INTERNATIONAL JUSTICE AND HUMAN RIGHTS IN THE POLITICAL PHILOSOPHY OF JOHN RAWLS

by

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submitted in accordance with the requirements
for the degree of

DOCTOR OF LITERATURE AND PHILOSOPHY

in the subject

PHILOSOPHY

at the

UNIVERSITY OF SOUTH AFRICA

PROMOTER: DR P VOICE

OCTOBER 1998

Student number: 3200-551-2

Declaration

I declare that INTERNATIONAL JUSTICE AND HUMAN RIGHTS IN THE POLITICAL PHILOSOPHY OF JOHN RAWLS is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

6 October 1998

SIGNATURE
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Summary

This thesis provides a critical examination of John Rawls's political philosophy as it relates to international justice and human rights. Rawls's theory of justice as fairness has made an enormous impact on contemporary political and ethical theory, yet it has been criticized by some for failing to address the extra-domestic aspects of social justice, including universal human rights. In Chapter One I describe the theory of rights developed in the social contract tradition and how this theory has influenced the modern discourse of human rights. In Chapter Two I discuss Rawls's theory of justice as fairness, the basic rights and liberties, and the idea of political liberalism. In Chapter Three I analyze Rawls's account of international justice and argue that it fails to uphold the same rigorous principles of justice as found in his account of domestic justice. Finally, in Chapter Four I discuss Rawls's more recent attempts to theorize international justice and human rights. I conclude that Rawls is not justified in limiting the set of human rights available to persons in different societies, and that this limitation is an unnecessary feature of his theory of justice. In contrast I argue for a more cosmopolitan system of social justice that is strongly normative and grounded in Rawlsian ideal theory.

Key Terms

Social justice; Human rights; John Rawls; Social contract theory; Political philosophy; Modern ethics; International relations; Cultural pluralism; Liberalism; Democracy.

Contents

Preface

> The media assaults us with horror stories daily . . . How should we think about these events? What should we do about them? What is the relationship between these two questions? In particular, what is the relationship between the theory of human rights and the practice of international human rights law? We are troubled not solely by injustice, but also by theoretical scruples about the universality of any given view of justice and human rights as a basis for intervention. The relationship between the theory and practice of human rights is problematic.[1]

This thesis is intended to contribute to the ongoing philosophical debate on international justice and human rights by exploring to what extent John Rawls's theory of justice can account for both. I base this project on the view that human rights discourse is best situated within the broader context of theories of social justice. This is because human rights theory depends in important ways on the terms or principles of social justice, which delineate the conditions of a well-ordered society necessary for the recognition and implementation of claims to human rights. Since conceptions of justice are not all created equally, it is my belief that a theory of justice which pays no regard to human rights is not an acceptable theory of justice. With this in mind, then, I examine Rawls's most important writings in order to assess how adequately his theory of justice does or is able to accommodate universal human rights.

Rawls's major statement on justice came in his influential A Theory of Justice. There Rawls identifies one's right to the most equal extensive liberty compatible with a similar liberty for others as the first of his principles of justice as fairness. Rawls establishes his principles by suggesting a scenario in which individuals representing several generations are to be abstracted from time and space and required to choose principles for an actual society, into which they would eventually be returned, which they could all agree to support as the most just possible. However, Rawls restricts his inquiry to single societies only, effectively neglecting the problem of justice internationally or globally.

In light of this omission in his work, it is not surprising that Rawls's theory has received criticism from those concerned with the international aspects of social justice, and in particular with universal human rights. In several of his publications following A Theory of Justice, Rawls has attempted to respond to these criticisms and explain how he understands justice as fairness to extend into the global domain and, most recently, its relationship to human rights theory and practice. It is this particular point of debate surrounding Rawls's work that forms the focus of this study.

I shall proceed as follows. In the first chapter I survey the primary ethical and political concerns of the social contract tradition and discuss the influence of this tradition on the development of modern human rights discourse. I also discuss some of the current issues confronting human rights theory, in particular those of social pluralism and globalization. With this as background, I then offer a comprehensive examination of Rawls's theory of justice as fairness in the second chapter. Here I address the role of rights in Rawls's theory and the transformation of this theory in his later writings.

In Chapter Three I specify more precisely Rawls's account of international justice. I show that Rawls's account fails to sustain the critical and creative energy of his domestic conception of justice, mainly because he gives priority to the domestic conception and restricts the principles of justice at the international level. In response, I argue that Rawls's theory should be reformulated such that the global original position is no longer subordinated to the domestic.

In the fourth chapter I offer an analysis of Rawls's most recent effort to globally extend justice as fairness in his essay "The Law of Peoples." I conclude that, although Rawls now attempts to justify the inclusion of universal human rights in his theory, he fails to overcome the same deficiencies that marked his earlier account of international justice. In the end, Rawls sacrifices the normative strength of his theory of justice as fairness in favor of a status quo description of international affairs, thereby weakening his attempt to account for human rights. I argue that an effective system of universal human rights would require a more cosmopolitan system of social justice than is offered in Rawls's own theory of international justice.

Perhaps the most enjoyable part of writing a doctoral thesis is having the opportunity to thank those who played a constructive role in its completion. First and foremost, I wish to thank my supervisor Paul Voice. He was a source not only of intellectual stimulation, but also of much needed guidance and encouragement. I would also like to thank Ron Slye for his useful and much appreciated comments on the issues considered in this thesis. Finally, I wish to thank my wife Katherine for her constant love and support; I could never have finished this thesis without her.

Chapter One

Contractarianism, Rights, and the Modern Discourse of Human Rights

In this first part of this chapter, I begin by surveying the basic ethical and political concerns of classical social contract theory. I then turn to a consideration of the relation between contract theory and the theory of rights, in particular of natural rights, which has informed the development of modern human rights discourse. It is not my intention to provide a detailed description and analysis of the various contractarian-rights approaches. Rather, I want to indicate how these approaches generally account for social order and political legitimacy, and how they conceive of the fundamental rights of individuals in society. In the second part of this chapter, I discuss the emergence of the modern theory of human rights and some of the conceptual and practical problems currently facing this theory, keeping in view the role of the contractarian-rights tradition.

A survey of the contractarian-rights tradition provides a useful introduction to this thesis for three reasons: First, because this thesis seeks to examine Rawls's theory of justice as regards the cogency of both the contractarian argument and the theory of universal human rights, the reader will benefit from an understanding of the philosophical principles and reasoning

offered in support of the contractarian-rights tradition. Second, many of the basic components of the contractarian-rights tradition are presupposed in the arguments examined more fully in later parts of this thesis and thus a certain amount of background information is necessary. Third, Rawls's contractarian theory differs in a number of ways from earlier, as well as contemporary, social contract theories, as does his employment of (human) rights.[2] The background material on the contractarian-rights tradition will, I hope, provide the preliminary spadework which helps to define the set of principles Rawls advances for his theory of justice and its concomitant theory of rights, as well as the arguments he gives in favor of those principles.

1.1 Normative Theorizing and the Social Contract Tradition

A brief discussion of the main divisions of ethical theory is necessary if the contractarian-rights tradition in general, and the Rawlsian version in particular, are to be adequately related to the issues of social justice and human rights. It is typically understood that ethical theories differ fundamentally over the relations they specify between the two most central ethical notions, the right and the good, as well as the way they characterize those notions. Two generalizations may be made about the many theories making up the social contract tradition. First, the contractarian theory of right is deontological in nature. Second, the theory of good one finds in the tradition is generally a choice theory of some kind. I will briefly explain both of these features in the discussion that follows.

Ethical theory is divided into two branches. The first, normative ethics, may be characterized as the study of the aims and principles of conduct and choice. The two central questions of normative ethics are: (1) What is intrinsically good? and (2) What is the right thing to do? Theories which answer the first question are called theories of value while theories dealing with the second question may be called theories of right.

The second branch of ethics, metaethics, involves theorizing about the theories belonging to the first branch of ethics. The two central questions of metaethics are: (1) What is the meaning, use, and logical status of the ethical terms which appear in normative theories? (2) Upon what grounds and by what methods, if any, are normative theories to be justified?

Theories belonging to the first branch of ethics are often called first-order theories and the metaethical theories about those first-order theories are termed second-order theories.[3] This distinction between first-order and second-order theories is evident in Rawls's complete theory of justice, for instance, in terms of the first-order principles of social justice which Rawls advances and the second-order arguments he gives in support of those first-order principles.

A bit more must be said about the subject of normative ethics. Value theory, as noted above, attempts to answer the question: What is intrinsically good? Value theories may be divided into four categories:

(1) Hedonistic theories identify pleasure as the only intrinsic good.

(2) Eudaemonistic theories characterize the intrinsic good as a state of well-being or flourishing which is considered to be more than merely a sum of pleasures.

(3) Ideal theories characterize the intrinsic good in terms of values other than either pleasure or well-being. Examples of such other values include love, beauty, knowledge, and community.

(4) Choice theories characterize the good as either the satisfaction of desire or as the satisfaction of rational desire.

The second division of normative ethics, the theory of right, as noted previously, provides an answer to the question: What is the right thing to do? Three very different kinds of theories have been proposed in response:

(1) Teleological theories characterize the good independently of the right and then characterize the right as a function of the good. For a teleological theory, the right act to perform (or, in some theories, the right rule to follow) is that which maximizes the amount of intrinsic good in the consequences. Of course, a theory specifying what counts as intrinsically good is required if a teleological theory is to be useful. Teleological theories are sometimes called "consequentialist" because they require that actions or rules be judged solely by the amount of good contained in the consequences.

(2) Axiological theories specify a definition of intrinsic value and then define the right in terms of a non-consequentialist relationship to intrinsic value.

(3) Deontological theories characterize the right independently of the good and so base the rightness of acts or rules on criteria other than solely the intrinsic good contained in the consequences. Deontological theories are thus non-consequentialist because they hold that actions or rules are to be judged on the basis of non-consequentialist criteria. Examples of such criteria include rights, duties, consent, principles that apply independently of consequences, certain features possessed by certain kinds of actions, and God's will.

Deontological theories are often called right-based theories, for the deontic concepts of right and ought are fundamental and other ethical concepts are defined in terms of them. For instance, the right, in such a theory, is prior to the good. Principles of right are derived independently of principles of good (or value) and serve as "side constraints" on the pursuit of the good.[4] (Side constraints specify kinds of actions one may never perform no matter what goal one aims at.) Thus, something does not count as good unless it is consistent with the right.

Teleological and axiological theories may both be called value-based theories, for in both types of theory, the category of the good becomes the category of overriding moral importance. Value is theoretically fundamental and

the deontic concepts are defined in terms of, or by reference to it. Teleological theories are sometimes called goal-based theories, for the right is subordinated to the good and defined in terms of the maximization of the amount of good in consequences.[5]

A complete theory of right must cover two different but related ethical categories, namely, obligation and duties. These may be partly distinguished as follows:[6] An obligation is a moral requirement that is (a) generated by the performance of a voluntary act or omission and is (b) owed by a specific person to a specific person or persons. There are two kinds of duty. (1) A natural duty is a moral requirement that (a) is not generated by the performance of an act but, rather, is binding upon all moral agents independently of any action; and (b) is not owed to any specific person but, rather, is owed to all moral agents. (2) An institutional duty is a duty which is (a) defined in terms of a particular office or other institutional position, and which is (b) binding only upon the individual occupying the particular office or position.

Now, most of the historically significant contract theories give a central place to the problem of political authority, a problem basic to any theory of right. That problem may be expressed as the question: What reasons, if any, justify the authority of the state? In other words, why ought one to obey the commands of the state? Some social contract theories provide, in addition to a theory of political obligation, a theory of social justice and some go on to provide an account of the rights, duties, and obligations of individuals, as well.

Although it encompasses a rich variety of theories, the social contract tradition is built upon the idea of conceiving the state as the result of an agreement or contract among the members of society. Through such a contract, the members of society give their consent to the authority of the state. This expression of consent is held to generate bonds of political obligation. A theory of social justice and a theory of the rights and duties of individuals may similarly be based upon a form of agreement or contract in which consent has been given by the members of society. Contract theories derive a structure of obligations and duties--a theory of right--and this structure is erected upon some form of personal consent.

As a criterion of right, consent is non-consequentialist in nature. The fact that an individual consented, or perhaps would consent under certain conditions, is a criterion which obtains independently of (future) consequences. Thus, since contract theories typically base the right on some kind of consent, contract theories typically provide deontological theories of right.

Social contract theories differ over the nature of the contract or act which establishes the structure of right. On some accounts, the contract is a historical reality that was made and ought to be adhered to. On other accounts, the contract is an ideal construct that either ought to have been made, ought to be made, or perhaps ought to serve as a guide or ideal to aim at. On still other accounts, the contract is one which is only tacitly made, or the contract is a hypothetical entity only and is used to specify what persons would consent to under certain conditions. Each type of contract theory, historical, ideal, and hypothetical, has

made its own method of arguing from the contract or expression of consent to a structure of right.

It is also possible to distinguish between versions of the contract which involve a permanent, non-revocable pact and versions which involve a renewable, revocable trust. Another set of distinctions concerns the actors involved. For some theories, the contract is between individuals only while for others it is between agents of individuals. For other theories, the contract is between individuals and the state while for others it is only between the state and individuals meeting certain qualifications. Thus, some contract theories are democratic while others are non-democratic.

There is a sense in which social contract theories are both reductionist and individualistic. Contract theories generally fit into the following schema. A question of justification at a national or institutional level (e.g., is the state's doing such and such justified?) is reduced to a question of justification at a "lower" level, one which involves only considerations about individuals (e.g., has each individual consented to the state's having such and such powers?). This reduction is generally accomplished using two elements. The first element is a normative theory and the second is an appeal to certain facts. The normative theory typically establishes some sort of natural moral status, a status which is possessed by each moral agent independently of political or institutional considerations. This natural status is usually specified in terms of rights (natural rights), duties, and obligations which are in turn based upon some characteristic or set of characteristics possessed by all moral agents independently of political

or social status. The facts appealed to will be either historical or hypothetical considerations concerning the origin, development, and operation of the state as well as (perhaps) the institutions of rights, duties, and obligations.

The natural moral status specified in the normative theory is typically established by employing a description of the state of nature, a state in which individuals exist without the institution of government. An account of the state of nature can be employed in a number of ways.[7] By theorizing about the state of nature, questions can be asked about the moral status of the person considered independently of institutional and political facts. This might lead to the development of a natural basis for various rights, duties, and obligations. That is, one might discover a way to derive rights, duties, and obligations from some characteristic or set of characteristics possessed by all moral agents and possessed independently of institutional and political facts.[8]

By specifying what life was like or perhaps would be like without the institution of government, an account of the state of nature allows us to compare the state of nature with civil society. This comparison may be used to justify the existence of the state. There are three types of justification here. First, one might argue that civil society is superior to the best non-state situation we could reasonably hope for. Second, one could argue that the state would necessarily arise from any non-state situation by a series of steps involving no morally impermissible acts. Third, one might show that the state would be an improvement if it arose.[9]

Theorizing about the state of nature might also be used to provide a fundamental explanation of the political realm, one which explains the political in terms of non-political elements. This might involve explaining why civil society developed out of the state of nature, or it might involve constructing a model of the process by which civil society comes into being. As Robert Nozick observes (1974: 6), there are two alternatives to such reductive explanations. One might argue that the political realm arises from the non-political but is not reducible to it. Or, one might hold that the political realm is completely autonomous, neither arising from nor explainable in terms of, the non-political.

However, social contract theories tend to reduce questions of justification and explanation from a societal level to an individual level, and they typically employ a normative theory in conjunction with an appeal to certain facts. This reduction can be accomplished in a variety of distinctive ways each making use of some form of contract, and we may categorize the various theories in terms of the contractual element employed. The first three categories delineated below are historical, while the fourth and fifth categories may be called ideal (in that the theory is not historical in some sense):

(1) "Express consent" theories appeal to an actual contract in which individuals have expressed their consent to certain institutions or arrangements.

(2) "Tacit consent" theories appeal to the terms of a tacitly-made contract in which individuals tacitly give their consent to certain institutions.

(Tacit consent is consent implied by action rather than consciously intended.)

(3) Mixed theories appeal to both tacit and express consent.

(4) "Perfect consent" theories describe an act of consent that constitutes a model to be aimed at, an act that ought to be made or a contract that ought to be adhered to. Perfect consent is not hypothetical in nature.

