of their generality via their mutual interconnection. Otherwise different theories with the same concepts and precepts of justice may have an almost completely different arrangement than other systems of justice. While Rawls describes the rights and justice of the distribution, Nozick explains how such a "patterned" distribution would violate basic liberties and rights, such as our basic freedom to endow anything. While we try to distinguish between the similarities and particularities of the conceptions and definitions of a theory of justice, we learn a lot about the idea of justice in general. At the same time, it gets difficult if one tries to compare them between themselves. For instance what I have considered as relevant in the conceptions of Rawls's theory of justice are actually irrelevant in Nozick's context. This is because evaluations of justice are contingent upon the point of view that each theory has toward the basic foundations that it is grounded in. Such an example would be the

case of ownership. One explanation for this divergence is that Rawls is a contractarian conceptualist whereas Nozick is a libertarian who advocates for the minimal state. In consequence, in Nozick's theory justice gets conceived in a "strange" way in comparison to Rawls. The libertarian principle says that each individual possesses rightful ownership of his person and whatever is related to that person (such as endowments). For instance, principles of justice are not relied on in this basic structure: on the contrary, the conditions under which this libertarian principle is conceived is outside the scope that Rawls has established for his own principles. While Rawls' principle excludes Nozick's, the latter's principle offers a different platform of justice under which Rawls's principle not only falls short, but would amount to a systematic injustice if it were ever applied. The main goal of this research is to mobilize such a tension in order to further explore the common ground in which such a differentiation can occur within the confines for liberal theory. In his book, Nozick develops a theory that would establish the minimal state from a state of nature. In *Anarchy, State, and Utopia*, Nozick tries to prove how cooperation should not be part of distributive justice as conceived by Rawls. For Nozick, it is this Theory of Justice that creates the problem of cooperation in the first place. According to him, the problem of cooperation would be simply regulated by agencies that will control exchanges of our goods, and natural endowments in our benefits. This would lead to a reducing of the government's influence to the bare minimum and the consequent flourishing of our holdings. So the only problem for Nozick is the actual creation of agencies which would take care of the exchanges and transactions; as matters theoretical matters have been "resolved", the problem is now a practical one. The main way in which theory informs practice in this case is negative: these institutions cannot be allowed to partake in coordinated distribution of social wealth, as this would require the widespread seizure of the very extensions of one's body, and thus the possibilities inherently reserved to the particular person in question. However, this "stateless" theory of justice is not one that Nozick judges as being particularly "liveable", and thus, he will have to transition from a state of nature to a minimal state.

We do not want to *stop* at the question of "why" these theories are perceived as incommensurable, as this would force us to reify this condition of incommensurability as a "given". Instead, we want to decompose the mechanisms employed by both theories in order to better understand how they coexist and contrast within a general liberal framework. Once this is known, the incommensurability between both thinkers is no longer "given" and thus, open to

reformulation. The real question is how JF would be formulated if someone in the Original Position shared Nozick's position. Would the difference principle still stand? For the holders of the incommensurability thesis, this question would seem preposterous at first: both thinkers depart from different grounds, and thus cannot cross paths in their respective journeys. Ironically, this question would be reasonable from Rawls' perspective, precisely because the conditions of incommensurability are removed from his original position. From here, we can then make rational choices that will determine the rest of political life; contrast in the elaboration of these choices is expected, and it is why Rawls is so adamant on balancing them instead of having them cancel each other out. If these reasons can be balanced in a relative harmony, then they were never totally incommensurable in the first place. This is no mere theoretical play. Real circumstances bring forth the necessity of developing such a theory: as it stands, the perceived incommensurability between Rawls and Nozick damages the future prospects of both of their theories. For if *JF* becomes the only choice, then any other choice falls short because it cannot replace the principles that satisfy *JF*. For this reason the arguments offered by *JF*, in its isolated state, shed light on arguments that would also lead to any utilitarian or perfectionist state. On the contrary, *JF* earns its recognition in its refusal to develop utilitarian and perfectionist principles; in other words, it does not want to reduce itself to the respect of a singular, overarching idea. In order to respect theory's internal dynamism, it is then paramount that we include conflicting reasons within the space of equality that it has erected. For if it doesn't do this, contract theory only pretends to solve the problem of social justice and instead leads to other problems in moral philosophy that have plagued the rest of the tradition.

In a *Theory of Justice*, "Justice as Fairness" is supported by the duty and obligation that comes as the result of an agreed convention on the principles of justice; the modalities of this agreement are determined by human psychology. These elements make up the last part of the observations of the Theory of Justice and belong to Rawls' speculation regarding how virtue would be attained if people choose two principles of Justice. These two parts have been omitted from this research insofar as they are merely consequences of the choices that were made in the original position: thus, they could easily become irrelevant if different principles of Justice are selected from the original position. Conversely, also Nozick's theory and conceptions about ownership, since my aim is not to compare them as two different ideals with comparable value but instead as two theoretical precepts whose principles' originate under the same social circumstances, albeit

from contradictory estimations regarding the origin and the source of justice. My intention is to study the anatomy of justice under a liberal theory that is challenged internally by contradictory and isolated cases that each present different inherent precepts and concepts of justice.

This research is divided in five chapters, which are to comprise of the five elements which make up the congruency of the JF. The first chapter discusses the conceptualization and establishment of fairness through a regulation of social cooperation. While this process is not arbitrarily undertaken, there is a variety of considerations that must be taken on behalf of a theory of justice based on two principles of justice. This is done through a rationality whose reasons are balanced on a Reflective Equilibrium, from which Rawls will get directions on how to guide those reasons in the choice of principles. In this chapter, we will analyze these reasons and expose how they necessarily lead the actors in the original position to choose a pathway to justice that is wholly different from utilitarianism and intuitionism.

The second chapter will explore the background institutions that will structure the procedures of justice. These institutions are important, as they play a part in the determination of the method that Rawls will employ in order to not only justify the chosen principles of justice, but also their respective priorities in his lexical order. This is important insofar as it allows us to understand just to what extent the principles themselves are rationally determined instead of being either arbitrary or determined by forces that reside outside of rationality itself. For example, Rawls' difference principle is only possible after the principle of equality has been previously established and accepted: it is now our task to expose the relation between this first principle and the institutions in which it will either flourish or falter, in order to show how this first principle is grounded instead of being the product of *decisionism*. Afterwards, we can then demonstrate the link between the first and second principles of justice in Rawls' theory, in order to complete the exposition of the systemic use of rationality in the latter. We will then show that the second principle is also efficient in turning inherently unfair states into ones that are congruent with an overarching conception of fairness, for Rawls is afraid that a natural lottery might cause inefficiency and injustice in social cooperation. For this reason he will be pushed to give arguments which, from Nozick's point of view, are inconsistent. The last section of this chapter will present Nozick's positive and negative arguments against such a hierarchy of principles as proof of Rawls' inability to nullify natural endowments and holdings. Finally, it will explore Rawls' list of primary

goods as an answer to Nozick's charge, in order to show to what extent Rawls' conception of the right is different the naturalistic conception of rights that Nozick is defending.

While the second chapter examines the concrete "background" in which principles of justice can arise, the third chapter examines the "moment" in which they are constituted: the original position. The goal of this chapter will be to examine how one arrives at the second principle of justice in the abstract "space" of the original position: the veil of ignorance. Finally, Nozick's version of an "original position" is contrasted with Rawls' in order to demonstrate how both theorists depart from the same concrete "background" towards similar abstract spaces, all while being able to arrive at the formulation of opposing principles of justice.

Now that we have exposed the moment in which the principles of justice are formulated as well as the institutional background within which such a moment can occur, the 4th chapter will analyze the structure of Rawls' reasons that arise within such a moment. Conversely, the reasoning in question will be contrasted with Nozick's critique, which pertains to the sustainability of such a structure of reasoning; in order to better delineate the contrast, we will examine both authors' conceptions of the basic freedoms and rights that underline their respective forms of reasoning. To do this, we first need to tie these basic conceptions to the institutions in which they can make sense; if not, the reasoning itself would have, despite its structured nature, arisen in arbitrary fashion. For example, on one hand the institutional character of the constitution is paramount in guarantying a well ordered society and the rule of law in maintaining rights, freedoms and liberties; on the other hand, it determines and limits the possibilities of establishing a just system of social cooperation.

Now that we have built up the set of institutional and theoretical conditions that lead to the formulation of Rawls' second principle of justice, it is possible to focus exclusively on the difference principle itself and thus transition from the problems of political theory to those of political economy. It is here where Nozick's main refutation of Rawls' theory of justice will be exposed, as we have now sorted through some of the ambiguities found in the respective trajectories of these opposing theorists. In sum, Nozick is not convinced that someone's worse endowed position is actually determinable, insofar as this would require some sort of a priori criteria for determining such a position. Unfortunately, such criteria can only be established in a posteriori fashion, as the determination of a worse position requires us to weigh it against the rest of the positions within a given society. As Rawls aims to solve this problem prior to the establishment of any institutions, this reveals an ambiguity within liberal theory in general.

Through an analysis of exchanges of holdings and the differences they contain in regard to natural endowments, we will be able to sketch a possible way of enlarging liberal theories of justice via this ambiguity without having to weaken the social-democratic or the libertarian precepts that are contained within them. This will be possible because both thinkers' conceptions of "difference" can be finally properly exposed: while Nozick ties difference to that which arises from nature, Rawls treats difference from the moral standpoint. Both of these standpoints are a priori, but both simultaneously see the other as a posteriori. Their reconciliation is then of paramount importance, as liberal theory cannot simultaneously think of difference from these two opposing standpoints; if it does, its internal ambiguities are then cemented into place as structural deficiencies that are particular to any theory of justice within the tradition of liberal theory (be it social-democracy or classical liberalism).

Acknowledgment

Though it is not the first time I deal with these types of philosophical issues, I still feel their weight on my shoulders as go through them. I doubt that I am the only one who has this feeling. Adding to this weight is the fact that I am writing from a different social and economic circumstance; I do not know how this research would have turned out if I had engaged in it from circumstance other than my own. What I do know that this weight was partially alleviated by my supervisor Christian Nadeau, who I was able to consult when matters got “too heavy”, so to speak.

As this is also the first time that I write in English and French, the weight on my shoulders was heavier than usual: in the midst of my battles with the language that this research is presented in, I sometimes had the urge to abandon the project. The reason this did not happen is because Mr. Nadeau was able to assist me with his thoughtful advice, valuable comments, and precious suggestions about corrections and improvements to my research. I am thankful to a few of my colleagues and friends who always found some time for comments and advice. My last thanks go to my wife, who for the smallest moment did not stop supporting me with her innumerable comments and readings of this paper, and my family, who though far from Montréal, continued to give me the same amount of love and support as they did back home.

1. Fairness

1.1 Intro

In order to better understand where Rawls is coming from, it is necessary to reframe Rawls' project of a "moral engineering" of social cooperation in the context of the western philosophical tradition. While it might critically assess certain resources provided by the tradition, it is not place itself as a direct successor to any particular aspect of the tradition (including contractarianism, which he heavily modifies before even considering its adoption). Its relation to the western canon is more abstract: it originates from a general moral framework that is present within the tradition, but then develops itself in opposition to the majority of the systematic theories that have been produced within the confines of that same framework. This is because Rawls' theory of justice came as a result of the urgent need to conceptualize citizenship as the only base for the maintenance and improvement of social cooperation: the re-construction of Europe and Asia after the Second World War was stricken by this very need. For cooperation cannot be effective if it does not abide by at least some pre-conceived principles of justice. But how does Rawls simultaneously originate these principles from the common ground of tradition without paying it lip service in the formulation of these principles? The answer is found in the fact that Rawls' explanation of justice is abstracted from the same moral values that have also originated in the tradition; he does not consider religious, philosophical or moral doctrines that simply "take" their content from the form of the tradition. In essence, he wants to work within the *form* established by the tradition without having to needlessly consider the veracity of its content.

A large content in the tradition is utilitarianism, which Rawls' will criticize in order to pave the way towards a possible formulation of fair principles of justice; utilitarianism is criticized because of its inability to provide adequate resources in the construction of a stable theory of justice. This criticism opens up a possible solution to the problem of social cooperation, as it would negate the possibility of sacrificing the happiness of a minority of citizens in order to maximize the happiness of the majority; instead, it would assure that each citizen would be treated equally, as an individual. Rawls thus individuates the subjects of his theory through an appeal to human conditions instead of the varied content that arises from them, such as moral and political doctrines. Utilitarianism, on the other hand, must always focus on this content, insofar as it requires it in the

formulation of the good it must maximize (and in consequence, sacrifice others for). The concern of the citizen whose liberty might be sacrificed for the larger benefit of society is followed by a concern for the return of liberal values (while Rawls does not believe that liberalism possesses its own conception of the good, it is of our opinion that the contrary is actually the case: because liberalism posits its values as regulative ideals, it subsequently blinds itself to their own contingency. As we will see, Nozick also shares this critique of Rawls (Nozick, 1974) under the form of a pluralistic and procedural theory of justice. It is these concerns that give Rawls the momentum to formulate a political conception of justice that remains under the rubric of liberal moral philosophy. Liberal values and their contractarian mode of realization are what tie Rawls to the western tradition, but measures taken by Rawls in the elaboration of a fair account of JF is an effort that puts him beyond the scope of traditional philosophizing in moral, religious and philosophical doctrines. As we will see, despite his initial efforts, Rawls remains within the doctrinal conception of justice in the *Theory of Justice*. Whereas, in the second try he attempts to formulate a plural conception of justice in the form of Political Liberalism (Rawls, 1996). Despite this, Rawls' philosophy (and consequently, the place it occupies within the tradition) is highly original. Even Rawls himself admitted that what he attempted to do was to carry the traditional theory of the social contract as represented by Locke, (Locke, 1690), Rousseau, and Kant to a higher order of abstraction. With his theory, Rawls hopes that it can be developed so that it is no longer open to the more traditional objections that are often thought fatal to it. The path that Rawls follows in his *Theory of Justice* is essentially Kantian, while his conception of « Political Liberalism » diverges from this tradition because Rawls believed that Kantian constructivism could not go beyond the constraints of the doctrine itself; in the end, reasons that are established via this form of constructivism do not differ from the principles that originate from dogma. However, his overarching goal remained the same: to work out a theory of justice that is a viable alternative to the doctrines which have long dominated the philosophical tradition.

1.2 Justice

Rawls defines justice as the highest virtue of any social institution and states that it can only be understood in a systematic way; while there are many different systems of thought that have developed their particular conceptions of justice, Rawls' stresses the fact that these

conceptions of justice could have never flourished outside of systematic inquiry. In other words, while the content of these conceptions of justice might be different to the point of incommensurability, their systematic character is the common ground that allows them to be able to confront each other in the first place. Unlike the traditional theories, Rawls will not let this systematic character constrain the truth of the principles, but assure that the precepts themselves will determine the systematic character of his theory. In other words, we can only develop a system based on certain common precepts, and it is precisely these precepts which are ignored when different systems within the liberal tradition are deemed as incommensurable. Rawls believes that there exists a conception of justice that is common to all humans, as almost all humans are rational: when humans look for justice in instances that reside outside of themselves, they are missing their target insofar as it resides inside their own minds. Most of human history consists of cases where justice did not include all its members into its own system. Moreover, even when it did, there were no instances of justice for each individual's cooperation; instead, the particularities of individual life were rendered intelligible in conformity to the needs of the majority. For this reason, justice lost its weight as a term for the inclusion of all men. Fortunately, it still resides inside of each individual in the form of "common sense" (a common form of reasoning), with which men could employ in public deliberation; to this day, this remains our only hope for finding the common ground in which a shared conception of justice could arise. "Thus it seems natural to think of the concept of Justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions have in common" (Hart, 1994, pp. 155-159).

It is precisely due to the fact that justice resides in human reason that it is the highest virtue of any social institution, as the act of partaking in such a virtue would call to the highest power an individual can possess: the formulation of the truth. And apart from serving men as a vehicle for the advancement of their particular conceptions of the good, society is also a place which is marked by a conflict as well as by an identity of interests; in other words, the experiential content which occurs in society is not confined to the individual, but projected outwards at society itself. For Rawls, there is an identity of interests because cooperation allows for each member of a given society to live better than they ever could if they simply worked at it alone. The conflict of interests appears when individuals are not indifferent to how the greater benefits produced by their collaboration are distributed, in the sense that they deem it possible to be given a larger share of

resources (at the expense of others) in the pursuance of their ends. To counter this, Rawls proposes a set of principles that assist in the collective determination of all social arrangements. Those social arrangements determine the division of advantages and the conditions for writing an agreement on the proper distribution of shares. Furthermore, these principles must be principles of social Justice. Rawls defines the social justice in the sense that "...they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation" (Rawls, 1971, p 4). If this condition is fulfilled, then society is well-ordered in the sense that it is not only designed to advance the good of its members, but also effectively regulated by a public conception of justice: this appears only when everyone accepts and recognizes the same principles of justice and when the basic social institution satisfy and (generally) fulfill these principles. Then those who possess the same interests can assemble to advance them by creating their own associations, while those who possess completely different aims and purposes can still share a common conception of justice that establishes the bonds of civic friendship. So one may consider that this well-ordered society is an association that is constituted over the public conception of justice. Most well-ordered societies are supported by these principles, but what constitutes a right to be just and unjust may still be in dispute. However, citizens can consider institutions as just when no arbitrary distinctions are made within their confines. When there are no arbitrary distinctions, according to Rawls, it leaves open the possibility for individuals to each discuss their own principles of justice. This discussion may specify which similarities and distinctions among individuals are relevant in determining rights and duties. But this does not settle any question; it only reminds the citizenry of the role of the principles of justice.

What characterizes justice is not only the fact that it is necessary for the constitution of any human community, but also for cooperation, efficiency and stability in regard to the mutual social ventures that take place within it. Thus, justice has another extensive role that guarantees the safety of those who enter in mutual cooperation: to a certain extent this is a sufficient criterion for Rawls, as it guarantees to other individuals who enter mutual ventures that their own personal conception of the good is not completely set-aside in the accomplishment of this venture. As Rawls notes, utilitarianism cannot guarantee this. The role of justice is not merely present for its own sake; it regulates itself precisely because that is the demand that its individual practitioners place on it. In this sense, regardless of who enters in social cooperation with the intention of realizing good or

bad ends and no matter how big the harm may be, justice must be able to restore and rearrange itself in order to distribute the other shares as well. In other words, its practitioners expect it to not get “caught up” with particular problems; it must always be working, and for that to be possible, it must be able regulate itself in relation with what it is constantly being confronted with. Thus, Rawls’ system of justice cannot allow for results that prevent the system from recuperating from them: as it is a procedural system, it must always give itself the means to continue functioning for those are not touched by the negative results in question. If in a certain society it is not clear what is just and unjust, it is clearly more difficult for individuals to coordinate their plans efficiently in order to ensure that mutually beneficial arrangements are maintained. “So the role of justice cannot be assessed by its distributive role alone. It must take into account its wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable” (Rawls, 1971, p. 6).

The aspect of justice that Rawls is interested in is related to its basic, rational structure. Justice is a large and deep concept that may include very small and simple human interactions to complex international conflicts. Despite this, justice remains a “large” concern even when it occurs in basic human interaction; furthermore, it always remains deep and varied. It is large when it treats institutions in relation to these interactions, and it is for this reason that it often falls short of fully encapsulating even the smallest of social problematics. Finally, it is various in the sense that it proposes multiple ways of solving problems of cooperation, even when it seems like the outcome is fatal.

So what is Rawls’ model then and how can it be aligned between the traditional ones? In principle, Rawls’s model is not that foreign from those of the tradition, but differs from them via his own particular principles; and in consequence his model represents a more limited form of contractarianism, insofar as his interconnecting principles necessarily reduce the scope in which his theory can operate. In other words, unlike the theories of the tradition, Rawls' theory makes no attempt to reach totality. It doesn’t desire to reach totality, because the real-world problems it encounters are not one that can be resolved via totalization measures: these problems require specific tools and thus, specific principles for their regulation. Moreover, even after the most strenuous of attempts to include the sum of social cooperation into theories of justice, there will always be some types of social cooperation that resist this inclusion; in this sense, there is a pre-

theoretical residue that persists after a **total** application of a particular theory of justice. This is a fair enough basis for the rejection of any totalizing theory of justice, insofar as they cannot realistically keep their “absolutist” promises. This is why Rawls makes clear that his theory of justice is purely social, in the sense that it concerns only social justice. The “subject” of justice in Rawls’ theory is the basic structure of society (as is defined in “Justice as Fairness: a Restatement” (2001)), in which major social institutions distribute fundamental rights and duties and determine the division of advantages in social cooperation. By major institutions, Rawls understands the political constitution and the structure of the principal economic and social arrangements. The legal protection of the liberty of conscience, competitive markets, private property in the means of production, and the nuclear family are examples of major social institutions. Through these institutions, any form of cooperation must be determined according to values and merits; the institutions must actively construct and institute these values and merits, lest they want inequalities of first and second nature to infiltrate their system and consequently pass themselves off as deliberately-chosen (and conversely, “just” forms of inequality). The normal condition of society is one in which inequalities are presented as problems of merit and desert; they are thus naturalized, as whatever inequality that originates from society is deemed to be inherent to that particular form of social organization. This is indeed deceitful, as the only inequalities that are “just” on the structural level are the ones that were deliberately allowed by the system of justice itself; there must be established reasons for such an inequality, and they cannot come from anything that is outside of reason. This disqualifies any a-priori *defense* of natural, structural or even contingent inequalities; if any of these inequalities are to be accepted, they must first pass through the tribunal of reason.

As Rawls examines the “subject” of justice, he narrows the scope of his analysis through a further delimitation of the meaning of “social justice” (and thus, the social realm itself). Once identifying the basic structure of society as a core for the distribution of justice, Rawls closes off this system with the aim of establishing the principles of justice within its very confines. These principles must function within the logic of this basic structure, and thus, their first aim is to establish and maintain a “well-ordered society”. While it is unlikely that these principles are perfectly general, in the sense that they can deal with all possible problems of cooperation in the social realm, Rawls stresses that they are still necessary: “The point to keep in mind is that a conception of justice for the basic structure is worth having for its own sake. It should not be

dismissed because its principle is not everywhere satisfactory” (Rawls, 1971, p. 9). A conception of social justice is to provide a standard through which the distributive aspects of the basic structure of society are to be assessed; while they might not respond perfectly to a particular problem of cooperation, they will steer us in the right direction when it comes to solving them in a just way. However, the *standard* of the basic structure and the principles *for* that basic structure are not to be confused: for while the principles might be different, they must conform to a basic standard in order to function properly together. These principles must fit within a certain standard, as a standard without precise principles is too abstract and thus beyond the scope of Rawls' theory of justice; conversely, principles without a standard become mired in problems endemic to intuitionism, which we will see later. For Rawls, principles and their standard must be mutually constructed for the establishment of a well-ordered society that can regulate most forms of conflict that originate in the social realm; this mutuality is the basis of any coherent theory of justice.

1.3 Contractarian Concept of Justice as Fairness

The coherence of Rawls theory stems from its contractual nature; it is thus constructed upon the traditional conception of contract found in Locke, Rousseau and Kant. With the concept of contract, Rawls does not mean the “deal” that is established between citizens in regard to the future society they will live in. As we previously stated, Rawls wants to take the contractarian tradition to a higher level of abstraction: he will then present the contract as the condition of possibility of any just agreement pertaining to the constitution of basic social institutions. His concept of the contract is thus transcendental in comparison to the rest of the tradition, as he is looking for the a priori basis on which traditional contracts can be established and upheld. It is for this precise reason that the original position is of such a high-level of abstraction: citizens have to be able to deliberate on the conditions of deliberation before any *real* deliberation has come to fruition. In contrast to the Hobbesian state of nature, the original position is based on the Lockean state of nature (Locke 1690, p. 269-278): in sum, we are all inherently equal in this state, as we've yet to determine our own life prospects due to the fact that they can only be rendered intelligible within the confines of a political society. In the original position men are equal as moral persons and rational beings and thus capable of collectively grasping the sense of justice regardless of social status and class; because of this, they can agree upon principles that they choose and then

assign rights and duties for the division of social benefits via rational choice. When men gather to choose the principles that they will follow, they find each other in an initial position where they do not know anything about each other's interest, knowledge, intelligence, aims and purposes; for this, they must abstract from the social background of each individual inside of the original position. Furthermore, men or parties do not know their conceptions of the good or their psychological propensities; in this sense, they are abstracted from their particular cultural background. Under the conditions where parties find themselves in the original position, they choose principles which would benefit their interest and enable each member to pursue their own good under the terms of freedom, equality and the norms of agreement that would guarantee to the parties the mutual respect of such principles. Rawls calls this "justice as fairness" (JF), since it conveys the idea of the principles of justice are agreed to in an initial situation that is necessarily fair to everyone; in this sense, justice arises out of fairness itself. But just as the propositions are not the same as the axioms which they are deduced from, justice and fairness are not the same: fairness is a condition for justice, and thus has priority over it.

The first principle that parties must agree on is what type of government and institutions that they will choose. This principle (which will be seen in the second chapter: The Principles of the Justice and the third chapter: Original Position) will contract parties under the conditions of freedom and equality for its members' benefit and cooperation in their mutual ventures. The general recognition of this fact provides the basis for a possible public acceptance of the corresponding principles of justice, as the ideal of the Public has just been realized in the formulation of the first principle. Nobody enters a society voluntarily, but everyone finds themselves at some particular time in a particular society, which they enter by birth and leave by death. Furthermore, nobody can choose to enter in an agreement with society or not, for society itself would not be possible without an initial agreement for its constitution that was made on some sort of common ground. Thus, according to Rawls, a society satisfying the principles of justice as fairness comes as close as possible to being a voluntary scheme that meets the principles which free and equal persons would agree to under fair circumstances. So this means that they are autonomous, in the sense that the obligations which they recognize are self-imposed.

The most difficult question that stems from this is twofold: will the principles of justice be as fair as the conditions in which they were established and conversely, will they be rational? First of all, the choice of principles is rational insofar as rationality is what supports the choices of the

participating parties: it is hard to believe that parties who view themselves as equal would agree to a principle which may lessen the possible prospects for themselves in exchange for a greater sum of advantages enjoyed by others. It is also irrational to expect that someone will resign from the determination of his own good just to serve the greater net balance of satisfaction. This is what differentiates Rawls's theory from utilitarianism. While both theories consider their actors as proponents of rational self-interest, Rawls sees it as irrational for actors to sacrifice themselves for the greater good: while utilitarianism can invoke coercion to force this sacrifice, Rawls' theory cannot. In sum, the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage and is inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society. Because of this, the principles that Rawls will formulate must be different: "the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society" (Rawls, 1971, p. 15). It is not fair when a certain group can prosper off of the fact that another group is worse off; in contrast, there is justice when the benefits of the privileged group is conditional on the improvement of the group that is worse off. Nevertheless, Rawls acknowledges the fact that this choice of principle is the most difficult part in the constitution of a just society. Apart from the fact that it may not be convincing to everyone, JF has another two problems. First, it would be difficult to accept the rational choice of principles and its initial position as Rawls suggested them. This is because doctrines such as utilitarianism and perfectionism are also founded on a structured process of rationality, and it would be thus required to usurp both doctrines' claims to rationality on the basis of rationality itself. In sum, reason runs into the "no true Scotsman" dilemma, and it cannot defend its superiority by recourse to anything external to it. Yet, Rawls is convinced that his contract theory prevails for two reasons. The first reason is that the principles are determined entirely on rational *choice* instead of substantive form of rationality (in other words, a rational doctrine), and that the rational choices of each individual become harmonized in the formulation of principles of justice: unlike utilitarianism there is no "antagonism" between rational actors that requires coercion to "correct". Lastly, these principles will have to conform to fairness itself insofar as they are mutually constituted by rational actors via deliberation on fair grounds. In other words, actors are rational and they can exercise their rationality on a common ground, in order to ensure that deliberation on

principles does not turn into a deliberation on rationality itself: if actors were debating on uneven grounds, then the debate would eventually fall apart due to the “uneven” character of the reasons behind the principles.

1.4 Reflective Equilibrium

The even-ness of the rationality behind the principles must be arrived at in a proper way. For example utilitarianism will smoothen this unevenness by basing the principle of utility on the rationality of a single thinking subject. It will then reduce all forms of rationality to this one; in consequence, collective forms of reason such as deliberative rationality are erased in favor of the dominant conception of instrumental reason. The goal of the original position is to secure deliberative rationality in place via the institution of equality, in order for it to then modify itself throughout the deliberations without ever having to be reduced or replaced. Initially, the two principles of justice that are preferred over those of utility are derived from rational choice. In their initial condition behind the veil of the ignorance, none of the parties know the interests and ends of the opposing party. Thus, it seems widely agreeable that it should be impossible for the parties to tailor principles to the circumstances of their own case. For instance, if one knew he was wealthy, he might have found it rational to advance the principle that various taxes for welfare measures are unjust; on the contrary, if he was poor, he would propose such a principle as being just. So, the original position suffices to abstract from an initial position, where all the parties are equal and can propose and deliberate on principles which may be accepted or rejected on the common ground of rational choice. It is sufficient enough that the limit of rationality is not based on the value of the principles which are proposed but rather on the sense of justice that men are capable of. On the other hand, rationality by its nature rectifies the margins of the principles and their effects on reflection. In sum, the principles and the reasons behind them are constituted via a reciprocal relation. Thus, according to Rawls it would be nonsensical for the parties to find rational discrimination and religious intolerance as just, as these principles would either exclude sophisticated reasons or sophisticated reasons would exclude these principles. These convictions and many others are historical contingencies: they are *provisionally* fixed points which we presume any conception of justice must fit. Thus, it is hard to determine the just distribution of wealth and authority *once-and-for-all*, as these points are subject to change over time. In order to find the best

reasons behind a particular judgement, Rawls suggests that it must be debated and argued from both ends until they find premises that would allow uniform principles of justice; in order to conform to the uniformity of the principles, historically contingent beliefs must thus be excluded due to their very nature. On the other hand, the nature of the contract itself is what bonds parties to each other, in the sense that it is the highest form of assurance to parties that everyone will respect the conditions of cooperation (which they have agreed upon by mutual interest). But there now resides a problem: while the long tradition of contract theory might give us the impression that any contract is stable by nature, Rawls' criticizes the tradition because this pretension of stability is nothing without a commitment to fairness. The question is: what does Rawls propose as a mechanism of stability once fairness has been established? Fairness is a precept, not a mechanism, and thus we have to look further.