(5) "Hypothetical consent" theories appeal to an act of consent that would be given if certain specified conditions obtained. For example, consent that would be expressed given full rationality and a knowledge of all the available facts qualifies as hypothetical consent.

Brief examples of some representative contract theories illustrate that these distinctions have real applications. One of the very first versions of the social contract theory appears in Plato's Crito.[10] There Socrates states a historical, pure tacit consent theory which may be summarized as follows. If any person chooses to live in a particular city or colony when he could live elsewhere, then that person has--in virtue of the act of residency--agreed to obey the laws of the state; that person has tacitly given his consent to the authority of the state. Socrates' theory is incomplete, but it surely belongs to the social contract tradition.

A historical, express consent theory is given in Plato's Republic when Glaucon suggests that: "Men decide they would be better off if they made a

compact neither to do wrong nor to suffer it. Hence they begin to make laws and covenants with each other."[11]

One of the first contract theories to appear in the modern period, and the first popularization of the theory, is that of Richard Hooker (1925). Hooker's theory is an example of a historical, pure express consent theory in which political obligation is grounded in a permanent, non-revocable contract. The contract, supposedly made at an early stage of society, is binding on all subsequent generations. Hooker's theory encountered vigorous opposition. Among the criticisms of his theory, several stand out as especially challenging. How can an agreement that is made by one group of persons obligate another group of persons?[12] How can we know the terms of the original agreement? And what evidence do we have that such an original agreement was ever formed?

It is with the work of Hobbes that classical contractarianism, and the theory of natural rights, is born. Hobbes (1962) postulates a state of nature characterized by the "war of everyone against everyone." Only by setting up an artificial condition of shared power, that is, the state, can human beings secure peace. Hobbes constructs a historical, mixed consent contract theory in which individuals transfer all authority to a supreme power, the state, on terms that make the state's power nearly unrestricted. The state's power is not totally unrestricted, however, for on Hobbes's account some elements of natural right constrain the power of the state after the contract is established.

Hobbes defines the "right of nature" as "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature" (1962:

103). This is the fundamental liberty that each individual possesses in the absence of political authority. The problem, however, is that in the state of nature one's natural right amounts to doing whatever one wants. Thus, "unless the natural right of every man to every thing" is defined and regulated by enforceable law, nobody is obligated to respect the natural rights of others: "RIGHT, consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindith to one of them" (1962: 103). It is the transfer of natural rights to a sovereign authority that is the basis of political obligation. Each individual must act or refrain from acting as if he were a party to an agreement to obey that authority. On Hobbes's view, the contract originates in an original act of express consent and it is then tacitly renewed by each subsequent generation.

However, the authority established by the contract is restricted when it comes to certain natural rights that Hobbes regards as inalienable:

> [T]here be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life. . . . The same may be said of wounds, and chains, and imprisonment. . . . And lastly the motive, and end for which this renouncing, and transferring of right is introduced, is nothing else but the security of a man's person, in his life, and in the means of so preserving life, as not to be weary of it. (1962: 105)

For Hobbes, the foundation that limits the power of the state is provided by the natural rights of individuals which precede the state. Specifically, the existence of the rights to life and to all things which are indispensable to the preservation of life, ground the limits of sovereign authority. The primary weakness of Hobbes's theory of natural rights, however, is his focus on the self-preserving character of those rights. In other words, while Hobbes is concerned to show in his account of the state of nature that humans have natural rights which, at least in part, cannot be fully surrendered to political authority, these rights consist in one's liberty to do or forbear to do whatever is necessary for the preservation of one's <u>own</u> life. Hobbes does not adequately account for the possibility of an obligation to equally preserve the rights of <u>others</u>.

The classical social contract and natural rights theory born with Hobbes is brought into a more mature age with the work of Locke. Locke's philosophy often differs sharply from Hobbes's, and plays an important role in the development not only of contractarianism but also of ideas about human rights and the state's duty to respect them.

Locke's description of the state of nature is significant in that he asserts that the fundamental law of nature is not simply that of self-preservation, but rather preservation of the life of others as well as oneself (1986: 9-10). It is for the purpose of securing life and ensuring the equality between and freedom of persons that a contract engendering civil society is agreed upon. According to Locke, "The chief and great end, therefore, of men uniting into a commonwealth,

and putting themselves under government, is the preservation of their property" (1986: 70). In this context, however, Locke uses the term "property" not only in the narrow sense of external possessions; rather, he says it must be understood to mean "that property which men have in their persons as well as goods," namely, "life, liberty, and estate" (1986: 49). With this statement Locke establishes the well-known idea that the individual possesses the natural rights to life, liberty, and property.

The primary function of the state--the protection of the natural rights of individuals--is thus conferred by the consent of those who enter into the social contract. Yet this function is not conferred absolutely or irrevocably; it is established instead as a trust for the public good. The only way that humans can divest themselves of their natural rights is by mutual consent to a social contract that would ensure not only the comfort and safety of all members, but most importantly the equality and liberty of all:

> [P]olitical power is that power which every man having in the state of Nature has given up into the hands of the society, and therein to the governors whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good and the preservation of their property. (1986: 94-95)

The contract that Locke derives from the state of nature gives the state far less power than does the contract derived by Hobbes. In Locke's theory, only one

contract is made, namely the social contract proper. This contract empowers the majority to erect a government with the state as a trustee, the people as trustor. Such a relationship places all of the rights on the side of the people and all of the duties on the side of the government. In Locke's view, natural rights are inviolable in the state of nature but are enforceable only in a civil society that recognizes and acts to protect such rights through the mechanism of the social contract.

Locke's contract theory is, then, an example of a historical, mixed theory. After sketching a theory of natural rights which serves to establish a natural moral status possessed by each individual, Locke bases the legitimacy of the state upon two premises. First, all societies originate in contracts expressly made by the original members. Second, this original contract is tacitly renewed by each member of succeeding generations. Each person--by either his residency in society, ownership of property, or acceptance of the benefits of society--implies by his actions a tacit acceptance of the contract. However, if a government exceeds the legitimate limits of the authority conferred to it, it can be dismissed for a breach of its trust, and replaced by another. A government exceeds its authority when it unjustly encroaches upon or fails to preserve the natural rights and liberties of the people.

Another important member of the social contract tradition is Rousseau. Rousseau (1994) develops a tacit consent theory according to which, when a number of individuals voluntarily unite behind a political power, each, by his actions tacitly gives his entire self, and rights, up to the group. A corporate being

is thus formed which possesses a general will and which is called the state. The general will aims at the good of all.

For Rousseau, the social contract functions as the fundamental principle underlying the political association whereby the social becomes an embodiment of the personal. The contract is a mechanism for harmonizing the liberty of individuals with the legitimate freedom of others, insofar as natural liberty is exchanged for civil liberty. By the terms of the contract, each person relates to all others as constituent yet equal parts of an "indivisible whole," under the direction of the general will:

> "Find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each one, uniting with all, nevertheless obeys only himself and remains as free as before." This is the fundamental problem which is solved by the social contract. . . . The clauses of this contract . . . come down to a single one, namely, the total alienation of each associate, with all his rights, to the whole community. (1994: 138)

The social contract gives the political association its characteristic "existence and life," namely, the intertwining of the individual good with the common good. Clearly, Rousseau differs from Locke in relegating the rights of the individual to a collective general will. In other words, the equal natural rights

of persons are ultimately grounded in the general will of society, such that these rights are conceived by Rousseau as being properly legitimated in the acts of political association by which society is formed. Rousseau's version of the social contract contrasts with the individualism of Locke's version, inasmuch as it favors a social conception of rights based on a contract intended to protect not only individual liberty but also social equality and political justice.

Rawls has developed his own theory of justice under the explicit inspiration of the contractarian tradition. In A Theory of Justice, he describes the idea of justice as fairness formulated therein as a theory "that generalizes and carries to a higher level of abstraction the traditional conception of the social contract" (1971: 3). In his major work, Rawls identifies one's right to the most equal extensive liberty compatible with a similar liberty for others as the first of his principles of justice. The first principle, the liberty principle, is to be secured, whenever possible, prior to the implementation of the second principle, the difference principle.

Rawls establishes his principles by suggesting a social contract scenario in which individuals representing several generations are to be abstracted from time and space and required to choose principles for an actual society, into which they would eventually be returned, which they could all agree to support as the most just possible. This "original position" would allow these individuals knowledge of general facts about the world, but not of the specific place they would be occupying, a restriction Rawls calls the "veil of ignorance." Particular conceptions of the good are thus disallowed in the original position and the

parties to the contract "do not know what final aims persons have" (1971: 563). Rawls stipulates that this is so because, first, the only relevant aspect of the self in considerations of justice (in the original position) is "moral personality" and, second, allowing knowledge of substantive standards of the good would compromise the priority of liberty (1971: 327-28). From this presumably impartial situation Rawls sets out a contemporary version of contract theory, since the occupants of the original position would use the principles they have agreed upon as guides for constructing actual socio-political institutions. In this manner Rawls offers a unique attempt to conceptualize the problem of social justice and support the priority of the right over the good.

Thus far, we have examined contractarian theories of right. As for the other branch of normative ethics, value theory, contract theorists have generally devoted relatively less space to the elaboration of a theory of the good. This point can be ascribed to the recognition that, in increasingly diversified societies, what is most important ethically and politically for contractarians such as Rawls is to reach agreement on general principles of right which will publicly regulate each person's pursuit of his or her own conception of the good.

As I mentioned above, contract theories have generally held choice theories of the good. What this means is that each person is to choose his or her own conception of the good and devise his or her own pursuit of that good. For contract theory, however, this pursuit must take a path which does not violate the public principles of right. In other words, people should be free to pursue their

own ends within a general framework of rules that is neutral toward these ends yet that nevertheless enforces the right.

According to some contract views, then, the good is the object of rational choice. This is a choice that meets certain rationality norms. An example of such a rational choice theory of the good is that of Rawls. Briefly stated, Rawls views people as sharing a minimal rational capacity for making moral choices and for taking responsibility for their lives, defined in terms of two aspects of moral personality: the capacity for a conception of the good, and the capacity for a sense of justice (1971: 560-67). Consequently, he holds that people are moral agents capable of adopting, pursuing, and changing their own beliefs about what constitutes a morally good life for them (which is not to say that all such conceptions of the good are equally valuable), while the legal and political institutions of the state enforce right actions as between individuals. These issues will be discussed in more detail in the next chapter.

In sum, then, we have seen that the contractarian tradition developed a deontological conception of right which harmonized with differing conceptions of the good. The right was to take precedence over the good insofar as the principles of right were seen as side constraints on the pursuit of the good.[13] This in turn has led to a strong emphasis on the fundamental rights of individuals within the sphere of social justice.

1.2 Contractarianism and the Theory and Practice of Human Rights

The philosophical and political dialogue on human rights has been greatly influenced by the natural rights tradition associated with classical and modern contractarianism. Although the natural rights perspective has often been criticized by various competing theories, it is nevertheless generally regarded as the primary precursor of contemporary human rights doctrine and remains an important concept in philosophy, politics, and law.[14] In the aftermath of World War II, natural rights theory became central to the renewed attempt to protect humanity from the atrocities promulgated by unrestrained political machinations and iniquitous laws divorced from critical ethical and moral foundations.

As we have seen, to some degree the classical social contract theorists all share a desire to protect the subjective interests and rights of individual persons. Their view is that the various rights naturally possessed by persons are irrevocable elements essential to a scheme of social justice. In other words, if all individuals equally possess certain fundamental rights, then the consensual moral and political framework of the social contract is concerned to protect those rights, as justice demands. Thus, the contractarian scheme of social cooperation in the pursuit of justice rests, to a great extent, on the view that there are certain fundamental rights which are basic features of a just social order. Such rights are properly called "human" rights because they prescribe a minimum definition of what it means to be human in society.[15]

The influence of the idea of natural rights is evident in the contemporary human rights doctrine. For instance, the Universal Declaration of Human Rights (UDHR) begins by stating: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. . . ." Article 1 of the same document asserts: "All humans are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[16] As employed in contract theory, natural rights embody aspects of both negative freedoms, i.e., freedom from government intervention in the quest for human dignity, and positive freedoms, i.e., rights to just governmental intervention in the quest for human dignity. Negative freedoms roughly correspond to the civil and political rights that are often referred to as "first generation" human rights, while positive freedoms belong to the "second generation" of economic, social, and cultural rights.[17] From the survey given thus far, it is possible to identify four basic concepts from the contractarian-rights tradition which have informed the modern idea of human rights, as expressed in the Universal Declaration of Human Rights:

(1) The equality, dignity, and worth of each individual (Article 1).

(2) The right of liberty to pursue the quest for human dignity against the abuse of political authority (Articles 2-21).

(3) The right to basic necessities in order to ensure an existence worthy of human equality and dignity (Articles 22-27).

(4) The obligations and responsibilities of individuals, states, and the international order to ensure these rights for all (Articles 28-30).

These basic conceptual and normative points have been formalized in a number of conventions and declarations in the International Bill of Human Rights. The International Bill of Human Rights consists of the human rights provisions of the United Nations Charter of 1945, The Universal Declaration of Human Rights of 1948, and the two Covenants of 1966 on Civil and Political Rights, and on Economic, Social, and Cultural Rights. In the Covenants, which are treaties that legislate what the Universal Declaration has declared, states undertake to respect and ensure the following rights: to life and personal integrity and security; to freedom from torture and cruel, inhuman, and degrading treatment or punishment; to freedom from coercion, slavery, and forced labor; to due process of law and to a humane and working penal system; to freedom to travel within and outside one's country; to freedom of thought, conscience, religion, expression, assembly, and association; and to take part in the conduct of government and public affairs (including the right to vote and be elected). The dominant themes are equality (equal treatment, equal protection of the law, equality of opportunity) and non-discrimination on the bases of race, color, sex, language, religion, opinion, origin, birth and status. In connection with non-discrimination, members of minorities within states are granted the rights, in community with other members of their group, to enjoy their culture, practice

their religion, and use their language (in addition, to be sure, to the rest of the rights in the Covenants).

In the Covenant on Economic, Social, and Cultural Rights states are to take steps "individually and through international assistance and cooperation . . . to the maximum of their available resources . . . with a view to achieving progressively full realization . . . by all means, including legislative measures" toward the fulfillment of the following rights: to work; to just and favorable conditions of work, including leisure; to join trade unions and to strike; to social security; to social protection of the family, mothers, and children; to an adequate standard of living, including adequate food, clothing, housing, medical care, social services, especially in the events of unemployment, sickness, disability, old age, or any other lack of livelihood beyond one's control; to standards of physical and mental health; to education and training; and to take part in the cultural life of the community and benefit from any scientific progress therein. Again, the themes of equality and non-discrimination are dominant in this Covenant. Together with non-discrimination, the right of all peoples to self-determination is the most important common provision appearing in both Covenants.

Human rights standards are said to be international and universal. Human rights are also said to be "inherent" or "inviolable" entitlements; in other words, they are supposed to work as normative trumps, having priority when in conflict with other norms, values, or goals. They are viewed as interdependent, and protective of a range of interrelated and equally important categories or

generations of goods. And finally, they are said to imply advantages for individuals and groups, as well as obligations on an individual's society and any other pertinent actor anywhere in the world (Lindholm, 1992: 394). I will briefly discuss the first two features of human rights standards below.

To say that human rights are international is to say that human rights are a matter of international concern (and of international standards), as is any other matter under international law, and are no longer only a matter of individual states' domestic jurisdiction. By adhering to the Charter, which is a treaty, states recognize the internationalization of rights. Virtually all states are parties to the UN Charter; either because the Universal Declaration is considered an authoritative interpretation of the rights provisions of the Charter (because whenever individual governments, the UN, or any other organization invoked human rights or condemned their violation, they appealed to the standards of the Declaration as the authoritative definition of human rights necessary to fulfill the Charter's obligations to respect human rights, and they did so with a sense of obligation), or it is considered customary law since it is claimed in principle that all governments must now ensure the enjoyment of all the rights of the Declaration, irrespective of whether they are parties to any other formal agreements. To put it another way, the universality of obligation and recognition on the part of every state and the universality of the applicability of standards in their integrity to every human being is presumed both in the law and in the theory of human rights.