The state of affairs where principles of justice are balanced and adjusted called reflective equilibrium. "It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises or their derivation" (Rawls, 1971, p. 20). The equilibrium, adds Rawls, is not necessarily stable; it might happen that we need to revise our judgments. This is what justifies the original position, for this also assures that even if the argument of the original position is not practically convincing, it is at least philosophically consistent. But does this mean that the truth of the principles is variable? Or do they consist of any truth at all? If they do, of what truth do they consist? Rawls does not claim that the principles of justice are necessary truths or derivable from such truths. "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is the matter of the mutual support of many considerations, of everything fitting together into one coherent view" (Rawls, 1971, p. 21). Certain principles of justice are justified because they would be agreed to in an initial situation of equality; in this sense, equality and coherence are intimately tied together as concepts, insofar as the coherence of principles can only arise from a situation in which its actors are deliberating on the same, common ground (Daniels, 2016).

1.5 Particularities of the Contract Theory as Fairness

Rawls's Theory of Justice is constructed in contrast to utilitarianism, perfectionism and intuitionism. While he spends some time on the refutation of the two latter doctrines, it is utilitarianism that serves as his primary target, largely due to its prominence in moral and political theory. Sidgwick's utilitarianism is the representative of utilitarian theory that Rawls criticizes, as he deems it to be the most cogent representative of the utilitarian doctrine: "The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it" (Sidgwick, 1877). At first glance, this conception may seem to present utilitarianism as rational when it comes to the definition of justice: after all, utilitarian thinking is the basis for setting up rational connections between means and ends. But while this might be rational for individuals, things become more complicated when utilitarianism is conceived on a social scale. This is because certain ends conflict with others, and thus, utilitarianism must decide which ends to honor before establishing a coherent system of means. Utilitarianism "solves" this problem by reducing society to the status of a single rational individual: the "end" of this individual is an amalgamation of all of the ends that can be properly harmonized into a singular end. This is why the ends it decides to honor are the ones that "*achieve the greatest net balance of satisfaction summed over all the individuals belonging to it*". Utilitarianism's notion of the good is thus contingent upon the type of ends that can be harmonized in society; what is "good" is what benefits the largest possible sum of its members. Justice denies that the loss of freedom for some is made right by a greater good shared by others. Any conception of the good that cannot be harmonized in this way is thus rejected by utilitarian theory. As we've previously stated, this is precisely what Rawls is trying to counter, as the exclusion of certain conceptions of the good in favor of others is unjust if there isn't an "a priori" justification for the exclusion that is conducted in a state of pure equality. While utilitarianism does make a distinction between the right and the good, it falters once the good is attained, as that good remains "isolated": it becomes an abstract notion to which our sole responsibility as citizens is the formulation of the most efficient means to attain it. Because this conception of the Good is arrived at via a reduction of the multiple ends of in society to a single one, the goods of the society in question are not regulated by any value criteria which arranges them according to their weight, but estimates them as general goods; it is the "most general" good

that then becomes the Good which society must arrange itself to attain. As a general value, this good is then distributed in society as any other good, which then makes it lose its value in the concrete life of individuals; because of this, it becomes an abstract good and is thus independent from the right. The two main concepts of ethics are those of the right and the good; for which Rawls claims that the concept of a morally worthy person is derived from them. In a Theory of Justice, the question of good is impartial to the question of right. Rawls interconnects the utilitarian conception of justice with his interpretation of teleological theories. “The clarity and simplicity of classical teleological theories derives largely from the fact that they factor our moral judgments into two classes, the one being characterized separately while the other is then connected with it by a maximizing principle” (Rawls, 1971, p. 25). Teleological doctrines differ according to how their conception of the good is specified. If it is taken, remarks Rawls, as the realization of human excellence in the various forms of culture, we have what may be called perfectionism; this notion was present in Aristotle and Nietzsche, among others. If the good is defined as pleasure, then we have hedonism; if as happiness, eudaimonism and etc. Whereas, for utilitarianism the good is defined as the satisfaction of desire, or better, as the satisfaction of *rational* desire: in this sense, desire is rational if and only if it can be properly subsumed into a means-ends system.

In the contrasting of his theory of justice and utilitarianism, Rawls focuses on a few key points. The first is that, for JF, equality of rights and the welfare of society are of equal importance only after they have been established in a lexical order within the original position. But for the welfare of society to be possible, we must *first* establish the equality of rights; this is precisely what utilitarianism does not do, as it does employ a lexical ordering of its principles. While utilitarianism aims to maximize the Good, JF prioritizes the right since the equality of rights guarantees the integrity of each individual and in consequence, their capacity to fulfill their particular conception of the good. By according particular importance to the rights of individuals, the notion of the good becomes a consequence that is based upon those rights. Despite utilitarianism’s claim to being the proper form of justice for an individualistic society, it fails insofar as it erroneously reduces society to the status of a single individual. In other words, its support for the individual is superficial as long as it doesn’t prioritize individual rights over an individualistic conception of the good. In the original position, society could never be reduced to a single impartial spectator, insofar as this would require each individual to possess an *a priori* conception of the good that will necessarily be harmonized with those of others. On the contrary,

they would agree only for the principle of equal *rights* and social and economic inequalities which are to each person's interest: they can thus only discuss foundations for the establishment of a plurality of life projects which, despite not being completely harmonious, can co-exist without coming into conflict. In sum, each individual's life prospect and their rational good must be pursued within the limits of other's basic rights.

The second contrast that Rawls mentions is that utilitarianism is a teleological theory, whereas JF is not. By definition, then JF is a deontological theory. There are two types of deontological theories, which can often overlap: the first type does not specify the good independently from the right and the second type does not interpret the right as maximizing the good. Deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and act independently of their consequences. All ethical doctrines must take consequences into account in judging rightness: those who don't would simply be irrational. Therefore, JF is a deontological theory of the second type. If it is assumed that the persons in the original position would choose a principle of equal liberty and restrict economic and social inequalities to those that pertain to everyone's interests, there is no reason to think that just institutions will maximize the good. For example, one might defend extreme tax cuts for the rich as a maximization of economic growth, which would be perceived by some (crude) utilitarian as conception of the Good that applies to the entirety of society. But to do this would necessarily diminish the prospects of the poor when it comes to their individual pursuits; thus, it would be unjust to sacrifice these prospects for the purported maximization of a social Good. Thus, if for utilitarianism the good is defined as the satisfaction of rational desire, then for JF the question of the greatest net balance of satisfaction never arises, as the maximization principle is not used at all: it is in this sense that JF and Utilitarianism employ different forms of rationality, as it can simultaneously be rational to maximize a good as well as refuse any maximizing principle for precise ethical reasons. Thus, the conflict between Rawls and the utilitarianism is not a conflict of reason, but a conflict of *procedure*; while procedures are supposed to be rational, not all of them are just.

The problem of choosing principles is rooted in the problem of intuitionism. Rawls presents intuitionism as an irreducible family of first principles, in which there is a balance that pits each principle against each other in the attempt to find a standard that would then best fit the principle of justice in the "family". But when we think of intuitionism in general, there is still a dispute in

the general theory regarding which first principle will be the one that all the others must conform to. To say it crudely, intuitionism is mired by the problem of determining a family “patriarch”. As a consequence of this, intuitionist theories encounter a “fork in the road”, so to speak: Either the principles collide with each other and give contrary directives in particular cases (and in consequence, impair our ability to make the right choice), or they include no specific method and we are forced to strike a balance by intuition. Or, adds Rawls, if there are any prioritized principles, they are thought of relatively trivial, in the sense that there could be multiple reasons for choosing other principles over others; in other words, the problem of the contingency of a hierarchy of principles plagues the intuitionist regardless of the direction he decides to take.

Even if concepts of justice and right are associated with intuitionism and are thus unanalyzable, when they are suitably formulated they express self-evident propositions for moral claims. What each moral claim may entail in itself is a matter of moral epistemology; in other words, what these claims may entail is contingent upon how moral facts are constituted within different systems of morality, which does not concern Rawls here at this stage. What does concern him is the requisite for the *priority* of principles in general. By aligning himself to this discussion, Rawls is more interested in finding the priority of his principle within a general theory of pluralist intuitionism. To some extent, every problem that we choose to discuss in everyday life as well as even the most fully-developed philosophical theories that we could use to answer such questions are intuitionist in essence, in the sense that the principles they constitute and/or confront derive from the intuition itself. To make it simpler, Rawls uses the example of social welfare. The point of this example is to demonstrate to what degree every theory requires a certain group of unquestioned precepts in order to then establish its principles on the foundation that they provide. For instance, a group precept would offer a principle for a fair wage, another for taxation, another for punishment, and so on. To arrive at the notion of fair wage, it must be somehow balanced upon various competing criteria such as skills, training, responsibility and workplace hazard. In sum, none of these precepts would be able to decide alone: a kind of compromise must be struck. Even existing institutions represent a particular weighting of these claims when they determinate wage; different social interests and relative positions of power and influence normally determine this weighting. As a result of this, it may not conform to any one’s conception of fair wage: individuals with different interests are likely to stress the criteria that serve their ends. But how can we reach a compromise that would go beyond mere competing of interests, and with that, reach an

agreement that would suffice to determine the founding principle justice or, at least, the balancing of its precepts? This is problematic, as justice is required for the regulation of different social ends. If we give more importance to the equality of wages, then it requires a higher demand on education, skills as well as a different type of tax policy. Along with this, we can fashion other problems of need in a different manner, or we can leave them to be regulated by another principle. This depends completely on the principles that we chose to regulate those ends of social policy. Moreover, those principles, whether are teleological or deontological, in principle can be intuitionist. Then again, whether they must succeed and fit together in a balanced manner is a completely different question that Rawls elaborates and resolves under the question of priority.

In order to show that the utilitarian principle of maximization (and the concept of equality that derives from it) is essentially intuitionist, Rawls discusses the aggregative-distributive dichotomy and explains it via indifference curves. This dichotomy has two principles: first regards the basic structure of society that is designed to produce the most good in the sense of the greatest net balance of satisfaction, and second regards the distribution of individual satisfactions that flow from the first principle in an egalitarian manner. Both principles have of course, *ceteris paribus* clauses. “The first principle, the principle of utility, acts in this case as a standard of efficiency, urging us to produce as large a total as we can, other things equal, whereas the second principle serves as a standard of justice constraining the pursuit of aggregate well-being and evening out of the distribution of advantages” (Rawls, 1971, p. 37). As distinct principles of utility, these two principles miss the chance of balancing themselves, as their intuitionist character does not provide a guarantee against their eventual collision. But a collision would be impossible as long as there rules the principle of indifference curves. This principle would guarantee that both of these principles of utility (maximization of the good and maximization of equality) can function independently of each other; in this sense, the indifference curve assures that the good and the right are kept separate, all while being able to maximize their respective goods. The indifference curve will then allow us to maximize the good without having to minimize equality, as both operate independently of each other. For utilitarian, this impartial decision works as a general principle that guarantees the coherence between justice and utility: the principles would then be able to respectively attain their most desirable outcome by respecting the boundaries set by the indifference curve. Yet no matter which one comes first, they are all intuitionistic and thus without priority. If somehow equality is starts to lag behind the issue of welfare due to the fact that society

cannot prioritize these principles, there is no principle which will force society to focus only on welfare after the issue of equality has been repaired to a certain extent. Rawls' answer to this problem goes in the opposite direction. Rawls thinks that such a situation would allow different people to give different weights to the same conception, insofar as they will produce different intuitions in relation to the same moral dilemma. While they might share these intuitions, the question of their ordering will be totally arbitrary and thus, what were once shared intuitions become pieces of different hierarchical moral systems. For example, those who prioritize the common Good will give more weight to the overall welfare of society, while those who prioritize other principles will not. It is now clear that for intuitionists, principles do not have any hierarchical value; while Rawls claims that it may be true that these principles have no such value inherently, the demands of justice require their prioritization in order to assure coherence between these very principles. For a lack of inherent hierarchal value is acceptable, but not a lack of structured coherence between the principles. So if there are no distinctively ethical principles, then how can we formulate principles that will reliably serve a system of justice? Almost all of them represent a conception of justice that is, at its base, intuitionist; but none of them can actually act as representatives of equality and in consequence, serve a Rawls' theory of justice in a reliable way. In sum, intuitionism denies the possibility of any useful and explicit solution to the priority problem; he must thus reject it on these grounds, insofar as he is required to establish a priority between principles of justice.

JF limits the role of intuition in several ways. The first limitation is concerned with the fact that the principles of justice are chosen, first and foremost, in the original position. Being rational, individuals in the original position recognize that they should consider the priority of these principles; for if they didn't, there would be no way of ensuring that significant principles are not hindered in the fulfillment of less significant ones. To establish agreed standards for adjudicating their claims onto each other, they will need principles for assigning weight to these very claims. The problem is that the claimants cannot assume that their intuitive judgments of priority will coincide; on the contrary, given their different positions in society, they surely will not. Therefore Rawls supposes that the original position will have to be the place in which parties can reach an agreement on how the principles of justice will be balanced. Now part of the value in choosing principles is found in the reasons that underlie the adoption of these principles in the first place; seeing as we are dealing with reasons, we must necessarily deal with "weights" insofar as some

reasons, *ceteris paribus*, are more valuable than others. “Since in justice as fairness the principles of justice are not thought as self-evident, but have their justification in the fact that they would be chosen, we may find in the grounds for their acceptance some guidance or limitation as to how they are to be balanced” (Rawls, 1971, p. 42). So, it is the nature of the original position itself that clears up the problem of “why” and “what” principle are preferable to others, and for much the same reasons that principles are derived in the first place: it structures rationality. Intuitionism can only structure the rationality of its principles in a posteriori fashion, as we can only organize what we have first intuited. The strength of the original position is found in the fact that it allows us to choose principles by relying on rational choice in an *a priori* fashion; this *a priori* rationality gives us the tools to possibly order these principles in conformity with it. As the *a priori* nature of this rationality implies that it is shared by each actor in the original position, we can possibly guarantee that this ordering will be accepted by all. Let us now turn to the problem of structuring rational choices.

One way of solving this problem is to structure principles by putting them in a lexical or serial order. This is an order which requires the satisfaction of its first principle before moving on to the second, and so on and so on. In this sense, a serial ordering avoids having to balance principles at all; those earlier in the ordering have an absolute weight with respect to later ones and thus hold without exception. Such a ranking can be regarded as analogous to a sequence of constrained maximum principles. For example, within a lexical order maximization can finally be tied to equality as long as the maximization principle satisfies the egalitarian principles that precede it. This ranking system strengthens the case for Rawls’ theory of justice, as he has finally found a way to transform equality into a true first principle, instead of trying to deduce it from other principles (and thus limit its scope by tying to something effectively “other”). This means that the basic structure is to regulate the inequalities of wealth and authority in ways that are fully consistent with the equal liberties required by the first principle. At the moment, the order is still not 100% convincing, as we still haven’t determined a way to assure that the other principles that come after equality are properly ranked. But if the principle of utility were prioritized first, it would weaken all subsequent criteria. Thus, it is not that the principle of JF is prioritized in arbitrary fashion; the second principle can only be satisfied if every attempt to satisfy it responds to the principle that came before it.

The solution of the lexical order, however, is not without its problems: unfortunately for Rawls, it might even come close to experiencing the priority problem again. We must remember that intuitionism isn't problematic in essence, as all principles are partially derived from intuition. But problems accrue and things get more complicated when principles of utility are chosen intuitively and then required to satisfy criteria of maximization. For one who thinks in terms of intuitionism when trying to maximizing good may become slowed down by the complexity of the various principles that he must perfectly order. Furthermore, the reason why Rawls rejects intuitionism is because the aggregate-distributive dichotomy is unmanageable when it comes to the problems of justice. It neglects many small social "particles" that constitute justice, and is thus problematic in the scope of a theory of justice, insofar as that theory must originate from these very social "particles", as small as they may be. Unlike utilitarians, Rawls' cannot be a conscious reductionist. Conversely, if there is one thing that Rawls must reduce, it is the hold that the faculty of intuition has on the formulation of principles; in this sense, his "reduction" is a limitation instead of a simplification: it is a limitation because Rawls does not want to eliminate them, but simply limit them as much as he reasonably can. These two solutions to the priority problem are the only rational alternatives in the formulation of the principles that will structure society and its institutions. The problem for Rawls is not to cope with the complexity of unalterable moral facts, but to formulate reasonable and generally acceptable proposals for bringing about the desired agreement in collective judgments. The complexity of moral facts is relevant to the social justice, and thus, a proper theory of justice must do more than merely "cope" with them. Thus, the problem is now centered upon the question of "how" complicated we need our moral facts to be. The lexical order is a good tool to help us weigh this complexity, insofar as we can now test these moral facts by seeing what happens when they are determined by others or vice versa. Most moral theories are single-principled and intuitionistic conceptions and thus, a lexical order cannot offer a solution to the problem of priority as the theories become confused once we depart from that first principle; the goal of Rawls' theory of justice is to counter this aspect of the tradition, and it will do so by creating a form of moral reasoning that allows for these principles to conform to each other more effectively through their lexical ordering.

What must be extracted from this is the fact that Rawls' theory retains its rationality all while refusing to become a doctrine. While it is deontological, it acquires its principles from reason itself, instead of a reasonable appeal to principles that were externally formulated. By doing this,

it founds itself on the rationally-derived obligations that we share amongst each other: in this sense, we can establish our duties without the assistance of any particular doctrine. And this is why Rawls has made it clear that he does conceive of justice as a something that can be modeled off of doctrines such as perfectionism, intuitionism and most importantly, utilitarianism: the “entrance” for his theory of justice is opened when the aforementioned doctrines fail to achieve a certain degree of rational consistency. As we have seen above, it was utilitarianism's inability to connect justice to something other than a monolithic conception of the good that pushed Rawls to develop a theory of justice that was not bound by teleology. For if it were, it would be forced to conceive justice as a mere means for achieving such an unquestionable end; this would inevitably lead to issues of rational consistency, insofar as it is very possible that the only feasible means towards such an end enter in direct contradiction with it. In other words, to present justice as something which merely *responds* to transcending demands is a mistake: the “transcendental” element must be rationally established within the confines of justice, or else it might eventually come into contradiction with the very means through which it is meant to be actualized.

Be that as it may, doesn't simply consider justice to be an end in itself: for if this were the case, the corresponding absolution of its principles would make it difficult to properly weight the means with which they will be attained. Rawls' way out of this dichotomy is to learn from utilitarianism's mistake and construct his theory of justice as a theory of truth. It must be understood that the goal of this construction is not to discover anything new, but to merely establish the general epistemic conditions from which the formulation of a consistent theory of justice arise. Before going any further, we must remind ourselves that its rationality is not substantive: in other words, it is not meant to extract a conception of the Good from the truth that it aims to establish. On the contrary, it is merely procedural: Rawls aims to establish the conditions in which a proper procedure of justice can arise, regardless of the different ends that it will inevitably encounter. It is in this sense that “discoveries” such as our inherent equality as citizens are nothing “new”: as such truths have been derived before, Rawls is simply employing them as practical necessities in the larger procedure of justice that he aims to establish. For example, the principle of inherent equality can adjust itself to many “ends” that we would consider as incommensurable. As such a claim is not derived via doctrine, it is not difficult to understand it in its generality: moreover, at this stage in Rawls' procedure we are not even sure if such a principle will even be able to determine the principles that will be derived from it. But one thing is for sure: it if were not for the

general acceptability of the first principle's neutrality in regards to divergent ends, there would never be a second possibility to restate the first principle in stronger fashion via its "importation" into subsequent principles that are rationally consistent with it. As Rawls is not concerned with the Good, his choice of principles is made with the general success of the *procedure* in mind. As we have seen, this is where previous doctrines failed: we will now see how Rawls formulates his own principles of justice in order to prevent such a failure from occurring. Rawls is convinced that his theory's outcome will justify arguments for his "rational theory" and it would, if it wasn't for Nozick arguments that succeed later in detecting some flaws in arguments of so called "procedure".

2. Principles of Justice

2.1 Institutions

Rawls theory of justice can be divided into two parts. The first part concerns the choice of principles and the situation in which these choices are made. The second part concerns the elaboration of an institutional infrastructure in which these principles will be embodied. The second principle is maybe the most indicative manner according to Nozick that JF first principle doesn't send to conclude the second one and not necessarily whatever distribution that comes from the second principle will be conform and justify the first principle. Not especially Rawls conceptions on the assessment of political assets over natural assets will solve this problem either. This Nozick's example that gets developed as a counter to Rawls theory of endowments will be brought for you under the heading of 2.4 (Natural Assets and Arbitrariness) when natural assets are first discussed.

Institutions provide a link between abstract principles (such as those which are collectively decided in the original position) and the regulations which will ensure their actualization and normalization. Whether an institution is grounded on a basic structure or not, its essential characteristic is found in the fact that those who enter an institution are doing so on the assumption that its actors have access to a certain pool of shared knowledge, and are thus acting in relation to a common "milieu". This guarantees that the members of an institution can expect a certain type of agency and behavior from their peers, as they are always supposed to be acting in conformity with norms that were established on the basis of shared, over-arching principles. Rawls remarks that principles applied to institutions should not be confused with those that are applied to individuals; while norms allow for principles to apply for individuals, institutions themselves cannot follow norms, but only embody those principles through the imposition of norms on its individual members. By an "institution", Rawls understands a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden, and they provide for certain penalties and defenses if violations occur. What institutions have in common is their establishment of various rights, duties, strategies and maxims for how to best take advantage of the resources they provide. Those strategies and plans help us when it comes to deciding what is permissible

according to the common interests that we agreed upon while formulating the institutions guiding principles. In sum, these principles serve as ends for institutions while serving as regulations for the means that individuals will employ to achieve those ends: it is in this sense that regulations are the bridge between abstract principles and the individual endeavors that are undertaken to actualize them.

For Rawls, proper liberal institutions allow for individuals to follow their rationally-derived ends in a way that is harmonious with the general principles of the institution, insofar as those general principles are meant to assure that individuals don't "walk over each other" on their individual paths to the Good. In other words, these institutions are meant to coordinate free enterprise without having to coerce its members, or its members having to coerce each other. Bentham named this coordination the "artificial identification of interest", while Adam Smith called it the "invisible hand"; in both cases, artificiality and invisibility are synonyms for a type of "spontaneous order" that does not require direct coercion to be achieved. Examples of liberal institutions are parliaments, markets and systems of property. Rawls divides them into two categories: abstract and realized institutions. Institutions are abstract when their only link to practical activity is the constellation of general rules that they provide; they are realized when those rules become particular via their collective "ingraining" in the thoughts of actors. In this sense, an institution is realized when is functional instead of merely "representative". Abstract institutions cannot be judged unless they were realized, and thus, our judgement of these institutions pertains not only to their ends, but their means of actualization and maintenance; in other words, an institution can be just in the abstract and simultaneously unjust in its realized form if the means with which it was realized were not in conformity to the principles that made it just in the abstract sense. In an institution that is structured by a coherent relationship between its abstract principles and means of realization, justice becomes the highest form of virtue in the attainment of the institutionally-derived ends that its members engage in; this is because only justice allows us to preserve this coherent relationship, which then provides contextual meaning to the endeavors that are undertaken within the institution. In institutions that don't possess this coherence, its actors are given the impression that their shared ends and respective means are arbitrarily-derived and contingent upon factors that reside outside the institution: all of this serves to weaken the institution over time. Conversely, it is this contextual meaning that provides the

basis for a shared sense of belonging to an institution; this sense of belonging is necessary in the internal maintenance and external protection of the institution.

Difficulties start to appear when groups of different institutions must agree to cooperate with the institutions which do not share the same precepts of values. Liberalism's solution to this problem is to establish itself as an abstract institution which is founded on the idea that, in order to pursue their own interests, individuals must be willing to agree for fair social justice practices to be enforced via over-arching rules that govern the relations between these institutions. This is why liberalism itself can only be realized when the relations between these institutions *function* according to this principle. The condition that this realization leads to is plurality: different (and often incommensurable) groups function together on the basis of fair terms of cooperation, regardless of (institutionally-derived) ends. This increases the need for high standing institutions and judges who work to implement principles of justice, depending on how strong and effective the institutions will be. In order for society to be just, its institutions must represent principles of justice as a system, in accordance with which each individual's behavior will be adjusted. For Rawls, just social cooperation is only secure when parties will have more reason to believe in the respect for equality as the very first principle of institutions. This is because institutions themselves can only function in tandem if there is a common base which they are all tasked with representing. But how is this common base possible if institutions themselves possess the autonomy to formulate and realize their own particular (and possibly irreconcilable) principles? To answer simply, if an institution grants itself such an autonomy, than it can only do so because it recognizes the right to self-determination as an a priori principle for institutions in general; if it didn't, it would necessarily defer to other institutions in order to determine its own general principles. Under a proper system of justice, the only "moment" of deference to other institutions is the recognition of this common ground, as the institution must first realize that other institutions are autonomous before it can start "acting" in an autonomous fashion. It is in this sense that a common ground leads to a basic structure: when principles are just and belong to this basic structure, the outcome of the institutions will provide a formal type of justice that guarantees that each member will benefit from fair cooperation. Fair cooperation will create reciprocal beliefs between parties and members, which will then strengthen this common ground via the substantiality of what was once considered to be "formal" justice. JF is thus a totalizing system, insofar as the feedback loop described above serves to strengthen and expand the scope of justice; on the other hand, it is not totalitarian, insofar as its

founding principles renders it impossible for institutions to all defer to a “master” institution (such as the Nazi party or Catholic Church) and thus lose their autonomy. It is only through this non-totalitarian form of totalization that justice and fairness can actively take hold on the world that it is meant to regulate.

2.2 Two Principles of Justice

The two chosen principles that will constitute JF can be described as follows: the first principle states that each person is to have an equal right to the most extensive basic liberty that is compatible with a similar liberty for others, while the second principle states that 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. These principles apply to the basic structure of society: they are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. As their formulation suggests, these principles presuppose that the social structure can be divided into two more or less distinct levels, the first principle applying to the one the second to the other. The level that is regulated by the first principle pertains to the formal rights that are granted to each member of society, while the second level pertains to the actual economic infrastructure of the given society. The basic liberties of citizens are: 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. Let us not forget the necessity of lexically ordering both principles: The first principle requires these rights to be evenly distributed, for if they weren’t, it would be impossible to apply the principle that we will now turn to.

The second principle applies to the distribution of wealth and income and to the design of the organizations that represent different levels of responsibility and authority. “While the distribution of wealth and income need not be equal, it must be to everyone’s advantage, and at the same time, positions of authority and offices of command must be accessible to all” (Rawls, 1971, p. 61). As well as ensuring the just distribution of wealth, the application of the second principle grants us equal access to positions that become subject to constraint, such as public offices and bureaucratic positions. The second principle is contingent on the first, insofar as a fair

distribution of wealth and access to public offices can only be possible if the citizenry is conceived of on equal footing; for the Greek polis might have been a community of equals, but this community was founded on the exclusion of the majority of the population. In this sense, we cannot hope to achieve a fair distribution of wealth and power if wealth and power are only reserved to a subset of the population. In Rawls' theory, all social values - liberty and opportunity, income and wealth and bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. As a result, while economic inequality is permitted, inequalities of injustice are not. Equality and equal liberties must be expanded to certain minimum in order to ensure that the realization of each person's rational plan to pursue the good is preserved. Let us imagine that there exists a society in which the basic social structure equally distributes shared values. These basic values would be necessary primary goods in the advancement of society's social and economic goals, insofar as they need to be realized in order for us formulate just means in the attainment of these goals. To tie the equality of liberty and the equal distribution of basic goods is to push the concept of equality to the forefront of these primary goods. In this sense, the second principle can never come to a *conclusion* in regard to what inequalities are permissible, because these very inequalities are constantly being negotiated; once an inequality no longer delivers equal benefit to the rest of society, it can be deemed unjust and countered through the establishment of new laws. While the objects of the second principle are in a state of constant negotiation, the objects of the first are strictly non-negotiable; if they were, the second principle would be undermined in its entirety due to the loss of a "ground" on which these negotiations can take place. As a consequence to this, it is thus impossible for the objects of the first principle to be exchanged for the second: in this sense, trading one's freedom for economic advantage (or, the modern iteration of slavery) would be unfeasible in Rawls' system insofar as it would contradict the serial ordering of both principles: "When this preference is rational so likewise is the choice of these principles in this order" (Rawls, 1971, p. 63).

Instead of understanding justice through its general conceptions, Rawls understands it by analyzing the two principles of justice in their serial order; there is now a connection between justice and rationality that Rawls' theory can no longer depart with. While it seems difficult to find any reason that would support sustenance of the second principle as consecutive to the first principle at first glance, Rawls shows us how both principles can be ordered in a common-sense manner. While both principles are concerned with different things – the first being concerned with

abstract goods and the second being concerned with tangible goods – they find their unification within the institutions themselves; as we specified above, institutions allow for abstract and tangible goods to be linked together via normalized behavior and shared regulations. Thus, institutions can realize the second principle of justice while embodying the first: only by admitting equality as an institutional norm can social and economic inequalities be distributed equally. In other words, social and economic inequalities are not to be defined via another set of norms (such as efficiency, piety or patriotism); this forces those to be conceived in relation to the first principle, as thus weighed on that scale alone (Audard, 2007; Lovett, 2011; Maffettone, 2011).

When further examining the second principle, we can see how the relation between both principles (crystallized in our shared institutions) comes full circle. The second part of the second principle states that any seat within a public institution is open to all; in this sense, institutions not only enforce the principle of equality, but are wholly constituted by it. Finally, all parties in society benefit from this type of equality, as it allows for institutions to select talent from the largest possible pool of candidates. By rewarding the types of members that are representative of the principles that govern the basic structure of society, the rest of society is encouraged to cooperate on the basis of these principles. It is for reasons such as these that JF would not allow itself to accept principles such as utility – which maximizes the sum of expectations of representative men – and then compensate for the losses of some by re-distributing the gains of others, for this would force us to regulate our institutions on this basis. If this was the case, we might elect representatives on their productive basis instead of their ability to embody principles; this would lower the confidence of the rest of society in its institutions, as it tacitly understands that the criteria of selection reflects qualities that are not inherent to just forms of social cooperation. By ensuring that everyone can benefit from economic and social inequalities, public confidence in institutions can resist their common utilitarian and populist threats: for the existence of efficient institutional measures and an elite class of functionaries to aid in their realization are both predicated on the fact that they benefit society more than they harm it. When equality is the benchmark, society can benefit from its principles and goods in an equal manner. But whether it can do this in an efficient matter is a different story; it is this issue that we will turn to next.