As for the character and purpose of the International Bill, legal theorists tell us that they aspire not only to help establish the legal, political, and economic climates in which individual freedom and equal dignity can flourish, but also to help protect the individual against governmental excesses everywhere. After World War II, it was argued that national protections for rights were deficient and that additional, international protection was necessary. It was believed that some of the monstrous violations of rights carried out during the war period might have been prevented had an international system of protection been in place. Still, most theorists add, the current human rights discourse sees human rights as rights to be enjoyed under the constitutional-legal system of domestic society. To induce states to rearrange their constitutional-legal systems in order to achieve that result an international law of human rights was promulgated. The aim of this law is the universal acceptance of the whole range of rights and the substantive, universal enjoyment of normative standards in their integrity.[18] When there are differences between national and international standards, the latter are supposed to supplement national rights.

Of course, the internationalization of rights standards, the universality of (state) obligation and recognition, and the universality of the applicability of the full range of rights are all theoretically and practically contested. Much has been written about the need to develop the International Bill so that it is capable of attracting popular support and vindication. Some authors point out that there is a certain theoretical conception of human rights in the International Bill capable of guiding social practices for their realization, although it is maintained that that

conception is still underelaborated. According to Louis Henkin, in 1948 the following points were proclaimed and accepted, and since then have been repeated as articles of faith:

(1) That there are fundamental human rights, rights of individuals, of all and equally, though no single, specific theory of the (aimed at) relation of the individual to her community (or for that matter, of the individual to the world community at large) is advanced, other than what is implied in the concept of rights itself.

(2) That human rights derive from the inherent and equal dignity of the human person. Even though, says Henkin, this does not necessarily assume that rights antecede society, it seems to forbid the claim that human rights or other instruments merely legislate rights. Still, there is no single, specific theory on how the needs and rights of such human dignity are exactly determined.

(3) That human rights have become necessary given World War II and prospective world circumstances. Yet beyond references to the Hitler and Hiroshima disasters, no clarification of those world "circumstances" is adduced.[19]

(4) That human rights are the foundation or the cornerstone of freedom, justice, and peace in the world, although there is no theory specifying what conception of freedom or justice is supposed to be reflected in the

list of human rights, or how human rights delimit such conceptions and guarantee peace.

(5) That human rights help create conditions (or, rather, are among the conditions) of well-being and stability, necessary for peaceful and friendly relations among peoples, even though there is no theory on how rights are to do so.

What one can read, both in the Charter and the Declaration, is that there cannot be peace without recognition of human rights and the conditions of justice, and that there cannot be a full realization of human rights without new types of social-domestic and international orders. However, these practical ideals have been largely dissociated from significant treatment in moral and political philosophy.

Moreover, it is recognized today that one of the most important problems in the human rights field (encompassing both theory and practice) is how to implement and make enforceable the human rights of the International Bill in a world of differing cultures. Theorists disagree in their solutions to, and even in the statement of, this problem. They disagree as to the nature of the obstacles and hindrances to the implementation and enforcement of rights, such as whether those obstacles are mostly domestic or extra-domestic; whether they hinge on normative differences or are structural or procedural; and whether they are due to the behaviors of populations and majorities or to the behaviors of governments and governmental actors. Some theorists might not deny the relevance of the

diversity among cultures of considered convictions about what political justice or human rights require; they might object, though, to the practical or moral priority this diversity is granted. At issue here as well are different understandings of the primacy and autonomy of the state within the inter-state system and perhaps, more specifically, of the current relevance of the domestic political community within the globalized framework. Also at issue are different understandings of the relation of the state to the community and of the notion of political community itself. Ultimately, the converging dynamics of globalization and pluralization bring culture and tradition to the foreground of current debate concerning international human rights. But what culture and what tradition? In what way does cultural pluralism matter to the theory of human rights?

When we reflect upon human rights abuses carried out in various countries around the world, we are characteristically torn between two potentially contradictory ethical concerns. On the one hand, we have strong, deep-seated intuitions that certain behavior, carried out by nations other than our own is, nevertheless, morally reprehensible. In juxtaposition is our simultaneous recognition of the value of cultural diversity, coupled with an acknowledgment of a dismal history of colonialism and unfounded moral condescension. The tension between these two sentiments has resulted in the contemporary dispute regarding the moral foundation and nature of international human rights. Largely, the discussion is carried out between cultural relativists, who contend that an individual's human rights are exclusively determined by his or her culture's traditions and contingent norms, and universalists, who insists that

despite a wide diversity of cultures, every human being qua person possesses certain inalienable rights universally held against a state or culture.

Cultural relativism, generally, is the thesis that "culture is the sole source of the validity of a moral right or rule" (Donnelly, 1984: 400). It is a political, often philosophical, conviction which results from a great variety of sources, some anthropological, others skeptical. Relativism is, in no small part, a backlash against 18th and 19th century notions of rationality and enlightenment. While there has always been a current of moral relativism throughout the history of Western philosophy, it had not attained its contemporary stature of acceptance until well into the twentieth century and the two world wars. The apparent senselessness of the world wars, coupled with their unprecedented levels of human loss and social destruction, irreparably broke much of the West's historical confidence in its moral and social superiority. Philosophers in both the analytic and continental schools became increasingly skeptical of traditional moral and religious thought, and enlightenment notions of universal reason. At the same time, an increase in Western interaction with foreign nations and cultures resulted in a greater skepticism toward the applicability and international relevance of supposedly European ethical norms.

Against this background, cultural relativism has entered into the debates concerning international human rights in a diversity of forms. There are, in the first place, anthropological observations that, as a matter of fact, the different cultures of the world have radically different ethical norms. What reason, some claim, might we appeal to for the belief that our moral systems are better than

those of other nations or cultures? Other relativists concede the possibility of universal morality, but believe it is epistemically impossible to determine what rights or duties such a moral system would entail. Lacking any potential knowledge, we should, and in fact must, content ourselves with whatever rights are provided in the context of our particular culture. Finally, there are several radical relativists who, perhaps paradoxically, argue that the very notion of human rights is inescapably immoral, in that the imposition of human rights is destructive of non-Western cultures.[20]

Thus cultural relativists believe, in varying extents, that culture forms the only legitimate basis for assessing the validity of any code of conduct (Donnelly, 1984: 400-401). Hence, whether an individual can exercise any particular right will ultimately depend upon whether, and to what extent, the protection of that right will conflict with that individual's native culture. In response, human rights proponents typically assert that irrespective of culture, international norms are either universal imperatives derived from the status of being human or rules of conduct explicitly consented to (Donnelly, 1984: 404-405). A universalist might argue, for example, that while it is clearly true that culture and upbringing determine, in varying degrees, our self-conception and societal roles there remains, regardless of cultural input, certain inalienable features common to all human beings, ranging from the ability to experience pain to the capacity to rationally form conceptions of the good (although the conceptions themselves vary). So when a universalist claims of an individual that she has a human right, he might mean that "She ought to be treated in such-and-such a manner" because

all human beings have certain common interests or moral powers that can be violated regardless of the culture in question. A universalist also might argue that the attitude of the cultural relativist, though perhaps motivated by a well-intentioned tolerance of cultural differences, is naively romantic, stereotypical, and ultimately discriminatory. It degrades the intelligence of "non-Western" people and refuses them a place in the international community (Howard 1993: 329 ff.). Finally, a universalist can counter that although one can in principle agree that respect and tolerance towards different manners of organizing social life are sound goals, in practice, the catchword of "difference" is often appropriated by state elites against their own populations. Thomas Nagel makes this last argument when he calls for the need to resist the "cynical appeals to cultural relativism with which authoritarian regimes defend the cruelties they use to stay in power" (1995: 84).

I agree with Nagel's position and, without entering into an extended discussion of this debate, I believe that cultural relativism is ethically and politically more problematic than useful.[21] Social and cultural pluralism is, of course, an issue to be addressed by any suitable contemporary account of human rights, but it is not clear that relativism of the type mentioned above is the only possible consequence of trying to frame human rights in ways congenial to diverse cultures and traditions. Rawls speaks, for instance, of the "social bases of self-respect" as a primary good of social justice, that is, as a way of showing equal respect and consideration toward diverse individuals and their interests. Other authors, like Will Kymlicka (1989), have argued that protecting those

"social bases" might entail the granting of special rights to minority cultures, for disadvantage with respect to the primary good of cultural membership affects the individual distribution of other benefits and burdens, which is the concern of liberal democratic justice.[22] In his essay on human rights (1993: 42-43), Rawls goes further and speaks of the need to tolerate "other reasonable ways of ordering society," i.e., other communities "organized by comprehensive doctrines, provided their political and social institutions meet certain conditions," such as protecting basic human rights. This approach, he suggests, is very much in keeping with liberal democratic ideals.

Furthermore, the moral concern with community and cultural pluralism is expressed in the international human rights instruments themselves. The International Bill of Rights recognizes a number of human rights that must be exercised by individuals as members of different racial, ethnic, and religious groups, in the understanding that membership and participation in those groups are essential to a life of dignity. Thus, the right of individuals in community with others to practice and observe their religion is an integral part of freedom of religion and might forbid, as expressed in the Declaration on the Elimination of Intolerance and Discrimination based on Religion or Belief, the establishment of measures on the part of the state whose effects are the impairment of that right. Of special importance are the cultural rights of minority cultures within multinational states; thus, Article 27 of the Covenant on Civil and Political rights ensures the right to members of those cultures in community with others to preserve their distinctive language, religion and, ultimately, their "way of life."

Because of the range of human rights protected in the major international human rights instruments, we might draw the conclusion that the framers of these agreements believed that cultural and individual rights are not necessarily at odds. The difficulty facing both the relativist and universalist views is that if either is taken abstractly the result is the denial of important elements of our humanity. The relativist ends up overlooking the value of individuality while the universalist ends up overlooking the necessarily social nature of every human being. I think it is for these reasons, however, that human rights have best come to be defined as those moral rights that every individual possesses as a human being, that is, merely by virtue of being human, even though individuals live in different cultures (Nickel, 1987: 38). In a clear indication of the influence of the contractarian-rights tradition, human rights are further defined as the moral rights held by human beings vis-à-vis the state, those "ethical liberties, claims, powers and immunities" of the individual which cannot be justly expropriated by any political power and which ought to be guaranteed by domestic and international law (Wellman, 1978: 53-56).

Human rights, then, are generally understood to mean those fundamental rights that human beings mutually recognize and grant one another in order to guarantee a life that meets the necessary conditions of dignity, liberty, and respect across all cultures. This does not preclude recognizing and respecting the diverse interests and values of individuals and groups, yet at the same time it means protecting those interests--such as obtaining the means of subsistence necessary for a life of dignity, and not being arbitrarily arrested, imprisoned, and

tortured--that can be reasonably regarded as common to all persons wherever and whenever they happen to exist. Human rights have thus been recognized as of paramount importance to matters of social justice.

As Rex Martin (1985) has noted, Rawls's work can be seen as making a substantive contribution to the inquiry into an adequate basis for a philosophy of rights and, I think, human rights. Seeking to pose an alternative to the utilitarian tradition, Rawls offers a contractarian conception of justice as fairness which provides that all "social primary goods," such as rights, liberties, opportunities and self-respect, are those things that all rational persons are presumed to want. For Rawls, injustice is a result of inequalities of these primary goods, such that the respect and human dignity of persons is unjustifiably violated. As I hope to demonstrate in the remaining chapters of this thesis, Rawls's theory of justice places on the philosophical and political agenda the realization that philosophy can help articulate notions of a just society and, moreover, a just international social order in which human rights are regarded as an essential end of justice. Whether Rawls himself articulates such a clear vision of global justice and human rights is the central problem this thesis examines.

Chapter Two

Rawls on Justice, Basic Rights, and Pluralism

The goal of the preceding chapter was to provide a brief yet coherent survey of contractarianism and its normative concerns, with special reference to the central place it accords to fundamental individual rights. This survey was then related to modern human rights theory and practice in order to highlight the relationship that contractarian normative theory has with the concept of human rights.

In this chapter I want to develop the primary features of Rawls's contractarian theory of justice in such a way as to bring out the conceptual and substantive claims made about rights in that theory. First, I offer a fairly straightforward exposition of Rawls's initial approach to justice and social and political organization as presented in his influential A Theory of Justice. I then try to elaborate on the emphasis Rawls places on the social primary goods of basic rights and liberties, and discuss how Rawls's views on the basic rights and liberties are taken up and modified in his later political conception of justice as fairness. Finally, I explore the influence of social pluralism on Rawls's theory of justice, again with respect to the issue of basic human rights and liberties, and respond to some criticisms of Rawls's theory raised by Michael Sandel.

2.1 Rawls's Contractarian Approach to Justice

In the first chapter I noted that the social contract tradition to which Rawls's theory belongs rose to prominence during the Enlightenment and has long served as an important inspiration to many liberal theorists concerned with social justice and human rights. I also discussed the different categories of contract theories in terms of the contractual element employed by each theory, such as the express consent and tacit consent theories. Rawls explains in A Theory of Justice that his "aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant" (1971: 11). In this section I present an account of Rawls's hypothetical consent theory of justice. I do so for two reasons. First, at least a basic description of the elements Rawls's theory is needed if we are to understand his approach to basic rights. Second, because our discussion of international justice and human rights in the following chapters seeks to extend Rawls's initial domestic or national account of justice, it will be useful to first work through the initial account itself. Thus, the general analysis offered here will be an essential guide our later inquiry.

In place of the original compact postulated by the various contract theories, Rawls describes what he calls an initial situation. This is a hypothetical choice situation from which the principles of social justice and the principles assigning basic rights and duties are to be chosen. Of course, a large number of descriptions of such an initial situation might be constructed, each determining

a choice of principles of social justice. Rawls calls his favored interpretation of the initial situation the "original position," and he provides substantial arguments in support of the claim that the original position is the most appropriate interpretation of the initial situation.

A general definition of the original position is introduced early on in A Theory of Justice. The original position is a purely hypothetical state of affairs in which all the members of a particular society are free, rational, equal, and concerned to further their own interests. They are to choose once and for all what is to count in their society as just and unjust. Thus, a set of principles must be chosen which will define the fundamental terms of their association, namely, the principles covering the major institutions of society.

The parties in the original position are behind what Rawls calls a "veil of ignorance." Behind the veil of ignorance no person knows his or her social position or status. No one knows the particular circumstances of his or her own society, such as its economic or political situation, or its level of civilization and culture. Furthermore, no one knows to which generation he or she belongs. No one knows how he or she fares in the distribution of natural assets. That is, no one knows his or her talents, intelligence level, abilities, health, gender, appearance, race, or ethnic origin. In addition, nobody knows his or her level of income or wealth, career, religion, conception of the good, psychological orientation toward risk, the personal characteristics of his or her parents. However, the parties know the general truths of economics, political science, anthropology, sociology, and human psychology--presumably in the form in

which these truths are known in society upon "entry" into the original position (1971: 548).

The veil of ignorance provides part of the sense in which all of the parties in the original position are equal, for the veil of ignorance removes from consideration all personal characteristics which serve to differentiate one person from another and it eliminates knowledge of natural and social factors that set persons at odds. The result is arguably a "symmetry of everyone's relations to each other," for all are "similarly situated" (1971: 12). The veil of ignorance also serves to ensure that the choice of principles is impartial or unbiased. Thus, nobody is able to tailor principles to favor the particular circumstances of her own case.

In Rawls's view, the correct principles of social justice are those that would be chosen in such a situation of equality. Rawls calls this way of regarding the principles of social justice "justice as fairness," for the reason that the original position exemplifies what is arguably a fair choice situation (1971: 11-12). Thus, "justice as fairness" is the name of the view which conceives the correct principles of social justice to be those that would be chosen in a hypothetical choice situation having the features of the original position. In this way, Rawls defines a procedure for the selection of principles of social justice, one which involves discovering the principles that would be chosen by persons in the original position.

Rawls takes it as an axiom that justice is the highest standard against which the laws and institutions of society may be assessed (1971: 3). That is, a

law or institution must be altered or abolished if it is unjust, even though it may be good or proper according to some other criteria. According to Rawls, a society is a relatively self-sufficient association of individuals who generally acknowledge certain rules of conduct and generally act in accord with those rules. These rules specify a system of cooperation organized to advance the good of those involved. Any society involves both a conflict and an identity of interests in the following sense: as Hobbes, Locke, and Hume recognized, an identity of interests exists because social cooperation makes possible a better life for each person in society than they would have outside of society. The conflict of interests consists in the fact that people disagree over how the benefits and burdens of social cooperation are to be divided. Thus, social life presents us with a typical decision theoretic problem; that is, all gain from cooperation, but people disagree over the form the cooperation should take.[23]

The basic structure of society is the complex consisting of major political, social, and economic institutions as well as the manner in which these institutions assign fundamental rights and duties, shape the division of advantages that arise through social cooperation, influence life prospects, and affect the hopes, ambitions, and realized abilities of the members of society (1971: 7). Rawls holds that the basic structure of society (or simply "the basic structure") is the primary subject of justice. This means that the most fundamental principles of justice are designed to regulate the basic structure. Therefore, these principles must cover the assignment of fundamental rights and duties, they must regulate the way the advantages of social cooperation are distributed, and they must

concern themselves with the way the basic structure influences life prospects, ambitions, hopes, realized abilities and so forth.

This is a controversial thesis, for many theories of justice do not take the regulation of the basic structure of society to be of fundamental concern. For example, theories of distributive justice often specify, as their most fundamental principle, a principle of allocative justice. Such a principle specifies a standard for determining a correct distribution of goods and this standard is determined independently of the operation of the social process. An allocational principle of justice typically specifies a property or set of properties of individuals on the basis of which the burdens and advantages arising through social cooperation are to be distributed. Marx's dictum, "From each according to his ability, to each according to his need" is such a principle. Utilitarianism is also an allocative conception of justice for it directs that goods are to be distributed so as to maximize the total or average level of satisfaction. Such principles do not apply directly to the basic structure and so do not take the basic structure to be of primary concern, for (a) they are designed to be grafted onto a functioning basic structure from above and the results of the operation of the basic structure are treated as raw input into the allocational principle, and (b) this leaves many aspects of the basic structure unaffected.

Rawls gives a number of reasons for his claim that the primary subject of justice is the basic structure of society. First, suppose that a society is free and social conditions are fair at time T1.[24] It is possible that a series of exchanges and agreements might be made, each member of which--when viewed alone--

seems free and fair, and yet the unintended, accumulated result of this series might eventually alter institutions and opportunities so that conditions for free and fair agreements no longer obtain. For example, a series of agreements--each of which seem free and fair when viewed alone--might, together with historical and social contingencies, lead to a state in which "fair" equality of opportunity no longer exists. This requires some explanation.

In order to understand what Rawls means by "fair" equality of opportunity, it is necessary to distinguish "fair" equality of opportunity from "formal" equality of opportunity (1971: 83-89). Formal equality exists when no laws unequally restrict the opportunities of anyone to acquire wealth, income, or powers of office. However, formal equality of opportunity does not concern itself with inequalities of life prospects that stem from unequal starting places in society. Thus, under a scheme of formal equality of opportunity, if two equally motivated and equally talented individuals start from unequal social positions, they may well achieve unequal levels of wealth, income or powers of office. Consequently, persons with equal talents and motivations will not have equal life prospects or expectations.

In contrast, fair equality of opportunity exists when persons with equal talents, abilities, and motivations have the same life prospects or expectations of attaining positions involving certain levels of income, wealth, and powers of office--regardless of the social position each is born into (1971: 73). This requires certain institutions designed to mitigate the influence of social position on individual attainment and thus to equalize life prospects regarding the

attainment of income, wealth, or the powers of office for individuals with similar abilities and motivation. As an example of a situation in which fair equality of opportunity fails to obtain, compare the life prospects of two equally talented, motivated, and able young persons, one having been born into a poor, illiterate black family living in a rural part of the country, and the other having been born into a wealthy white family headed by a mother who practices law with a prestigious law firm and a father who teaches at a major university. Surely two such individuals, similarly talented and motivated, do not have similar life prospects.

Consider that such a state of affairs in which fair equality of opportunity no longer exists could develop as the result of a series of agreements and exchanges--each of which seems free and fair when viewed alone--together with various natural and social contingencies. For instance: some people enter a line of work and then, due to market forces beyond their control, suffer prolonged periods of unemployment during which they lose nearly everything they own. Others take up farming and, due to a series of crop failures and early freezes, go completely bankrupt. Or, a man is killed in an automobile accident, leaving behind a hungry family. Cases such as these can result in large numbers of children being raised in poverty and without the encouragement, education, and training necessary for getting out of such a situation. It follows, the argument continues, that the basic structure generates, in conjunction with natural and social contingencies, conditions which can be the source of what seem to be significant injustices. Consequently, the basic structure must itself be regulated.

Rawls's judgment, that an absence of fair equality of opportunity is an injustice, is controversial. Whether such a condition is unjust or not depends upon which principles of justice are correct. On Nozick's theory, for example, an absence of fair equality of opportunity might be unfortunate or bad but it would not necessarily be unjust; the basic principles of justice would not necessarily be violated.

It might be thought that rules could be devised to regulate each member of the series of agreements and transactions made in society so as to insure that free and fair background conditions are maintained but without requiring constant attention to background institutions. Rawls replies to this that the consequences of acts leading to unfair background conditions are usually unforeseeable either because the consequences are so far in the future or because the causal connection is so indirect, thus, such rules cannot be formulated since the necessary information is not available. According to Rawls, therefore, any theory which does not concern itself in a fundamental way with the operation of the basic structure will be inadequate as a theory of justice, for it will operate at the wrong level of generality by failing to cover the most fundamental injustices, namely, those generated by the basic structure in conjunction with natural and social contingencies.

Rawls (1977: 160) gives another reason for taking the basic structure as the primary subject of justice. The basic structure influences the desires, ambitions, hopes, abilities, and talents of individuals. Even if some of these, such as talents, have a genetic component, each is still influenced by the basic

structure since genetically based attributes can be realized and hindered in a variety of ways by existing social conditions. Since the basic structure influences important aspects of each of us, it ought to be an object of serious concern. Thus, any theory which does not deal in a fundamental way with the basic structure neglects an important influence in our lives, an influence we would surely hope is in accord with the demands of justice.

As a third reason, Rawls observes that the basic structure is the most likely source of a number of the most significant social and economic inequalities, some of which have very pervasive effects throughout society. For instance, these inequalities lead to conditions in which some have lesser life prospects than others due solely to their social origins, as described above. Since the effects of the basic structure are so significant, and since these effects can include what seem to be some of the deepest injustices (such as a lack of fair equality of opportunity), a theory of justice ought to concern itself in a fundamental way with the basic structure of society.

It should be noted that Rawls distinguishes the terms "concept of justice" and "conception of justice" (1971: 5). Suppose someone asks "What is justice?" That person might mean, "Which principles, of the many proposed so far, are the correct principles of justice?" Or, alternatively, "What do we need principles of justice for? What role do principles of justice play in society?" A conception of justice consists of a particular set of principles of social justice. The concept of justice is specified "by the role which these different sets of principles, these different conceptions, have in common" (1971: 5). This role consists in the

assignment of fundamental rights and duties and the determination of a "proper distribution of the benefits and burdens of social cooperation" (1971: 5). Thus, justice provides the most fundamental standard we have for the resolution of the various conflicts of interest that go with organized human social life. Various conceptions of justice ought to be evaluated in terms of how well they fill this role.

Rawls divides his theory of justice into two parts. The first part to be developed is ideal theory (1971: 245). In an ideal theory, one assumes strict compliance and then works out the principles of justice that would characterize a well-ordered society existing under circumstances favorable to the functioning of such a society. Strict compliance obtains when everyone acts justly and does his part in upholding just institutions. Ideal theory thus gives us an account of what a perfectly just society would be like, it presents a social ideal.

After constructing ideal theory, one completes the theory of justice by constructing non-ideal theory (1971: 245-46). In non-ideal theory, one assumes partial compliance and less favorable circumstances. There are two parts to non-ideal theory. The first part covers the principles for governing adjustments to ideal theory that are required because of natural limitations and historical contingencies. The second part, called partial compliance theory, consists of principles for handling injustices. Here, principles of punishment, civil disobedience, revolution, and just war are worked out.

Ideal and non-ideal theory together fit into a complete theory of justice in the following manner. Ideal theory presents a conception of a perfectly just

society against which the existing society is judged. To the extent that the existing society diverges from perfect justice, injustice exists. Non-ideal theory then comes into play as a guide to the rectifying of injustice. Rawls writes that his main concern is with ideal theory. Thus, in the original position, strict compliance and favorable conditions are assumed; the principles chosen in the original position belong to ideal theory and provide a definition of a perfectly just scheme of social cooperation. The point of developing such a theory is to provide a guide for social reform, an ideal we can aim at (1971: 245).

As mentioned above, Rawls's principles require a thorough regulation of the entire basic structure of society. However, they do not provide for principles of allocative justice. While it is important that Rawls's principles be distinguished from allocational principles of justice, I will not explore this issue here. I will note, however, that Rawls assumes that the distributive and allocative functions of the market system can be separated, as long as market mechanisms operate against just background conditions. The market is used to achieve allocative efficiency but it is not used as the sole determinant of the distribution of income. Rather, distribution is partly determined according to the principles of justice. In other words, once the basic structure satisfies the two principles and a suitable minimum is provided, the rest of the total income is settled by the operation of the price system (1971: 277). Rawls characterizes this situation in terms of "pure procedural justice." He argues that three types of theories of justice should be distinguished:

1. In perfect procedural justice, there exists an independent criterion for what counts as a fair or right outcome, defined prior to and separately from the procedure to be followed. Furthermore, it is possible to devise a procedure which will guarantee the desired outcome (1971: 85).

2. In imperfect procedural justice, there exists an independent criterion for what is to count as a fair or right outcome, defined prior to and separately from the procedure to be followed. However, it is not possible to devise a procedure which will guarantee the desired outcome (1971: 85).

3. In pure procedural justice, there is no independent criterion for the right result. Instead, there is a correct or fair procedure which is such that whatever the outcome that results, it will be right or fair (1971: 86).

As an example of perfect procedural justice, Rawls mentions a case where a number of people must divide a cake between themselves (1971: 85). The independent criterion of a fair division is, simply, equal pieces. The procedure guaranteed to lead to this, technicalities aside, is to let one person divide the cake and get the last piece, the others choosing their pieces first. As an example of imperfect procedural justice, Rawls mentions a criminal trial. Although an independent standard specifying the correct result obviously exists, no procedure is available to guarantee this result (1971: 85). As an example of pure procedural justice, Rawls mentions a game consisting of a series of fair gambles. In such a case, we have no criterion for the distribution of winnings after the betting has

taken place. But if all individual bets have been technically fair, then the outcome is fair as well (1971: 86).

We can now contrast Rawls's theory of justice with other theories in terms of the way the basic structure of society is dealt with. Justice as fairness involves pure procedural justice in a fundamental way. Rawls develops principles which aim to insure that the process by which the basic structure operates is a fair process. However, no independent criterion for the proper social outcome is specified. Rawls even develops an argument that the basic principles of justice must treat the issue of distributive shares as one of pure procedural justice (1971: 84). In contrast, an allocational theory such as average utilitarianism allows the fundamental operation of the basic structure to proceed unchanged and then requires redistribution of the burdens and benefits of the social process in such a way that an independent standard is satisfied, namely, average utility is maximized. Of course, no process is known which insures that average utility is at all times maximized, so average utilitarianism is a theory of imperfect procedural justice.

The definition of the original position, it will be recalled, characterizes the terms of a problem of rational decision. The terms of a rational decision problem must include a conception of value as an assumption about motivation and so the definition of the original position must include an account of what counts as good. However, this raises a problem for Rawls. In justice as fairness, the concept of right is supposed to be prior to the concept of good, which means in part that a necessary condition for something's being good is that it fits into

activities consistent with the principles of right already established (1971: 396). Thus, Rawls must work out a theory of right before he works out a theory of good and then the theory of right will be used in the formulation of the theory of good. Yet the definition of the original position is used to determine the theory of right and, as noted, that definition requires a conception of good. So, the problem is that Rawls needs a conception of right in order to fully characterize a conception of good, but he needs a conception of good in order to determine a conception of right.

Rawls's solution is to construct what he calls a "thin" theory and a "full" theory of the good (1971: 395ff.). The thin theory of the good is used to establish a motivational assumption for the purposes of the original position, and the account of the original position is then used to derive a theory of right. Once the theory of right is derived, the full theory of the good is constructed within the constraints of the principles of right. The full theory of the good that Rawls develops includes an account of the moral virtues, an account of the moral worth of persons, an account of supererogation, and a number of other issues covered by any complete theory of good.

The thin theory consists of the bare essentials of a theory of good and is relatively non-controversial for it is a familiar theory going back to Aristotle and is accepted by many contractarian and utilitarian philosophers. Rawls defines his thin theory with three stages. The first stage provides an explanation of what we mean when we say that some object is good in relation to a shared set of interests and circumstances (e.g., Honda is a good car). The second stage provides an

explanation of what we mean when we say that something is good for a certain person when our judgment makes no evaluation of the way the person is living his life (e.g., It would be good for a bank robber to have a fast car). The third stage provides an explanation of what we mean when we say that something is good for a person in a more objective sense (e.g., It would be good for someone who wants to be an airline pilot to receive the proper training). According to the three stage definition, then, a human good is anything that satisfies what "is rational for someone with a rational life plan to want" (1971: 399).

Among the things that qualify as human goods, Rawls includes what he calls the "primary" goods. These are goods that are necessary for the implementation of any rational life plan; with a greater number of primary goods a person can generally be assured of a greater likelihood of success in carrying out his or her plan no matter what that plan is. Thus, primary goods are goods it is rational to want no matter what one's rational plan of life. Primary goods are divided into two categories. Social primary goods, so named because they are at the disposal of society, include rights and liberties, powers and opportunities, income and wealth. Natural primary goods arise from nature although they are influenced by the basic structure. Included in this category are health, vigor, intelligence, and imagination (1971: 62).[25]

Rawls offers several arguments in support of his account of primary goods, although here I mention only his conclusion that what to count as necessary for the execution of any rational life plan relies upon the general facts of social interdependency. The social facts of interdependency concern those values that

are not only good for those enjoying them but which also tend to enhance the good of others as well (1971: 425). Rawls mentions here friendship, education, and the creation of art and beauty. Such socially interdependent values will naturally be encouraged in any well-ordered society, and the fact of interdependency provides reason to include these values in any long-term plan of life.

The thin theory of the good is used by Rawls in his derivation of the theory of right. In contrast, the full theory of the good makes essential use of the theory of right, the theory of right being prior to and built into the full theory of the good.

Rawls observes that we naturally distinguish, in principle, between claims of liberty and right on the one hand and the value of an increase in total social welfare on the other hand (1971: 27-28). Furthermore, he says, we give a certain priority to claims of liberty and right over considerations of social welfare. That is, each person is naturally presumed to have "an inviolability founded on justice or, as some say, on natural right, which even the welfare of everyone else cannot override" (1971: 28).

Rawls aims, in constructing justice as fairness, to develop a theory which takes account of this "common sense conviction," that is, that claims of right take a certain priority over considerations of social welfare. Thus:

> In justice as fairness . . . persons accept in advance a principle of equal liberty and they do this without a knowledge of their more particular

ends. They implicitly agree, therefore, to conform their conception of their good to what the principles of justice require. (1971: 31)

The principles of right which justice as fairness contains place limits upon which satisfactions have value and upon what is to count as a reasonable conception of the good; they therefore serve as constraints upon the principles of good. In this sense, the principles of right are prior to the principles of good. On this view, social policy does not simply take individuals' wants and aims for granted and then seek the most efficient way to fulfill those wants and aims. Rather, a just social system defines the scope within which persons must develop their wants, aims, and life plans.

The theory of right is used in the definition of the moral virtues. A good person, a person of moral worth, is defined as one who possesses to a higher degree than the average "the broadly based features of moral character that it is rational for the persons in the original position to want in one another" (1971: 437). Thus, moral worth is judged in terms of "broadly based" properties, that is, properties it is rational to want in a person no matter what social role she fills.

The theory of right is also used by Rawls as a kind of restriction on the parties in the original position, along with the veil of ignorance. Rawls does not claim that the formal constraints are implied by the concept of right, nor does he claim that they are self-evident or that they follow from the meaning of morality. Rather, Rawls holds that given the role the principles of right must play, viz.,

adjudicating the claims persons make on social institutions and on each other through the assignment of basic rights and duties determining the division of social advantages, it is reasonable to impose the conditions of the formal constraints on the choice of conceptions of justice. Five constraints are given:

(1) Moral principles, and thus principles of social justice, must be general principles since principles of justice must be capable of serving as a public charter of a well-ordered society in perpetuity.