2.3 The Principle of Efficiency

Because the two parts of the second principle of justice contains the (rather ambiguous) clauses “everyone’s advantage” and “equally open to all”, the principle of efficiency can be interpreted in many different ways. One interpretation associates equality with natural liberty and thus refers to a state of natural aristocracy, while the second associates equality with liberal equality and consequently refers to democratic equality. As Rawls rejects natural rights in favor of political rights, he will start by accepting the second interpretation of efficiency. But even if this basic conception is accepted, Rawls must distinguish this concept in relation to the principles that it is accompanying; efficiency in regard to the first principle is not the same thing as efficiency in regard to the second, insofar as the former applies to rights and liberties while the latter applies to the distribution of economic goods. Though Rawls’ distinction is weaker than we think. In both interpretations, however, the economy is conceived as free market, and this is because the latter is the only economic institution that coincides with the first principle. Natural liberty can thus be considered as a viable option, since the basic structure of society satisfies the principle of efficiency in which positions are open to those that are able and willing to strive. Assigning rights and duties in this way is thought to be fair, whatever the allocation turns out to be. As all interpretations of the efficiency principle contain an element of procedural justice, it equally applies to natural liberty and political liberty.

Efficiency is a term that originated in economics and initially served as a particular form of arrangement for the distribution of goods between consumers and modes of production; because of this, it was never meant to be employed in the study of non-market institutions, such as political and legal ones. But it is not difficult to export such a concept, insofar as it can be applied whenever things are being distributed. As the institutions in question not only pertain to the distribution of economic goods, but also of public offices and political power; in this sense, we can speak of “efficiency” without having to modify its meaning beyond repair. In other words, even in non-market cases, the concept of efficiency can still be applied in a similar way to its application in economics; it possesses its own internal criteria, so it doesn’t have to adopt the internal criteria of the institution we apply it to, but merely adjust itself to it. When adjusted to the principles of the social institutions that Rawls’ is referring to in his theory, the principle of efficiency states that an arrangement is efficient if changing it would make at least one person worse off than before. For

instance, Rawls explains that a distribution of a stock of commodities among certain individuals is efficient if there is no redistribution of these goods that improves the circumstances of at least one of these individuals without disadvantaging another. If we were to bring this slightly modified principle of efficiency back to economics, it would imply that production of X is efficient if any further production reduces the production of Y or Z. Thus, if we could produce more of one good without having to give up some of another, the larger stock of goods could be used to better the circumstances of some people without reducing the circumstances of any other person. Conversely, institutions are inefficient when there are still ways in which one can do better without having to make anyone else worse off. Rawls assumes that this principle will be agreed upon in the original position, insofar as it functions in perfect conformity to the two principles of justice.

Despite this, Rawls treats the question of efficiency in a separate manner, insofar as it can be relativized and thus procure a different meaning depending on the context in which it is applied. This relativity can lead to incoherence if the “relative” aspects of the principle are assumed as being essential to it. Using the two diagrams that are presented in figures 3 and 4 (Rawls, 1971, pp. 68-9), Rawls explains how index curves vary between those who can do better without having to make others worse off, and those who are parallel to them but cannot do better without making others worse off. Parties A and B possess the same fixed starting point: O. initially, they are equally distanced, but as they progress, one might surpass the other in relation to O. For example, B might be in a higher position than A. But we can then have points Z, D and F in which Z is inferior to D in relation to O and F is superior to both in relation to O. In this sense, F's superiority only has something to do with the inferiority of D and Z, but not necessarily A and B. There are many kinds of efficiency, but none of them can be judged as being good or bad the only thing that can be stated with confidence is that some are better than others. In other words, efficiency cannot employ its internal criteria to determine whether it is just or not, as the question of justice is qualitatively different than the question of efficiency. The only way that an “efficient” arrangement can be just or not is whether it conforms itself to principles of justice; as we've just seen, this is exactly what Rawls is trying to accomplish. As efficiency is relative to the institution that we are applying its criteria to, Rawls needs to make this principle conform to a single maxim, or else it will apply differently to each institution. For example, imagine if each party that is somehow in relation with other party will follow its own maxim and stick with it during negotiations. Between parties A and B, B's principle of efficiency will be respected, while between Z and D, it will be D's principle

that is accepted. As B and D's principles of efficiency might be incommensurable due to differing internal criteria, it is necessary to create a Principle of efficiency that, regardless of the institution's internal criteria, will regulate all matters of efficiency between cooperating parties. In consequence, Rawls concludes that the basic institutional structure must provide a general principle of efficiency when parties get together to decide and choose the types of principles that their future society will be modeled upon. This is a way of ensuring that the relative utilitarian consideration so each institution will not affect the way in which others operate. In sum, we can say that an arrangement of rights and duties in the basic structure is efficient if, and only if, it is impossible to redefine the scheme of rights and duties in order to raise the expectations of any member without, at the same time, lowering the expectations of at least one other member. In this way, efficiency is made to be consistent with the other principles of justice: when it modifies the basic structure, it is not permitted to violate the principle of equal liberty or the requirement of public positions that are opened to all. According to Rawls, all that can be modified is the distribution of income, wealth and the way in which organizational powers and various other forms of authority regulate cooperation. Allocation of these primary goods may be adjusted to modify the expectations of individuals, but they must always be consistent with the constraints of liberty and accessibility.

What all of this entails is that, for JF, equality comes before efficiency: nothing can be judged in matters of efficiency before it was judged (and accepted) in matters of equality. This is necessary, as an un-mediated conception of efficiency derives from the state of nature, which is precisely what the actors inside of the original position are trying to move out of. Whatever form of justice the principle of efficiency will conform to is contingent upon the debates that take place within the original position. When we ask ourselves (inside the original position) which are the types of institutions that ensure the just distribution of social goods, we are questioning and developing a working conception of justice. With the theory of natural rights, justice is achieved by the arrangements implicit in the conception of careers that are open to talents (which might or might not be the results of natural assets; either way, the theory doesn't care). These arrangements presuppose a background of equal liberty (one that is different than the equality found in Rawls' first principle) and a free market economy. They require a formal equality of opportunity, in which each member possesses the same right of access to all advantaged social positions as any other member. But since there is no effort to *preserve* such equality (or social conditions in general)

unless its weakening directly threatens the structure of our social institutions, the initial distribution of assets is strongly influenced by natural and social contingencies. “The existing distribution of income and wealth, say, is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view” (Rawls, 1971, p. 72). This interpretation resembles the concept of natural equality but differs in one aspect from natural liberty, for it accepts that an equality of opportunity in regard to public office must be instituted in order to counter-balance the arbitrariness of the natural talents that might influence such opportunities. For Rawls, the problem with natural liberty is that it can possibly hinder equality right as it promotes or preserves itself. Social laws will only preserve the equality of opportunity for those who possess a minimum of talent, as those who do not have such talent will be arbitrarily disqualified from the equal distribution of the social goods in a free market. If this is the case, then natural endowments will determine the efficiency of our cooperation. It is social justice that must balance this unequal yet natural diversity of skills, abilities and talents; this is why a liberal theory of justice is forced to possess something akin to Rawls’ second principle of justice, as it is the only way of regulating these types of natural inequalities without having to penalize others for not possessing them. Natural rights, on the other hand, not only opposes this by accepting the moral validity of a “natural lottery”, but goes even further by selecting this natural lottery as one of its main mechanisms of social justice. In other words, the acceptance of the priority of natural abilities over social equality overrides equality in the sense that it is impossible to lexically order both principles without having to undermine one or the other.

Now that natural rights have been rejected, the path to establishing democracy becomes clearer: it is the only form of political organization that can go beyond the principle of equality in the formulation of a just procedure of cooperation inside of the public sphere. In this sense, establishing democracy is the only in the second principle of justice can be actualized. Fair equality of opportunity and the difference principle can be harmonized quite effectively in a democratic society. This harmonization is necessary in order to arrange institutions on the principle that the higher expectations of the luckier members of society are just if, and only if, they work as part of a scheme which improves the expectations of the least advantaged members of society. Just as the

minority who voted for a losing party would be crossed if the winning party disadvantaged them in retaliation, the unluckiest members of society would not accept a system where progress is won on their very backs. In this sense, the principle of efficiency now benefits these lower classes instead of harming them (as it does in most capitalist and communist systems); the “efficient” part of this equation is found in the fact that it finally encourages the lower classes to participate in such progress, insofar as they know that they will be the first ones to benefit from it. Just as the principle of efficiency found in the state of nature acts as if the productive classes are the only ones that exist, this modified principle of efficiency acts as if the lower classes were the only ones to exist; this is how they can be rewarded first in the distribution of goods, regardless of their contribution to it. Rawls’ theory of Justice does not need to ask itself how to improve the living conditions of those who are already better off, as these individuals seem to be able to adequately accomplish this on their own. The lower classes, however, are in this predicament because of the difficulty involved in improving one’s condition at this level; in order to efficiently distribute justice, the institutions must thus focus on this social strata, as it is where justice is lacking the most. As both parties can raise their expectations without having to lower those of the other, there is little reason or class conflict, insofar as this would damage both parties’ prospects. For Rawls, this is justice, as it finally solves the problem of turning social cooperation into a zero sum game (with its obligatory winners and losers).

While this is the *de facto* condition of justice’s realization, it is by no means *enough* to conclude that the outcomes produced by this society will be just. It is not enough to say that, by only *implying* fair principles, the outcome of the game will be just: on the contrary, it must be also played in a fair way, least one wants to delegitimize the principles of justice immediately after the start of the game. Even that is not enough: fair play must be normalized in order for it to be repeated without direct intervention on the part of the referees. In order for the difference principle to be applied, it must be secured by a *procedure* of justice; in sum, it must be repeatable on a consistent basis. This allows us to make sure that equality was applied and will be applied according to the requisites of justice: for the attainment of justice is not a finally stage of history, but a continuous process of negotiation. The reason for this is simple: while the conditions of negotiation might be set in stone, they do not exhaust all of the possible contingencies associated with the distribution of social positions and goods. Even in possession of the most just and efficient institutions known to man, if these contingencies are not consciously dealt with via procedure, then both justice and

efficiency fail. For Rawls, this is the point of efficiency: to ensure that justice does not suffer from entropy throughout the repetitive procedures that we employ to keep it actualized.

To some extent, Rawls accepts that justice is efficient in general, even while he is aware that too much of connection between justice and efficiency might bring his position closer to that of utilitarianism. But as far as this connection might go, it hits a wall before becoming utilitarian. This is because, as we've mentioned earlier, the principle of efficiency is always contingent upon the two principles of justice that it is meant to serve. This is because efficiency alone cannot predict just outcomes unless it is given its criteria by the basic structure of society, which, as an embodiment of the principles of justice, creates the mechanisms that the efficiency principle will regulate. It is according to rules and laws that efficiency is constituted as a criteria for justice, and not the way around (Audard, 2007).

2.4 Natural Assets and Arbitrariness

As we could see in the previous section, this is the first time that Rawls treats the issue of entitlements in his theory. For him, the theory of natural rights is not the proper way of treating this issue, as it allows for certain social goods (such as the ones produced by natural endowments) to be distributed in an arbitrary, and thus morally invalid, manner. This is inherent in the concept of a natural lottery itself: as we have no choice over our natural endowments, the logic states that we shouldn't have a choice over the distribution of the goods that flow from these endowments. Robert Nozick has a problem with this: after all, why doesn't Rawls ask whether people have actually chosen to develop their own natural assets? Why this questions is left out? Is it because beings are still considered to be products of forces that remain out of their control, and thus, the choice of whether to develop these endowments is as arbitrary assigned as the endowments themselves? The idea that it is in Man's character to cultivate his particular endowments is a bit problematic for Rawls, mainly because he considers that the character of one's achievements depends largely upon fortunate family and social circumstances for which we, as individuals, can claim no credit. Coupled with the arbitrary distribution of natural endowments, Rawls gives us the impression that there are many factors to our success that elude us entirely; to argue against this is not necessarily the result of greed, but of a lack of awareness. But the problem goes further: to a certain degree, many of the rational choices we make can be the results of these natural

endowments. For example, to be able to truly weigh multiple complex considerations and outcomes when making a rational choice is itself an endowment that many people do not possess; in this sense, how can they rationally decide to develop something that they are not even aware that they are lacking? The flipside of this very example is that the better endowed are more likely, *ceteris paribus*, to strive conscientiously; this is possible because there is a higher chance that they have been endowed with the capacity to properly reflect on their own achievements and all of the factors that have contributed to them. However, for Nozick this argument is not satisfying as he believes that Rawls is only blocking the possibility of personal autonomy being the deciding factor in the outcomes of individual endeavors; by doing this, he is according primacy to external factors in the constitution of one's destiny (Nozick, 1974, p. 214).

In sum, Nozick's problem with Rawls' treatment of natural endowments is the fact that latter's theory, which prizes the autonomy of rational individuals in the constitution of something far greater than their individual endeavors (the construction and maintenance of a just society), will simultaneously downplay such autonomy when it comes to endeavors that are much more "controllable" than the one mentioned above.

Before we attempt to examine Rawls's reasons for the rejection of natural liberties, Nozick states that "we should first examine the situation of those in the original position" (Nozick, 1974, p. 214), insofar as it is the ground from which Rawls' reasons will flourish into a systematic set of prescriptions. This is not a rhetorical ploy; on the contrary, it is a brilliant move on Nozick's part, insofar as the original position is the moment in which different forms of liberalism first start to distinguish themselves via their means of treating the problem of justice. This initial lack of distinction can be seen in a few of Rawls propositions: to a certain extent, the second principle of justice seems to be Rawls' interpretation of natural rights, insofar as it presupposes the principle of equality as a quasi-transcendental entity. The problem for Nozick is that Rawls did not make clear whether the parties in the original position choose among all the various interpretations of this principle, thought this may be the perfect conception of the principle for those who have yet to formulate their own. Regardless of the answer to the above question, Rawls is still in trouble: for if we answer yes, it means that he is being disingenuous by automatically excluding interpretations that might contradict the rest of his principles; if the answer is no, then it implies that his veil of ignorance is too strong, insofar as it prevents its wearers from exhausting the possible interpretations of certain ambiguous principles. In essence, Rawls *faux pas* is that he does

not give explanations for why the parties reject natural liberties in the original position (Nozick, 1974, p. 215). It is unlikely that their rejection of natural rights is predicated on the idea that the distribution of goods is morally arbitrary if founded on the arbitrariness of a “natural lottery”, as there is nothing more “morally arbitrary” than the difference principle itself! For Nozick, the problem is that rational individuals inside the original position would never accept Rawls’ stance on the problem of entitlements and endowments. As a consequence of this, Nozick criticizes Rawls for designing the original position in such a way that it would evaluate any natural endowment as negative. This is of major importance to Nozick, as it is this precise design decision that structures the rest of Rawls’ theory, as the demarcating line between what is possible and what is impossible to conceive in the original position has a direct effect on what principles of justice can be rationally chosen in the first place. Perhaps it is not that the inheritors of natural endowments will choose differently if placed in Rawls’s original position, but rather that, Rawls would disagree that the principles of justice that govern their mutual relations were fixed by what they would choose in the original position. For instance, Rawls claims that the demand for the egalitarian principle does not come from envy, but from the principles of justice via their resentment of injustice. But this argument cannot stand according to Nozick, as the very consideration that men have envy makes them gather around an “initial situation in an original position” to bargain in regard to their future. Thus, in principle, envy underlies the principles of justice: Rawls’s criticism of the (libertarian) principle of entitlements/endowments is based on a type of envy that negatively yields two principles of justice, which are then geared to nullify differences in social circumstances and in natural assets (Nozick, 1974, pp. 215-216). But why should holdings not depend partially on the natural endowments of their holders? Rawls’s reply is simply “no”, since natural endowments and assets are “arbitrary from a moral point of view:” as we can see, this is hardly satisfying.

To Nozick’s advantage, Rawls’ reply leaves open the possibility that distributive effects of natural differences might be nullified (which Nozick labels as a set of positive arguments) and at the same time, leaves open the possibility for the distributive effects of natural differences to not be nullified (which Nozick labels as a set of negative arguments). Let’s now turn to how Nozick presents each set of arguments.

2.5 The Positive Argument

The first argument that Nozick analyzes is related to the positive arguments. These arguments simply state that natural endowments should have no effect over the determination of their holders' lives insofar as they are arbitrary from a moral point of view: as a consequence, they should be nullified.

1. If we put in the way that Rawls states it, it would sound like people can only keep holdings that they deserve and for this reason, must lose the holdings that they do not deserve.
2. People do not deserve their natural assets.
3. If a person's X partially determines his Y, and his X is underserved then so is his Y. Therefore, Rawls comes to distributive justice and concludes:
4. People's holdings should not be partially determined by their natural assets.

This argument is problematic for Nozick, as it means that Rawls is explicitly against distribution according to moral desert because of the fact that men would not agree to distribute income and wealth according to natural assets in the original position. In regard to the first premises of the argument sketched above, Nozick states that Rawls could not allow for the possession of holdings while neglecting the very holdings that flow from natural assets. Furthermore, by insisting to pattern a distribution that is based on such a neglect of particular types of holdings, Rawls is structuring his entire distributive scheme from a morally arbitrary position; if the distinction between just and unjust holdings is morally arbitrary (as Nozick believes), then the rest of the pattern of distribution is also morally arbitrary. In sum, if we reject the first premise of Rawls' argument, then the rest of it cannot possibly hold nor be developed further. Nevertheless, Rawls's arguments follow. Let us consider his second argument:

1. Holdings ought to be distributed according to a pattern that is not arbitrary from a moral point of view.
2. Inherent differences that stem from uneven natural assets is arbitrary from a moral point of view.
3. Holdings ought not to be distributed according to natural assets.

Nozick's problem with this line of argumentation is that natural assets are not always related to differences that are arbitrary from a moral point of view. There are cases when natural

assets are of some moral relevance to distributional questions; for example, Friedrich Hayek (Hayek, 1960) has argued that, under capitalism, distribution generally occurs in accordance with the goods' perceived service to others. Thus, the goods that flow from natural assets can be of much importance to other members of a given society, and it would then be immoral to block these goods from being exchanged. If this is so, then the ability to serve others will depend on such natural assets; differences in distribution must thus be correlated with differences in natural assets. For the proponents of this type of argument (such as Nozick), the regulative principle of this system of distribution is *not* "distribution in accordance with natural assets"; on the contrary, differences in natural assets will lead to differences in holdings under a system whose principle is *distribution according to the perceived service to others*. If this is the case, then any pattern that aims to regulate the relation between natural assets and the distribution of social goods is not only morally arbitrary, but possibly immoral altogether. While Rawls considers this type of argument to be too strong, Nozick is arriving at a crucial conclusion: not only must we prevent the distribution of social goods that come from natural assets from being enacted via a morally arbitrary pattern, but there is a very good chance that any of these patterns is morally arbitrary. Let us now look at the third argument:

1. The pattern that is to regulate the distribution of holdings should not be arbitrary from a moral point of view.
2. The possession of natural assets is arbitrary from a moral point of view.
3. If (part of) the explanation of why a pattern contains differences in holdings is that other differences in persons' natural assets give rise to these differences in holdings, then, taking proposition #2 into account, the pattern is also arbitrary from a moral point of view.

Therefore,

4. Differences in natural assets should not give rise to differences in holdings among persons.

In the 3rd premise, Rawls is trying to remind us that natural assets are *inherently* arbitrary; consequently, any distributive pattern that results from them will also be arbitrary. However for Nozick, the problem has nothing to do with arbitrariness, as any pattern has the possibility of being arbitrary. "The problem is rather that the difference principle gives some people larger distributive shares than others; the question of who will receive these larger shares will depend on differences

between these persons and others” (Nozick, 1974, p. 219). These differences are morally arbitrary, for some people with special natural assets will be offered larger shares as an incentive to use these assets in certain ways; as the distribution of these incentives is morally arbitrary, then so is the distribution of goods that *naturally* flow from them. As we’ve seen, this is why a distributive pattern is necessary for Rawls’ theory of justice. Nozick is asking himself why we should use a pattern to distribute these goods in the first place, if there are other ways of distributing them that do not rely on patterns whatsoever. If things were to be given as if they fell from heaven, then perhaps there might be a more compelling reason to search for a pattern and subsequently establish it. But since these assets come into being as already “held” (or with agreements already made about how they are to be held), there is no need to search for a pattern that distributes un-held assets; in consequence, the process in which holdings actually come into being (or are shaped), does not need to be modeled upon such a pattern. Thus, there is no reason to expect any pattern to result in a just distribution of goods, insofar as justice doesn’t apply to this issue in the way that Rawls thinks it does. As nothing simply falls from heaven in the real world, in the sense that everything that is useful to us is also mediated by even a minimum of production, there should not be any pattern of distribution for these types of goods, as “given” goods don’t even exist. Nozick’s argument relies on the idea that patterned exchanges between men can be transformed into voluntary exchanges of holdings. Despite the fact that every exchange can be transformed or subsumed into a pattern, there are always patterns that are incommensurable with others by design, insofar as this incommensurability might be established in a voluntary fashion by those who are freely engaged in such an exchange. As a result, Nozick thinks that it is important to not neglect the fact that people are in these conditions because of their *choice* to not disturb the patterns that are generally admitted by all; though it is their fault that they do not react these patterns, insofar as these patterns have also granted them their holdings.

By the last positive argument, Nozick states that Rawls' conclusion that distributive shares should not depend upon natural assets is due to the idea that the distribution of natural assets is morally arbitrary. Because of this, Rawls calls for the establishment of equality, and it is precisely at this moment that the difference principle must be mobilized in order to complete the establishment of such a type of equality; for if we didn't mobilize the difference principle, then Rawls' first principle would fall victim to the conception of equality that is inherent in natural rights. For Rawls, differences between persons are arbitrary from a moral point of view if there is

no moral argument for the idea that there *ought* to be differences. From the premises of this argument, Rawls concludes that differences in natural assets are unacceptable if they enable differences in holdings, otherwise holdings ought to be equal unless there is some other principle that says differently. But why, asks Nozick, should people's holdings be equal because of the absence of a special moral reason to deviate from equality? Why should deviation from equality only be determined by moral forces? Nozick's problem is that most of the arguments assert that differences between persons are arbitrary and must be justified. But why the need to justify differences in the first place? For example, should my choice of which local corner store I prefer to go to be justified to the public? Nozick doesn't think so, for our personal reason for choosing one over the other is enough of a justification. "Treating everyone according to a same template is something that contemporary governments do" (Nozick, 1974, p. 223) and this does not allow their citizens to freely choose on the basis of their wishes and whims. Improving someone's position without making someone else worse off is sometimes impossible when we consider to what extent the relation between them is distant. They may not want to cooperate with each other under these terms and as a consequence, both become worse off. The problem derives from the fact that equality, according to Rawls, is reduced to equal holdings; for Nozick, this is the core problem of his theory insofar as it violates some of the most basic freedoms in the name of equality. By restricting freedom of natural assets, Rawls weakens our ability to differentiate holdings; by restricting holdings, he then restricts other freedoms and liberties as well. By only focusing on what people have the right to possess, Rawls forgets that there are also people who seem to be acting upon their natural right to freely employ their natural assets and endow their holdings with the benefits that flow from these assets. Why should our freedom be restricted in the domain of natural assets and holdings, then?

Nozick isn't satisfied by Rawls' explanation of the right to equal holdings because such a right becomes a restriction on a multitude of other liberties. Furthermore, the only reason Rawls can get away with it is because he effectively traded the conception of natural rights for that of social rights; in other words, if he would have still accepted natural rights, his second principle would be inconsistent. It is in this sense that Nozick sees Rawls position as being unfair, insofar as it goes at considerable lengths to determine something that wasn't even our choice in the first place. On the other hand, Rawls could not have selected any other principle to replace his second one, as it would necessarily weaken the first principle's commitment to a conception of social

rights instead of natural ones; this is a necessity for Rawls, as we have seen that he views natural rights to be morally arbitrary. But if this is the case, why would one then expect to sacrifice her natural endowments in exchange for just social cooperation when she is not even guaranteed to benefit from it. This problem worsens when we consider that Rawls' assurance that second principle will be chosen on the grounds of its rationality isn't actually consistent with the very real possibility that other principles are chosen for reasons that are considered to be just as rational. In other words, Nozick sees the second principle as essentially limiting insofar as it presupposes that the actors within the original position will choose to think of rights in a social manner instead of a natural one: in this case, it is limiting the freedom to share concepts for political purposes. It is for this reason that Nozick views the second principle as arbitrary, and in consequence, views its derivation from the first principle as irrelevant.

2.6 The Negative Argument

As Nozick is currently unsuccessful in his attempt to connect the claim that people do not deserve their natural assets with the conclusion that differences in holdings ought not to be based upon differences in natural assets, he will now turn to what he calls “the negative argument”. Let us consider the following counter-argument to the last argument sketched in the previous section:

1. People deserve their natural assets.
2. If people deserve X, they deserve any F that flows from X.
3. People's holdings flow from their natural assets.

Therefore,

4. People deserve their holdings.
5. If people deserve something, then they ought to have it (and this overrides any presumption of equality that there may be about that specific thing).

Nozick says that Rawls would rebut this counterargument by denying its first premise, namely the idea that people do not deserve their natural assets. As we have seen, this is because Rawls views the initial distribution of these assets as arbitrary. Let us now examine Nozick's modified counter-argument to this:

1. If people have X, and their having X lets us leave aside whether they deserve to have it or not; does not violate anyone else's right or entitlement to X; and that Y flows from

or arises out of X by a process that does not itself violate anyone's rights or entitlements, then the person is entitled to Y.

Therefore,

2. People's natural assets do not violate anyone else's entitlements or rights.

This means that people are entitled to the products of their work, to what they receive from others and exchange with others. Thus, according to Nozick, it cannot be true that a person earns Y (a right to be praised for writing a book, for example) only if they have earned (or otherwise deserves) whatever they used in the process of earning Y, including natural assets. Some of the things that they used to write that book (such as their intelligence or ability to understand deep emotional states) are natural assets that they simply have, and having them is not illegitimate. Not all foundations that cause desert are themselves fully deserved.

To make it clearer, Nozick parallels the statement about desert with one about entitlements. He now describes people as entitled to their natural assets even if we cannot say that they *deserve* them; because of this, then every case of the word "deserve" in the 5th argument is replaced with "are entitled to". Let us now examine the outcome of this modification:

Argument seven:

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

Therefore,

4. People are entitled to their holdings.
5. If people are entitled to something, then they ought to have it. (This overrides any presumption of equality that there may be about holdings).

"Whether or not people's natural assets are arbitrary from a moral point of view, they are still entitled to them and thus, what flows from them" (Nozick, 1974, p. 226). Furthermore, Nozick believed that if Rawls had accepted entitlements in regard to natural assets, he would no longer need to formulate something akin to the difference principle in the first place. Rawls knew this quite well, which is why he incorporated the difference principle into his system. By doing this, he could then avoid the problem of determining whether entitlements are deserved or not, insofar as the difference principle's lexical ordering also allows it to reinforce the first principle that it flows from. Without the difference principle, the equality principle is ambiguous in relation to

entitlements regarding natural assets. For Nozick, this is why Rawls could not start with the difference principle: he needed it to come second in order to establish a logical connection between equality and the imperative of ensuring that any form of inequality will necessarily benefit the most precarious members of a given society.

Nozick has himself stated that one could not find a cogent argument in order to establish that differences in holdings that arise from differences in natural assets should be minimized or eliminated. Can the moral arbitrariness of the distribution of natural assets be determined in the original position? Surely, the answer would be “yes” for Rawls. But even if the structure of the original position itself forces its participants to formulate a principle that would nullify differences in holdings that flow from natural assets, there would be no possible argument to defend it. In this sense, the structure of the original position is more coercive on our capacity to reason than we originally thought; otherwise, it would have not been necessary for Nozick’s counter argumentation to be developed any further. To summarize, what Nozick is stating is that the structural exclusion of knowledge pertaining to natural assets is what forces the participants inside the original position to (by performance) adopt the viewpoint that the distribution of natural assets is morally arbitrary, all without having to actually argue about it; the problem with this is that this viewpoint should be arrived at through the *means* of rational argumentation *within* the original position itself instead of being posited as “prior” to any argumentation whatsoever. It is for this exact reason that we cannot find a rational argument in favor of this viewpoint in the original position, and not because the distribution of natural assets is *actually* morally arbitrary.

The question is: why should knowledge of natural assets be excluded from the original position in the first place? Nozick construes Rawls response as follows: this knowledge should be excluded because its moral arbitrariness makes it of no use for moral reasoning itself. But this is not *all* that the original position excludes people from, as it may also exclude them from knowing anything about themselves, their features, and their rationality, ability to make choices, life span, and memory and so on. What we could do in this case? Asks Nozick. It is not our fault that our genetic makeup is not that of muskrats or trees, and that fact itself is arbitrary from a moral point of view! But does this mean that we are to not know anything about ourselves? The answer is a resounding “no”.

2.7 Primary Goods, Tendency to Equality and Principles for Individuals

The idea of primary goods stands to simultaneously enrich and balance the concept of efficiency and its function within the original position. This is because, in Rawls' view, a society in which natural endowments and assets are arbitrary would not only hinder the less-endowed, but also the well-endowed and well situated. In this sense, the right to holdings that stem from natural assets is not even beneficial to those who possess them, insofar as their endeavors can always be hindered by someone who possesses even more natural assets than they do. First of all, it will nullify the social effects of various talents by forcing them inside of a very limited expressive and creative space, and as a consequence, will either atrophy the existence of genius on a large scale or force citizens to abide by the logic of a genetic lottery. For Rawls, freedom consists of the coherence between large-scale social cooperation and the distinct ends of the individuals who engage in it; this coherence is possible because there are primary liberties that are transformed into norms and laws by social institutions. Nozick, on the other hand, thinks of freedom first (and thus, as a self-contained principle) and then arranges social cooperation on the basis of any principle that would allow this self-contained conception of freedom to flourish in economic cooperation only; contrary to Rawls, Nozick does not want all social cooperation to be modeled upon the same pattern. In this sense, Nozick is assuring that the moral issues that derive from other types of social cooperation do not “pollute” moral considerations within the sphere of economic exchange. Rawls softened the differences in natural assets so everyone could benefit from cooperation (and in consequence, have moral justification to nullify considerations of natural rights), since he knew that if natural assets are not to be rendered *neutral* as they currently stand, it is better to *nullify* them instead. For Nozick, on the other hand, our skills are what make us. Because of this, he is in favor of the freedom of individuals to use their skills as they see fit; if this involves demanding more in an exchange due to the particularity of the skills in question, “then so be it”. Rawls thinks that the risk of injustice is too large, as it implies that it is possible to leverage these rare skills to such an advantage that any exchange that flows from it would be too lopsided to be considered fair. In this sense, we must minimize the leverage that can be accrued by natural assets, insofar as their arbitrary distribution means that there the surplus of social power that eludes the scales of justice is too high.