(2) The principles of justice should be public which means that they must be suitable for use as a public conception of justice.

(3) Principles should provide an ordering of conflicting claims that can or that are likely to arise.

(4) The principles should serve adequately as a final court of appeal in practical reasoning; there will be no higher standards for the adjudication of disputes concerning claims.

(5) The principles must be universal in application. That is, they must be understood and followed by every moral agent and they must hold for a given moral agent simply in virtue of the fact that she is a moral agent.

This last constraint is significant. Rawls's definition of moral personality involves two features: (i) a moral agent is capable of having a conception of good, and she normally realizes this capacity in the normal course of development, and (ii) a moral agent has a sense of justice, that is, the "desire to

apply and act upon the principles of justice" (1971: 505). Moral personality singles out the kind of beings that the principles of justice bind. Rawls notes that this idea may be used to provide an interpretation of the traditional idea of natural rights, discussed in the previous chapter. Claims of right that follow from the principles of justice are based upon the possession of moral personality. Justice as fairness holds that certain fundamental rights are "assigned in the first instance to persons" and "are given a special weight" such that "the system of equal liberties is absolute practically speaking under favorable conditions" (1971: 505-06, n. 30). I will return to the issue of rights in the following section of this chapter.

Although the original position is a hypothetical state of affairs, its definition does provide a heuristic device, one which provides for a way of thinking about the question of social justice. As Rawls observes, one may "simulate the deliberations of this hypothetical situation, simply by reasoning in accordance with the appropriate restrictions" (1971: 138). Thus, to say that a particular conception of justice would be chosen in the original position is similar to saying that rational deliberation under certain restrictions and conditions would result in a certain conclusion. This task of determining which principles would be chosen in the original position is easier than it first sounds. As Rawls observes, since all "differentiating characteristics" among the parties are removed and since everyone is equally rational and "similarly situated," each will reason in the same way (1971: 12).

After setting out the definition of the original position, Rawls argues that a two-tiered set of principles would be chosen by the parties in the original position. The first tier of the two-tiered structure is summarized by Rawls in the form of the following principle, referred to as the "general conception" of justice:

> All social values--liberty and opportunity, income and wealth, and the bases of self-respect--are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. (1971: 62)

The general conception of justice applies only at early stages of economic development which allow for neither the effective establishment nor the effective exercise of basic liberties (1971: 542). The general conception allows a trade-off of social values such as liberties and equality of opportunity for, perhaps, improvements in economic well-being provided that (a) the quality of civilization is enhanced in such a way that all benefit, and (b) the improvement moves society closer to a state of development where equal liberty and opportunity can be enjoyed by all as specified in the special conception of justice (discussed below).

The idea here is that at very low levels of economic development, the marginal value of further economic and social advantages is so relative to the interests of liberty--since the liberties cannot be effectively exercised anyway--that it is rational to allow the stated trade-offs. Rawls argues that as the economic development of civilization continues, the marginal value of further

economic and social benefits diminishes relative to the interests of liberty so that a point is reached beyond which it becomes irrational--from the perspective of the original position--to allow liberty to be traded off for the sake of greater material benefits. Consequently, a new conception of justice would be chosen to govern a society which had advanced to a level of economic development capable of supporting rights and liberties that can be effectively exercised (1971: 542). Thus, the general conception of justice is superseded in favor of the "special conception" with which Rawls develops his theory of justice as fairness. The special conception of justice constitutes the second of the two tiers, and is expressed in two principles of justice that Rawls argues would be chosen in the original position:

> (1) First Principle:
>
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> (2) Second Principle:
>
> Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. (1971: 302)

In the first principle, Rawls speaks of a "system" of liberties, which suggests that the various liberties are components affecting one another. The

reason the principle is framed in terms of systems of equal liberties is because Rawls holds that basic liberties cannot be evaluated singly. Rather, they must be evaluated as a whole since the character of one liberty normally depends upon the specification of other liberties (1971: 203). For example, if freedom of speech is defined too broadly, then property rights might be endangered. I have in mind the case where freedom of speech is defined in such a way that the incitement of riot is permissible. Although it is true that a greater liberty is by and large preferable to a lesser liberty, this only holds for the system of liberty as a whole and does not hold for each individual liberty. Another reason Rawls gives for the claim that the character of a liberty depends upon the specification of other liberties is the observation that when individual liberties are left unrestricted, they "collide" with one another. For instance, without rules of order in a convention, freedom of speech loses its value. Thus, liberties must be balanced in a give and take process until a systematic maximum of total liberty is reached--subject to the constraint that all individuals have the same liberties.

The first principle of justice thus guarantees an equal liberty to each person. Rawls illustrates how the argument for equal liberty from the original position would proceed by taking the example of the liberty of conscience. The reasoning in this case is then generalized to the other freedoms. The parties do not know what their religious or moral convictions are, or whether they even have any such convictions. Furthermore, they do not know whether their religious or moral beliefs are in the majority or the minority. Thus, they will not want to take chances concerning their liberty of conscience by (say) permitting the majority

religion to suppress other views (1971: 207). Neither would the parties consent to a utilitarian principle, for their freedom of conscience would then be subject to the "calculus of social interests" and might be restricted if such an action maximizes utility. Consequently, equal liberty of conscience is the only principle the parties will acknowledge.

Rawls goes on to derive a limitation to this principle: The maintenance of public order is understood as a necessary condition for any person's achieving his or her ends, no matter what those ends might be. Thus, from the standpoint of the representative citizen, all have an interest in public order and security, and this common interest limits the principle of liberty of conscience, that is, when it is reasonably expected that the public order will be damaged, liberty of conscience can be restricted. And this gives us a principle of toleration: Different moral and religious views are to be tolerated until the point is reached at which the public order is threatened.

It may be observed that liberty and the notion of the "rule of law" are closely associated in Rawls's theory. Liberty is "a complex of rights and duties defined by institutions" (1971: 219). The rule of law is essentially formal justice or justice as regularity, i.e., the ideal of "regular and impartial administration of public rules" applied to the legal system (1971: 235). The relation between the two is expressed by the observation that without the rule of law, one's liberties cannot be secure.

From this ideal of a legal system, a number of precepts follow. First, ought implies can. Given this precept, (a) actions required or forbidden by rules

of law should be ones that persons can reasonably be expected to do or avoid, (b) those who enact laws and give orders must do so in good faith, (c) impossibility of performance should be recognized as either a defense or at least a mitigating circumstance. Without this precept, a legal system might be an "intolerable burden on liberty."

The second precept is: similar cases must be treated similarly. That like decisions be rendered in like cases limits the discretion of judges and figures in authority, and forces them to justify the distinctions they make between people. The third precept is: there is no offense without a law. This requires (a) "that laws be known and expressly promulgated," (b) "that their meaning be clearly defined," (c) that laws be general and not be used to harm particular individuals, (d) and that the more severe offenses be strictly construed (1971: 238). The fourth precept is that of natural justice. A conscientious effort must be made to determine guilt and innocence and impose correct penalties. Thus, orderly trials and hearings, the correct application of rules of evidence, and so on are required. Rawls argues that without the rule of law, our liberties are uncertain and insecure. In order to attain confidence in the exercise of their liberties, then, the members of a well-ordered society will require the rule of law.

The second principle of justice that Rawls argues would be chosen in the original position speaks of "social and economic inequalities." Rawls is here referring to inequalities in the following social primary goods: income, wealth, opportunities, and powers of office. Liberty is not included in this list since it is treated by the first principle of justice.

The term "least advantaged members of society" in clause (a) of the second principle requires explanation. When principles refer to persons, Rawls notes, the reference is to "representative persons" holding various representative social positions. It is not necessary to consider things from the point of view of each representative person from each social position. An assessment of the competing claims of thousands of different social positions is obviously impossible. A complete theory of justice must therefore single out certain social positions as more basic than others and as providing an "appropriate standpoint for judging the social system" (1971: 96).

Rawls supposes that each person holds two social positions, that of equal citizenship, and that specified by a place in the distribution of income and wealth. The position of equal citizenship is defined in terms of rights and liberties required by the first principle and also in terms of the fair equality of opportunity provided by the principle of fair equality of opportunity. Equal citizenship provides a "general point of view" from which to judge a social system (1971: 98).

The number of representative positions in the distribution of income and wealth is problematic, but clause (a) of the second principle focuses upon the position of the least advantaged and this requires only the representative least well-off person. Rawls suggests two possible ways of characterizing this position. One might take the average income of an unskilled worker and count as least advantaged all those with the average income of this group, or less. The expectation of the least advantaged would then be equal to the average income

and wealth of this group. Or, one might count as least advantaged all those with less than half the median income and wealth.

Clause (a) of the second principle of justice is known as the "difference principle" and allows inequalities in wealth, income, and powers of office if these work to the advantage of the least well-off members of society, as measured by reference to an index of social primary goods and a measure of long-run expectations. The extent of the inequalities allowed would be decided, presumably, at the legislative stage, since a great deal of information about society, economic incentives, and so on is required for this task, which the veil of ignorance excludes from consideration (1971: 285).

One may view the difference principle as a requirement that social and economic inequalities are to be evaluated in terms of their impact on the least well-off. Rawls notes, however, that there are several senses in which the expectations of each representative person are raised by the operation of the difference principle (1971: 80).

First, it is obvious that each representative person's expectations are raised by the operation of the difference principle in comparison to an initial arrangement of absolutely strict equality (i.e., one involving equal shares of the benefits of social cooperation). In addition, expectations might be chain-connected, which means that if an advantage has the effect of raising the expectations of the representative worst-off, then it also raises the expectations of all representative positions in between (1971: 81). This does not entail that all

effects upon all levels always move together, for nothing is said of cases where the least advantaged do not gain while others do.

Furthermore, expectations might be close-knit. This means that it is impossible to raise or lower the expectations of any representative person without raising or lowering the expectation of every other representative person, especially the least well-off (1971: 80). Obviously, in such a case, all benefit by the operation of the difference principle in the sense that each person's expectations are raised.

Suppose that expectations are not close-knit. The representative least advantaged is not affected by some changes in the expectations of the representative best off, although others are. Thus, providing incentives to certain well-off individuals raises the expectations, say, of the middle class but leaves the expectations of the worst-off unchanged. In order to cover such possibilities, Rawls proposes what he calls the lexical difference principle. This is the general principle of which the difference principle constitutes merely a simplified form:

> [I]n a basic structure with n relevant representatives, first maximize the welfare of the worst off representative man; second, for equal welfare of the worst-off representative, maximize the welfare of the second worst-off representative man, and son on until the last case which is, for equal welfare of all the preceding n-1 representatives, maximize the welfare of the best-off representative man. (1971: 83)

Clause (a) of the difference principle makes mention of the just savings principle. This principle represents a solution to the complex problem of justice between generations. The life of a people is a scheme of cooperation spread out across time and intergenerational relations ought to be governed by the same conception of justice that regulates relations between contemporaries (1971: 289). Thus, a principle of just savings must be chosen from the original position, specifying how the burden of capital accumulation and of raising standards of development is to be shared between generations. In the original position, no generation has stronger claims than any other. The parties to the original position ask what is reasonable for members of adjacent generations to expect of each other, and seek to balance how much at each stage they would be willing to save for their immediate descendants against what they feel entitled to claim of their immediate predecessors. Clause (a) thus requires that the operation of the difference principle be consistent with the just savings principle. By this, Rawls means that the just savings principle acts as a constraint on the application of the difference principle. The expectations of the least well off in a given generation are to be maximized subject to the constraint that the just amount of savings has been set aside (1971: 292).

Clause (b) of the difference principle requires that fair equality of opportunity be established. This requires the establishment of various institutions whose purpose is to insure that similarly endowed and motivated individuals have similar life prospects regardless of the social circumstances of birth.

Next, Rawls devises two priority rules which apply to the two principles of justice. The purpose of the priority rules is to solve the priority problem which plagues intuitionist theories of ethics. Intuitionism is the doctrine that there exists an irreducible family of first principles from which all other ethical principles and judgments derive. In cases where the various principles conflict and give contrary directives, the intuitionist requires that we balance the principles against each other by intuition. Thus, the family of first principles is not "prioritized." Utilitarianism avoids the priority problem by reducing all moral principles to a single, fundamental first principle, namely, the principle of utility. Rawls avoids the priority problem by specifying the two priority rules. Without such rules, we would have no precise way to balance the satisfaction of both of Rawls's principles of justice. The first priority rule states:

> The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:
>
> (a) a less extensive liberty must strengthen the total system of liberty shared by all;
>
> (b) a less than equal liberty must be acceptable to those with the lesser liberty. (1971: 302)

This priority rule (The Priority of Liberty) places the two principles of justice in a serial or lexical order with the first principle lexically prior to the second. This means that a society must satisfy the first principle before the

second principle comes into play. Therefore, a departure from the institutions of equal liberty--required by the first principle--cannot be justified by a resulting increase in social and economic advantages or by increased fair equality of opportunity. A lexical order prohibits the balancing of principles. It functions like a sequence of constrained maximizing principles: any principle is maximized given the constraint that the preceding principle is fully satisfied (1971: 43).

An example of what Rawls has in mind with clause (a) of the first priority rule is the following: It might be determined that our total system of liberties is stronger if no private individual has the liberty to possess machine guns or plastic explosives. Or, perhaps our system of liberties might be strengthened if private individuals are not allowed to construct their own atomic weapons, even if they do so purely for their own scientific enlightenment. In these cases, while our total system of liberties is restricted, the remaining liberties are much more secure so that our total system of liberty is strengthened. Without the restriction, none of our other liberties would be as secure.

Clause (b) of the first priority rule requires that, in order to justify an unequal liberty, one must take up the perspective of a representative person having the lesser liberty and one must prove that the inequality in liberty would be accepted by the less favored individuals "in return for the greater protection of their other liberties that results from this restriction" (1971: 231). This qualification, that the unequal liberty must be acceptable only in return for the strengthening of the remaining liberties, is important. For without the

qualification, it sounds as if an unequal liberty is justifiable if it is acceptable as a means to any other end, whereas the first priority rule insures that liberty may be restricted only for the sake of liberty. The second priority rule states:

> The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:
>
> (a) an inequality of opportunity must enhance the opportunity of those with the lesser opportunity;
>
> (b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship. (1971: 302-03)

The principle of efficiency is the Pareto optimality criterion of welfare economics. According to this criterion, a social arrangement is optimal or efficient when it is impossible to change it without making at least one person worse off. The principle Rawls mentions requiring the maximization of the sum of advantages is simply the principle of utility.

By specifying that the principle of fair opportunity is lexically prior to the difference principle, Rawls is requiring here that the principle of fair equality of opportunity be fully satisfied before the difference principle comes into play. Thus, the expectations of the least well-off are maximized subject to the constraint that the institutions required for fair equality of opportunity are fully funded and operating properly. By specifying that the difference principle is

prior to the principle of efficiency, Rawls is requiring that the difference principle be fully satisfied before officials seek to move the economy towards its Pareto frontier. By specifying that the difference principle is prior to the principle of utility, Rawls is requiring that society must first fully satisfy the difference principle before attempting to promote total or average utility.

Rawls offers a number of detailed arguments as to why the two principles of justice constitute the correct solution to the decision problem of the original position, primarily in terms that show the two principles are preferable to (classical and average) utilitarianism. I shall only briefly review some of those arguments here.

To begin, one of the argument Rawls advances concerns the question of the burden of commitment associated with the principles of justice. He contends that the parties will not enter into an agreement which lacks the following feature: The agreement is one such that persons can rely upon one another to adhere to the principles adopted given even the worst possible consequences (1971: 176). The two principles possess this feature, argues Rawls, for the following reason. The two principles allow the parties to guarantee their basic rights and they also allow the parties to insure themselves against the worst eventualities, i.e., severe deprivation of social primary goods. Such eventualities would prove either unacceptable or excessively burdensome, as would an unequal or inadequate assignment of basic rights (1971: 176).

In addition, the principle of average utility (maximizing average per capita utility) does not insure against the worst eventualities nor does it guarantee that

equal liberties are secured under all circumstances (1971: 176-77). Were a person to gamble with his liberties and major interests hoping that the principle of average utility might bring him a greater well-being than he might receive under Rawls's two principles, he might find himself in circumstances worse than the minimum guaranteed by the two principles. For utilitarianism carries with it the possibility that the interests of some are sacrificed for the greater overall good, i.e., for the sake of a greater average of advantages to everyone. While the two principles guarantee the priority of liberty, the principle of average utility allows for the restriction of liberty, or even allows an unequal liberty, if such a policy serves to increase average utility. In such a case, this person would remind himself that the operation of Rawls's two principles would have secured him a better life.

Another argument Rawls gives for his claim that the two principles are superior to utilitarianism from the standpoint of the original position involves the question of psychological stability. A desirable feature of a conception of justice, Rawls suggest, is that it would be stable if implemented (1971: 177). A conception of justice is stable if: (a) the basic structure satisfies it principles for an extended period of time; (b) this fact is publicly recognized; (c) the public recognition of this fact leads persons to develop a desire to honor and uphold the principles of justice and also involve to themselves in institutions which exemplify those principles.

Rawls supposes that the two principles are superior to average utilitarianism as far as stability is concerned. A well-ordered society involves,

among other things, a stable scheme of social cooperation. A stable scheme is one in a state of stable equilibrium (1971: 457). In general terms, an equilibrium is stable when it is such that departures from the equilibrium state call into play endogenous forces that tend to bring the system back to the original equilibrium state. The internal restorative forces in the case of a scheme of social cooperation include a sense of justice and concern for others, both of which lead individuals to support and participate in just institutions and also make reparations when a wrong has been committed. Since stable principles of justice generate their own support, it follows that the more stable the principles of justice, the stronger the internal restorative forces will be and, consequently, the more stable the scheme of social cooperation will be. Rawls draws on certain theories of moral psychology, which I will not venture into here, to conclude that the two principles are superior to average utilitarianism as far as the question of stability is concerned, since they help realize moral development and a sense of justice to a greater degree. In short, those in a utilitarian society whose prospects have been sacrificed for the benefit of others will not feel very inspired to uphold principles of justice.

2.2 Rawls on the Basic Rights and Liberties

My aim above was to present the distinctive moral and political principles which form the core of Rawls's conception of justice. In this section I want to focus on what Rawls has to say about the basic liberties and rights, which allows us to

consider the connection between ethical principles and social institutions in Rawls's theory. As Rawls recognizes, a good ethical theory is a system of principles which explains our considered judgments in the sense that the theory shows us how our judgments are implied by the operation of a specific set of normative statements plus the relevant factual judgments (1971: 46ff.). This set of statements thus serves to unify and systematize our considered moral judgments. Furthermore, such a set of principles serves to provide guidance in areas where we have no considered judgments. In such cases, we apply the principles because they yield plausible judgments in other areas of which we are more sure.

Individuals normally develop a sense of justice once they reach a sufficient maturity. They display a skill in judging things just and unjust and in giving reasons for these judgments. Rawls suggests that we view moral philosophy as an attempt at describing this moral capacity. A conception of justice describes our capacity when the judgments that we make and the reasons that we give, are actually in accord with that conception. Of course we should only be concerned with explaining those moral judgments in which our moral capacity is displayed with the least amount of distortion. Thus, theory development involves a process of give and take between theory and considered judgment. The theoretical limit to this process of theory construction is a state of affairs in which theories and considered judgments have been altered back and forth until the best possible fit has been achieved. Rawls calls this state of affairs "reflective equilibrium" (1971: 48).

Rawls argues that the principles of justice which he derives from the original position best unify our considered judgments in reflective equilibrium, in the sense that those principles constitute the best fit between theory and considered judgments as mentioned above. The reflective equilibrium argument purports to uncover the highest-level principles that underlie our considered judgments in reflective equilibrium. These principles provide "a theory of the moral sentiments" which explicates the "principles governing our moral powers, or, more specifically, our sense of justice" (1971: 51). Thus, the principles determined in this way, tested by their congruence with our considered judgments in reflective equilibrium, constitute the principles underlying our moral faculties. As we have seen, Rawls is concerned with the normative implications of the contractarian method, as manifested by the principles of justice as fairness.

Rawls's contractarian argument is intended ultimately to demonstrate that the conception of social justice that would be chosen by the parties in the original position (a) is fair, (b) is acceptable from a moral point of view, (c) enables individuals to "express their natures as free and equal rational beings" (1971: 252), (d) is the most stable conception of justice, and (e) fosters self-respect. The role of justice is that of providing an ultimate standard assigning basic rights and duties, fixing a proper balance between conflicting claims to the advantages of social cooperation, and determining the proper distribution of the burdens of social cooperation.

The two principles of justice, together with the priority rules, guarantee each person an equal liberty, a sphere of activity in which one's claims cannot be

neglected or overridden even for the sake of a greater benefit to society as a whole (1971: 499). In thus guaranteeing to each--regardless of social position or natural endowment--such an inviolability, the principles of justice as fairness publicly express a deep concern for the autonomy of each person and enhance the good of each as well (since autonomy is surely good). This kind of unconditional concern for autonomy and liberty for each person, expressed by the two principles and priority rules, cannot be guaranteed, for example, by utilitarianism. Under utilitarian justice, the liberties of some must be traded-off in favor of the liberties of others if doing so increases the measure of social welfare

Rawls mentions a further important factor present in a society regulated by the two principles, but absent in one regulated by the utilitarian conception. The difference principle functions as a principle of fraternity. This is because the difference principle expresses a "refusal by others to take advantage of accident and happenstance" (1971: 499). In a utilitarian society, the effects of natural and social contingencies are taken as given and fed into the social welfare function. The social outcome is thus influenced by these contingencies; no attempt is made to nullify their effects or to choose institutions that are based upon considerations independent of such factors. However, by agreeing to the difference principle, people choose to structure society around a concern for a rational nature as such, independently of social and natural contingencies. But this affirms each person's good, in a public manner, for a concern for a pure rational nature is a concern for our good. Moreover, by affirming the difference principle, those who are more favored in the natural lottery choose to gain from their luck only on terms that

work for the benefit of those less favored in that lottery. Those more favored do not wish to gain unless this benefits the least well-off as well. In contrast, the principle of utility expresses no concern for the good of the least well-off, nor does it express a concern that all benefit from the process of social cooperation.

It can be seen that the two principles, when manifested in the basic structure, express the Kantian imperative that each person is to be treated as an end and never merely as a means. Under justice as fairness, each individual person is treated in accord with the principles she would freely and rationally choose in an initial situation of equality. In this sense, each is treated as an equal and as an end. Furthermore, each is guaranteed an equal liberty, which is also to treat each as an end (1971: 180). Finally, the difference principle provides an additional sense in which each is treated as an end. To treat persons as ends is to agree, Rawls says, "to forgo those gains which do not contribute to their representative expectations" (1971: 180). To treat people as means, on the contrary, "is to be prepared to impose upon them lower prospects of life for the sake of higher expectations of others" (1971: 180).

According to Rawls, from the standpoint of the original position, self-respect and effective social cooperation are both important values which it is rational to seek and secure (1971: 178). Public recognition of the fact that the basic structure satisfies the two principles gives increased support to individual's self-respect, and leads to a greater effectiveness of social cooperation. Rawls argues that the two types of respect--respect for self and respect for others--are reciprocally self-supporting (1971: 179). That is, those who respect themselves

are more likely to respect others and those who respect others are more likely to respect themselves. In addition, the absence of the respect of others undermines one's self-respect. Now, the two principles secure mutual respect among persons, for when that basic structure satisfies the two principles, everyone's good is included in a public scheme of mutual benefit. The public affirmation of this fact supports and enhances an individual's self-esteem for it affirms that each person's ends are worthwhile. Public recognition of the fact that the principles treat persons as Kantian "ends in themselves" ought to also affirm both self-respect and respect for others.

Every ethical theory works with a conception of the person, of course, whether implicitly or explicitly. The members of Rawls's well-ordered society are regarded as free and equal moral agents who can contribute to and honor the restraints of social cooperation. Each desires to take part in the scheme of social cooperation for mutual advantage. Furthermore, each is viewed as motivated by two highest-order interests (Rawls, 1982: 165-66).

The first is the interest to realize and exercise the capacity for a sense of right and justice. The sense of justice is an effective desire to comply with the principles of justice as defined by the principles of the public conception, and the desire to act on this conception is generally effective. The sense of justice also implies a desire to conform one's pursuit of the good and the demands one makes on others to public principles of justice which all persons can be reasonably expected to accept.

The second is the interest to realize and exercise a capacity to decide upon, revise, and rationally pursue a conception of the good. In addition, persons regard themselves as having a higher-order interest "in how their other interests, including fundamental interests, are regulated and shaped by the basic structure" (Rawls, 1974a: 143). They consider themselves beings capable of choosing their own ends and wish to preserve their liberty in this regard. Furthermore, each feels it legitimate to make claims on others--in the name of the conception of the good--regarding the design of institutions. Finally, each has, and views himself as having, "a right to equal respect and consideration in determining the principles by which the basic structure of society is to be regulated" (Rawls, 1975: 548). Accordingly, Rawls's theory suggests that the basic liberties of persons are intimately connected with the primary goods of respect, both self-respect and respect for others, and human dignity.

In the first principle of justice, Rawls argues that all persons have "an equal right to the most extensive total system of equal basic liberties" (1971: 302). Rawls initially outlines that the "basic liberties" are as follows:

> 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. (1971: 61).

Clearly, Rawls's outline of the basic liberties retains the same emphasis on civil and political freedoms found in the liberal-contractarian theories of rights. This emphasis is also reflected in the priority principles, which dictate the priority of liberty and hold that liberty may not be sacrificed for other social or economic goods. Rawls explains that this prioritization is necessary in order to distinguish between liberty and the worth of liberty, insofar as socio-economic elements affect "the worth of liberty, the value to individuals of the rights that the first principle defines" (1971: 204). By this Rawls means that the worth of liberty will be unequal, depending on whether a person is either wealthy or poor, educated or uneducated, and so on, such that persons will place different values on the liberties they hold. Despite this difference in the worth of liberty, however, the first principle of justice guarantees that all persons equally possess the same basic liberties.

This last point, that equality in the worth of the basic liberties is not required even though the basic liberties must be held equally, has been frequently criticized. For instance, Norman Daniels argues that the unequal worth of liberty is unacceptable in the original position. He contends that Rawls's priority principles imply that political liberty is compatible with significant social and economic inequalities. Given this assumption, the priority of liberty is "a hollow abstraction lacking real application" without the ability to effectively exercise the basic liberties (1975: 278). In other words, if the wealthy have an undue influence on the political process, it is difficult to speak of the presence of equal

political liberty. And what effect would this influence have on, say, freedom of expression or conscience?

Rawls is not unaware of this point of criticism. A response suggested by his theory is that, because the interests of different people and their own perceptions of those interests will diverge, so too will the relative value placed upon the basic liberties amongst different persons. Yet the difference in relative value and possible conflicts between liberties does not negate the principled criterion identifying and protecting certain fundamental rights. The basic liberties may have different values for different persons, but the liberties themselves are something that all individuals are entitled to independently of the socio-economic conditions affecting the worth of liberty. Thus, varying social and economic benefits do not suffice to justify a less than equal liberty or the equal possession of basic liberties; one is not entitled to "more" basic liberties if one is wealthy, nor does one possess "less" basic liberties if one is economically disadvantaged. All persons have the same status with respect to the basic rights and liberties. And, as mentioned previously, liberty is fundamental because it provides the most effective social basis for the primary good of mutual and self-respect:

> [T]he basis for self-esteem in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties. And this distribution being equal, everyone has a similar and secure status when they meet to conduct the wider affairs of society. (1971: 544)

In a just society then, liberty, not income, must be distributed equally. For Rawls, the principle of equal civil and political liberties is at bottom a normative principle directed towards the moral quality of social existence and the security of individuals' relations with one another. On this basis he asserts an integral connection between fundamental rights and liberties and the moral-political norms of personal autonomy and mutual and self-respect.

In the essays collected in Political Liberalism, Rawls expands upon his discussion of the place of basic rights in his theory of justice. Before addressing what more Rawls has to say about rights, it will be useful to briefly mention some of the recent developments Rawls's theory of justice has exhibited.

Rawls's revised theory of justice is centered on his claim in A Theory of Justice that the two principles of justice would ensure social stability since they would be the guiding moral principles adopted by the members of any well-ordered society. However, Rawls came to view this position as unacceptably idealistic, arguing that the pluralism of moral, religious, and philosophical principles as a permanent fact of modern society makes it untenable to claim that everyone would adopt the two principles as universal moral truths. In response to this problem, Rawls no longer claims that his theory ought to be regarded as a comprehensive and general moral theory; instead, it ought to be seen as a political theory of justice. By this he means that a theory of justice should carry out the practical task of developing solutions to political and public problems within society, or a group of societies. The existence of rival doctrines of the

good requires developing a theory of justice based on those points of agreement or publicly shared ideas that obtain among competing views within our society. Only in this way can stable social unity be achieved in the conditions of pluralism.

Rawls's account of justice assumes a political character, he argues, because he now takes the public political culture of a contemporary democratic society to be the background of his theory. In other words, the ideas out of which the political conception of justice is constructed and justified are held by Rawls to be implicit in that public political culture. Many of the important features of Rawls's earlier version are still operative, such as the original position, the idea of a well-ordered society and the basic structure, the notion of social cooperation for reciprocal benefit, and the need to establish a set of principles of justice necessary to achieve such social cooperation. However, these principles are now those most appropriate given that there exists an irreducible pluralism of reasonable comprehensive moral, philosophical, and religious doctrines in contemporary society (1996: 36).

Given this condition, the principles of justice are not comprehensive moral principles governing all aspects of life, rather, they are the appropriate publicly shared principles for socially distributing primary goods and governing the life of persons in the public domain. Thus, Rawls claims that the pluralism which characterizes contemporary societies is one of the basic circumstances of justice, indeed is the natural outcome in a society which respects basic rights and liberties

(1996: 66). It is important to recognize the diversity of contemporary societies since this diversity often has the potential to destabilize a well-ordered society.

More importantly, social diversity cannot be overcome simply by the rational selection of a single comprehensive moral doctrine or theory of justice overburdened with metaphysical assumptions. It is for this reason that Rawls's revised theory of justice takes its justification from ideas and institutions found in the public political culture of contemporary democratic societies.[26] Rawls describes the justification involved as one of formulating an "overlapping consensus," that is, a consensus on a "freestanding" political conception of justice that exists despite the differences due to the various conflicting religious, philosophical, and moral doctrines in contemporary society (1996: 15, 39-40). Presumably, such a consensus provides for the stable unity of political society through the engagement and toleration of social differences.

According to Rawls, an overlapping consensus on justice is political, in that it is based on public principles of justice rather than private comprehensive doctrines, and thus neutral because of its independence from such comprehensive doctrines. The goal of an overlapping consensus is to reach agreement on principles of justice in a liberal, pluralistic society in order to achieve stability and equilibrium in the public sphere, while remaining neutral toward the private sphere of each individual's personal affairs and beliefs. Overlapping consensus is necessary to Rawls's revised conception of justice because the function of political philosophy is to construct principles consistent with certain "intuitive ideas"--primarily that of citizens as free and equal persons and of a well-ordered society as a fair system of cooperation over time--found in the common public political culture of democratic society. Justice as fairness is thus conceived in

reference to a political culture which shares a liberal ideal of citizenship, i.e., of persons as free, rational, and equal. Rawls's concern that his earlier conception of justice as fairness amounted to a comprehensive doctrine is thereby eased by putting forward a revised conception appropriate for a modern liberal democracy, but not necessarily appropriate for other forms of political society.