Primary goods lay the basis for the minimal conditions of justice to be met. Liberty, equality, authority, power, income and wealth are primary goods insofar as those formulating the principles of justice in the original position must consider them before moving onto anything else. This list of primary goods has been subjected to criticism that mainly revolves around the notion that such a list is simply an arbitrary nomination of goods that serve the interests of the dominant party. For instance, if the poor are the dominant group in society (under a dictatorship of the proletariat), then institutions will prioritize goods that pertain to them specifically (such as equality and income) while downplaying goods that pertain to other opposing groups (such as liberty and wealth in the case of the bourgeoisie). Rawls, however, puts it in a different way: primary goods serve as the minimal conditions in which justice can be achieved. While reasons such as these demonstrate the “external” scope of primary goods, we must also remember that they also possess an “internal” *function*: they also make up the minimum requirement for an individual’s realization of their particular conception of the Good Life.

The ability of citizens to determine their own conception of the Good Life and their respective means to achieve it is honored as the first right from which the others will be deduced; from this first right will then come the second, which guarantees that each member of a given society is given equal opportunity to fulfill their particular conceptions of the Good life. These two rights are, in essence, the two principles of justice that will ground future forms of social cooperation. The ordering of such principles is rationally derived, insofar as the first principle serves as the precept which the second principle will weigh itself in accordance to; to reverse the hierarchy of both principles is impossible insofar as the second principle derives its content from the first. The content of the outcomes produced by the second principle is of no concern to justice; as we've seen above, this content is to be determined solely by the individuals engaged in social cooperation. As the content of these outcomes is of no concern, justice is rather interested by the form of these outcomes; it is for this reason that the second principle assures that regardless of what is produced, it will be to the benefit to the most precarious members of society. For even the most banal inequalities are just if they are to the benefit of society's most precarious members. If they weren't, then no one in the original position would feel secure in the society they are about to enter, as they might be in the position of precariousness.

The second principle thus serves as a guarantee that it is possible to achieve your conception of the good life, and it does this by assuring a just distribution of primary goods such

as freedom, equality, wealth and power; even if you are given the least amount of these goods in the process of justice, any re-configuration of such a distributive pattern would make you worse off. In this sense, we must not think of primary goods as more abstract forms of capital, but of conditions that guarantee the fruition of particular outcomes; they are not to be traded, but maintained and extended.

The position of the least advanced member of society is not equal to that of the poorest man or the worse off; someone is only “least advanced” in relation to someone who isn’t. For instance, B is only the least advanced if there is A to be compared with; because of this, A alone without B is just worse off as B alone without A. It is for this reason that Rawls claims that justice’s minimal realization requires the least advanced member of society to benefit from anything that increases the lot of more advanced members. While we cannot conclude that the least privileged member of society has been put in that position by the existence of more privileged members, we can ensure that the existence of the better members (and that which flows from it) improves the least advanced member’s attempts to fulfill his goals. If social and economic inequalities are to be arranged in that way, then there is no that someone will get worse off due to the distribution of primary goods; for if they did, it would not be a failure on the part of the class of more advanced members, but the system of justice (and its corresponding institutions) in its entirety. This conception of justice is thus opposed to aristocracy and meritocracy, insofar as the former sees privilege as a natural right and the latter allows for natural assets to have a disproportionate stake in the distribution of rewards. The problem with meritocracy is that what the judges consider as merit can also be the result of natural assets (and thus an arbitrary winning of the natural lottery). For Rawls, the need for fair cooperation must come from both parties equally; for the conception of “fairness” of a single party might not coincide with that of the other party. As fairness must be built by both parties, whatever will come out of the production process will *have* to be acceptable for each of them.

As we can start to see, one of the by-products of building justice in the original position is the development of a basic fraternity that will be represented (and eventually normalized) by social institutions. While actors are particularized once they exit the original position, the type of institutions that they decided on in the original position bears the mark of this initial state of fraternity. Rawls claims that once we understand fraternity in the sense of family, it is easier to understand many of the secondary effects of his theory: as the family is the only institution where

justice can be experienced when its members share and honor each other with the highest forms of respect, fairness and solidarity. Because of this, JF views democracy as the only political system which would easily accord itself to these principles. Liberty, Equality and Fraternity are indeed the three values that are in full concordance with the two principles of justice: liberty (as identical between members) accords itself with the first principle, equality accords itself with the second principle and fraternity is the by-product of the lexical ordering of both of these principles.

Principles that concern the basic structure of society are different than those which concern individuals. Fairness is the principle that applies to individuals and comes into play whenever mutual cooperation takes place. As Rawls previously mentioned, fairness is not what characterizes the rules of the game but what characterizes its players: a game has its own rules, but whether the players are playing fairly or not cannot be effected by changes in those rules. If everyone plays their part fairly within the team, the whole game will be fair regardless of the content of the rules. In other words, the reason players play fairly is for love of the game, not the rules: to play fairly is a duty towards the game, which is simply the structured fair-play between groups of individuals. This duty towards the game thus becomes a duty towards others, and it is in this sense that the idea of reciprocity is fundamental to any form of fairness. For individuals that either run for public office or have already attained it, fairness is a duty: as representatives of institutions founded on fairness, they have a larger obligation to be fair than anyone else. If they don't fulfill this obligation, they are undermining the very fairness that allowed them to reach that position of power in the first place. To illustrate this, Rawls draws a parallel with the act of marriage, as such a mutual venture is only possible on the ground of certain shared duties and moral obligations.

In this conception of justice, the morality of sacrifice and heroism does not have a proper place except when the act is committed in the name of a just war. Even so, justice does not oblige anyone to commit such an act, since nobodies' freedom, equality and fraternity is less important than anyone else's. Rawls is aware that, regardless of the theory of justice, it is impossible to settle all disputes in society nor encompass all issues of distribution and cooperation. What can be expected though is that JF offers enough moral facts that parties would agree on during their formulation of principles of justice within the original position. Rawls does not see this as being either problematic or impossible, especially when the conditions in which these discussions take place effectively promote liberty, equality and fraternity. Furthermore, Rawls deems it to be philosophically sustainable, insofar as the structure in which this process takes place is just as

rational as its actors are. We shall now further examine this structure in order to determine whether it is as “inherently” rational as Rawls deems it to be.

3. The Original Position

3.1 Justice (*Theory of Justice*, § 20).

The original position is the cornerstone of Rawls' philosophical argument, as it provides the minimum conditions for rational debate about the principles of justice that will ground the institutions of a given society. It is part where Rawls felt the most comfortable to ground principles of justice since he was convinced that under these conditions though under the minimal ones original position would be self-sufficient enough to yield a “similar” outcome acceptable for all human reason the same. But, as it may catch on surprise one, such an example was undertaken by Nozick himself and proved completely the opposite what Rawls stated and believed to prove. However Nozick attempt will be briefed in succession of this chapter where we would get familiar with closely.

The conditions for original position are minimal insofar as they are meant to apply to the least informed members of society; in this sense, once these conditions are met, it is not possible to exclude anyone from such a debate. This is more or less the main feature of the original position; by limiting what it is possible to know about yourself in society, every participant is transformed into a moral person of equal weight within such a debate. As these arguments contain moral facts, it is plausible to use philosophical arguments to make deductions and logical connections between those facts: these arguments can be sustained due to the rational structure of the original position, as it allows any one of its members to interject and present conjectures from a footing that is equal to that of the others. For Rawls, equal footing can occur because the principles of justice that are discussed within the original position relate directly to the establishment of such a footing; the fact principles derive the same ground as the arguments themselves is what lends to the overall coherence of the debate inside of the original position. In this sense, there is a philosophical momentum that starts to build up the very moment that two parties gather to discuss the principles of justice. The fact that parties know almost nothing about themselves is what allows for this momentum to build, as the discussion is concerned with the establishment of the conditions in which these parties will learn about who they are (and thus, their respective places within these conditions).

This momentum cannot be mired by self-interested motivations, precisely because the "self" that appears inside the original position is so minimal in the first place; because of this, parties cannot establish principles of justice that will benefit themselves at the behest of others. What this assures is that reason that this minimal self-interest is employed in a constructive manner, and that what is to be constructed will benefit each and every "self" that contributed to its establishment. While this might not remove the total conditions of injustice, it will at least make sure that these new conditions will allow for less injustice in general. This is why we can say that the procedure undertaken within the original position is rational: the coherence between the rationality of the structure and that of the actors is what ensures that what is produced within the structure isn't arbitrary, but carefully constructed. This is why Rawls can *guarantee* that any discussion within the original position will result in a more just distribution of goods in society. The two principles discussed within the original position are requisites for moral persons of equal stature, insofar as they are themselves deduced from this equal stature. As principles of justice, they question the general ethical issues of morality. The two principles of justice must be considered as a charter of rights and duties for the regulation of a fair, just and well-ordered society, all without determining what particular rules or laws are morally correct. What forms justice is an overall inclusion of individual entities into a system. The two principles of justice are not chosen because they determine the rightness of the regulated forms of cooperation, but because they allow us to grasp common ethical issues in a rational fashion; for the determination of what is "right" is a component of any principle within a given theory of justice. By doing this, each individual entity within the original position departs from these common issues in order to partake in the building of a system that is meant to answer them in a way that suits each and every entity within it. All theories are equally responsible for what constitutes just human conduct, but they do not all share the same definitions. There are theories and systems that might be better than the one that Rawls presents, but we cannot say that they are less just, unless they have been constructed in an irrational manner. For if they were, they would not be able to deliver justice in a systematic fashion, and would then be patently unable to apply justice to the largest possible amount of ethical dilemmas. In sum, the pursuit of justice must be totalizing; it would be impossible to achieve this via irrational principles, as this would destroy the very momentum that was mentioned above. While justice for Rawls is invisible, its truth can be discovered via rational means since it is in the nature of laws

and principles to be understood as a consequence of reason and the ability of humans to employ it in the pursuit of justice.

Another feature of JF is that the nature of the contract can be agreed upon between parties in the original position. Contract theory orders parties in an equal manner due to the fact that the contract represents obligations and duties that must be respected in equal manner. It is for this reason that Rawls believes that the contract is the only way to ensure the legacy of justice over multiple generations; while newer generations are further removed from the contract in the chronological sense, the duties and obligations contained within the contract apply to their lives just as much as they applied to the lives of their forefathers. When parties choose and agree for principles of justice in the act of erecting a contract, they indirectly involve a third person that does not take part in the present discussion, but must be considered as a future guarantor of the contract's legacy and legitimacy. By representing future generations as equal to the current one in the establishment of the contract, intergenerational equality is assured; furthermore, this is what allows for different generations to share common values in the first place. While the contract represents a certain tradition in this sense, it is a tradition that is meant to outlast most others due to its rational nature; in other words, it is a tradition that vies for the (practical) status of a historical invariant, despite its constructed nature. The parties are aware of the contract's transcendental nature, as there are a few legal and juridical constraints which make people consider principles within this original position. The first constraint pertains to the generality and inclusivity of the principles: a general principle must include all moral persons regardless of their differences and belongings. What this entails is that in order to be applicable, a general principle must be universal; this universality is a constraint insofar as it prevents the principles from becoming too particular (and in consequence, too determinate). Principles are functional only when they meet these two conditions. If a principle considers all men in equal manner and is applicable universally, it then meets the minimal conditions of justice. Furthermore, there are other principles that can be deduced from the two principles of justice that are formulated in the original position, though each following principle must be stronger (or, more determinate) than the last one; what this means is that there must be a fine balance between the conditions of generality and universality on one hand and the particularity and determinability of a principle on the other. The last constraint is that these principles must be accepted publicly, as there must be a situation where parties observe the truth of the principles and agree upon those truths as they appear in public, to a common audience. In other words, parties

cannot accept the same principle all while possessing different interpretations of it; the principle that is accepted must be accepted in its common form. The agreement for a principle is thus predicated on agreement in regard to how it is to be interpreted; for if this condition isn't fulfilled, then there will be ambiguity in regards to the parties' shared obligations towards such a principle. This common interpretation is possible due to Rawls' adoption of the Kantian conception of "public reason", which is the ground for intersubjective exchange within a public sphere. For Kant, public reason consists of a "court" in which ideas are judged on the basis of the "common sense" that allows for intersubjective exchange to be possible in the first place. In other words, ideas are subjected to the form of reasoning that we share when we communicate on a daily basis. Once a statement or principle has been approved by public reason, it immediately becomes norm that will slowly make its way into "common sense", eventually taking a part in its very constitution. It is for this reason that public reason enables justice to achieve general social solutions, for such solutions are founded on the compromise between varying beliefs that appear in a public setting. As a consequence to this, public reason becomes a source of authority insofar as it becomes the condition of intersubjective exchange: ideas must seek its approval if they want to be exchanged between the members of a discerning public.

In conclusion, the constraints mentioned above are the justifications for the original position as the basis for the fairness and reasonability of justice, as they permit us to rid ourselves of (most, if not) all doubts over the *nature* of the principles that parties bid for. Once this nature is firmly grasped, parties will reject any principles that are formulate on egotistical bases. Secondly, since no one is willing to derive principles of cooperation in this way, it guarantees to the parties in the original position that whatever principles are formulated will be respected in a reciprocal manner. This is important, insofar as it assures that each actor inside the original position will possess a common tie to the others through the medium of what they are constructing together.

3.2 The Veil of Ignorance (*Theory of Justice*, §24)

The role of the original position is to set up a fair procedure in which parties can reach an agreement (Lovett, 2011). But since parties do not know each other's social position, the good, their generation and their knowledge, the only mechanism that remains in their possession is their ability to reason in common. This limitation of knowledge actually makes it easier to choose

general principles, as there are less possible determinations that can influence their choice; because of this, reasoning together is also easier. If these choices were based on more determinate knowledge, they would further constrain our ability to reason in public insofar as imbalances in information would then make for imbalances in the substance of such reasoning. It is far better to establish principles in this way than on the basis of other determinations, such as social class. Furthermore, any union or coalition is not allowed since it would imply that there are imbalances and inequalities between the actors in the original position that must be harmonized via artificial means. Despite these epistemic limitations, parties possess information about the concepts of justice, society and economic efficiency that would then allow them to agree upon principles of social cooperation. Parties may not have information about each other's rational plan for the good and the generation they belong to, but when they discuss issues such as intergenerational wealth transfers, it becomes a question of social justice insofar as it incites parties to think of justice between generations. In an original position parties may decide to not pass their wealth to their successors in the same way that they received it in the past, simply because they do not think they are obliged towards those who are to come and instead want to benefit in the present time. This may be considered as something which has been decided in the past and in consequence, is something that we cannot do much about. While there are no *guarantees* that the parties in the original position will come up with truly just principles, there is a guarantee that public reason and its limiting conditions will allow for the parties to understand what is at stake during the formulation of such principles. For example, while parties might agree to nullify intergenerational wealth transfers, their lack of knowledge pertaining to which generation they belong to will at least force them to consider the position of someone who is placed at the tail end of that scale in this sense, these constraints force them to consider the problems of justice contained within these issues regardless of what will be determined afterward.

This is not to say that the establishment of unjust principles within the veil of ignorance is unproblematic. Rawls elaborates his answer to the problem in the second part of "A Theory of Justice" (Rawls, 1971) and "Political Liberalism" (Rawls, 1996). Besides that, Rawls does not negate parties' lack information: on the contrary, the kind of information that parties possess in the original position is social and economic knowledge, which is indispensable in the formulation of just principles. But men also possess the idea of justice, the question of which is brought up in their daily lives. According to Rawls, the original position should not be understood as a situation

that involves everyone in the present, nor a situation that lasts forever and thus incorporates each possible actor at the same time: such a thing does not exist! It is rather a tool for those who can see themselves from a perspective where everyone is an equally moral person; in other words, it is a tool for those who possess the ability to abstract from their own particular viewpoint in order to consider general viewpoints from the position of others. As everyone within the original position must be able to reason in such a way, this abstract viewpoint is meant to be the same for everybody: it is a product of transcendental subjectivity, as it derives from the formal structure of subjectivity that allows us to reason together in a public setting. “The veil of ignorance is a key condition in meeting this requirement. It insures not only that the information available is relevant, but that it is at all times the same” (Rawls, 1971, p. 139). So even if parties want to know about each other, they will not be able to find what others may think of their aims and ends, as they themselves are not aware of their own ends. As they do not know about each other’s plans, it is harder to tailor and choose principles that will benefit only a particular party in question or deprive others from their ends. In sum, the epistemic limitations incurred by the application of the veil of ignorance are productive limitations, insofar as they force its members to establish general principles that apply to all instead of simply extending the knowledge of determinations that might influence such principles. For example, instead of being able to collect more information that might influence the formulation of a principle, they are forced to work through the problems that occur when this principle is generalized and subsequently improve that principle on those grounds alone.

3.3 The Rationality of the Parties (*Theory of Justice*, §25).

Due to the epistemic limitations incurred by the veil of ignorance, the rationality of the parties in the original position differs from the rationality of everyday life. Rationality in the original position is characterized by the position from which justice is conceived, since parties have an opportunity to rationalize the principles they want to choose. It must be accepted that parties would like to derive the most amount of benefits from the principles they establish: in this sense, their reasoning is utilitarian. If everybody's rational plan is to achieve their particular ends in a maximal setting, then it would be unacceptable to unequally distribute the primary goods that allow for such a maximization. While some might reject utilitarian thinking on moral or religious grounds, it is assumed that the majority would at least consider utilitarian reasons when

establishing a coherence between their ends and the means to achieve them. Yet this type of thinking runs into a limitation: In the context of moral psychology, it is irrational to formulate principles based on expected ends, as we are not actually if those ends will manifest themselves in the way that we think they will. Because of the fact that actors are not sure about how their rational plan will turn out, it would be foolish to reason as if its accomplishment were a certainty. In this sense, it is admissible to think that parties can agree on principles that will actually harm them in the future, as their expectations of the future can be completely erroneous; because of this, the utilitarian aspect of moral reasoning is limited. This is why the veil of ignorance specifically states that parties will not know anything about the future; for if it didn't, parties might assume that their expectations of the future are correct and consequently formulate principles that are harmful in the long run. Moral reasoning must thus be privileged over utilitarian reasoning; the limitations of the veil of ignorance will hinder utilitarian reasoning, but will strengthen moral reasoning by forcing its subjects to think in a more abstract and general fashion. It is for this reason that parties are not interested in the aims of others; it is not because they don't matter, but because a party cannot make accurate judgements about them. This is a fundamental factor in the accomplishment of JF, as it is the basis for non-interference in the ends of other parties. Using the example of a game, one can be assured that it will be fairly played if each player tries to score the highest amount of points without breaking the rules to interfere with the strategies of others. The fact that we do not know the strategies of others thus gives us less of an incentive to break the rules. As a result of this lack of knowledge, envy is now eliminated from the original position. Since the persons in the original positions are assumed to take no interest in the interests of others (although they may have a concern for third parties), it may be thought that JF is itself an egoistic theory. While it is not one of the three forms of egoism mentioned earlier, some may think (as Schopenhauer thought of Kant's doctrine), that it is egoistic nonetheless. Rawls sees this as a misconception, as the veil of ignorance is meant to assure that those who debate within the original position do not possess enough knowledge about themselves to even possess an "ego". One must remember that despite this, the two principles of justice require us to consider the rights and claims of others. Furthermore, the sense of justice is found in the obligation to comply with the restrictions that prevent one from interfering with the goals of others. The motivation of those in the original position must not be confused with the motivation of persons in everyday life: in practical affairs an individual does have a knowledge of her situation and she can, if she wishes, exploit

contingencies to her advantage. “Should his [her] sense of justice move [her] to act on the principles of right that would be adopted in the original position, [her] desires and aims are surely not egoistic” (Rawls, 1971, p. 148).

Rawls supports this conclusion for other reasons, too. Once we consider the idea of a contract theory, says Rawls, it is tempting to think that it will not yield the principles we want unless the parties are (to some degree) moved by benevolence, or an interest in one another’s interests. For instance, Perry thinks of the right standards and decisions as those that will promote the ends reached by reflective agreement under circumstances of impartiality and goodwill. In Rawls' case, on the other hand, the mutual disinterest incurred by the veil of ignorance provides the same effect as benevolence, for it requires its participants to treat the ends of others as if they were their own; as we've seen before, this is possible if one is just as ignorant of his own ends than he is in regard to the ends of others. In JF the effects of good will are brought about by several conditions working jointly and thus, the idea that this conception of justice is egoistic is an illusion fostered by a single-minded focus on a single one of these conditions. The conditions of the veil of ignorance are more effective than the combination of knowledge and benevolence; for quantitative increases in knowledge and benevolence does not determine the way in which they will interact. Furthermore, the relation between knowledge and benevolence is too complex to be used in the formulation of general principles, insofar as this relation is up for interpretation; as we might never possess enough knowledge to properly interpret such a relation, it is thus too arbitrary to be used as a general methodological principle. Not only are the complications caused by so much information insurmountable, but the motivational assumption requires clarification. To be brief, the combination of mutual disinterest plus the veil of ignorance has the merits of simplicity and clarity while at the same time ensuring the effects of the moral assumptions that seem the most attractive at first; whether they remain attractive or not is up to the reasoning at play, and not the vast knowledge that it can mobilize. It is for reasons such as these that benevolence should not be included within the veil of ignorance. Moreover, it would defeat the purpose of grounding the theory of justice on weak stipulations; this would then make it incongruous with the circumstances of justice.

With this in mind, we can now understand how parties that employ utilitarian thinking will also have the incentive to respect the aims of other parties regardless of the relation to their own, for any principle that harms another party might harm them in the long run. While the formulation

of discriminatory principles might be justified in the establishment of criteria for certain public offices, they cannot be formulated in general. Furthermore, each of these discriminatory principles is an affront to the liberty of anyone inside the original position, so in this sense, they cannot be established without a reason that is accepted by all. It is because of this that such principles can never be ordered as “first principles”, as the injustice inherent in it will then be passed on through the other principles that derive from it. It is then inevitable that racial and sexual discrimination is excluded from the original position, and this is not only because of the fact that such forms of discrimination are unjust: under the veil of ignorance, these forms of discrimination are entirely irrational.

3.4 The Reasoning Leading to the two Principles of Justice (*Theory of Justice*, §26).

The goal of this section is to clarify and define the idea of a reasonable choice within the original position; after this has been achieved, we can then move on towards understanding why a reasonable person would opt for Rawls’ principles of justice over any others. As this choice employs moral reasoning instead of utilitarian calculation, Rawls presents the argument for his two principles of justice in qualitative fashion. To remind ourselves of the idea of JF: primary goods must be distributed on the basis of equality, unless the inequality of a certain distribution will benefit the least-privileged members of society. As no restrictions are placed on the exchanges of the goods, it is therefore an attempt to maximize liberty and equality without having one overstep into the boundaries of the other. Now that persons in the original position will be deciding on these principles, they cannot know whether particular principles will disadvantage them or not; they are thus encouraged to formulate these principles in a way that takes into account the possibility of ending up in the lowest “rank” in a given society. Since there is no possible reasoning for the unequal distribution of social goods in this case, it would be irrational to accept anything less than equality. It is for this reason that the person is encouraged to establish equality as the first principle of justice.

By abiding by the first principle, the people within the original position must now establish the equal distribution of goods and opportunities for public offices. But why should equality be the “end” of this society? If there are cases where certain inequalities make everyone better off in the long run, it would be counter-productive to nullify them on the basis of equality. This issue

cannot be resolved by stressing peoples' natural predisposition to help others or consider their interests, as this information is omitted from the original position via the veil of ignorance. For the parties, acceptance of inequality is the acceptance of the relations in which men stand in the circumstances of justice. They have no ground for complaining about each other's motives, for they are conceding the justice of these inequalities under the veil of ignorance. To search for a principle that will regulate these inequalities is to accept one that would view these inequalities from the standpoint of the least advantaged member of society; inequalities are consequently accepted when they maximize the long-term expectations of this least-fortunate member. But this does not determine which inequalities are accepted for the basic structure of society; as it currently stands, the first principle still forbids any exchange between liberties and economic benefits. In this case, parties assume that their liberties will be preserved when gaining economic advantages: unless a suppression of liberties will protect liberty in the long run (a particular military draft, for instance), it is unacceptable to exchange liberties for things that are exterior to it. Thus, by agreeing to the serial order in the original position, parties know that they admit to the effective realization of equal liberties, regardless of (most) circumstances. Serial ordering is reasonable if it follows this method.

While serial ordering is one of the foundations of the rational structure of argumentation in the original position, it is not its sole guarantee. On the contrary, some might want to argue in favor of certain principles in a more systematic manner. That can be done in a few ways. One way to do this would be to observe the outcomes of the principles of justice and then weigh them in comparison to the general precepts that lay behind the principles; the arguments that will follow such a comparison will be much more decisive, insofar as they treat directly with the temporal conditions underlying the process of justice. In order to better understand how this is achieved, we must first think of principles as maxi-min solutions for the problems of justice. The maximin rule ranks alternatives according to their worst possible outcomes, by which we are to adopt an alternative if its worse outcome is better than those of the others it is being weighed against. This is possible in the original position because one cannot be malevolent while under the veil of ignorance; for to be malevolent would require one to know more about himself and his society than the veil will allow. But the veil does not simply protect against anti-social dispositions such as malevolence. It also ensures that the parties can agree on a principle's worst outcome in the first place; the worst outcome of the difference principle can be different if a liberal or conservative is

asked to identify it. Under these conditions, Rawls states that the maximin rule can be a good case for the principles of justice since it uses their features to the fullest possible degree; because of this, it is much easier to entertain these principles via philosophical argument.

Through the use of a gain-and-loss table Rawls is able to better determine the results of the maximin method. Let us use the example of a game: we enter it alone, our choices do not determine who wins or loses and it does not require us to compete against anyone in order to win. Our points are scored depending on the choice of the ranked outcome of possible gains under certain circumstances of possible loss; gains and losses are represented in dollars. There are three decisions and each decision undergoes three separate circumstances. In the first circumstance of the first decision, we can lose 700\$, but maybe gain 800\$ under the second circumstance and gain another 1200\$ under the third. In the second decision, we might lose 800\$ under the first circumstance or maybe gain 700\$ under the second circumstance and gain 1400\$ under the third one. The third decision that the maximin rule requires is that the worst that can happen is to gain 500, which is better than the losses in the other decisions. By adopting this choice of the maximin rule, we earn +500\$ but under other circumstances might win 700\$ and 800\$. The maximin term means the maximum minimorum, and under the maximin rule we are meant to evaluate gains and losses on the basis of the lowest possible loss.

For Rawls, the maximin rule is plausible due to its three main features. The first feature is that if each possible choice is re-coded as monetary gain, it would push each individual to think of a few scenarios based on the likelihood of certain common circumstances. In the light of these outcomes, we will then choose one in which the maximin rule applies to all of its circumstances, in the sense that under the worse circumstances it will still have the least-damaging outcome. This lowers the ambition of individuals who would choose principles that are disproportionate to reality; as we have previously mentioned, this method cannot be misused by malevolent individuals due to the epistemic limitations of the veil of ignorance. It would thus be irrational for parties to consider principles without first consideration their relation to their own interests, which in this case is to gain +500\$; in the second one +600 but losing -800\$ and -700; and in the third gaining +800\$ but losing -1200\$ and 1400\$. Parties will consider it as rational to compute as many possibilities as they can and in every case select the one with the least-damaging negative outcome. The second feature of the maximin rule is it takes advantage of a particular disposition that we possess in relation to our own conceptions of the good: once we achieve this conception minimally,

we are given less incentive to expect anything above that established minimum. For if one were to risk this minimum in the attempt to attain a marginally better outcome and lose, they will always be losing more than what they were purported to gain. This minimum acts as a threshold; once passed, marginal benefits start to decline at a steady rate. This last provision alludes to the third feature of the maximin rule, which states that parties will not accept outcomes that they find intolerable. The choice of principles then becomes a matter of combinations: the maximin rule is working correctly when all three of these features are maximized. Rawls states that this rule does not apply gradually, nor is it self-evident; rather it is a rule that comes into its own in special circumstances. Its application depends upon the qualitative structure of the possible gains and losses in relation to one's conception of the good, which is the background where choices are reasonably estimated. Furthermore, examples of the gain and losses are represented via a monetary amount instead of utility because utility itself derives its content from a particular conception of the good, which the parties are not aware of. It is for this reason that the parties cannot agree upon any principle unless it includes a minimal list of things that are accepted by everyone. This "minimal list" contains all primary goods and the parties will thus make their choices accordingly. Now, we must remember that parties in the original position are in a situation in which they do not know what kind of direction their society will take. Since they do not possess such information, parties might become weary towards the outcomes of the possible choices. While the game of monetary losses and gains is a suitable analogy for the maximin rule, Rawls is aware of the fact that these decisions will take place in much darker circumstances; in this sense, the consequences will be much graver. It is for this reason that Rawls formulates his two principles of justice with the problem of the minimum in mind; for while minimums have their value in the abstract, their value in reality is of a wholly different level of importance as it might determine the difference between historical cases of justice and injustice. With this in mind, Rawls writes "if we can maintain that these principles provide a workable theory of social justice, and that they are compatible with reasonable demands of efficiency, then this conception guarantees a satisfactory minimum" (Rawls, 1971, p. 156). This is why the parties will choose equal liberties and lexical ordering in the original position: they realize that these minimums ensure that, under a tradeoff between economic equality and personal liberty, the least amount of one will be traded for the other and vice-versa. It is for this reason that the parties will not want to jeopardize this rule, for if

they did, they might end up losing a lot more than they bargained for in the attainment of marginally better outcomes.

Finally, the third feature states that conceptions of justice that are ignorant of this rule might lead to the establishment of institutions that the parties might find intolerable. For example, while utilitarian conceptions of justice might not lead directly to serfdom or slavery, they might lead to concessions between liberty and economic benefits that are totally unjust. While this method cannot entirely rule out conceptions of justice, Rawls states that this isn't the goal; on the contrary, the point of this method is to show how a respect for minimums allows us to disqualify certain conceptions of justice that seemed to generally applicable. The maximin rule is not meant to determine the argument for Rawls' two principles of justice, as they are too substantial to be treated solely via methodological principles. What the rule is supposed to do is clarify the rational structure in which these choices are debated on by providing a qualitative anatomy to the argumentation itself.