Because the political conception of justice relies on the requirement of impartiality as to comprehensive doctrines, the veil of ignorance is still employed at the stage of the original position. Consequently, information concerning substantive conceptions of the good must be bracketed by the parties to the original position, if agreement (overlapping consensus) on the principles of justice is to be reached. Thomas Nagel questions, however, whether the necessity of agreement driving Rawls's theory here provides sufficient reason for the parties to exclude knowledge of substantive conceptions of the good. He insists that "the demand for agreement . . . must be grounded in something more basic" (Nagel, 1987: 229). Nagel suggests the need for "a kind of epistemological restraint" through which one's convictions are to be regarded "merely as beliefs" in the context of the public domain, while they may be treated as truths in the context of the private domain (1987: 229-30). Epistemological restraint would then arrive at the requirement of neutrality by holding that, even though one is absolutely convinced of the truth of one's personal religious or moral doctrines, one would refrain from advancing those doctrines as bases for the principles of a political conception of justice since they could be reasonably rejected by others holding different conceptions of the good. Although Nagel and Rawls take somewhat different routes, it seems to me that they both arrive at the same place, as is evidenced by Rawls's statement that "it is vital to the idea of political

liberalism that we may with perfect consistency hold that it would be unreasonable to use political power to enforce our own comprehensive view, which we must, of course, affirm as either reasonable our true" (1996: 138).[27]

To the problem, then, of arriving at legitimate principles to regulate social interaction given the diversity of contemporary societies, Rawls responds with two somewhat revised principles of justice, which read as follows:

> a. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
>
> b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society. (1996: 291)

The first principle of justice, which is most relevant to the present discussion, is revised to read "a fully adequate scheme of equal basic liberties" rather than "the most extensive total system of equal basic liberties."[28] Rawls makes this change because the criterion of the earlier version is "purely quantitative and does not distinguish some cases as more significant than others" (1996: 331). He then identifies two "fundamental cases" in which the basic liberties are to guarantee certain essential social conditions for human activity. The first is connected with developing and exercising a sense of justice, while the second is connected with forming, revising, and pursuing a conception of the good.[29] Rawls refers to each of these activities in terms of "moral powers" that

are developed and exercised given the appropriate social and institutional conditions or primary goods. Rawls provides the following revised list of primary goods (1996: 308):

a. The basic liberties, which are: "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally the rights and liberties covered by the rule of law" (1996: 291).

b. Freedom of movement and free choice of occupation against a diverse background of opportunities.

c. Powers and prerogatives of offices and positions of responsibilities.

d. Income and wealth, understood broadly as all-purpose means.

e. The social bases of self-respect.

Rawls offers several arguments in support of the fully adequate scheme of basic liberties and rights which focus on the political conception of the person and the two fundamental moral powers. First, Rawls argues that the political liberties (e.g., the right to vote, freedom to organize politically, freedom of speech and press) and freedom of thought are primary goods necessary to the development and use of the capacity for a sense of justice (1996: 334). Clearly, people will not be able to develop their moral sense of justice and apply it to the basic structure of society if they are denied freedom of political participation and freedom of thought and expression. Second, freedom of thought, liberty of the person (e.g., freedom of religious practice, freedom of movement, freedom from arbitrary interference or arrest) and the political liberties are also needed if

people are to be able to pursue and realize their particular conception of the good over a complete life (1996: 335).

Freedom of conscience is a particularly important example, since a person's ability to exercise her moral powers would be severely violated if she were forced into accepting different or new moral, religious, and philosophical convictions, or was not allowed to freely develop new or different moral, religious, and philosophical convictions. In addition, from the perspective of the original position, the parties do not know whether their beliefs will be those of a minority or a majority. Thus, it is reasonable for the parties to choose the most secure guarantee of freedom of conscience that is possible in order to protect their equality in either case.

Taken as a whole, the basic liberties and rights effectively advance mutual and self-respect insofar as they provide normative conditions for how people regard and treat one another in political society: "By publicly affirming the basic liberties citizens in a well-ordered society express their mutual respect for one another as reasonable and trustworthy, as well as their recognition of the worth all citizens attach to their way of life" (1996: 319). From the perspective of Rawls's revised theory, then, the basic rights and liberties are a scheme intended to protect each person's interest in living cooperatively with other persons, as free and equal, on terms of mutual respect and reciprocal benefit, under a stable framework of basic political and economic institutions organized by a shared set of principles of justice.

One might question, however, how Rawls arrives at his account as to the basis of the basic rights and liberties, since Rawls fails to clearly address the nature of these rights other than to describe them as "fundamental." Ronald

Dworkin (1977), for example, has argued that Rawls's theory of justice presupposes the basic right of individuals to equal concern and respect, so that his theory is essentially right-based.[30] According to Dworkin, such "background" moral rights are distinguishable from "institutional" or positive-law rights and are akin to the traditional notion of natural rights. Dworkin actually embraces this perspective and suggests that Rawls's original position be seen as modeling what he regards as the fundamental natural right persons have to equal concern and respect. If Dworkin's argument is correct, however, would this not present a problem for Rawls's contractarian claim that the standards of justice as fairness are derived from a rational choice procedure?[31] While I do think that Rawls "presupposes" certain basic rights, I do not think that move is fatal to his contract theory.

Recall that, in A Theory of Justice, Rawls noted that "it is appropriate to call . . . the rights that justice protects" natural rights (1971: 505, n. 30). Rawls argued that human beings are equally entitled to fundamental liberties and are "owed all the guarantees of justice" because of their "capacity for moral personality" (1971: 507, 505). While the contractarian mechanism is used to derive principles of justice from an agreement between parties to the original position, the parties to the agreements are not themselves completely devoid of certain characteristics. The description of the parties in the original position identifies certain attributes referred to by Rawls as the capacities of moral personality, that is, capacities of humans as "free and equal" moral persons. As a deontological theory, Rawls's contractarian account of justice therefore seeks to provide right principles "about the way basic social institutions should be arranged to conform to the freedom and equality of citizens as moral persons"

(1980: 517). Parties in the original position are not blank slates; they are "model-conceptions" of individuals who agree to the chosen principles of justice precisely because those principles accord with their representation as free and equal moral persons.

This returns us to our previous discussion of the two moral powers or capacities and the two highest-order interests identified by Rawls as corresponding to the conception of moral pers nhood. While Rawls's inspiration is decidedly Kantian in this respect, there are further aspects of his revised theory of justice which help us to find answers to the question raised above by Dworkin. First, given Rawls's characterization of his theory as political rather than metaphysical he emphasizes that he is not starting from assumed a priori principles; rather, he is drawing on "certain fundamental ideas seen as implicit in the public political culture of a democratic society . . . seen as a fund of implicitly shared ideas and principles" (1996: 13-14). Rawls emphasizes that his theory is constructed from the political conceptions already held by those living in a democratic culture, for the purpose of securing political agreement in spite of substantive differences that people may have with regard to philosophy, religion, and morality. Second, then, Rawls insists that his theory applies only to the basic structure of society, that is, to a society's main political, economic, and social institutions. While Rawls's theory does not rest on a single comprehensive doctrine, it seeks to provide a conception of justice on which adherents of different doctrines can converge or overlap despite their differences in matters that do not involve the public political culture. Justice as fairness thus presents a reasonable interpretation of the political ideas and traditions of a democratic culture.

Rawls mentions a number of fundamental ideas that are drawn upon in constructing his theory, such as that of society as a fair system of cooperation over time, but for present purposes we are concerned primarily with the idea "of citizens (those engaged in cooperation) as free and equal persons" (1996: 14). As Rawls has made clear, the idea of citizens as free and equal persons is to be understood as a model-conception drawn up from the historically developed shared understanding of moral personhood found in our public poli ical culture. In other words, members of democratic societies are regarded as free and equal moral persons in that, as conveyed by Rawls, they possess a capacity for an effective sense of justice and a capacity to form, revise, and pursue a conception of the good, complemented by the highest-order interests in developing and exercising these moral powers. The principles of justice are constructed by Rawls in such a way as to reflect the values of the conception of the person implicit in a democratic public political culture. The principles of justice articulated by Rawls would be agreed to because the members of such a culture favor the political ideals of freedom, equality, and the autonomy of moral persons.

Three responses are now available to the problem posed earlier. First, Rawls's contractarian theory is contextualized by the implicitly shared ideas and principles of a democratic political culture. This context provides the background for the original position, the parties in the original position, and the principles of right and justice. Second, that background of implicitly shared ideas and principles includes the conception of free and equal moral persons which is fundamental to democratic public political culture. Thus, Rawls does not presuppose a metaphysical notion of the essential human self per se, although

communitarian critics such as Michael Sandel (1982) have taken Rawls to task on this point. Rather, he pulls together the fundamental characteristics of how the members of a democratic society view themselves and each other, that is, he constructs a model-conception of our political self-understandings which have developed historically around the notion of moral personhood. Third, as a corollary to this shared conception of moral personhood, the democratic public political tradition has affirmed the idea of certain basic, inalienable rights and liberties possessed equally by all members of society that ought to be protected by political and legal institutions. Rawls's principles of justice reflect this affirmation and the conviction that such rights and liberties have a special status by virtue of their attachment to the political meaning of free and equal moral persons.

It seems safe to say in response to the issue raised by Dworkin, then, that Rawls does not sacrifice his claim to a contractarian argument merely because he contextualizes his theory with existing social values and practices, and that he does provide a political (or practical) rather than metaphysical justification for his account of the basic rights and liberties in modern pluralist societies. Whether these basic rights ought to be characterized as traditional "natural" rights is debatable and, I think, unnecessary given the entirety of Rawls's political conception of justice as fairness. It would perhaps be more useful to regard them simply as human rights, without the metaphysical baggage associated with traditional natural rights, since such rights are treated as the socially recognized and protected claims of all moral persons. By this I mean that Rawls conceives of basic rights as natural rights insofar as they are universal and unconditional, yet in order to satisfy the actualization of social justice these

rights must also be elaborated in the form of socio-political institutions, including the rule of law. Thus for Rawls, such rights are like a coin with two sides: they are not merely conventional rights that can be arbitrarily "taken away" (although they can be violated), but neither do they have a determinate existence unless they are realized and protected in the basic structure of political society. This last point is also made by Rex Martin, who writes that "For Rawls all natural or fundamental rights, insofar as they are rights, strictly conceived, are necessarily embedded in the basic structure of society" (1985: 41). It is this feature which distinguishes Rawls's conception of basic rights as "natural" from the classic natural rights theories, and leads me to suggest that the basic rights are better referred to as human rights.

2.3 Further Reflections on Rawls and Political Liberalism

I have suggested that the account of basic individual rights formulated within the framework of the political conception of justice as fairness can be referred to by a vocabulary of human rights rather than classical natural rights. This is because Rawls regards such rights in terms of our publicly justified convictions of the characteristics of moral personhood and not as mere metaphysical truths. The ethical-political theory advanced by Rawls is, then, firmly entrenched in the liberal tradition even though it challenges some of the foundationalist assumptions of that tradition. As Thomas Nagel says, "Liberalism takes various forms, but they all include a system of individual rights against interference of certain kinds, together with limited positive requirements of mutual aid, all institutionalized and enforced under the rule of law in a democratic regime"

(1991: 57). In what follows I want to examine further the broader contours of Rawls's political liberalism and especially the issue of social pluralism, which was itself a difficulty recognized by classical liberalism. The discussion will then be tied back into that of the basic rights and liberties by way of a few remarks on Michael Sandel's communitarian critique of Rawls's theory.

In the Federalist I, Alexander Hamilton addressed the responsibility of the American people "by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force" (1993: 219). What is conveyed in Hamilton's words is that the task of constituting a well-ordered political society is a deliberate undertaking requiring the intelligent and conscious participation of persons who do not want to leave their lives and their government up to the vicissitudes of fortune. While not disregarding the actual historical limits on direct participation in the public political life that were in place in 1787, it is important to recognize that the political experiment that did take place in the newly independent American colonies signaled a significant opening for liberal political thought and life. However, of the many challenges faced during the formation of the Constitution of the United States, the justification of the legitimacy of a constitutional democracy was the first and most pressing task.

Notwithstanding all of its imperfections, that experiment firmly established one essential fact of liberal politics: the public political domain is a fundamental arena of community life, and consequently of individual well-being. Alexis de Tocqueville summarized this importance when he wrote that "among

the laws that rule human societies, there is one that seems more precise and clear than all others. If men are to remain civilized or become so, the art of associating together must grow and improve in the same ratio in which the equality of condition is increased" (1990: 197). Cultivating the art of association was, for Tocqueville, linked to individual self-interest rightly understood. I take self-interest rightly understood to be the recognition that the pursuit of different individual ways of living is bound up in a s ɔcial context where participation and cooperation secure the protection and promotion of public rights and liberties that enable each person to pursue their conception of the good.

To be sure, the relations of association that we encounter in political society are not seamlessly harmonious nor always guided by reasonable self-interest. The very fact that political relations frequently exhibit the character of dissensus rather than consensus has been a central preoccupation of liberal political thought and practice. Indeed, factional and individual dissensus created by narrowly defined interests or imperatives has made and still makes the forging and maintaining of social cooperation a difficult task. And it also renders the principles legitimating a democratic polity open to manipulation. James Madison viewed "the violence of faction" as the greatest threat to civil society and popular government. Madison's anxiety about the disruptive effects of factional dissensus was the principal concern of his famous Federalist X article:

> The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government, and many other points, as

> well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to co-operate for their common good. (1993: 404)

While Madison believed that faction and dissent were part of the human condition, he also believed that the causes for that dissent could not, and should not be removed. Madison understood that human beings will embrace different doctrines that order their understandings of the world, and that disposition is something that cannot be expeditiously eliminated. Instead, Madison argued, our efforts should be directed towards negotiating and controlling the effects of dissensus. However, Madison was convinced "that neither moral or religious motives can be relied on as adequate control" (1993: 408). Neither moral virtues nor religious sentiments were sufficient enough to secure the stability of the polity from the intrigues and machinations of conflicting doctrines, and to provide a common reference to transcend those particular interests. For Madison and other framers of the Constitution, the objective was to construct a political framework that took into account the diversity of competing positions and worked to channel the ambitions and passions "in the direction of a common, public good" (Krouse, 1983: 63). The burden rested on justifying a set of political principles capable of appealing to competing interests to take up

Hamilton's call to responsibly form good government based on reasonable reflection and choice.

The political point that emerges from this discussion is that any undertaking to legitimate a form of political society must also entail a justification of the principles upon which the polity will be constructed. While some regimes may resort to terror, force, or coercion to impose the "legitimacy" of the State upon the population, democratic polities are based on the assumption that legitimacy is obtained only through the uncoerced and participatory consent of citizens who have a vested interest in the political affairs affecting their lives. Madison's project is thus in many respects no different from Rawls's theoretical experiment to justify political liberalism as the legitimating framework for a constitutional democratic regime, whose legitimacy cannot be imposed by force.

Like Madison, Rawls recognizes that political life is replete with "prejudice and bias, self- and group-interest, blindness and willfulness" which can turn political practices into, as Ambrose Bierce defines it, "the conduct of public affairs for private advantage."[32] And just as Madison noted that "neither moral or religious notions can be relied on" for negotiating the contested terrain of political society, Rawls, too, is concerned with providing a viable framework for a constitutional polity that does not rely on comprehensive moral, religious, or metaphysical doctrines. In terms reminiscent of Madison, Rawls argues that "no general moral conception can provide a publicly recognized basis for justice in a modern democratic society" (1985: 225). For Rawls, the single most important conception for working out the basic structure of a modern constitutional democracy into "one unified system of social cooperation" is a

free-standing political conception of justice as fairness that would be, "so far as possible, independent of controversial philosophical and religious doctrines" (1985: 223). The political conception of justice as fairness would navigate the sometimes treacherous fields of metaphysical claims of universal truths, human nature, and especially transcendent goods that would, more than likely, impede the practical political undertaking of justifying principles of a democratic political society in non-metaphysical terms.

Since liberalism embraces a range of fundamental freedoms and rights that give great latitude to how human beings will pursue the creation of fulfilling individual lives, "deep disagreements . . . as to how the values of liberty and equality are best realized in the basic structure of society" invariably take place (Rawls, 1985: 227). Many of these deep disagreements stem from incommensurate conceptions of the good that inform individual private lives spilling over into the public political domain where they become instruments for narrowly-vested political purposes. This is evidenced, for example, in the domestic political affairs of the United States, where a politicized religious extremism has mobilized extensive resources for the purposes of imposing a religious comprehensive doctrine on private and public morality, sexual relations and public education that would threaten many of the basic rights and liberties central to that constitutional representative democracy. This particular example illustrates the kind of intervention into political society with which Madison was so concerned, where individuals mobilize to "use the coercive apparatus of the state to win for themselves a greater liberty or larger distributive share on the grounds that their activities are of more intrinsic value" (Rawls, 1985: 229).