This is not to say that the use of such a method is a form of "technical progress" in the neutral sense. On the contrary, it is contestable on moral grounds: "The objection is that since we are to maximize (subject to the usual constraints) the long-term prospects of the least advantaged, it seems that the justice of large increases or decreases in the expectations of the more advantaged may depend upon small changes in the prospects of those worst off" (Rawls, 1971, p. 157). While the most extreme disparities in wealth and income are allowed if the expectations of the least fortunate are raised in the slightest degree, the inequalities favoring the more advantaged are forbidden when those in the worst position lose by the slightest amount. In the most extreme case, the moral character of a million dollar gain (and in consequence, its legality) is predicated on whether it will increase or decrease the lot of the poor by a mere penny. This objection is analogous to the following difficulty with the maximin rule. In order to explain further, Rawls invites us to go back to the example of gain-and-loss tables:

$$\begin{array}{c} 0 \quad n \\ 1/n \quad 1 \end{array}$$

N represents all natural numbers. Even if for a smaller number it is reasonable to select the second row, there is surely another point later in the sequence where it is irrational not to choose the first row (which is contrary to the rule). We must remember that the difference principle is not intended to apply to such abstract possibilities. Furthermore, the problem of social justice is not the

quantitative allocation of a certain good, be it money, pleasure, property, etc. For expectations are not made of a substance that can be shuffled from one person to another in all possible combinations; their qualitative differences prevent this from being possible. The possibilities that the objection considers cannot arise in real cases; the feasible set is restricted to the point that these possibilities are excluded. For Rawls, the reason for this is because the principles of justice are connected to a single form of equal liberty, one which prevents such contingencies from occurring. As the expectations of the better off are improved, those of the worst off improve with them. The advantaged ones can spend in order to train and prepare those who are to come into the given society, and the latter can thus use their skills and talents to contribute to this society. The latter group is incentivized to do this because any mutual enterprise that they engage in will necessarily incur economic benefits, even if there is inequality at play. Social and economic equality is only meant to render equal whatever endowment, nature and skills are made unequal when they are exchanged. A combination of unequal differences that is shared equally among each individual would not only be just, but also advantageous for everyone.

The difference principle presupposes a certain theory of social institutions. Rawls accords more detail to this in chapter V of “A Theory of Justice”. In particular, it relies on the idea that in a competitive economy, with or without private ownership of the means of production, excessive inequalities will not be the rule. What must be stressed at this point is that Rawls sees no problem in basing the formulation of these principles of generally accepted facts in economics and psychology. This might sound like a contradiction, as parties in the original position are not supposed to possess such general facts about the society they live in; this is because the use of such facts in the formulation process would make the principles relative to these very facts. For instance, Rawls has repeatedly stated that utilitarianism can allow for certain forms of slavery and serfdom: whether the existence of these institutions is justified depends on whether the calculations behind them yield a higher balance of happiness. The utilitarians will defend this by stating that such calculations are a fundamental aspect of human nature, and such, if the institutions are justified by such calculations, it is because they conform to our nature (to a certain degree). This goes to show that even utilitarians have a standard set of assumptions that underpin their claims of equality and liberty: for example, each person has equal utility which can function in the diminishing of marginal utility. Let’s say that there is a fixed amount of income that must be shared equally, and after being shared equally between those who have accumulated a lot of after a certain amount of

time, it can then be transferred to those who have less of it. Rawls has nothing against such a procedure, provided that the assumptions are sound and based on the principles of justice. But unfortunately, it is very possible that they may not. We must keep in mind that the parties in the original position do not have to choose principles that will regulate their social and economic assumptions; instead, they must choose principles that will regulate cooperation within the capacities of their knowledge under conditions of their veil of ignorance. The parties do not have the capacity to know the principles and assumptions of other parties, and they themselves know nothing more than the content of the first principle of justice: equal liberty.

So far, we can see what arguments enable Rawls to solve the problem of rational choice in regard to the formulation of the principles of justice. If all things are to be considered, the parties will select advantages which have better long-term outcomes than any other possible choice. We are not sure whether the choice reached in this way will represent the voice of each member in a unanimous fashion. For Nozick, Rawls' confidence in his own arguments about the choice of principles and his assurance in the arguments' accuracy speak more of the gaps in Rawls' reasoning more than anything else. Nozick uses the same arguments as Rawls, in the sense that he too will enter the original position as it was intended by the latter; despite this, he will not arrive at the same principles that Rawls' has. I do not think that it must be a matter of who we trust more. On the contrary, what matters for both thinkers is the question of cooperation; they simply order their priorities in a different fashion. Despite Rawls's arguments in favor of fairness represented as duty and obligation, Nozick's arguments are unfolded in favor of individual rights. Nozick thinks that Rawls mistake consist in the fact that he was trying to install end-result principles as entities that can be derived from a historical tradition; what he did not realize is the fact that freedom is a condition in which its bearer is burdened by the lowest possible amount of constraints. In this sense, Rawls' conception of justice not only does a disservice to free individuals, but to freedom itself; it limits freedom as a whole, and this for Nozick is unjust.

3.5 Principles of Justice as End-Result Principles and Nozick's Attempt at Formulating them Himself

Nozick's problem with Rawls' attempt at formulating such principles is that it assumes that the principles selected by the least-privileged members of society will be fair. Nozick asks us to

imagine a pie that no one has a claim to the pie itself or any of its infinitesimal portions but also requires unanimous agreement on how it is to be divided. Let's imagine that an equal distribution of its portions was agreed upon in a fair manner. "Now imagine if the size of the pie were not fixed, and that its claimants came to the realization that such a distribution would make the size of the pie smaller; they might well agree to an unequal distribution which also raises the size of the pie (and thus, even its smallest portion)" (Nozick, 1974, p. 198). But doesn't this raise questions about differential claims on parts of the pie? Or rather, who would be the one to make the pie larger if given a larger share, but not if given an equal share under the scheme of equal distribution? Incentives are to be given to someone, but they must also be bonuses that take the form of long-term returns. If the pie were to be a good that no one was originally entitled to, it was as if it fell from the sky. But if it did, things like entitlements or freedom would be meaningless, as they are relative to things that have no original claimant. The problem with Rawls' reasoning is that the latter seems to treat goods that have been produced (and thus given value by a specific producer) as goods that have simply fallen from the sky; in this sense, it is easy for Rawls to talk about these goods as a single pie to be split, despite the fact that the value of its slices have been determined by specific actors, way before it was ever to be split in the first place. By agreeing to split the pie in equal ways, Rawls is engaging in a form of distribution that would have made the pie much smaller in the first place; this problem is present precisely because Rawls' reasoning considers the value of the pie "as it is", and not "as it has come to be".

As we can see, this is a procedure that takes place between people who have found their guiding principles within their rationality, but do not have access to much empirical content outside of rationality itself; their rationality guarantees that the principles found within it will be transformed into fundamental principles for the regulation of major social institutions. While Nozick does consider that historical principles of justice might have been erected in order to protect the innocent from being punished, he questions whether Rawls' method can arrive at principles of justice that are not merely historical, but applicable to future generations as well. In other words, Nozick's question is whether such a procedure will always arrive at the same conclusions; as we've seen in the example of the pie, the veil of ignorance seems to enforce a certain outcome insofar as it prevents the actors from knowing who contributed more to its overall size. The problem is that such a procedure might enforce certain principles of justice that are indeed historically contingent because the actors' lack of historical knowledge makes us assume that they selected the principles

of a basis of pure reason; in consequence, what is necessary for justice is actually contingent, and it is Rawls' very own procedure that gives us this impression.

Let us put this another way, with help from another one of Nozick's examples. Suppose that there is a group of students who have studied for a year, taken an examination and, unbeknownst to them, received grades between 0 and 100. Still having no idea of their own grades, they are gathered together and they are asked by their instructors to put together all the grades in order to make a total sum. First, let us suppose that they are to decide on a particular distribution of grades, and thus, they are to give a particular grade to everyone that is present in the meeting (including themselves). In order to restrict conflict and unequal shares, Rawls' reasoning would lead to an agreement between students in which each one is given the average grade. Yet Nozick is not convinced: he believes that this particular distribution will still not be agreed upon, even by those who did poorly (Nozick, 1974, p. 199). This is because being given the average grade doesn't actually help the poor-performing student in any way, as it misrepresents his weaknesses to the point that the instructor no longer has a proper idea of how he's progressing. While Rawls' reasoning avoids conflict, it is not in tune with the reality of the actual situation.

Let's give this problem of distribution a closer look, now by assuming that the students are to discuss the principles that are to regulate how the grades are distributed. Despite the fact that multiple principles can be chosen, we can see that Nozick thinks that the equality principle doesn't stand much of a chance in this case. And if it turned out that the sum total of the grades did differ than the total that they were divided from originally, and if they decide to divide them according to the ability of each student, then the principle of distributing grades so as to maximize the lowest grades might seem like a plausible choice. But would these students agree to the historical principles of distribution had they been given the grades by a qualified and impartial observer? "If people knew the particular distribution that would be yielded by this historical principle, they would not necessarily agree to it" (Nozick, 1974, p. 200) for the sum total of grades might be less, now that the stronger students are only incentivized to get the average grade. This would return us to the previous phase of choosing grade distribution, and we have seen Nozick's reason for why they will not choose an entitlement distribution. But if people do not know the particular distribution yielded by this historical principle, they cannot be led to select this principle either; furthermore, they cannot simply choose it because it looks fair or just, for even the original position does not allow such a practice. On the contrary, says Nozick: it forces each member to calculate

themselves whether this historical principle will maximize their interests. Maybe each person would try to find a way that would assign more goods to someone in a similar position, and in consequence, themselves. It is for this reason that it might be unlikely that each person's calculations would lead to the historical-entitlement principle before any other principle based in personal preference. If we consider a reversed-version of the entitlement principle, in which the most entitled give to the least entitled (and the 2nd most to the 2nd least, etc), it seem just as likely to be selected as the original entitlement principle, as there is no calculation that can give priority to one over the other. Thus, Nozick's retort is founded on the assumption that there is a disconnection between the calculating abilities of those in the original position and that which is to be calculated. This assumption is not wrong; for calculation requires content to be calculated, and the veil of ignorance has hindered our access to such content. Nozick thinks that the difficulties that people face when deciding upon principles of justice are sufficient enough to show that people in the original position will be limited to make a choice of final and fundamental (end-state) principles of distribution. The self-interested person evaluates every non-end-state principle based on the way it works out for him; these calculations consequently based on how they will end up under a chosen principle. It is here that an actor might consider the labor they have already sunk into their endeavors, and the labor that they will have to do in the future. The occupant of the original position will then have to calculate possibilities under a certain distribution by comparing it to their position under another probable distribution. For Nozick, what is important is that the point would remain the same even if they use some other decision or rule (of the sort discussed by decision theorists: it will change nothing. The only role that the principle plays in these calculations is that of generating a distribution of goods or a probability of such distributions; principles are thus compared on the basis of what alternative distributions they respectively generate. Each self-interested person will make a choice among alternative end-state distributions, and for this reason principles (in general) exit the picture (Nozick, 1974, p. 202). What each of them choose cannot become a general and fundamental principle of justice that is valid for all. But the logic of Rawls' original position says something else: people either directly agree to an end-state distribution or they agree to a principle; and if they agree to a principle, they do it only on the basis of considerations about end-state distributions. So the principles that they can all converge in agreeing upon are fundamental and must be about an end-state. But can the original position actually allow for the production of such a principle? Nozick's answer is no: The original position fails to yield

principles of justice that would become historical in the context of a given society. The reason why it fails is that it does not reach unanimous convention regarding the selected principles, and instead allows only for the possibility of generating principles of a similar nature: the serially-ordered dual principle structure of Rawls' theory of justice. Neither the original position nor the veil of ignorance allow for questions regarding the nature of principles; due to this, they do not offer sufficient space to think of principles other than those that Rawls presents. The original position and the veil of ignorance should not be employed as elements that lead us towards the formulation of end-state principles: they should instead convince us that the two principles of justice are those ones that cannot become end-state principles.

3.6 The Reasoning Leading to the Principle of Average Utility (*Theory of Justice*, § 27).

In this section, Rawls examines the principles of classic and average utility by testing them as if they were chosen in an original position similar to his own. It is in the nature of contract theory to have distinct principles, which in some way or another coincide with the reality of our daily lives. Applied to the basic structure of society, classical utility requires that institutions be arranged to maximize the absolute weighted sum of the expectations of the actors within. This sum is arrived at by weighting each expectation by the number of persons in the corresponding position and then adding them together: and so, *ceteris paribus*, when the number of population doubles the total utility be two times greater. In the utilitarian view, expectations can be measured and foreseen; unlike the principles of justice, they are not indexical of primary goods. Now the principle of average utility directs society towards the maximization of the average amount of utility instead of the total amount: this model was used by Mill and Wickssell, and has served as the basis to modern utilitarian theories ever since. So, to apply this principle to the basic structure of society implies that we are to set up institutions so as to maximize the *percentage-weighted* sum of the expectations of the representative men of the society. In order to compute this, Rawls multiplies the expectations of representative men by the fraction of the “pie” which they represent. For Rawls, it is not true that, *ceteris paribus*, when society doubles in number, its utility will also double. As the population doubles, the fraction that each member represents is the same, as the size of the pie doubles with its number of members. So which of these principles would be favored in the original position, wonders Rawls? The thing is that both principles (classical and average)

send us in the same direction when the size of the population is constant. But when the population changes, Rawls claims that there is a difference. The classical principle requires that the size of one's family and age of marriage is weighed in relation to the total sum of utility. For the principle of average utility on the other hand, these factors plateau and eventually fall when the size of the population is too high, as increased population does not necessarily coincide with increased utility for the average person; a decline in per capita shares due to population increase is only remedied if the productive capacity of each new member is equal to or above the productivity of the average member. In Rawls' mind, the members inside the original position would thus favor the principle of average utility over that of classical utility. The two principles would be equivalent only if it is supposed that the average well-being always falls sufficiently fast, so that there is no serious conflict between both; in this sense, the combination of both principles leads to a "race to the bottom" in the production of wealth. But from the stand point of the people in the original position, it would appear more rational to agree to some sort of floor that prevents such a race to the bottom from occurring. "Since the parties aim to advance their own interests, they have no desire in any event to maximize the sum total of satisfaction" (Rawls, 1971, p. 163). It is for this reason that Rawls assumes that a plausible utilitarian alternative to the two principles of justice is the average principle instead of the classical one.

Rawls's interest consists in knowing how parties might arrive at such an average principle. For instance, he considers what would happen if the principle of average utility was presented as the only possible foundation for a contract. For example, imagine if we were presented a fixed number of societies to which we can join, depending to our preference; each of them would regulate their distribution equally since natural resources and talents are already equally distributed. Despite this, each society has different policies. It would now be easier for parties to decide which society to enter once they have established their ends within such a society; they will thus choose a society based on a maximization of such prospects. While they would not be privy to this information in the original position, Rawls is willing to let such a special case occur for the sake of the example. Let us now alter this case incrementally, so that it increasingly resembles that of someone in the original position. To do this, let us first suppose that the hypothetical "chooser" is unsure about what role her talents will play in a given society. If she assumes that her preferences are the same as everyone else, she may decide by trying to maximize her expected well-being. She computes her prospects in a given society by taking the alternative utilities of others as

representative of her own. She chooses the society offering the highest or the best prospect. However, let's now assume that the hypothetical chooser knows nothing about either her abilities or the place she is likely to hold in each society (it is assumed that her preferences are the same as the people in these societies). If we suppose that she reasons along probabilistic lines, she will come to the conclusion that she has an equal chance of becoming any individual in that society. In this case, her prospects are still identical with the average utility of each society. These modifications have at last brought his expected gains for each society in line with its average welfare.

So far, Rawls assumes that all individuals have similar preferences whether they join the same society or not. But if we drop this assumption (which Rawls does for the purpose of the argument), we move to an initial position where nothing is known about the particular preferences of the members of these societies. The veil of ignorance is now complete. But one may imagine that there will always be at least one newcomer in the process. Once again, this newcomer's prospects are highest in the society with the greatest average utility. If members are to compare their utility and if they cannot compute all possibilities, what would happen if they chose any of the possible principles? It would then lead naturally to an average principle. By choosing it, the parties maximize their expected well-being (from this point of view); again, the principle of average utility is selected over the classical one. The principle of average utility is not like the classical one, insofar as it is not a teleological doctrine, but rather a moral theory that aspires towards a Good in order to make a Right, and for this reason the maximization of maximization is extended to contract theory.

The concept of average utility may be chosen in the original position just as well as the two principles of justice; for Rawls, both types of principles seem to function under the constraints of the veil of ignorance. For if one does not know their own conception of the good, they might tend towards using average utility as a guiding principle; as no one knows of this, they are encouraged to employ criteria that applies to everyone equally. In this case, both average utility and the principles of justice possess this equality. Either way, parties head towards the principle of average utility, even while on their way towards the principles of justice. But this no longer happens once the principles of justice are chosen, for parties in the original position accept the priority of justice over the bargaining of social and economic benefits; since these principles distribute primary goods such as rights and liberties, they can no longer be bargained for in exchange for economic

benefits. The utilitarian principle accepts such bargaining, as these primary goods are viewed as means towards the end of utility maximization.

Yet in spite of Rawls' rationalization, his theory still encounters problems which originate from "outside", which consists of reality and the historical tradition in which Rawls' "encounter" with the former occurs in: they concern the real manifestations of a Social Contract in the rules and habits that have determined historical forms of social cooperation, such as labor. While Rawls' method of constraining the formulation and refutation of principles of justice to a procedure gives us the impression that his conclusions are safe from being determined by arbitrary or contingent matters, it is hard to determine whether the impression corresponds to reality or not. Rawls has criticized for this because the procedural approach ascribes a certain rationality to the choices of principles that it presents, but does not fully justify why one should be abiding by such a rationality in the first place: in other words, the rationality behind the choice of principles might effectively obscure the rationality of the world in which the theory will operate. For to think in the way that Rawls expects us to think is not a given, and in this sense, neither are the principles that are submitted to the procedure itself. And if this is the case, then the procedure might not be fully adapted to possibilities of testing other sorts of principles. For example, the maximin principle and lexical ordering are procedural mechanisms that are meant to test certain types of principles, regardless of whether the members of such a procedure will actually formulate the principles in that way or not. By means of negation, the priority of the principles is no longer rational, but arbitrary: Its *imposition* of a certain form of public reasoning on a given society is proof of the arbitrariness behind the theory's purported rationality, insofar as it cannot totally adapt to the contingencies that constitute the content of numerous historical forms of social contract. The particularities that underlie Rawlsian rationality become increasingly apparent when viewed from this angle, and this is because the reasons that Rawls provides for the two principles are based on a negation of the logic that underpins traditional conceptions of morality in justice, as he attempts to guarantee the most amount of freedom via the least amount of original possibilities. In other words, he initially limits the possible principles of justice that even be "processed" by his procedure, and then selects a principle by formulating it in relation to the failures of the others. But if the principle is erected in negation to large failures instead of more precise ones, then the selected principle will have a hard time corresponding to the particular realities that it will inevitably encounter. In consequence, Rawls' principles might never solve their respective

problems, as the problems themselves were never adequately formulated in the first place. Rawls is aware of the fact that his principles don't need to even be considered in a particular case unless they have been established on a universal grounding: it is for this exact reason that Rawls returns to the idea of the social contract. But after what we have just seen, we must now ask whether his particular contract is arbitrary or not. In the end, Rawls' attempt to purge his principles of contingency might have had the inverse effect: his theory might now be contingent, and this is worsened by the fact that it cannot accurately assess whether it is or not.

But here is a second problem that Rawls' theory can't overcome when it comes to rooted habits in the making of choices. No matter how brilliantly the rules of cooperation are presented, there will always be some that are no longer familiar to us as "rules", but as habits. While rules provide a visible constraint on the choice of principles, the effects of habits are effectively ignored by Rawls. For Nozick, these habits are important and in consequence, must not be ignored: if we do, we might ascribe the inability to choose particular principles as rule-based instead of being constrained by habits. In a case like this, habits might prevent the rules from determining a certain outcome, leading actors to assume that the impossibility of the outcome was necessary within the framework of their respective procedures. As well as the one sketched above, this dilemma is important to consider insofar as it concerns the space in which a procedure can be effectively construed. As this space is the original position, we can affirm that problems such as these effectively bring us back to the starting point from which Rawls originally departs from.

4. Equal Liberty

4.1 The Four-Stage Sequence

For Rawls, it is important to show how the two principles of justice can be applied: the importance of this was underlined above, as the problem of properly applying the principles might send us back to re-structuring the original position itself. To demonstrate how such principles will be applied, Rawls will schematize them as they apply before the final formulation of just institutions: this entire process is undertaken in 4 stages. In the previous chapter, we saw the argument that underlines the choice of the two principles of justice instead of the conceptions of classical and average utility and also Nozick's arguments in consisting his critique of original position and how it fails to produce historical end principles. Now will see through another Nozick's argument that such a Rawls' theory that is not provable and workable in micro-situations isn't ether in macro-situations. Why isn't provable Rawls theory, we will have chance to see when Nozick questions grounding of the reasoning for institutions in the second section of this chapter. At this moment, we consider that the parties inside the original position have chosen the two principles of justice and are well on their way to crafting institutions that represent such principles. Furthermore, in the second chapter we presented the distinction between both of these principles: while the first principle applies to individuals, the second principle applies to institutions. In these chapters, the underlying arguments were abstract insofar as they applied to individuals who were debating in a hypothetical situation; in the following chapters, we will rather be concerned with the application of such principles in the constitution of a basic social structure. While it is evident that the veil of ignorance prevents actors from knowing about anything which might determine their position in society, they gain knowledge of social and economic facts when they enter society with the goal of tailoring institutions to the principles that were agreed upon under the veil of ignorance. This newly-gained information is necessary for the tailoring of institutions; and even if such new knowledge cannot be of much assistance, it is also possible for the actors in question to look back to the past for wisdom that they might still serve them. When parties are agreeing on a contract, they must look back at the basic structure of society in order to ground the contract on something tangible; after this is done, the basic contract will preserve this structure as a necessary component in the procedure of justice. We must remember that at the current moment, we know

of what is just, true and right; we do not know if such things constitute a Good, as this is not yet up to the parties to figure out. For instance, we might select other principles of justice based on this knowledge and they might turn out to be different than Rawls' two principles; what matters is that we can now mobilize such knowledge in the constitution of concrete institutions instead of abstract agreements.

The evaluation the principles of justice and their possible outcomes takes place only later in Rawls' theory of justice; at the moment, parties are only considered with rightful and just cooperation. They do not know any more at this point. Because of this, the first thing they must decide is whether social and institutional policies are just. The parties can also know that their opinion may not always coincide with the opinion of others, since their judgments and beliefs may differ under certain circumstances (such as those where their interests are involved). Afterwards, Rawls views the political process as a machine that produces political decisions in relation to the content that serves as its input; in consequence, citizens can determine whether certain procedures for building such a machine are more just than others. The goal of the system of justice is no mere policy assessment, but also the selection of the ranking procedures that we know which political propositions can be actually enacted into laws. After this comes the third decision, which pertains to the selection of the procedure through which such a system of justice will be established. As political systems are imperfect, the parties must learn when to comply with the rules enacted by the majority and when to refuse them when they are no longer binding. In other words, they must be able to simultaneously determine the grounds and limits of political duties and obligations. A theory of justice that deals with these three kinds of questions must employ a multi-staged sequence in order to answer them.

As we have seen, the deliberations inside the original position consist of the first stage of the process: once the principles are chosen in the original position, the parties must then return to their place in society and henceforth judge their claims based on these very principles. But if certain intermediate sequences are combined into a definite sequence, the latter may help us sort out some of the complications that we will face, as each stage represents a certain angle from which certain questions of justice are considered. Rawls takes the idea of a four-stage sequence from the United States Constitution and its corresponding history; he interprets this history along lines similar to those of K.J Arrow, 1951 in "*Social Choice and Individual Values*". The second step in such a procedure is thus the move towards a constitution convention: the parties that decide upon

the justice of political forms and a constitution are the sole delegates and representatives of such an agreed convention. Under the principles of justice, the involved parties are obliged to design a system for the constitutional powers of the government and the basic rights of citizens. Rawls claims that it is at this stage where the principles of justice are weighed in contrast to the multiplicity of political views found in the given society. As we can see, the parties' agreement upon the appropriate conception of justice signals that the veil of ignorance has been partially lifted. As Rawls has stated several times before, the parties in this particular position are shielded from particular information about individuals in society: they do not know what place each of these individuals take in society, the place they take in the distribution of natural attributes, or what constitutes their conception of the good. In this stage on the other hand, parties are now privy to certain facts, such as the society's natural resources and geographic circumstances, its economic conditions, political culture and so on. Given that there are now known facts about their social and economic circumstances, the parties are to choose the most just and effective constitution which satisfies the principles of justice; furthermore, they must base practical considerations such as utilitarian calculation on these very principles. According to Rawls, a just constitution is a just procedure that assures a just outcome. The procedure will be a political process governed by the constitution, and the outcome of this process will be the establishment of legislation; afterwards, it is up to the coherence between procedure and principles to judge the outcomes in a just and effective way. But in order to pursue the ideal of a just procedure, we must first design it. A just procedure must incorporate the liberties of equal citizenship into its constitution and use the latter to protect them. According to Rawls, the included liberties must be ones like liberty of conscience and freedom of thought, free movement and the right to political participation. The political system - which Rawls assumes to be some sort of the constitutional democracy - would not be just if it did not embody and preserve these very liberties.

It is important to remember that a feasible procedure can still yield an unjust outcome. Even Rawls is well aware of the fact that there is nothing that totally guarantees such an outcome will not be produced; for him, it would be madness to assume otherwise. The best we can expect is imperfection, which is ironically what procedural justice is meant to remedy in the first place; while it can assure that unjust outcomes are not arrived at arbitrarily, its structure is not meant to protect us against every possible unjust outcome. This is because different forms of procedural justice employ different principles, just as principles of equality or utility. For Rawls, this is the

main problem with Bentham's attempt at identifying artificial interest: a just procedure must yield a just outcome, and for this to be possible it must thus be based on principles of justice instead of utility.

Rawls thinks that the two principles of justice are sufficient enough to lead us to a just constitution with an independent standard of the desired outcome. If such a standard is not arrived at, the question of the constitution has not been posed in proper fashion; if it were, we would be able to tailor the application of the principles of justice to many of the newly discovered political possibilities that are discovered by the actors once they leave the original position. We are now at the moment where the actors transition from the first stage to the second: proposed bills are judged from the position of a legislator who does not know the particularities about herself and must consequently rely on the principles of justice as her criteria. Shifting between these stages of the constitutional convention in order to tailor such a constitution to the established principles is Rawls' procedure for assuring that we will at least go in the direction of a just constitution.

Now whether this legislation is just or unjust in its confrontation with various social policies is a matter of opinion. These options are generally based on "*lieux communs*" within social theory and political philosophy and as such, they might have the ground to assert that the legislation in question is just or unjust. Rawls remedies this problem by establishing the difference principle: because it is deduced from the principle of equality, the latter must also be invalidated if one wanted to dismantle the former. And since the violation of the first principle is in almost all cases an injustice onto itself, it is hard to find a way of dismantling such a duo simultaneously. When these principles are violated, the impact of such a violation can be noticed in public and be consequently brought to the attention of major institutions. But this case is quite rare, considering that economic and social arrangements are based on the difference principle itself.

After this stage, Rawls envisions that a division of labor will take place, as particular questions of justice will be posed by concerned actors. For him, this division of labor is in accordance with the basic structure of society under the guidance of the two principles of justice. The first principle corresponds to the convention of the constitution and it requires that liberty of conscience and freedom of thought be protected in order for the whole political process to become a just procedure. In this way, the constitution assures the common status of equal citizenship and in consequence realizes political justice. As we have previously noted, it is when the second principle comes into play that legislation itself is discussed; the questions that appear in this case

are different than the ones that appear in the former, thus requiring different actors to pose and resolve them. In this sense, the priority of the equality principle of the difference principle mirrors the priority of the constitutional convention (and the constitution that it produces) over the legislature itself; in both cases, the latter must always be justified in relation to the former.

In the last stages, the outcomes of legislative action is then applied by judges and subsequently “distributed” to the citizenry. Rawls reminds us that in this stage, all facts are known and nothing remains under the veil of ignorance since the rules have now been accepted by the parties and applied in the virtue of their particular circumstances and moral characteristics. We must remember that the ground and limits of political duty are not set in this stage, but in the original position; if it wasn't, the knowledge that one gains while exiting the veil of ignorance will necessary influence the establishment of such conditions. Once the trajectory underlying the choice of such principles has been established in the original position, the full weight of the constitution can be felt: its disappearance would now be noticed, the logic of such a trajectory is the same one that underpins basic social institutions. The availability of knowledge in this fourth stage-sequence is compounded upon the facts about principles of justice that are known in the first, then the general social facts known in the second (such as economy, environment, etc) and finally the facts about particular individuals that are discovered in the third stage. In sum, limitations on knowledge are relaxed once principles are chosen and further elaborated. In each stage is gathered only the minimum amount of information required to guide actors in their particular task: any knowledge that is likely to give rise to biases which will hinder cooperation is immediately ruled out by Rawls. For him, the only admissible knowledge is that which contributes to rational choices and their impartial application. As we can now see, this compounding implies that the last stage is the only one in which actors are totally free from the epistemic constraints of the veil of ignorance.

This four-stage sequence is only a procedure in relation to the theory that underpins it; in other words, it is not a procedure that the constitutional convention will follow. Each stage deals with particular questions of justice and these are two parts of the basic structure. The first part shows how JF judges the constitution in the light of the first principle and social institutions in the light of the second. No matter what nature these theories possess or in what direction they lead the parties in question, JF must consider these four stages in order to come to a constitutional point. Furthermore, all of these conceptions of justice are dressed according to JF. After the arguments underpinning the establishment of the basic institutional structure are given, we can then clearly

establish a constitutional convention during the first part and a proper legislature and legislation in the second. Enacted laws will be part of the entire procedure of justice, and thus must come at the end in the form of the procedure's outcomes. Such a result is not a defect of the theory of justice, but rather one of the main expectations regarding it.

4.2 Nozick's Disagreement with the Theory of Justice as Fairness: The Grounding of Sustainable Justice

In the previous section we saw Rawls' reasons that underlie the grounding of his principles of justice and their eventual establishment via the progressive transformation of social institutions (the four-staged sequence). In this section, we will examine Nozick's disagreements with this procedure of justice as well as its fundamental principles. We can see from Nozick's earlier objections that he is concerned with the possibility of even formulating entitlement principles. This then ties to what we saw earlier, namely the fact that Rawls' procedure applies to the macro-structure of society, so that counter-examples emanating from the micro-structure cannot be accounted for. In Nozick's view, JF has nothing to do with justice; on the contrary, it is unfair and would thus be chosen by no one inside of the original position (Nozick, 1974, p. 204). There are a lot of counterexamples that can be used to show how defective the difference principle actually is, but Rawls does not claim that the principle is supposed to be applied everywhere. In reality, it is to be applied only to the basic structure of the society. But how can we ensure this, asks Nozick: how can we make it sure it doesn't apply to anything else? Maybe we cannot focus on macrostructure as Rawls suggests: for Nozick, our aim is to come to the point of "reflective equilibrium" in the same ways as Rawls does, except that the thought experiments in which these principles are tested occur in micro-situations instead of macro-events. In other words, if a principle cannot hold in a micro-situation, then it cannot be universally applicable. As Nozick deems principles are correct when they are universally applicable, this will lead Nozick to automatically reject Rawls' principles of justice. For Nozick, Rawls proceeds as though distinct principles apply in their respective macro and micro-situations, as the "basic structures" and political conditions of these situations require specific principles in the first place. Nozick simply asks: how come these principles are all meant to apply to the macro-structure, and not anything else? Someone might simply think that the totality of justice is what matters, while the parts that

constitute it do not make such a difference unless they are directly related to the logic of this totality. But can we reach the totality of justice if its individual parts will never all be just at the same time, and for the same reasons? We must remember that something cannot be expected to be just simply because it appeals to the macro-structure of society. It is for this reason that Nozick thinks “it is disadvantageous to only focus on the intuitive justice [...] of complex wholes” (Nozick, 1974, p. 205). Wholes like this are hard to be grasped in their totality; it is thus extremely difficult to keep track of everything that is occurring within such a whole. With this in mind, the goal is to point towards macro changes through these micro-situations and observe how they interact with the macro-side of things afterwards. If this becomes the case, then one should not depend upon judgments that anticipate the whole as a large pool of data that one uses to test their principles against. This is because Nozick thinks that the macro side can always be affected by the micro side, as all it takes is the outcome of a particular situation to go against the logic which regulates the whole. In this sense, Rawls’ exclusion of macro-situations from the constitution of principles is seen by Nozick as an attempt to preemptively protect his macro-oriented principles from their inherent weakness.

Rawls does not accept any theory of entitlements, as he does not want to regulate relations on the basis of simple exchange; on the contrary, he concentrates on principles that aim for something that is beyond what constitutes justice between two men. For Rawls, it is thus important to apply principles in the basic structure of society by neglecting the possibility of certain contingent facts (such as the difference principle’s outcome in a society which abides by the natural distribution of natural talents). In other words, Rawls’ desire to see the difference principle maximize the plight of the worst-off forced him to neglect certain possible outcomes; for example, the possible outcome in a country which re-distributes organs via utilitarian calculation instead of a chronologically-structured waiting list. While Nozick agrees that bringing such cases to light may be a bit hysterical, Rawls’ neglect forces us to do so, insofar as it is very possible that one of these contingent situations topples the universal justification for the difference principle. We don’t care whether these types of situations will occur or not; we are simply concerned with Rawls’ reasons for rejecting such possibilities in the constitution of his principles of justice. For instance, what if people are to choose different principles? Or conversely, what aspects of the basic institutional structure determine which laws will be applied? In sum, what guarantees that this procedure in its entirety will actually lead to a just outcome? The possibility of a refutation of

Rawls' principles which stems from the micro side of things is enough to warrant us to ask such questions, insofar as we must see in what way the macro-structure will take micro-based problems into account.

For Nozick, this weakness stems from the lack of proper connectivity between Rawls' principles of justice, for he believes that the conclusion of the first principle is wholly different than the conclusion of the second. The question is: how do we get from one to the other in the first place? How does the deduction occur? Rawls might explain how it happens in the abstract, but never actually gives examples to answer such questions. For Nozick, the problem is that Rawls does not deduce them at all; in this sense, he doesn't explain their deductive origin either (Nozick, 1974, p. 207). This means that the equality principle is established on arbitrary grounds and its subsequent principle is not as tightly connected to it as Rawls would make us believe. According to Rawls on the other hand, this has nothing to do with deduction and instead has everything to do with the ordering of such principles, which is not the same. Rawls has a scale for which P is true, and in this scale, any possible outcome is P. For Nozick, this scale will always give a different result, as the outcome of P can only be produced by P itself; in this sense, not all the possible outcomes are P, which then allow for different results to be produced. Nozick believes that Rawls was aware of this, and "it is mainly for that reason that the [latter] turned to contract theory," (Nozick, 1974, p. 208) as he knew it would be the only way to save his own theory. For Nozick, the only thing that props up the difference principle is the contract itself; if it weren't for the contract, its lack of connection to the equality principle would force us to abandon it in search of something else. Nozick believes that utilitarianism also suffered from this problem, as it could not properly distinguish between its principles and the ends of the state. The problem is that the both theories do not apply principles for the sake of the principles themselves; in other words, instead of applying principles because they are ends-in-themselves, they applied principles that will serve these ends. Nozick asks if these principles could serve themselves without stepping over themselves at the same time: he concludes that they cannot, as they are not end-principles.

The difference principle simultaneously acts "as an organic and patterned end-principle at the same time;" (Nozick, 1974, p. 209) this is a flaw, as Nozick doesn't believe that there are patterned end-state principles in the first place. It is organic because it tries to distribute something that will improve the lives of the worse-off. But it cannot become an end-state principle, as its aim is to simply keep distributing without having anything to do with the ends of the worse-off. To

better understand, Nozick asks us to imagine that this principle will distribute things in the same way even if certain members within society are removed as it is operating. It will continue to do the same job; it will distribute shares similarly to those that no longer exist. But wouldn't this distribution pattern change if some of the more well-off members are removed from society? The fact that Rawls provides no answer to this worries Nozick, as it implies that the distribution pattern will not actually benefit the least well off when the overall population pattern is modified.

4.3 The Concept of Liberty (*Theory of Justice*, § 32).

In this section, Rawls clarifies the conception of liberty that he employs in the formulation of his theory of justice by comparing it to established conceptions of liberty, such as the commonly-held negative and positive variations of the concept. Rawls will not try to define liberty, as definitions such as these are the result of different systems of values, which will necessary collide when a *de facto* definition is considered. The conception of freedom that Rawls is thinking of is abstract in nature. When Rawls thinks of liberty, he imagines that liberty includes four other “parts” that remain unseparated; these parts serve as micro-conceptions of liberty. The first micro-conception is equal liberty of the liberties, such as freedom of thought, liberty of conscience and equal citizenship. All of these parts must constitute liberty in the end, as it cannot operate without it; in other words, this is how Rawls avoids having to define liberty in too precise of a manner. Therefore, Rawls believes that liberty can be explained by referencing three factors: the agents who are free, the limitations which they are free from, and what they are free to do. Every theory of justice treats these liberties in its own distinct manner, in the sense that they each have different ways of ordering them; this does not prevent them from having to eventually provide a definition. Because of this, we are in no hurry to define liberty and all of its features in the beginning, as the definitions will naturally flow from the particular problems that the concept of liberty is confronted with. The general description of liberty, then, has the following form: this or that person is free or not free from this or that constraint or set of constraints. Associations as well as persons may be free or not, and the constraints to which they are subject may range from the laws, public opinion, social pressure, etc. We must remember that Rawls is mainly concerned with the legal/judicial constraints to liberty. Under such a concern, liberty is conceptualized as a certain institutional structure whose constraints are defined by a certain system of public rights and duties. As there

are different associations, persons, and states, their rights and duties are to be defined under certain conditions of constraint which then make up the apparatus which will regulate particular rights and duties. This is why it is important for Rawls to distinguish between certain liberties; furthermore, Rawls believes that these distinctions can be made without having to introduce new conceptions of liberty into the equation. Because of this, people are given rights that others might not possess, and vice-versa: at the end of the day, what matters is that this imbalance of rights and duties allows for individuals to achieve their goals with the least amount of interference possible. For instance, as liberty of conscience is defined by law, all persons are thus free to pursue their moral, philosophical or religious interests without legal constrictions which require them to either go against such pursuits or the pursuits of others. Because men must be free from particular constraints in regard to their respective aims, the government has the duty to not interfere with such aims.

Rawls insists that these liberties and rights must be assessed as a whole; in this sense, we cannot regard them as distinct liberties and instead must see them as a relatively coherent system. Each particular type of liberty will necessarily “spill over” other types of liberty, so liberty itself must be treated as a whole when it comes time to establishing it via the second principle. When liberty is treated in this way, it will achieve more liberty in general than if it was seen as a collection of distinct concepts. For Rawls, if these liberties are not restricted systematically, they will eventually collide and collapse into each other. For instance, if there were not rules for proper inquiry or debate, the right of free speech would lose its value. For the sake of this example, it is important for Rawls to distinguish between rules of order and the rules restricting the content of speech: while rules of order would constrain us from our freedom of speech since we cannot speak whenever we please, they are required to gain the benefits of this liberty. Because of this, the delegates in the constitutional convention (or the members of legislature) must decide how various liberties are to be specified so as to yield the best (total) system of equal liberty. They must also balance these liberties against each other; for the best arrangement of these several types of liberty depends on the totality of limitations to which they are subject, followed then by how they are ordered in their defining scheme. Restrictions on equality may happen says Rawls only within the confines of the equality principle itself, and in consequence, what follows it in the lexical ordering of principles. For Rawls, liberty is unequal whenever there is a class that has greater liberty than others, or whenever liberty is generally less extensive than it should be. This is the condition in

which all liberties can (and must) be equal for each person. However, there are liberties which are more extensive and whose extension can be measured: if its extension is measurable, then it can be compared with other liberties as well. This is why liberties must adjust themselves in relation to other liberties; they can only do this if they are part of a system which guarantees the coherence of such an adjustment. If the first principle states that everyone must have equal liberty, then any other liberty that follows must be adjusted to that very principle. In other words, constraints on other liberties are possible as long as they do not violate the first principle of the equal liberty. All other liberties must be seen from the stand point of the equal citizen. So now the questions that arise are rather from the perspective of the constitutional convention or the legislative stage, which then ask themselves what system it would be rational for the parties to prefer. The inability to take advantage of one's rights because of poverty and ignorance is one of liberty's core constraints. These two things somehow affect the worth of liberty, or the value of first principles. With this understanding of liberty and equality, the moments that constitute the basic structure (finding the principles and establishing them) are now reconciled into a coherent process. Thus liberty and its value are distinguished as follows: liberty is represented by the complete system of equal citizenship, while its value is proportional to the capacity of free individuals to advance their ends within the framework that the system defines. Freedom as equal liberty must be the same for all, which means that the question of lesser-than-equal liberty never arises. We must remember that the value of liberty is not the same for everyone, especially for those who have greater means to achieve their goals. However, the lesser valued liberty of the poor is compensated by the difference principle, which assures that the members in society whose liberty has the less value is compensated for this very inequality. Rawls reminds us not to equate such compensation with an acceptance of unequal liberty: in the end, both the most and least privileged member of society enters with the same political rights and the assurance that regardless of their position in society, they will always benefit from inequality and the depreciation of the value of one's liberty that accompanies it.

This conception of freedom is completely abstract. But Rawls insists to explain it in this way, as he wants the concept of equal liberty to be indeterminate enough to allow for other principles to have "room to move" when adjusting themselves to it. Liberty of conscience, freedom of thought, political liberty and the liberty of the person as protected by the rule of law are the only liberties that will further explain and clarify equal liberty as the principle of Rawls' theory. In other

words, we get a better idea of the first principle once these aspects of liberty have properly adjusted themselves to it.

4.4 Liberty of Conscience (*Theory of Justice*, § 33).

Liberty of conscience is limited by the principle of equality, as Rawls constructs the former's entire process of argumentation with recognition and acknowledgment of the latter. In the original position, parties cannot assume anything more for the opposite parties than they can for persons possessing a difference conscience. Each person is aware of her conscience since it guides them according to their own aspirations and interests.

Parties in the original position have sufficient knowledge to understand that cannot always expect other persons or parties to share the same interests that would lead them to choose the same principles, as they may be possess different or maybe completely opposite opinions than them. Persons are conscientious that as long as they share common values with those who are of the same beliefs and opinions, there are others who do not share such values or opinions. For this reason, any religious, philosophical or moral conscience is not sufficient enough to determine and follow principles, even if this type of conscience is shared by the vast majority of people. Parties would never choose the principle of which they have the least amount of knowledge, and for this reason cannot guarantee that they will accept the principles that are correct in the eyes of others. This is because liberty of conscience makes parties understand and respect the right of one moral person to behave on behalf of their conceptions and beliefs. In the original position we do not know what those people may endorse and we do not know the value of such an endorsement, so we must then respect these things as if they were our own. As the value of the principles of justice (and as a consequence, their very ordering) are determined within the confines of one's conscience, individual rationality thus becomes the main mechanism through which these different values and orderings are computed. This computation can occur because parties are then guaranteed that they cannot lose anything in the procedure of justice, as even if they end up less well-off due to it, they will be compensated by the benefits that flow from increased inequality. And thus, by the acceptance of liberty of conscience parties will be free to follow their rational conception of the good and gain knowledge on behalf of their individual aims and ends, all while respecting the right

of others to do so as well. All individuals are moral persons and must be regarded and respected as equal persons with equal freedom to pursue their ends.

The role of justice is to assure moral persons that their (equal) freedom will be protected while they pursue their rational good, as no conception of the good can be even determined before the right to equal freedom has been established. Indeed, this is what justice shall maintain in order to let people enjoy the right to their freedom and the subsequent making of their own choices within the scheme of equality. The parties are free and rational enough to be expected to agree upon general principles that apply to all. Rawls now wonders why we would then be afraid that the parties will reject the first principle, when it has been established from the viewpoint of an impartial observer that is represented by the rationality that is shared by each party. When the veil of ignorance is finally lifted, parties will feel secure in their choice of such a principle, as lifting the veil will have no effect over it: in this sense, they are just as secure as when the veil of ignorance was in effect. Because of this, the choice of the first principle is fully rational, insofar as it allows for lifting of the veil of ignorance without changing the balance of liberties within the first principle; afterwards, the second principle can be applied with the full reassurance that the first principle is here to stay. It is only in this way that we can say that the problem of the first principle of justice is now settled.

The second argument that leads parties to the choice of the first principle after they have acquired relevant information about social and cultural heritage is the just regulation of the relations between generations. Since the role of justice extends between generations, the parties must consider two limitations before agreeing upon principles. Make no mistake: it is perfectly rational for the parties to accept these limitations, and we are about to see why. The first limitation states that parties cannot choose principles for shaping the choice of the future generations that they would not accept for themselves. As the standpoint from which principles are derived is that of an impartial observer, it is only natural that these principles must be chosen by both parties, even if they are separated by time itself. The second limitation states that the parties cannot choose any principle that would otherwise determine the choice of principles for future generations, as this determination would lessen the liberty of the next generation; as we have seen, this liberty is non-negotiable. Since we cannot choose the principles for generations to come in the same way that we choose principles for ourselves, the only rational thing for parties to do is to choose a principle that will guarantee that no matter what choices will be made, liberty will always remain

the basis for equality. While this choice might seem paternalistic for the generations to come (they cannot re-select their first principle), the values on which this principle is grounded must be taught to these future generations as something that is chosen for their good and that will be adjudicated and protected by the list of the primary goods.

The third argument of liberty of conscience that leads to the first principle is a distinction from the choice made in the utilitarian conception of justice: in the original position, it would be unacceptable for parties to choose a principle that disadvantages the few in order to bring better advantages to all.

Rawls combines these arguments in order to show the rationale behind privileging equal liberty as the first principle in his theory of justice. Doing this allows us to recognize that we have more confidence in the principle of equal liberty than the premises from which a perfectionist or utilitarian view would be derived. The grounds for this confidence, according to the contract view, is that equal liberties have a different basis altogether. They are not a way of maximizing the sum or achieving the greatest net balance of satisfaction, as the notion of maximizing a sum of values by adjusting the rights of individuals cannot possibly arise. Instead, these rights are assigned to fulfill the principles of cooperation that citizens would acknowledge when each is fairly represented as a moral person. Thus, the conception defined by these principles is not that of maximizing anything, except in the vacuous sense of meeting the requirements of justice to the best of our abilities.

4.5 The Constitution

So far, Rawls has explained the journey towards the realization of the last step of the process of justice: the constitution. After both principles of justice are commonly understood between parties (as Rawls says they will), the principle of equality will then enable the parties to take a step further in the matter of applied justice. These principles will create a sufficient basis for the basic structure of society. The first part of the basic structure would enable a constitution that would uphold both principles, and the second part will allow us to enact legislature in accordance with them. This transition between the original position and a legislative structure is only possible if each member of society makes this transition on equal grounds.

The principle of equal participation comes as the result of the first principle, as it guarantees the right to participate equally in public affairs. This right must be understood as one that enables the equal participation of its members, despite their different social and cultural backgrounds. From different experiences that occur in democratic societies, it is quite evident that democracy is the best-suited system for the maintenance of such rights. Democratic systems have all the necessary mechanisms to secure a direct representation of its citizens, who require it in order to ensure that the constitution is upheld. As everyone has an equal right to participate, they will consequently have an equal right for self-representation. Number of those who will represent directly those that have equal rights to participate would make a corps which enacts the legislature of the state in accordance with the rules. They will be elected by free votes on the principle of rules for the rules. The role of this judiciary corps is to represent equally all members of the society. To put in different words, every member represents a vote and an electorate which means that each person counts. Those that are elected will make sure that rules and laws are amended in accordance with constitution. The role of this legislative body is empowered by an authority though its role is not to make checks and balances for executives, neither to organize plebiscites and vote of trust for governments nor to return the bills, but is to make parliamentary bases.

Equal participation is inherently comprised of freedom of speech and assembly, and the liberty to create political associations. For democratic societies, is important to create circumstances for the application and acceptance of the principle of loyal opposition: this form of unanimity only enriches the diversity of human life. Political order is important, but it is not all that counts for Rawls. The possibility of unanimity that democratic societies can provide has its origin in the principle of equality. The principle of equal participation as such is not to be eliminated, but instead must be grounded in the political sphere of democratic societies.

In regard to equal liberty as defined by the principle of participation, three points must be discussed: its meaning, its extent and the measures that enhance its value. Equality in this case is represented by the right of each member to vote and become elected, as well the fact that each vote is of the same value as any other. The system of representation must be organized in a way that allows it to avoid things like gerrymandering, in which a minority can artificially overtake the power of the majority for no other reason than geographical location. In this context, Rawls does not have any other solution but to admit majority rule; he simply doesn't see anything wrong with it *in general*. What is more concerning to Rawls is creation of a system in which majority rule does

not suppress equal liberty. This is possible if it is also assured that the first principle gets applied and with that, other liberties which guarantee equality for each member regardless to the majority's political stance.

Another thing that Rawls wants to change is the financing and support of political parties. Instead of political interference with industry in order to amass funds, Rawls suggests that a certain amount of government funds are allocated to each political party. As every adult member of society possesses the equal right to be elected, it would be erroneous to assume that this equality will be properly represented under the current financing rules, which allows for industry to have significant influence in the funding of political parties. This is because the right to be elected is infringed by industry's right to select representatives that suit their interests, as anyone who does not support such interests is refused funding as a consequence.

Social justice does not only insist on safeguarding the freedom of minorities in democratic societies that are subject to majority rule, but also tends to regulate the type of economic influence and power that has been historically associated with families who possessed enough of it to restrict the freedoms of those who were a threat to their interests. As a solution to this phenomenon, Rawls suggest that opportunity and public offices be open to all, as it would not let social and economic background determine people's life prospects and the freedom that these prospects require.

In sum, the principle of equal participation has no other intention than to make a distinction between two liberties: the right of the citizen to represent herself and participate equally, and the right of representative to represent their constituents. These rights cannot otherwise be guaranteed and maintained unless they are understood as the rights expressed through a conception of JF for equality. It only reminds us of the equal weight that parties have in regard to the constitution and its institutions.

4.6 Limitations on the Principle of Participation

In the previous heading, we could see the importance of the principle of participation, as it guarantees equal weight in the formulation of a constitution. On the other hand, we also caught a short glimpse of how such equal participation could fall to the domination of majority rule. If the previous case showed us how the principle of participation allowed for a better constitution to be formulated, we will now examine a case in which equal participation can lead to a majority rule

that constitutes itself via the suppression of the political freedoms of minorities. In this section, we will see how Rawls determines whether it is necessary or not to limit equal participation in order to thwart this; the answer to this will allow us to determine whether it is possible to preserve equal participation all while eliminating the possibility of the domination of the majority. To give it away early: Rawls believes that the principle of participation must be limited by the constitution, as the constitution is what would prevent any majority from impeding on the freedoms of minorities that do not share their vision. While equal participation is necessary for the creation of a just constitution, it is also blind to certain inequalities that stem from the seemingly organic constitution of political majorities. It is for this reason that the constitution's imposed limits on the unchecked extension of political freedoms is meant to simultaneously keep majority rule under control and assure the freedoms of minorities. While this might limit freedom in general, it assures that the outcome of this limitation will result in the protection of freedoms that might elude our collective eye.

Another reason for limiting the principle of political participation is that its maximization might unbalance the equal value of each vote. For instance, Mill himself might have been a liberal, but he stated that each vote should not necessarily hold the same value: for him, the vote of an intelligent person is worth twice that of an average citizen. Rawls' does not necessarily criticize the principles behind this argument, insofar as Mill was trying to ensure that the minority of intelligent people wouldn't be totally subjected to the whims of the unintelligent majority. However, Rawls does not believe that the freedom of minorities can be secured by expanding their freedom to the point of infringing on the freedom and equality of others, especially if this leads to the prioritization of political freedom over other forms of liberty. On the contrary; for JF, what counts is that when it deals with freedoms it considers all as equal, limitations to liberty are not argued from the standpoint of equal citizenship, but from the standpoint of the most vulnerable freedoms. In other words, the goal of limiting political freedom is not to level everyone's political rights, but to ensure that the maximization of those rights do not overshadow other forms of freedom. To limit freedoms equally in favor of the vulnerable few is based on the idea of limiting freedom in order for everyone to pursue their ends without being restricted. For JF, it is important that its two principles be applied in conformity to the full exercise of freedom first and political rights second. Rawls considers that the prioritization of political freedoms as a means of attaining other types of freedoms is not in accordance with justice as fairness, as we have seen that the

fundamental freedom that is secured prior to political freedom is the equality of liberty represented by the first principle. To go back to Mill's example, the right of intelligent people to have two votes is not in accordance with the principle of equal opportunity. Of course, political rights are valued by Mill as much as by Rawls; the key difference is that Mill aimed to establish these rights from the basis of political will while Rawls aimed to base them on a constitution. By basing rights on political will, the highest freedom is to maximize one's participation in politics; the constitution on the other hand allows us to see how this can be detrimental to others in general, as it is based on a general conception of liberty, or one that isn't constrained to the political sphere. In this well-ordered society, the people who will think of the principles of justice must ensure that political will is mobilized to secure such principles; once this is assured, only then is it possible to determine if it can be given further scope and extension. As we have seen, the principles of justice are meant to secure primary goods, political participation being one of them: if we were to base the principles of political will, it would be the only guaranteed form of freedom insofar as it does not guarantee the securing of primary goods. In sum, we should not give the political will any more rights than it needs to accomplish its task; politics isn't an end in itself, and Rawls believes that it shouldn't be treated as one either.

4.7 The Rule of Law

In this section, Rawls considers the rights of the person that are protected by the principle of the rule of law. As Rawls has stated so far, his intention is not only to relate to the principles of justice but also to elucidate the meaning of the priority of liberties. In the second chapter of this work, we have seen how Rawls explains how formal justice (the regular and impartial administration of public rules) may become the rule of law when it is applied through a legal system. If judges and others in positions of authority fail to apply or interpret appropriate rules, we are now dealing with the conditions of unjust action. Cases of injustice are not represented by things like bribery and corruption, but also of racial discrimination and the propagation of hatred and intolerance. A regular and impartial administration is defined by Rawls as “justice as regularity” instead of “formal justice”. With this in mind, we can see that the rule of law is closely related to liberty, especially when we consider the intimate connection between a legal system and the regularity of justice.

A legal system is a coercive order addressed to rational persons in order to regulate their conduct and provide a framework for social cooperation. Rawls claims that when these rules are just, they establish grounds for legitimate expectations by which persons can rely on each other and also rightly object when their expectations are not fulfilled. So if the base of these claims is unsure, so must be the boundaries of men's liberty. In order to better understand these boundaries, it is best to think of these rules as ones that are meant to assure the proper functioning of a certain game; this is not far-fetched, as most institutions and associations relate to their rules and regulations in a similar manner. "Given that these rules are fair or just, then once men have entered into these arrangements and accepted the benefits that result, the obligations which thereby arise constitute a basis for legitimate expectations" (Rawls, 1971, p. 236). The legal system distinguishes between its comprehensive scope and the regulative powers that it has over other associations: the constitutional agencies defined by the legal system work in a coercive manner, at least in comparison to private associations. Legal systems exercise a final authority over certain territories limited by their borders; moreover, this geographical factor reinforces the image that laws and principles define the basic structure within which the pursuit of all other activities takes place.

Precepts of justice can be associated with the rule of law as they are given as legal orders, to be accepted by all rational men. These precepts are those that Rawls claims would be followed by a system of rules which perfectly embody the idea of a legal system: *ceteris paribus*, the best legal order is the one that best fulfills the precepts of the rule of law. It will provide a more secure basis for liberty and a more effective means to provide a cooperative scheme. Yet the precepts guarantee only the impartial and regular administration of rules; because of this, they still might be unjust. Those that are in charge of enacting the laws and rules must keep in mind that laws ought to be based on the expectations of reasonable members of society, who can decide unanimously on what should be restricted in general. For Rawls, it is reasonable to expect that parties will reject precepts that do not coincide with their rational cooperation before even having to "test" them by creating principles and enacting laws that derive from them. This is the principle of good faith, which is fundamental in assuring that we do not commit injustice while attempting to discover if certain precepts are unjust or not; this is because the "ought" that the precepts imply are based on what is reasonable for parties to agree upon. In this sense, it is not a matter of "faith", but one of rational expectations. As a consequence of this, it will be expected that once they are accepted and publicly recognized, they are ready to be executed: none of the parties then have right

to neglect them in the name of an inability to perform, as they are precepts that are meant to be applied by the average member of society. On the contrary, says Rawls: freedom is in danger when such an inability to perform becomes the main reason for refusing to apply such principles.

Another precept that Rawls brings to light is that similar cases be treated according to similar laws and rules. The aim of such a precept is to minimize the discretion of judges in the “regular” enacting of justice, as it would then require judges to justify distinctions between persons by reference to relevant legal rules and principles. Though if rules are complicated, it calls for an interpretation which then makes it easier for judges to justify a possibly arbitrary decision on shaky grounds. But the more that such cases increase, it becomes increasingly difficult to rely on such methods to cover up the arbitrary character of a particular judgement. For the legal system to be consistent, we must consequently focus on interpretative tools that apply to all cases and prevent arbitrary judgements from garnering themselves with a rationalistic coating; in other words, legal interpretation must be critical of the interpretation itself. This precept also suggests that in cases of equity, an exception must be made if the established rules face certain ambiguity: this is because there are no clear interpretations of the limits of equality, which means that any difference in interpretation will make for a difference in the realization of justice. If so, then the principle of authoritative decision applies; for Rawls, this is sufficient enough.

For Rawls, the precept that there is no offense without law is derived from the ideal of the legal system. There are a few things that follow from this: laws must be accepted by everyone, there is no discrimination nor bill of attainder that is exercised over any member or association, and finally that the penal laws should not be retroactive to the disadvantage of those to whom they apply. These concepts are implicit in any legal system which regulates behavior via public rules: if people do not know of these public rules, then they do not know how to conduct their behavior since what they can or cannot do is unclear unless there is a bill of attainder that would enforce such conduct. Moreover, this may not happen unless there is a tyrant who institutes terror through laws and punishments; but even if this was the case, tyrants tend to forget about using the same punishments for sets of offenses insofar as it is a testament of their power to produce different punishments for each particular offense. However, this rarely results in a legal system insofar as there is no ground for social cooperation that resides outside the scope of the tyrant's power; as no legitimate expectations can arise out of this, the citizenry have to interest in participating in the maintenance of such a legal system. Finally, there are precepts that the notion of the legal system

considers as natural law. If laws are addressed to rational people, then courts must guarantee that laws are respected, as well as try to make sure that each offense will be followed by the appropriate consequence. This then implies that the legal system must organize a juridical process based on inquiry, which is then exercised by impartial and independent judges. Trials must then be fair and not prejudiced by public clamor. In sum, what the legal system considers to be natural is the regularity and objectivity of the legal process; this isn't hard to accept, insofar as regularity and objectivity are nature's most significant attributes. With this, Rawls is trying to make a clear connection between the liberty and the rule of law, as the rule of law determines the duties and rights of citizens; it establishes the confines of their very freedoms in a regular and impartial fashion. The limits of freedom are indeterminate; for Rawls, the only thing that restricts our personal freedom is fear. It is for this reason that liberty is defended by specific rights and freedoms, which then allow us to pursue our ends in accordance with our freedoms, as well as protect them from the intrusion of others. The rule of law must thus be maintained in order to reduce the fear that individuals might experience when thinking about the possibility indeterminate outcomes of their aims.

But Rawls can also arrive at the same conclusion through different means. It is unavoidable that the government must exert coercive power through the form of penalties in order to maintain the rule of law. Even if people share a common sense of justice, there is no guarantee that others will conform their duties and obligations to this sense of justice: the negative consequence of this is the fact that others might not feel the need to do their part if they feel as if others are not either. Because of this, rules may break down in certain circumstances. The suspicion that others are not honoring their duties and obligations in the absence of an authoritative interpretation and enforcement of the rules is the very condition under which the meaning of these rules deteriorate. For instance, Rawls says that it is impossible to think of taxes being paid on a voluntary basis, insofar as taxpayers will see themselves as being exploited when they see non-taxpayers benefitting from the re-distribution of taxpayer revenue. By enforcing taxes through the use of coercively-granted penalties on behalf of an authoritative government, this problem can be avoided. It is for this reason that a sovereign coercive power must exist in order to insure that its rules respected, even if Rawls thinks that the underlying rationality that governs the behavior of members of a well-ordered society doesn't require such a form of coercion. This penal machinery is rather meant to assure an underlying sense of security when individuals are in the presence of

each other; while this was meant to quell fear in the previous example, it also ensures that individuals see fellow citizens are moral beings who are subject to the same legal scrutiny as them. Now in setting up such a coercive machinery, people must weigh the disadvantages. According to Rawls, they are two: the first one has to do with the taxes that people have to pay if they want their freedoms to be assured, and the second is the possible damage done to freedoms if these taxes are not paid. Rawls would pick the first outcome over the second, insofar as he deems it to be more rational to establish a coercive agency than have the value of one's freedoms fluctuate at an unstable rate. Taking these two disadvantages into account, the best outcome would be to minimize both of them: we pay the least amount of taxes in order to maintain our freedoms in the most stable way possible. All other things equal, the dangers to liberties would be lessened if the law is impartially and regularly administered in full accordance with the principle of legality; once this occurs, citizens can have a better idea of how to plan their endeavors in accordance to the boundaries set by the liberty of others.

In order to proceed in this matter, society requires a penal code which allows for the limits of liberty to be fully “legible” to the general population; liberty must thus be “explainable” via such a penal code. Despite thus, we must remember that Rawls sees liberty as a concept which is based on responsibility and not penalization. The public character of these rules is meant to promote responsibility, instead of merely defining freedom negatively through the means of penalties. On the contrary, the legal system that Rawls schematizes rather has the aim of instituting liberties, and not penalties. To be explained this, Rawls uses the example of armed religious groups: if they arm themselves for protection and government enacts a law against weapons possession in order to ensure certain liberties, then all such possessions must be penalized even if they are within the confines of the group's private property. While there are many cases in which it is hard to stop all injustices, the least that can be done is to limit those injustices in the most just way possible. We must remember that it is unjust to tip the balance towards the greater good of the few at the expense of the good of others, as well as trading liberty for socio-economic benefits. For this to be possible, we need a penal code in order to fully clarify the contours of liberty and the greater good; once this occurs, it is possible for citizens to act upon these conceptions in accordance with their limits.

4.8 The Kantian Interpretation of Justice as Fairness

Rawls' relation to Kant is not a discovery, nor an innovative interpretation; it is rather affirmed by Rawls himself in his Theory of Justice. Despite the fact that Rawls account of the concept of equality and the priority of rights is derived from the Kantian conception of autonomy, he does not limit himself to this: Rawls believes that these are not the only two significant notions in regard to the application of ethics. It is for this reason that Rawls thinks that staying within such confines is trivial.

For Kant, moral principles find their origin in rational choice. Kant believed that this rationality constitutes moral law, which will then conduct men in an ethical commonwealth. These moral principles are considered as legislation for a kingdom of ends and must consequently be accepted by all in a public setting. To this moral legislation is meant to be agreed upon under conditions which reinforce our status as moral and rational beings; Rawls original position is meant to serve as an explicit formulation of such conditions. This is perfectly normal, as Rawls' comes from the same contractual tradition as Kant: in other words, both aim to establish the conditions in which a just contract can be erected and subsequently agreed upon. For Kant, action is autonomous when men choose principles as free, equal and rational beings. In order for this to be possible, the opinions which shape such an agreement cannot derive from someone's social position; if this were the case, the principles would be heterogeneous and in consequence, incommensurable. Rawls veil of ignorance aims to solve this problem by only allowing for the appearance attributes that are homogenous to the population, such as rationality; because of this, the principles are erected homogeneously and can thus be accepted by the entirety of the actors in the original position. Rawls and Kant both agree on the aim of such homogenous principles: the establishment of a basic social structure: in this sense, Kant and Rawls share a similar rationale, insofar as they accord relatively similar means for the accomplishment of similar ends.

Under Kantian ethics, these principles that the form of hypothetical and categorical imperatives: principles are categorical imperatives when they *must* be applied to the conduct of a person in virtue of their nature as free, equal rational beings, and they are hypothetical when they relate to the aims of individuals that have nothing to do with morality. In this sense, Rawls ties the two principles of justice with the categorical imperative and the list of primary goods. Categorical imperatives are privileged over hypothetical ones, as the incommensurability between variations

of the latter does not permit for their principles to be spread to the rest of the population via rational means. This is why Rawls believes that acting upon the principles of justice is the equivalent to responding to the categorical imperative, insofar as the latter applies regardless of our individual aims.

Kant's categorical imperatives and Rawls principles of justice are meant to limit freedom within the boundaries of autonomy. Kant feared the mutual disinterest of parties involved in deliberation and for this reason did not rely on their benevolence; due to his recognition of their autonomy in relation to expectations of such benevolence, he then had to rely on their duty in the form of the categorical imperative. As we have seen, this is the only way to assure that autonomous parties will respond accordingly to the requirements of justice. In this sense, for Kant and Rawls freedom is right and meaningful only when it is in accordance with such requirements: no matter how the parties conceive of their good, they have complete autonomy to follow it as long as the categorical imperative/principles of justice are responded to as priorities, and not afterthoughts. As it follows parties, have full autonomy in the contractual sense: they are free to pursue their aims, as long as their aims can be legible within the context of such categorical imperatives/principles of justice.

However, Rawls considers that there is a difficulty (noticed by Sidgwick) which must be clarified. Sidgwick remarked that nothing in Kant's ethics is more striking than the idea that a man realizes his true self when he acts from the standpoint of moral law, whereas if he permits his actions to be determined by sensuous desires or contingent aims, he becomes subject to the laws of nature. According to Sidgwick, Kant believes that the lives of the saint and the scoundrel are both the outcome of free choice and causal laws. Rawls agrees with this problematization of Kant, as the latter never explained why the Saint's life is the outcome of free choice while the scoundrel's is contingent upon natural law. Sidgwick's objection seems to be very decisive, since he remarked that for Kant free choice is based solely on principles that come from the "transcendental" self or "rational being"; in consequence, any other choice stemming from hypothetical imperatives is not. Rawls will defend Kant here, as he states that Kant believed that it wasn't possible to develop homogenous principles in any other way. In sum, if someone wants to reveal his true self via his actions, he will have to act in accordance with rational principles, insofar as they are the ground from which one can reveal oneself to others: conversely, other types of principles might not be legible to the rest of the population. The reason Rawls brings this up is because he believes that

Kant was missing a key argument: the latter didn't bring up the fact that such homogenous principles/categorical imperatives are meant to allow for common legibility in regard to the self that is revealed through moral action.

Rawls sees his original position as a corrective to Sidgwick's objection: parties in the original position can construct and agree upon such rational and homogenous principles. As members in the original position have the freedom to choose between such rational principles, it is expected that the results of such a free choice will be in closest conformity to the requirements of justice; this is the inherent rationality that ensures that homogenous principles will be produced. This is possible because members in the original position will choose principles on the basis of how their rationality is in accordance to the rationality of everyday life; these principles will thus be necessary in ensuring the regularity of justice that we have examined above. As such a choice is called for by the requirements of justice themselves, actors grant themselves the autonomy to choose such principles; in sum, this is how we move from self-granted autonomy to the formulation of homogenous principles instead of heterogeneous ones. It is for this reason that Rawls accuses Kant interpreters of erring when they conceive the latter's moral philosophy as being one based on law and guilt; acting unjustly is not the result of some intrinsic guilt, but the failure to act as the rational beings that we are beneath the surface of our appearances. To act immorally is to act in disrespect to oneself, as the self that is revealed is one that is fully subjected to the contingency of natural laws; it is disrespect insofar as we act as if we weren't free and thus deny the rational basis of our very autonomy. As much as liberty was important for contractarians like Rousseau and Kant, their aim was to show that liberty consists of acting in accordance with the law that we give to ourselves in rational manner.

Just like the inherent rationality of the Kantian subject, the rationality of Rawls' procedure is what allows for this theory of justice to be consistent, in the sense that its rationality will always produce a similar outcome. In consequence, we can affirm that Rawls' theory is a totalizing one, insofar as it employs the constraints of reason to block out different outcomes that might possibly arise. In other words, it seems as if his theory of justice does not allow for other philosophical conceptions to enter into dialogue with it, and this is to the fact that they are imprinted with the substantive forms of rationality that clash with Rawls proceduralism. With this in mind, we can better understand why Rawls is bound to procedural rationality: it is the only non-doctrinal form of rationality that can, under the same circumstances, produce the same outcome. Again, this is

possible because of the theory's Kantian heritage: it is consistent because the rationality at play limits itself before actually producing anything. As this self-limiting must occur prior to any of reason's activity, it is for this reason that Rawls chooses the original position as the starting point of his procedure: it is the space in which this very act of self-limitation takes place. After this has occurred, Rawls' procedure is guaranteed to always reach the same outcome: the formulation of the equality and difference principles.

While this might be the case in theory, it is not the case in reality: actual situations produce different outcomes, and it is precisely these types of outcomes that Rawls theory needs to take into account. For instance, what if one doesn't comprehend the theory of justice as Rawls does; would he or she be less rational, or maybe even irrational? Rawls' would not disagree, insofar as he understands that it is still possible to bring irrational principles to their logical conclusion, especially when thought experiments are employed. Nozick, on the other hand, believes that the need to ensure the same outcome is what will force Rawls to impose certain types of precepts, as well as a certain type of rationality on the actors in the original position; according to the former, such an imposition is proof of the relative arbitrariness of what is imposed. In other words, if Rawls' principles were truly universal, we would not need to constrain the actors in regards to the modalities with which they will discover the principles' very universality.

For Rawls, the modalities themselves are constrained because they are the only ones that can allow for the proper formulation of principles of justice: without the 4 stage sequence, we cannot guarantee that the resulting principles will be in conformity with the precepts of justice. Despite this, we must remember that the resulting discussion regarding the four stages, contract, constitution and toleration only establish the *pillars* on which Rawls theory of justice and its truth will be established. Nozick wouldn't have anything against this method if it were not for the fact that the framework in which it occurs is not fully credible. And this lack of credibility is betrayed by the method itself, as the four stage sequence is meant to incorporate anything that was unintentionally left behind by the theory's incapacity to incorporate and comprehend the small details that define problems of justice. In other words, Rawls method is meant to integrate all that *remains* from the theory's confrontation with reality: if aspects of reality resist theorization, the method will then subsume them into the theory via the 4 stage sequence. In order to evade the risks of the typical ambiguities that accompany conceptions of justice, Rawls wants to assure a procedure which, in case of the failure of the parties to keep up with the further development of

the principles of justice, remains intact insofar as it can be revisited in order to understand in what context the principles were accepted. In consequence, while Nozick's criticism of the groundwork of Rawls' procedure diminishes the relevance of the 4 staged sequence, we must remember that it is still a necessary condition for a consistent theory of justice.

But Rawls' theory of justice is more than merely consistent: it is totalizing insofar as it constrains public discourse and deliberation in a transcendental manner. It does this by positing the limits of actors' knowledge, then erecting a 4-staged sequence that functions in conformity to these limitations. Because of this, justice cannot possess a meaning, as meaning itself is not permitted within the epistemic limits of the original position: if this is the case, then we can safely say that Rawls' theory of justice doesn't aim for anything outside of its very procedure. In other words, it must do what reason suggests within the confines of procedure, but cannot allow for reason itself to provide anything substantial in the formulation of principles of justice. This is why Rawls' reasoning can allow for the sacrifice of certain types of liberties in the name of justice, as these liberties contain nothing substantial in the context of the procedure itself; while they might have something substantial outside of the procedure, in the sense that they are considered meaningful by the actors in question, this has no bearing on their status within the epistemic confines of the procedure. In the end, they can only be chosen if they conform to the principles of justice; if not, they can be easily discarded. In the following section, we will see how the principles of justice respond to the demands of social cooperation after they have been formulated within the original position; in other words, it is time to see how they are adapted right before they are meant to be applied in reality.

5. Distributive Shares (Second Principle)

5.1 Justice in Political Economy

In the previous four chapters, we have exposed the arguments for the procedure with which we can formulate the first principle of justice: the equality principle. In this section, we will expose Rawls' arguments for the establishment of the second principle of justice: the difference principle. The second principle belongs to the sphere of political economy and its task is to lay the foundation for a regulatory apparatus which is meant to balance the dynamics of cooperation within that sphere. But this question and the way how Rawls approaches to it, for Nozick doesn't seem to be enlightening, considering Nozick's arguments that it is impossible to regulate transactions between cooperative and noncooperative agents by a set of principles for distributive justice. We will have the chance also in essence to reveal Nozick's conception that duty of justice is to render at least an exchange just between those who cooperate and not as Rawls made question once whether noncooperatives must include in distributive justice. So we will see that both Nozick and Rawls question cooperation, but with different questions.

As we now understand the scope of the first principle of justice, it is apparent that this is unavoidable: a second principle must complete the first. As the state of the national economy is not implied within the original position, we will have to formulate the second principle in order to lay down a rational foundation for how the economy works at its most basic level. For this reason, the outcome of Rawls' Theory of Justice is a reply to the utilitarianism, as it remains the most basic rational structure in which the economy is made intelligible. Rawls' goal is to take utilitarianism as far as possible in the attempt to fulfill both principles of justice; the point of this is to then formulate a second principle of justice that takes utilitarianism's flaws into account.

To do this, Rawls will first turn to the problem of inter-generational justice. Besides treating this issue in *A Theory of Justice*, (Rawls, 1971) Rawls presents an alternative conception of the same problem in *Political Liberalism* (Rawls, 1996). Despite the temporal gap between both books, his alternative in *Political Liberalism* still retains the basic structure that it does in *A Theory of Justice*. Let's now turn to the difference principle and examine how it applies to such a basic structure.

We must first understand that Rawls' conception of the economy is a contractual one, insofar as it can only be established after its founding principles have been agreed upon in the original position: the economy must thus be structured around the two principles of justice. These two principles of justice imply a list of primary goods, which then determines the scope and the limits of justice within the contract. At first glance, this might seem too idealistic: but Rawls accepts this because it allows us to get a better idea of the nature of the contract itself. Because of this, Rawls' political conception of the economy is closer to perfectionism than utilitarianism, in the sense that the motives for cooperation do not arise from a general condition (the constitution of average utility, for example): instead, they are based on the ideal constitution of mutual cooperation that is present in the social contract itself. If it wasn't based on such an ideal, it would have a hard time preserving and maintaining the contract, as general social conditions (which average utility reflects) are subject to historical change. In other words, an ideal conception of the economy ensures that we do not deviate from the precepts and principles of the social contract: there is no arrangement of the economy that can be accepted by Rawls unless it is based on such a contract. As we have seen, Rawls' contract does not concern the meaning of the good life, but the rules through which different interpretations of the good life interact. This is not to say that Rawls thinks that the contract doesn't allude to a particular conception of the good; it does, but it goes no farther than being an allusion, thus preventing itself from becoming an outright endorsement. In other words, the contract cannot determine any particular conception of the good, but it can allow us to see that some come closer to the principles of the contract than others. This differs from utilitarianism because the latter does endorse a particular conception of the good: it is a contingent one, insofar as it is based on what is considered to be the "current" maximization of society's utility. In order to counter such contingency, Rawls aims to establish the ideal conditions in which any particular conception of the good can find its meaning. It is the system of rules that will shape the conduct of people within society; people will follow these rules because they have already agreed to their underlying principles in the original position. Rawls' contract will thus differ from utilitarianism because it cannot go against such principles in exchange for economic benefits, no matter how productive or efficient they are. This is because these principles are based on the agreement for the distribution of primary goods that are prior to entering society. In this case, they are thus prior to utilitarian calculation itself; as utilitarian calculation only has meaning once these primary goods have been fulfilled, it would be paradoxical to trade them on the basis of

maximizing one's utility. For utilitarianism, the priority of freedoms and liberties are conceived as choice while for Rawls, they are given and thus non-negotiable; in other words, they are conditions in which our choices can arise and consequently make sense to us. Utilitarianism doesn't see these as conditions, as it derives utility from the viewpoint of the impartial spectator; as the spectator resides "outside" such conditions, they have the same value as any other goods that can be exchanged. Thinkers like Hume and Mill characterize this impartial spectator by abstracting from society and positing the most general "end" of such an abstraction. For Rawls, the idea of such a spectator is nothing but a standard assumption that can be found in many moral theories; as matter of the fact, it can still be found in most moral philosophy today. Interestingly, it is just a variation of the original position: the only difference is that Rawls wants multiple individuals to take the role of the impartial spectator, in order to see what they will agree upon in deliberation. In this sense, Rawls' "impartial spectator" is a dialectician, while that of utilitarianism is didactic. In Rawls case it is completely understandable that two opposite parties will agree when it comes to the idea that the freedom to pursue one's individual ends in accordance with their life prospects is the basic foundation for a just society. While they might disagree on the meaning of such ends, it does not change the fact that they recognize one's right to abide by their own interpretation of the Good life. For Rawls, there is no reason to argue about the meaning of certain ends in the original position, as we do not know which ones we are to eventually adopt as our own; once the two principles of justice have been established, there is no longer a need to privilege one conception of the good life over another, as we have already secured the individual's freedom to choose a particular one *as if* it were the "best".

5.2 Economic Systems

Rawls is not concerned with the theories that are meant to describe complete economic systems; at this point, he is still employing the tools of basic economic reasoning. This is one of the reasons why he admits that he is not concerned with the economy per se, but rather with how economic arrangements relate to morality and justice. In this sense, he limits himself to questions such as savings, taxation and minimum wages: the goal here is to formulate the most just economic arrangement instead of the most efficient one. Because he is considering justice first, he cannot praise any of the current economic systems, insofar as their organization (be it in the Soviet Union

or the United States) is based on efficiency first. This does not mean that Rawls proposes a new economic system, as he has not given himself the tools to do so: instead, he is simply trying to find a bearing for justice inside of a given economic system.

In order to avoid further misunderstandings, Rawls starts by making a few remarks regarding the system in the context of political economy: he is not only concerned with markets, but of the social institutions that are meant to regulate them. First, he will explain what an economic system actually is: an apparatus which regulates the means and ends of production, as well as the overall distribution and re-distribution of what is produced. Rawls' goal is to see how far these arrangements can satisfy the two principle of justice; but first, he must see if it is possible to satisfy them in the first place.

Rawls is not concerned with the differences between capitalism and socialism, but instead between two aspects of public sector. The first aspect has to do with the ownership of the means of production: the difference is that in socialism the public sector is much larger, whereas in capitalism the number of publicly owned firms is much smaller. The second aspect of the public sector is the proportion of total social resources devoted to public goods, as there are goods that may be required more by certain people, yet still must be divided equally in order for all to benefit from them: since they are not private goods, they cannot be produced only for the few who can afford them. An example of such a good is the army. While a private army might be able to protect the few who need it most for an appropriate price, its efficiency is not taken into account because of the fact that protection is a public good that all citizens are equally entitled to. However, this reveals a problem with public goods: the problem of assurance. While public goods can be distributed fairly via the means of public services, it is not guaranteed that all citizens will participate equally in the maintaining of such services. The problem is that whether participation increases or decreases, the good that is provided must be distributed in a stable and regular manner. For Rawls, this participation must thus be enforced via the means of legal obligation, as this will ensure that the same quality of public services are provided to the largest amount of citizens, all in a fair and equal manner. The reasoning behind this is simple: while equally-participating citizens might reap the benefits of such services in an unequal manner, this inequality in service tends to dissipate as time goes by. An example of this would be the privatization of vaccinations against contagious diseases. If it were privatized, consumers could benefit from the vaccinations while non-paying citizens won't; but if this disease spreads amongst the latter group, the repercussions

will eventually reach the vaccinated consumers if the contagion is not countered in its totality. The answer to this problem is to render vaccinations public in order to ensure that the disease doesn't spread enough to be considered a threat to society as a whole. Another example would be the externalities associated with the harming of the environment: while private entities are free to deal with their property as they wish, these actions can lead to the degradation of the environment as a whole: as markets have a hard time dealing with such externalities, it is imperative to at least ensure that they can be dealt with before they do irreversible damage. The inability of the market to deal with such externalities is part of its inherent character; as there is a difference between public and private "accounting" when it comes to these matters, Rawls accepts that we cannot leave everything up to the accounting of the latter.

The very indivisibility of the public sector is what gives it its "public" character: the goal of the state is to regulate the outcomes that can only arise in such an un-divided sphere. It is in the interest of everyone to participate in the indivisibility of public goods, as a lack of participation is only eroding the public sector's indivisible character. The basis of any collective agreement pertaining to public goods must be found in the fact that whoever participates will be guaranteed their fair share: without this, no one would have the incentive to participate in the first place. This can be represented quite accurately by the prisoner's dilemma and thus, cannot allude to a preferred solution as one must expect the actors inside the solution to behave in a way that we cannot guarantee. In order to let the market function in its own way, we must thus establish a minimal form of assurance. In the context of game theory and the prisoner's dilemma, this means that the game itself must at least ensure that the least viable outcome isn't a threat to the basic structure of society. If this policy of assurance is to be established, citizens will be encouraged to participate equally in the distribution of public goods and thus ensure that the individual efforts towards such a distribution are not in vain. The only way that this can be possible is if the government erects a system of incentives and punishments that ensure that a minimal form of behavior will be ensured, even in the worst of all cases. Once this assurance is established, citizens can feel comfortable in their role, as they are participating in the very process that guarantees their shared equality (Rawls, 1971, pp. 220-40).

Whether the means of production are privately or publically owned does not concern Rawls, and this is for two reasons. The first reason is that trade is something that "passes through" different societies and involves more isolated societies under different forms of government. The

second reason is that the government can contract from both the private and public sectors: this is possible because there will still be a market structure, as it is in conformity with the two principles of justice. The reason that the market will persist under either socialism or capitalism is because it is a minimal condition for free cooperation within the economic sphere; in this sense, Rawls cannot know whether labor power will be purchased by the government or the private sector, but instead rest on the assurance that there will be some sort of labor market in place. Markets fulfill the requirements of justice because they allow for free competition to regulate prices, as well as an efficient distribution of the goods that are produced within it. In order to ensure that the efficiency principle doesn't overtake the principles of justice, the relationship between labor and the owners of the means of production is determined on the basis of equality instead. While the government cannot fix the interdependence between these two classes, they can ensure that the least privileged are also able to compete on equal footing. As we have seen, this can only be established by institutions which are modelled upon the two principles of justice: there needs to be an actualization of the difference principle for this to be possible.

Nozick finds this form of economic regulation unsustainable. To demonstrate the weakness of the difference principle in relation to the economic sphere, Nozick employs the example of two individuals who do not cooperate, but still engage in exchange: if this is the case, then it means that the economic sphere is independent from the totality of cooperation, and thus does not require the principles of justice to regulate it in total fashion. For Nozick, such regulation will needlessly complicate and subsequently worsen the cooperation that does occur within the economic sphere: his answer to this is to make social cooperation the last object of state intervention, in order to minimize the waste of resources that he foresees. This is a waste insofar as it requires a certain amount of resources to turn this regulatory apparatus into one that can account for all social cooperation: as all social cooperation doesn't necessarily need to be watched over by such an apparatus, Nozick sees this as inefficient. Furthermore, he sees no urgency in establishing such a total form of regulation, as cooperation does not need to be regulated in its totality in the first place. Let us go back to the example of the non-cooperating individuals: if they were to cooperate, they might benefit from a higher sum total of produced value, but are then mired by the problem of determining how to justly distribute it to the rest of the population. Nozick conceives of this problem in two different ways: according to him, we must ask either ourselves how the total sum is to be allocated, or how the benefits of social cooperation are to be allocated. While it might not

seem like it at first, these two questions concern themselves with different things: in the first question, we are concerned with the just distribution of the totality of productive output, while in the second we are concerned with whether those who cooperated will get their fair share. In other words, the first question is concerned with distributing goods to non-cooperative members, while the second one is concerned with what the cooperative members gain in exchange for their cooperation. For the non-cooperative individual, neither of these types of distribution would be fair. For Rawls, the concern of the first question is a fair one insofar as it takes the least-well off citizens into account: even if they don't cooperate, they will still receive a minimum of support. On the other hand, by excluding non-cooperative members, the concern of the second question is not fair in the eyes of equality. Nozick's problem with Rawls is that the latter seems to be only interested in the first concern, while the second one is omitted in order to better suit his theory. While one might claim that the enormous amount of benefits being divvied in the first question will negate the concern of the second due to the small size of non-cooperative shares in relation to cooperative ones, it does not lay an appropriate foundation for entering cooperation in the first place: people are expecting to be rewarded for their share in cooperation, instead of being rewarded on the basis of how the totality of goods is distributed.

This problem leads to Nozick's main question: why does social cooperation require distributive justice in the first place? If everyone was rewarded on the basis of their own efforts, would they even need justice in the first place? If we suppose (as Rawls seems to do in Nozick's mind) that this situation does not raise questions of distributive justice, then in virtue of what facts about social cooperation do these questions of justice emerge? "What is it about social cooperation itself that gives rise to issues of justice? It cannot be said that conflicting claims will exist only in the context of social cooperation: they also exist in the spheres where individuals produce on their own and fend for themselves" (Nozick, 1974, p. 185). If there were ten Robinson Crusoes and if each of them lived separately in his own island for two years, after which they were given radios to communicate, wouldn't it be possible for them to try to think of justice in this new context? Wouldn't the poorest one make a claim in regard to a just distribution of goods on the ground of being the least well-off? Furthermore, he might go on and say that different individual noncooperative shares stem from differential natural endowments which are not deserved; after this, it would be possible for him to make a case for the re-distribution of what was produced on the different islands. Had the situation lacked social cooperation and no one made such claims,

the claim to distributive justice would then seem to be without much merit. But why? We must remember that in instances of non-cooperation, individuals were given the share that they earned on their own instead of having it re-distributed through juridical means, as no one could claim to merit what another person has produced for themselves. For Nozick, the question of who deserves what is quite clear in this situation: the inhabitants of the islands deserve what they have made for themselves on their respective plot of land. For this reason, Nozick concludes that social cooperation introduces a muddying of the waters that makes unclear who is entitled to what (Nozick, 1974, p. 186). Rather than saying that no theory of justice applies to this noncooperative case (but what if one steals from someone in noncooperative situation), Nozick aims to replace it by his own theory of justice: entitlement theory. This leads to a problem: how does social cooperation make it so the principles of entitlements that apply to noncooperative cases are inappropriate to cooperatives ones? According to Rawls, everyone is equal and has a right to equal claims, and this is how joint products must be divided. But for Nozick “the problem is based on the question of how we distribute the totality of shares when they both come from cooperative and noncooperative spheres” (Nozick, 1974, p. 186). This is indeed the problem that defines the entirety of distributive justice.

According to Nozick, there is cooperation between people even when they produce things individually. For instance, let us imagine that there are social classes that produce specific goods, and that they want to exchange these goods with other classes. Each product will be recognized by its own producer, who will engage in a variety of services like producing, packing and transporting until it reaches the consumer. People cooperate in making things but each of them work separately; they would need only a marketplace where their holdings will be dependent on the price that has been determined by the exchange itself. So what would be the role of justice in such a system of social cooperation? Would it be to set criteria for “fair prices”? This isn’t an issue for Nozick, as he believes that the context of exchange will allow for fair prices to be set, insofar as exchange cannot happen unless both parties agree on pricing. If this mutual agreement is a voluntary one, why should justice intervene in the first place? Why is the result of such a voluntary exchange potentially unjust when both its members have agreed on its very modalities, as well as the result? To answer this question, Nozick asks us to think of people who produce things via cooperation instead of simply exchanging individually-produced goods. “However the question here is not whether a jointly-produced good underwent a fair and just distribution, but rather whether such a

joint product is recognized by any theory of just distribution in the first place” (Nozick, 1974, p. 187). For Nozick, Rawls’ theory does not recognize that such a marginal product is a problem at all. As far as we know, people who cooperate do so on a mutual basis. For instance, even when there are joint products, there are mutual relations that serve as the context in which they are produced: for example, the relation between owners and executives, or the relationship between managers and employees. Because of this, the benefits that stem from a product are distributed via voluntary interaction between these specific actors. If the parties do not recognize the notion of a marginal product, then the resulting distribution would not be patterned in accordance with marginal productivity. But Nozick counters this: someone who viewed marginal productivity as a patterned theory of justice might think that such situations of joint production and indeterminate marginal product provided an opportunity for some theory of justice to make its entrance and determine appropriate exchange ratios; contrary to this, an entitlement theorist would accept whatever comes from voluntary exchanges. The workability of marginal productivity theory is an intricate question, as everyone enters its context on the basis of the different things that they are capable of doing. Because producers and workers encounter each other on an arbitrary basis, they must consequently establish a fixed price that is non-arbitrary.

Nozick’s problem with Rawls is that the latter wants to distribute the results of this marginal productivity to an isolated few. He even goes further by accepting inequalities as long as they benefit that few. “These "serviceable inequalities" (as Nozick labeled them) stem from the idea of inequalities as incentives to perform various activities and fill roles that not everyone can do equally as well. So Rawls does not imagine that these inequalities are exactly what is needed to fill positions that everyone can do equally well” (Nozick, 1974, p. 188). But if this is the case, who is actually being incentivized here? When do we know whether those who are more in need of the balancing of the difference principle are the better-off, or the worse-off? Yet there is no part of the joint product whose contribution is undetermined. If the joint product was all what they could produce, then they could not know whether the additional products produced by these motivated people is greater than expenditure to them in incentives. So as a consequence of this, it could not be known whether the incentives were efficient or not. However, Rawls perception of justifiable inequalities presupposes that these things can be known. This is a problem for Nozick, as he believes that Rawls' conclusion causes more problems of social cooperation than it solves in the context of distributive justice. As we have seen above, this is because it allocates the benefits of

marginal productivity to groups that don't possess the same the marginal criteria in the first place: as the worse and better off have different conceptions of marginality, all that Rawls is doing is blurring the lines between such criteria.

5.3 Background Institutions for Distributive Justice

The problem of distributive justice in JF is to try and find the best possible arrangement for a unified scheme of institutions so that a fair, efficient and productive system of social cooperation can be maintained over time, from one generation to the next. The aim of distributive justice is to make sure that these institutions fit a large variety of the needs, desires and demands of the individuals that are known in general the society, but who did not cooperate and contribute in the production of those commodities. But this presents a problem of allocative justice. Perhaps the easiest way to resolve this is through an arrangement that would allocate commodities so as to achieve the greatest satisfaction of the individuals from the present into the future. But this is not what Rawls wants, as he has already rejected utilitarian principles in his theory of justice. Citizens will accept to cooperate in regard to the social resources which they have claims on. Rawls says that in a well-ordered society, the distribution of income and wealth illustrates what is called the “pure background” procedural justice. The basic structure is only arranged when people follow the rules that are publicly recognized and honor the claims that these rules specify; because of this, the distributions of the resulting goods are accepted as just, regardless of what this distributions turns out to be. The justice of the claims permitted by institutions will be weighed in this basic structure, for if they didn't, people who behave as they pleased. An issue of distribution cannot be judged apart from the claims of individuals, which are earned by their efforts within a fair system of cooperation from which those distributions result. In contrast to utilitarianism, the concept of allocative justice has no application. There is no criterion for just distribution apart from background institutions.

Rawls continues by explaining that even the term “background” implies that certain rules must be included in maintaining fair cooperation in society. To better explain this, Rawls uses the example of the basketball draft: at the end of the season, the winning team will be placed last on the list. In this system, new teams are placed at the top of the list, and can then change their ranking based on their performance. The goal of respecting these rules is to ensure that the least well-off

teams are still able to properly compete, as they can draft promising players before the richer teams have a chance at buying them. As we can see, background institutions require all the rules that are needed to fulfill the two principles of justice. Their duty is to keep property and wealth evenly shared and maintained over generations, which comes after preserving the fair value of liberties, as well as equality of opportunity. It can be ensured by laws that regulate bequest and inheritance of property, and others such as taxes to prevent excessive concentrations of private wealth and power. Since the difference principle applies to the institutions as rules, their requirements are foreseeable. Citizens who share different values will thus be able to adjust their life plans according to the differences that they share with others, as the principles of justice and institutions clearly denote the means with which they can achieve this. Moreover, the difference principle respects legitimate expectations based on publicly recognized rules. The rules that the two principles of justice require are meant to ensure social cooperation over time. The background institutions that they constitute are meant to protect equal political liberties and equal opportunity, and to ensure that economic and social inequalities contribute to the general good as well as the least advantaged members of the society. As in the basketball example, these rules are meant to strengthen fair play in social cooperation: even if they reside in the background, they are meant to render public the procedures of justice.

Despite the fact that Rawls predicted the safe function of the difference principle in social distribution, Nozick remains unconvinced: we know the reasons for this, as we have seen them in the previous chapters. Rawls explains that parties in an initial situation will be able to choose principles of justice that would find consent of the both parties. As far as we can recall, the choice is done in complete freedom because the choosers are under the veil of ignorance. For Rawls, people cannot choose better principles than the ones chosen in the original position: the argument for this relies on the minimax principle and lexical ordering, which are both methods which appeal to the rational choice. The outcome of this process will yield two principles of justice: the equality principle and the difference principle. Nozick sees the determinacy of the two principles as unfair, as Rawls ensures that no other principles will be selected other than them. Furthermore, he does not accept that the original position privileges groups over individuals. To counter this, Nozick invites us to think of the original position from the standpoint of the individual: if we do, Nozick is convinced that the process which takes place in the original position would immediately cease.

For if they thought of the principles of justice in relation to their individual rights, they probably would.

As we have seen, Rawls' theory of justice is an attempt to synthesize freedom and equality by connecting the second principle of justice to the first. Nozick refuses this, because it is always possible to shift the goalposts in relation to what is considered as "worse-off": for example, being below the point D on a graph might be considered worse off, right until point F is traced below point D. In other words, those that fall under certain state of being better off or worse off will change their view when confronted with an opposite state; while they might not change it completely, they will adjust it to a certain degree. What Nozick is trying to advance is the idea that one can only determine one's position in relation to others: as no one possesses a bird's eye view of society, they will never be able to accurately determine if they are worse-off or not.

But there is another argument that can be mobilized: someone who is better off did not necessarily get in that position by making someone worse-off. As a consequence of this argument Nozick states that it would improve my life in various ways if one were to choose to become my devoted slave, supposing I could get over the initial discomfort. Is this the cause of our present state? "Obviously not. Furthermore, enslaving ourselves to a poorer person would improve his lot and worsen ours: does this mean that the poor person is badly off because we are as well off, or is it the opposite?" (Nozick, 1974, p. 191).

This leads to Nozick's critique of the difference principle: as a measure of equality, it is quite conflictual when it comes to actually determining justice. No doubt, the difference principle presents itself as the ground in which the least well-off will be incentivized to cooperate. But is this a fair agreement? When looking at social cooperation, the distribution of gains seems to already be symmetrical for Nozick: according to him, the better endowed gain by cooperating with the worse endowed, and the worse endowed gain by cooperating with the better endowed. The problem with the difference principle is that it isn't neutral, as it forces the well-off to cooperate with the worse-off in cases where cooperation might not happen organically. This is because the symmetry gets disturbed when we measure how much we would gain from social cooperation in comparison to no cooperation: benefits would be greater if exchange occurs between all groups instead of a single group, be it the worse-off or best-off. The members of both groups gain from the internal cooperation within their respective groups and have larger shares than they would if there were no social cooperation at all. In consequence, benefits would be greater for someone

who stands in between the cooperation of the better off and the worse off than it would be within limited intra-groups. Cooperation will be better for a group if the mean gain that was achieved is higher in that group than in the other: while this signals inequality, Nozick asks in what direction the inequality is pointing toward if the better-endowed group includes those who can accomplish something of great economic and social value that would benefit the less-endowed as well. Because of this, Nozick cannot avoid concluding that the less endowed gain more than the better endowed do from the scheme of general cooperation. So what may be the conclusion to this? While Nozick does not believe that the better-off should benefit any more than they already do, he does not think that we should punish them by giving more to the worse-off, who benefit more when you consider that they spend less resources in the cooperative endeavor than the best-off.

For Nozick, Rawls seems to only think of the case in which the worse-off can approach the better-off and make claims related to the maximization of their benefits in the scheme of cooperation: when they make their demands, they will force the better-off to give them as much as possible (in the sense that if they are given any more, the total sum of benefits will decrease) or else they will not cooperate. But as we have seen, Nozick thinks that the better-off can formulate claims to be made against the worse-off in the same way, insofar as the worse-off seem to benefit more in the scheme of cooperation. In this sense, if the demands of one camp are unreasonable, then so are the demands of the other. Because of this, Nozick then asks if this is the type of demand that the worse-off should even be making in the first place. This is what leads to the conclusion of Nozick's entire argument: Nozick believes that Rawls "devotes too much time to the explanation of why the less-favored should not complain at receiving less in the scheme of cooperation" (Nozick, 1974, p. 195).

Rawls' explanation is that it is in the advantage of the least favored to make this demand, since they will receive more through this inequality than they would do in a context of equality. In this sense, the worse-off have the right to grievance until they reach a point of inequality that actually benefits them in the long-run. But is this fair for the better-off? For Nozick, the fact that the better-off have to accept such demands is not fair, as it forces them to adapt their endeavors to the claims of a group that employs an abstract form of privilege to coerce them into cooperating on abstract terms. For this reason, Nozick then wonders how the difference principle can lead to a fair conclusion if it finds its origins in an unfair agreement: it is unfair precisely because it only treats the concept of fairness from the standpoint of the worse-off, and not the standpoint of those

who are not in that position. As we have seen, Nozick believes that the standpoint of the better-off is misrepresented precisely because they have no right to present the worse-off with their own list of demands.

5.4 The Problem of Justice between Generations

Rawls relates the problem of justice between generations to the problem of the minimum of savings that a generation must make in order to prepare for the next one. We could see in previous chapter how the well-ordered society would be structured if it had background institutions to secure a fair scheme of cooperation between generations. JF must not only ensure fairness in a present society, but also to the generations that follow; when doing this, it must also conform to the just distribution of goods in the present. Taking into consideration what Rawls has already said about procedural justice, we could all agree that for justice to prevail over time, it is up to the maintenance of procedural justice in order to have a just outcome in regard to distributive justice. Rawls knows that many societies do not share the abundance of wealth and well-ordered institutions that allow for distribution to be both just and efficient: in these cases, it is not efficiency that ensures justice but procedural justice that ensures fair cooperation over time. It might happen that some societies are going to be so poor that the scarcity of their resources entails that any just distribution of goods will be inefficient; despite this, what is important is that these goods have been distributed in a just manner first, as matters of efficiency can only be solved once the problem of equality has been dealt with. Moreover, efficiency will pay off if it is the result of procedural justice, as it provides the framework in which the limits of efficiency can be established: in other words, it pays off because it doesn't sacrifice justice in its pursuit of rationalization. But for the moment, there is no potential risk that parties would determine any principle of savings that is in contradiction with the precepts of the original position: as we are speaking of any society as if it were a future society, we are still in it. They cannot formulate a principle of savings because they lack the empirical data that exists outside the veil of ignorance. Furthermore, parties do not have a clear and unanimous concept of the general good; it is for this reason that they cannot rely on the principle of savings unless they aim for a fair and just procedure of distribution, as any other conception of savings requires knowledge of empirical data and the different conceptions of the good that are present in society. Because of this, actors within the original position must conceive

of the rate of savings on the basis of procedural justice and its principles: the result of this is that the principles and their derivatives will have to apply to everybody, regardless of generation.

As we have seen the principle of savings must apply to all generations equally, it must thus be based on a neutral principle: unfortunately, the fact that a particular generation must establish this principle is problematic, as it might be formulated in relation to contingencies that other generations might not face. Because of this, Rawls states that the first step towards such a principle is to ensure a minimum amount of savings that each generation will make, regardless of circumstances. This minimum must be sufficient enough to benefit the poorest members of society. But this leads to a significant problem, since the level of poverty differs from one society to another; furthermore, the situation of the worse-off might decline considerably for contingent reasons, and then throw the rate of savings into an un-balanced state. So this suggestion currently falls short. Rawls then suggests that the principle of saving can be taken as the minimum limit of the expectations of the poorest members of society. But as we have seen with Nozick, the expectations of the poor are contingent upon the expectations of the rich; as a result, the expectations of the poorest will fluctuate in tandem with those of the rich and thus invalidate the possibility of creating a generationally-neutral rate of savings. Because of this, Rawls finally concedes that it is impossible to derive a just rate of inter-generational savings from the difference principle.

In order to be efficient, the procedure of savings must be based on taxes that are especially collected for this purpose: if these specific taxes start to rise to the point of rivalling other tax rates, then it is possible that many citizens will reject such a rate over time. Even if such a principle is motivated by a utilitarian ideal, it will hardly be understood by the parties, as we have seen in a previous chapter how they do not possess enough information to engage in utilitarian calculation and subsequently apply the latter's derived principles. As utilitarian calculation cannot justify inter-generational savings, citizens in the original position can use a reduced form of utilitarian calculation (one which is possible to use individually within the original position, but not substantive enough to be transformed into a principle of justice) to come to the conclusion that it is not worth sacrificing resources to secure the rights of the poorest minority of a future society. As it is tailored to work with democratic constitutions, the principle of intergenerational savings is not accepted by democracy or the actors in the original position unless it is determinate, and thus non-arbitrary. This is because constitutional democracy establishes an interconnection between

inter-generational savings and freedom of choice: new generations have more choices to make if they have been given a certain “pool” of resources that can then be used as a social safety-net. This is perfectly understandable, as the institutional framework for a constitution is developed within the original position, which has been constructed in order to expel the influence of arbitrary factors from the process of formulating a system of justice. As the original position does not allow them to know about arbitrary factors such as the rise or fall of poverty within the scope of multiple generations, they cannot formulate a principle for inter-generational savings. To make matters more complicated, the actors inside the original position are not even given a guarantee that future generations will follow and apply such a principle; this can only discourage them from attempting to formulate one, let alone establish it. Quoting Herzen, Rawls replies that such a chronological form of unfairness is normal to the development of human civilization, as new generations *always* tend to benefit from the products of past generations, without ever having to “give back” on a social scale. More importantly, the capital that is transmitted from generation to generation is not only material, but cultural, scientific, institutional, legal, etc. In this sense, every generation has a duty to pass these goods to the next one, regardless of expectations. Expectations don’t matter because the previous generation didn’t use mixed expectations as a reason to prevent the transfer of these forms of capital to the current one: if this is the case, why should the current one wait until it is ensured that the following generations will conform to the rate of savings? For Rawls, this is the beginning of the solution to the problem of intergenerational justice.

Rawls is looking for a principle that represents the human motive to provide for future generations, as it is our nature to do so. From the standpoint of the original position, we know that parties will not set a rule for themselves while others will disobey that same rule: in this sense, parties are justified in mistrusting rules that must apply inter-generationally, as they have no guarantee that the other generation will respect them in the same way they did. So the question is: if we cannot know what future generations will be like, we should we care about providing for them via sacrifices that are made in our generation. But Rawls then asks: what if the previous generation saved something for us? The goal of saving is not to make a generation wealthier every time savings are passed, but is instead based on the duty to pass on our culture to future generations; as we already have a system of taxation in place, we can then use it to ensure that capital is passed on in a similar way, without having to worry about ensuring that the next generations will be wealthier or not. We have a duty to provide for the next generation, just as the

previous generation acted upon their duty to provide for us: this duty, represented by a lack of expectation in regard to reimbursement, is the same type of duty we have towards our children in this generation. If this is the case, we must think of future generations just like we think of the children of ours, as they are the most vulnerable members of society insofar as they cannot provide for themselves. In other words, we must treat future generations as if they were part of our own. The question we must now ask is: what is the appropriate tax rate for determining how much will be given to the next generation? As we have seen, it is contingent upon the current allocation of natural and social resources, and thus cannot be formulated precisely in the original position: but this is not a problem, insofar as we have secured intergenerational savings as a duty instead. To put it differently, we have secured the *ground* for intergenerational savings: the rest is up to the actors to decide outside of the original position. But groundwork always leads to a certain conclusion, and in this case, Rawls provides a hint: the rate of saving can be measured by looking at the savings that the poorest member of society makes for their children. In other words, it is the bare minimum: this is normal, as it is the minimal expectation of what we *think* we will be able to save, regardless of the contingencies that determine the exact amount of capital that is produced and accumulated.

In spite of Rawls claims that his theory doesn't offer any substantive conception of justice (in the sense that his conception of justice is not contingent upon a particular conception of the Good), we can see that the institutions that are created in conformity to the second principle do possess a certain meaning in the context of justice. By trying to find room for the application of the second principle of justice in reality, Rawls must necessarily ascribe a certain meaning behind the institutions that operate in its name: it is precisely this "meaning" that constitutes the substantive conception of the Good that Rawls sneaks into his theory. These institutions must possess an overarching meaning because it is the only way to ensure that they function in tandem, in the sense of consistently being able to respond to the imperatives of the surrounding institutions. Nozick's critique anticipates this, and it is why he states that it is impossible to let a single principle regulate the entirety of social cooperation no matter how good or true it actually is: because the entire system of distributive shares is what determines whether someone will be better or worse off, it is unrealistic to think that they will interact in conformity to a single, unified meaning. Taking this problem into account, Nozick suggests that we stop analyzing social cooperation through such a principle and instead, through calculating the increases in value that derive from exchange: in

other words, instead of asking whether someone should be better or worse off, we must ask what we can do to make both parties better-off in the context of exchange. For Nozick, this is the proper way of ensuring the neutrality of proceduralism, insofar as the calculations behind maximizing exchange value do not require any substantial Good or its derived meaning in order to operate.

Conclusion

The aim of this work is to compare the forms of rationality employed by Rawls and Nozick in the formulation of their respective theories of justice. Its main problem is to determine whether Rawls and Nozick employ the same form of rationality, for if they do, it means that it is very possible to engage in a procedure of justice within a liberal context and still arrive at different outcomes. Through our analysis, it is possible to see how the form of rationality employed by Rawls is unsustainable in the liberal context of justice, while Nozick's is. But how come? By leaving the right to natural entitlements untouched, Nozick can then engage in the same type of reasoning as Rawls, without having to suffer the inevitable clash between principles such as equality and difference: while Rawls' principles increasingly contradict each other as the actors move away from the epistemic constraints of the original position, Nozick's choice to accept the actor's knowledge of natural entitlements ensures that the deliberations will found the principles of justice with that reality taken into account. As the reality of natural entitlements is incontestable, Nozick's conception of justice is meant to adapt itself to reality instead of trying to shape the latter in its image. In other words, it is meant to adapt itself to a form of freedom that we already possess: the freedom to benefit from what was granted to us by nature.

As both theories are competing within a liberal context, it is exactly at the concept of freedom where the two pairs of principles prove themselves to a purely rational "jury"; as a consequence of this, the principles of justice that will be selected must be in accordance with the *reality* of freedom instead of its idealization. It is at this point in the "procedure" that Nozick's arguments come to presence, as they defend the reality of freedom from the Rawlsian principle of justice: by doing this, they ensure that a *liberal* conception of justice must harmonize itself with the reality of freedom, instead of the opposite. As Rawls justifies the sacrifice of this reality in exchange for a greater good that operates covertly in his theory, we can say that much more is at risk here, namely because that which freedom is being sacrificed for is ill-defined in comparison to the very freedoms that will be lost. Nozick, on the other hand, is very lucid when it comes to defining exactly what will be lost, and in consequence, what *can* be gained in exchange: he can know this because the freedoms that are discarded set the limits for the freedoms that one can benefit from in Rawls' theory.

After Nozick's critique, Rawls understood that the classic line of argumentation that underpins A Theory of Justice could no longer be consolidated within the context of liberal theory. In essence, the attempt to ground local manifestations of justice via a universal form of contract implies the imposition of a certain form of deliberative rationality on cultures that possess their distinct deliberative and conceptual traditions. As such, Rawls' attempt remains local because his contract is always meant to apply locally; it is this contradiction in the nature of the contract that will push Rawls to develop a global form of contract in his later works. Yet a global contract is not a universal one, as Rawls has simply given on the original pretension of JF, which was to provide its procedure with a universal conclusion. For this reason Rawls abandons JF as the “only” rational procedure for formulating principles of justice, and thus transforms his theory of justice into a form of political liberalism. The difference between the new political form of his theory and its predecessor is also where we can locate the difference between a global and universal theory: while a universal theory implies that its precise conclusions must be accepted globally, a global theory allows for more practical divergence in the formulation of those very conclusions. In other words, political liberalism treats the modalities of the original position as the fictions that they actually are, instead of allowing their epistemic strictures to be treated as if they were real conditions of knowledge. By doing this, it is possible to modify them for practical purposes tied to the contingency of the reality in which the theory will be applied: a universal theory cannot do this, as its imperative to produce universal truth forces it to act as if its epistemic strictures already correlated with the way in which we experience reality. As we experience reality in different ways, a global theory must take these differences into account when enticing actors to formulate locally-applicable principles of justice.

Be that as it may, Rawls theory still suffers from a problem when it is applied in a liberal context: as it remains a form of social contract, it will necessarily infringe on the types of freedoms that exist prior to the contract but cannot be integrated into its infrastructure. Rawls answer to this problem is to provide a list of primary goods and ensure that the procedure respects them as necessities; in this way, nothing necessary will be constrained by his theory. However, any functional principle of justice must be workable on a larger scale: because of this, another society's list of primary goods might not coincide with the measures taken to preserve those that Rawls has enumerated himself. For Nozick, the right to benefit from the fruits of nature is one that is inherent to all people: it is the only "universal" primary good, yet is ironically barred from global application

in Rawls theory. This is why Nozick claimed that Rawls theory was only partial, despite its universal ambitions: it doesn't tell the whole story, as there is a part of the story that requires us to take natural entitlements into account. And as economic cooperation has such a place in this particular "part of the story", then Rawls' theory has failed to account for the reality that it so desperately wants to transform.

As we can see, the problem of natural entitlements constitutes the multi-polar character of liberalism: while liberal theory aims to compromise between the poles of distributive justice and libertarianism, we must effectively pick a side when it comes to the problem of natural entitlements. But all is not lost, as these poles tend to complement each other when liberal theory is applied in reality. For example, when having to regulate an irregularity, liberalism employs the form of rationality inherent to distributive justice in order to establish a self-replicating pattern in its place; yet if this irregularity is a natural one, then libertarian rationality is employed in order to preserve our free disposition towards such an irregularity. In essence, these two poles follow a similar logic, and it is only their grounds that make them differ substantially: while libertarianism responds to the demands of nature, distributive justice responds to the demands of history. As ideologies such as fascism aim to respond to the demands of one via the logic of the other (by responding to historical demands via biological solutions), we can safely affirm that liberalism's strength is found in the fact that the demands of both are restricted to being answered within the confines of their respective poles. Because of this, deliberation is always necessary as the rationales behind both poles must be reconstructed in tandem if they are both to be taken into account by a particular set of actors. This "need for deliberation" is much more suited for our contemporary context, as the only universal principle that political discourse still relies on is the plurality of actors in the public sphere: in this sense, questions of toleration take precedence over questions of truth. While this makes it possible to criticize liberalism for refusing to articulate a conception of the good that rests on a substantive conception of reason and truth, it makes it noticeably harder to criticize in the domain of freedom insofar as it allows actors to freely experience their particular conceptions of the truth. But according to Nozick, all of this is put into jeopardy by Rawls' difference principle: by limiting our knowledge of natural endowments and then forcing a universal outcome based on this arbitrary limitation, it simply presents itself as another particular form of truth with *Universalist* aspirations.

Ironically, accepting the very finitude of Rawls' theory also makes it harder to criticize. If we see it as a product of its time, it is easier to both understand why Rawls ideas made more sense "back in the day", and why some of Nozick's objections didn't apply as well as they do now. This is because Rawls constructed his theory in a political context that was wholly different than today: liberal ideas and practices were under threat from communist, fascist and nationalist regimes, which is why some sort of substantive rationality was necessary to counter the substantive character of the ideologies mentioned above. In this sense, he required a theory of justice that could reconcile the liberal commitment to freedom with the illiberal commitment to social cohesion: the strength of such a defense is found in the fact that it provides an explanatory context for the clashes in Rawls theory. As we have seen, these clashes increase as Rawls' theory approaches reality, and we now know why: they represent the actual clashes in the political reality of his time. As solution to this problem, Rawls came up with an idea of social contract; by this, he meant an agreement that is tied to a constitution whose foundation is based on rational deliberation. Basing a constitution rational deliberation might sound like it is taken directly from the social contract tradition, but in reality is based on something much more concrete: the need to ensure that the core functions of an institution still function even when the application of social policies fail. As the constitution is the framework in which such deliberation can take place, the contract is meant to ensure that this space is preserved in the eventuality that its corresponding rationality will be required in the formulation of new social policies.

While this work aimed to determine which form of "rationality" better suits its liberal context, its partisan aspirations end here. The rest of the work's merit resides in what has been discovered during exposition of both theorists' arguments. By exposing the way in which both of liberalism's poles interact in regard to common issues of justice, we can better understand political debates as they occur in western societies; this is because these debates mostly take place within the confines of liberalism itself. So instead of viewing liberalism as a monolith, it is much more fruitful to see political debates as operating with the intersections of these two poles. For instance, such arguments might explain phenomena such as the recent American presidential elections, in which the conservative candidate was able to appeal to his fiscally-conservative base despite the fact that he subscribed to protectionist ideology: to understand the debates within the Republican Party in that context is to turn to the tension between the poles that were described above. But these insights not only pertain to inter-party debates; on the contrary, they also pertain to the

negotiations that occur between political parties. Remaining within the recent American context, it would be fruitful to examine the ways in which political negotiations can tend towards conditions akin to those in the original position. In this sense, the social contract can inform and even substantiate competing interpretations of primary goods, as well as the arguments employed to promote or preserve them. While some might believe that the idea of a social contract is a necessary infringement on individual liberties, it is still possible to use it as an interpretative tool, in the sense that many of our current political practices echo those that occur within the framework of such a contract. And this interpretative stance is one that informs a genuinely plural form of political deliberation, insofar as most interpretative frameworks presuppose a plurality of interpretations. And if this is the case, we can better understand the necessity of plurality in liberal politics due to the fact that the very act of deliberation requires it as a condition of possibility. To cement such a necessity would be to create institutional frameworks that negate the possibility of bringing illiberal attitudes such as racism, sexism and homophobia into the confines of political debate. As we have seen, these types of attitudes are immediately proscribed by both Rawls and Nozick's methods which is proof that despite liberalism's multi-polar character, there are some issues that provoke an almost unanimous response.

But this does not limit our concerns to western political debate, nor does it limit us to speaking solely of situations in which there already exists a stable set of social institutions in which the debate can take place. The current war in Syria is an example: on what grounds is it morally feasible to deny the liberties of civilians in the preservation of social institutions? To what extent can violence be used to protect institutions that were meant to render such political violence obsolete? And finally, how does one recompose such social institutions after their attempted rescue has led to their near destruction? While rational deliberation does not currently seem like a possible course of action, it will necessarily become one when it is time to recompose such institutions. And as we have seen, the question of whether such a contract can respect individual liberties in a plural context is one that has yet to be answered coherently by liberal theory: the tension that we have exposed must thus serve as the starting point to any debates regarding the implementation of contract-based institutions and practices. While theoretical debates such as these seem far removed from real politics, it is real politics that ends up calling for them out of necessity; thus, it is not a question of "if" we are to engage in such a debate in the first place, but a question of "when".

The inevitability of these types of debates is not a burden on liberal theory, but is instead its saving grace. While this work conceptualized liberalism in general as a moderate attempt to settle oppositions that arise between political positions based on incommensurable conceptions of the Good, Rawls' proclamation of the difference principle has, per Nozick's critique, contributed to the erasure of the distinction between liberalism and other substantive political theories. As we have seen, this is because Rawlsian liberalism preserves a particular conception of the Good in the form of a substantive rationality that effectively hides behind *proceduralism*. In other words, liberalism is now plagued by the tendency to move towards one-dimensionality as a defense mechanism: if there is a certain aspect of reality that contradicts the theory, all the theory needs to do is banish that aspect of reality to the noumenal realm via the absolutization of particular epistemic strictures. The reality which was banished by Rawls was that of natural entitlements; as Nozick has presented the inevitable contribution of natural entitlements to the content of one's freedom, this is a topic that must be deliberated upon instead of being cast-out from the outset. For if we don't, we are not taking the reality of freedom seriously: if this is to be the case, then we cannot expect our selected principles to apply anywhere else than the original position. While Rawls purports to save liberal theory from the one-dimensional character of utilitarianism, he is actually putting the tradition's dynamism into question by limiting pluralistic conceptions of property, rights and personhood from the outset. It is precisely this dynamism that must be regained through the means of rational deliberation, an example of which this work has attempted to expose: despite the current poverty of deliberation in politics, the necessities of political reality itself consistently provide us with ample opportunity to remedy such a situation.

References

Primary Sources

Rawls, J. 1971, *A Theory of Justice*, Cambridge, MA: Harvard University Press. Revised edition, 1999. The page citations in this entry are to the 1971 edition.

Rawls, J., 1996, *Political Liberalism*, New York: Columbia University Press. Paperback edition, 1996; Second edition, 2005.

Rawls, J., 1999, *Collected Papers*, S. Freeman (ed.), Cambridge, MA: Harvard University Press.

Rawls, J., 1999, *Lectures on the History of Moral Philosophy*, B. Herman (ed.), Cambridge, MA: Harvard University Press.

Rawls, J., 2001, *Justice as Fairness: A Restatement*, E. Kelly (ed.), Cambridge, MA: Harvard University Press.

Rawls, J., 2007, *Lectures on the History of Political Philosophy*, S. Freeman (ed.), Cambridge, MA: Harvard University Press

Secondary Sources

Audard, C., 2007, *John Rawls*, Montreal: McGill-Queen's University Press.

Corlett, J. A. (1991). *Equality and Liberty: Analyzing Rawls and Nozick*. New York: St. Martin's.

Daniels, N., (ed.), 1975, *Reading Rawls: Critical Studies on John Rawls' A Theory of Justice*, New York: Basic Books. Reissued with new Preface, 1989.

Daniels, N., 2016 "Reflective Equilibrium", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/reflective-equilibrium/>.

Ehman R. (1991) "Rawls and Nozick; Justice Without Well-Being". In: Corlett J.A. (eds) 1991.

Freeman, S., (ed.), 2003, *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.

Lloyd, S., (ed.), 1994, "John Rawls's Political Liberalism", *Pacific Philosophical Quarterly* 75 (special double issue).

Lovett, F., 2011, *Rawls's A Theory of Justice: A Reader's Guide*, London: Continuum.

Mandle, J., 2009, *Rawls's A Theory of Justice: An Introduction*, Cambridge: Cambridge University Press.

- Nozick, R., 1974, *Anarchy, State, and Utopia*, New York: Basic Books.
- Pogge, T., 1989, *Realizing Rawls*, Ithaca, NY: Cornell University Press.
- , 2007, *John Rawls: His Life and Theory of Justice*, Oxford: Oxford University Press.
- Reath, A., Herman, B., and Korsgaard, C., (eds.), 1997, *Reclaiming the History of Ethics: Essays for John Rawls*, Cambridge: Cambridge University Press.
- Richardson, H., and Weithman, P. (eds.), 1999, *The Philosophy of Rawls: A Collection of Essays*, 5 vol., New York: Garland.
- Sidgwick, Henry 1877, *The Methods of Ethics*, London: Macmillan and Co.
- Hart, H. L. A., 1994, *The Concept of Law*, New York: Oxford University Press.
- Libertarians
- Barnett, R., 1998, *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Clarendon Press.
- Brennan, J., 2012, *Libertarianism: What Everyone Needs to Know*, Oxford: Oxford University Press.
- Epstein, R.A., 1995, *Simple Rules for a Complex World*, Cambridge: Harvard University Press.
- , 1998, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good*, New York: Basic Books.
- Hayek, F.A., 1960, *The Constitution of Liberty*, Chicago: University of Chicago Press.
- Hospers, J., 1971, *Libertarianism*, Los Angeles: Nash.
- Locke, J., 1690, *Two Treatises of Government*, P. Laslett (ed.), New York: Cambridge University Press, 1960. Extract reprinted in Vallentyne and Steiner 2000b.
- Maffettone, S., 2011, *Rawls: An Introduction*, London: Polity.
- Mack, E., 1995, “The Self-Ownership Proviso: A New and Improved Lockean Proviso,” *Social Philosophy and Policy*, 12: 186–218.
- Narveson, J. 1988 *The Libertarian Idea*, Philadelphia: Temple University Press.
- Narveson, J. and J. P. Sterba, 2010, *Are Liberty and Equality Compatible?*, New York: Cambridge University Press.
- Paul, J. (ed.), 1982, *Reading Nozick: Essays on Anarchy, State, and Utopia*, Oxford: Basil Blackwell.
- Rothbard, M., 1978, *For a New Liberty, The Libertarian Manifesto*, revised edition, New York: Libertarian Review Foundation.

—, 1982, *The Ethics of Liberty*, Atlantic Highlands: Humanities Press. Extract reprinted in Vallentyne and Steiner 2000a.

Wheeler, S., 1980, “Natural Property Rights as Body Rights,” *Noûs*, 16: 171–193. Reprinted in Vallentyne and Steiner 2000a.