The conflicts generated by the clashes between religious extremism and advocates of liberal political principles of fundamental rights and freedoms has not been altogether reasonable or tolerant. Madison would certainly consider such a situation as threatening to the stability of popular government because of the manner and methods by which certain factions were unreasonably questioning the legitimacy of its democratic framework. Rawls would also view this situation as threatening, because "certain fundamental questions give rise to sharp and divisive political controversy, and it seems difficult, if not impossible, to find any shared basis of political agreement" (1985: 226). But dissensus between citizens and political factions also arise over issues of systemic injustice that reveal varying degrees of disregard for substantive liberal principles, such as the long-term struggle to overcome racial-ethnic discrimination or fully implement 14th Amendment equal protection guarantees of constitutional civil and political rights in the face of unfair state practices.

However, individuals or groups which call into question the "fundamental intuitive ideas" as they are worked into a liberal political society or attempt to manipulate the constitutional or legislative framework to the disadvantage of the rights and liberties of other persons, force social tensions into what can be considered a legitimation crisis.[33] I believe that Rawls's theoretical experiment presupposes the contingencies of periodic legitimation crises that beset liberal democratic societies and challenge the coherency and justification of liberal principles. To a large degree these emerge as challenges to the two fundamental components of Rawls's conception of justice as fairness: rights and liberties and a fair distribution of resources. Invariably the relations between the individual, government, and society serve as the lens through which attacks against rights,

liberties, and fair distribution of resources are focused. In this light justice as fairness, the priority of right, and overlapping consensus can be considered as three theoretical tools with practical application for confronting conditions which threaten the principles legitimating the stability and unity of a constitutional polity. Crisis situations provide a crucial opportunity for reassessing the tools and principles employed for creating a just and reasonable framework "sufficient to underwrite a just constitutional regim." (Rawls, 1985: 247).

One of the many complaints leveled against liberal political philosophy is that the commitment to individualism, grounded on mistaken metaphysical premises, necessarily results in insufficient attention being given to the fact that individuals are embedded in and never detached from the communal, social, and cultural relations that contribute to forming the individual's identity and moral linkages.[34] These criticisms, at least in regards to Rawls's work, were no doubt principally inspired by his ideas of the veil of ignorance with an "unencumbered self" placed in the original position, allegedly "independent of its contingent wants and aims" (Sandel, 1982: 20). One of the most vocal critics has been Michael Sandel, who writes:

> What is denied to the unencumbered self is the possibility of membership in any community bound by moral ties antecedent to choice; he cannot belong to any community where the self itself could be at stake. Such a community--call it constitutive as against merely cooperative--would engage the identity as well as the interests of the participants, and so implicate its members in a citizenship more thorough-going than the unencumbered self can know. (1982: 19)

But Sandel's objection misses the practical aim that Rawls is working towards, namely, "to provide a more secure and acceptable basis for constitutional principles and basic rights and liberties" (Rawls, 1985: 226). This is not an easy task, as Rawls well understands. He recognizes the fact that individuals are situated in communities, and that the diversity of those settings also implies "a diversity of doctrines and [a] plurality of conflicting, and indeed, incommensurable, conceptions of the good affirmed by the members of existing" communities (1985: 225). The fact that there are different settings "constitutive" of moral ties, identities and interests motivates Rawls, as it did Madison, to undertake the serious practical task of elaborating a non-metaphysical conception of justice that steers clear of controversial religious, moral, or metaphysical doctrines. Individuals embodying different frameworks of values do not always agree or cooperate in a reasonable manner over what should be the political principles of a democratic polity nor how those principles will be implemented and realized in political, social, and economic life. Thus Rawls is not fabricating an abstract individual that can assume a transcendent kind of justice, because the aim of the political conception of justice as fairness is practical in that it "can serve as the basis of informed and willing political agreement between citizens viewed as free and equal persons" (1985: 230).

As I argued in the previous section, citizens viewed as free and equal in no way suggests that they are somehow magically unencumbered from their constitutive identities or comprehensive doctrines. Rawls's endeavor to recast the social contract in terms of an overlapping consensus requires negotiating the empirical contingencies of individual difference, social dissensus, and histories

that are the "all-encompassing framework" in which we are embedded. Yet as Rawls states, "the reason why the original position must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principles of political justice between free and equal persons must eliminate the bargaining advantages which inevitably arise within background institutions of any society as the result of cumulative, social, historical, and natural tendencies" (1985: 235-36). Like Madison, Rawls is not concerned with eliminating the causes of dissensus but in practically navigating the effects in such a way as to "shape into one coherent view the deeper bases of agreement embedded in the public political culture of a constitutional regime and acceptable to its most firmly held considered convictions" (1985: 229).

As we have seen, Rawls presupposes the general fact that a democratic political culture contains certain fundamental intuitive ideas concerning rights and liberties that can be worked up into a political conception of justice suitable for a democratic constitutional regime. We can also grant that for any public political agreements to be achieved, many of the fundamental intuitive ideas must also have found their way, albeit perhaps somewhat altered, into the background doctrines of civil society. The original position only serves to model what Rawls considers fair conditions whereby free and equal citizens can elaborate the terms of social cooperation in the case of the basic structure of society. In this manner, a framework could be secured enabling individuals to pursue both private and cooperative goods over a complete life. Sandel's argument that Rawls's individual could not experience either a constitutive community or a deeply meaningful citizenship begins to lose its plausibility.

However, Sandel does not stop there. He is also very disturbed by the priority Rawls places on universal rights for setting limits on permissible ways of life, as well as for their implication in creating the abstract free and equal citizen. Sandel is concerned that the "universalizing logic of rights" has displaced direct political life from smaller fora of participation to the universal, comprehensive dimension of the State. This he considers to be the supposedly dangerous contemporary predicament of the "unencumbered self." Sandel offers the following description of the current political situation as he perceives it:

> [I]t is a striking feature of the welfare state that it offers a powerful promise of individual rights, and also demands of its citizens a high measure of mutual engagement. But the self-image that attends the rights cannot sustain the engagement.
>
> As bearers of rights, where rights are trumps, we think of ourselves as freely choosing, individual selves, unbound by obligations antecedent to rights, or to agreements we make. . . .
>
> In our public life, we are more entangled, but less attached, than ever before. It is as though the unencumbered self presupposed by the liberal ethic had begun to come true -- less liberated than disempowered, entangled in a network of obligations and involvements unassociated with any act of the will, and yet unmediated by those common identifications or expansive self-definitions that would make them tolerable. As the scale of social and political organization has become more comprehensive, the terms of our collective identity have become more fragmented, and the

forms of political life have outrun the common purpose needed to sustain them. (1992: 28)

Sandel paints a grim tableau of life in a liberal democratic polity, but his reflections are part nostalgic fiction and part misconstrual of the landscape we live in. The nostalgic fiction is implicit in the above characterization of liberal democracies as an ensnaring matrix of abstracted rights, obligations, and entanglements that disempower individuals from being able to exercise will-governed acts of genuine meaning entwined with collective identities and common purposes. According to Sandel, true individuality cannot be experienced in the anomic, fragmentary spaces of the all-encompassing welfare state where we are compelled by rationalized obligations to engage with other individuals. Instead, the saving grace that lies within Sandel's denunciation of liberalism is some unnamed living solidarity of persons in a community defined by antecedent moral bonds and common purposes that create a "true" local political life. In that association, rights are not necessary as trumps against others because they would be irrelevant in such a community of self-sustaining mutual aid and respect. But just where does Sandel's counter-example exist? Sandel's criticism clearly misses the sources of fragmentation and disempowerment to which he should be directing his attention, such as unequal and unjust economic development and consumption, decaying urban spaces, degraded environments, extensive movements of populations, social and familial violence, and so forth, which cannot be so conveniently blamed on liberalism. In many respects, the invention of universal rights or, better yet, human rights has proven to be one of the most effective tools for addressing assaults on human well-being and dignity.

Rawls's priority of right is an essential element in his political conception of justice as fairness in that "the principles of (political) justice set limits to permissible ways of life; hence the claims citizens make to pursue ends that transgress those limits have no weight" (1988: 251). John Stuart Mill succinctly explained the purpose of such a political morality in the well-known third chapter of his On Liberty:

> That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at the present of recognizing all the sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. (1991: 63)

In minimal terms, rights can be considered as deliberately considered rules in an informal or formal rule-governed system which protect certain claims of right-holders by imposing reciprocal duties. However, I believe that this does not fully convey the sense of mutuality, solidarity, and reciprocity implicit to human rights, nor does it capture the importance Rawls gives to the complementarity between right and good. Human rights should be understood both as positive principles invoked by moral persons to aid and cooperate with other individuals in securing, protecting, and promoting the full realization of fundamental rights and liberties, and as negative principles not to impede or coerce other individuals from participating in securing, protecting, and promoting the conditions in which individuals will be enabled to fully develop their moral powers. As Rawls puts it:

> [T]he equal liberties and freedom of speech and thought enable us to develop and exercise these powers by participating in society's political life and by assessing the justice and effectiveness of its laws and social policies; and liberty of conscience and freedom of association enable us to develop and exercise our moral powers in forming, revising, and rationally pursuing our conceptions of the good that belong to our comprehensive doctrines, and affirming them as such. (1989: 262)

In his work, Rawls is concerned with distinguishing that his political conception of justice elaborated through political liberalism is not a comprehensive doctrine embracing the whole of life and defining the moral boundaries for each kind of relation we are engaged in. For political liberalism to attain that kind of totalizing insinuation into a democratic pluralistic civil society, "only the oppressive use of state power" could be used to "maintain a continuing affirmation of one comprehensive . . . doctrine" (1989: 246). Rawls believes that a constitutional democratic state should be grounded in the fundamental intuitive idea of society as a fair system of cooperation between free and equal persons who are fully cooperating members of society over a complete life. Rawls's version of the social contract is replete with the importance of participation, cooperation, civility, tolerance, mutual and self-respect: terms that no doubt Sandel would consider as exemplary of social relations in his meaningful, non-contractarian community. But the difference is that Rawls stresses the importance of individuals having the appropriate conditions of fundamental rights and liberties to make the important deliberations and decisions which affect their lives. To develop and exercises one's full moral

powers, a setting is needed where individual action and social cooperation are "guided by publicly recognized rules and procedures which those who are cooperating accept and regard as properly regulating their conduct" (Rawls, 1985: 232).

Rawls of course sees these rules and procedures as based on the principles of justice as fairness. In order for political liberalism to justify its principles as a legitimating framework for the basic structure of a democratic polity a reciprocal tolerance is needed between those principles and other religious, philosophical, or moral comprehensive doctrines. This reciprocal tolerance is a necessary feature of Rawls's well-ordered society where there is "a public understanding not only about the kinds of claims it is appropriate for citizens to make when questions of political justice arise, but also about how such claims are to be supported" (1988: 255). The key is revealed in Rawls's understanding that right and good are complementary, and provide that nexus for finding "a shared idea of citizen's good that is appropriate for political purposes . . . that is independent of any particular comprehensive doctrine and hence may be the focus of an overlapping consensus" (1988: 256).

The right and the good are complementary in the sense that publicly affirmed rules and regulations covering permissible and impermissible actions do not force a single metaphysical good on all individuals, but contribute to public conditions being secured and promoted that enable each person to pursue his or her conception of the good, either singularly or in community, as long as it does not transgress the limit of permissibility. As Rawls explains, "permissible comprehensive conceptions of the good, however distinct their content and their related religious and philosophical doctrines, require for their advancement

roughly the same primary goods, that is, the same basic rights, liberties, and opportunities, as well as the same all-purpose means such as income and wealth, all of which are secured by the same social bases of self-respect" (1988: 257).

Sandel's criticism that the "universalizing logic of rights" is somehow the cause of alienation and fragmentation overlooks the good that has been achieved through the post-Second World War human rights system, especially when combined with democratic practices. It also overlooks that human beings all over the planet who, on a daily basis, face illiberal regimes and practices aspire to be the moral subjects of human rights and appeal to them for protecting their well-being and dignity. It is evident that comprehensive doctrines that only minimally, or not at all, embrace the kinds of principles espoused in Rawls's political liberalism have taken unfair advantage of political, social, and economic relations in such a fashion as to undermine the stability of human rights as the primary core of justice as fairness.

The two principles of justice seek to enable all persons, regardless of their identities or histories, to equally benefit from the scheme of human rights and liberties, and provide a limiting restraint to inequalities through an ethic of sharing the burdens of inequalities more equally. Since we are indeed situated in particular social contexts that are constitutive of our diverse characters, values, and goods, Rawls's rights and principles of justice serve as a threshold of dignity which should guide our relations with other persons and give us the permissible latitude to choose how we will lead our lives. However, Sandel argues that these terms of the social contract by "their very arbitrariness" of imposing "entanglements" of rights and claims and the imposition of a "false" ethic of sharing are remote from the particular moral ties that constitute the real bonds

where sharing is something more than the redistribution of resources for the public good of a "concatenated collectivity" (1992: 20-24). But why should we consider that human rights or an ethic of sharing the burdens of inequalities are somehow disingenuous compared to what might exist in some romanticized "traditional" community? Do rights, liberties, or an ethic of sharing resources to secure citizen's fundamental needs fail some test of substantiality whereby they cannot serve as basic values constitutive of who we are as human beings engaged in both common and private purposes?

Sandel in fact fails to provide any plausible evidence to show that some traditional constitutive community which regards "commonality" as fundamental could provide the conditions by which a human being can fully develop his or her moral powers as an individual and citizen in a polyethnic culture. Indeed, the 20th century struggle for human rights and freedoms has been principally against the prejudices of traditions that discriminate against "otherness." Human rights as part of a society's constitutional framework also place obligations on legislative majorities to respect and protect those rights regardless of the particularities that differentiate us as human beings. This is where Sandel and other communitarians misunderstand what the liberal individual is and the role that human rights play in today's pluralist political and civil societies. Human rights serve not as the identification of a single, unchanging nature for all human beings. They are, instead, political and ethical principles that human beings have worked out for treating each other's well-being and dignity while respecting the differences that otherwise distinguish them.[35] Thus, as Thomas Nagel recognizes, the "radical communitarian view that nothing in personal life is beyond the

legitimate control of the community if its dominant values are at stake is the main contemporary threat to human rights" (1995: 106).

The centrality of civil and political rights to attaining and sustaining this project of obtaining human well-being is of great ethical importance. Freedom of expression, belief, conscience, religion, association, equality before the law, and security of person, all contribute a dynamic component to a liberal political society by the very fact that the individuals constituting it are empowered via political principles with moral import. When combined with the cultivation of just and fair conditions supportive of social cooperation and individual choice, reciprocally complementary experiences of self- and mutual respect are bound to make both public and private lives substantially meaningful and connected. As Rawls notes (1989: 249), differences and diversity are then accepted as a healthy state of public democratic culture. It is through these practices and principles actuated within our lives that a liberal political society can generate commitments to cooperatively justify its principles by addressing the affairs that are important to our lives as members of that society and by legitimating its constitutional stability through protecting individual rights and liberties. Rawls's justice as fairness and the priority of right serve not only as non-metaphysical principles for securing the conditions necessary for human dignity, but also for establishing fair rules and conditions of cooperation and participation so that different individuals can work out the everyday essentials of living together.[36]

It is true, however, that another difficulty, which I have purposely avoided up to this point, is presented with Rawls's theory of basic rights and liberties. Rawls's political conception of justice draws upon the public political culture of Western democratic societies. Consequently, Rawls stipulates that one of the

basic assumptions on which the application of his conception to the basic structure of society rests is the following:

> I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. . . . That a society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details. At some point a political conception of justice must address the just relations between peoples, or the law of peoples, as I shall say. (1996: 12)

Clearly, the theory of justice that we have analyzed up to this point is meant by Rawls to address the issue of justice within a single society. As Rawls admits, this leaves issues of international justice out of the picture. Yet it is certain that the questions of international justice and human rights are at the heart of the problems with which Rawls's political philosophy are ultimately concerned. This is particularly apparent in Rawls's focus on the basic rights and liberties of persons in today's culturally diverse societies. But does Rawls's assumption that his theory is constructed in terms of a "closed" liberal-democratic society negate the possibility that principles of political right are applicable across the boundaries of diverse political cultures? To address this question, what must be examined next is how well Rawls's theory succeeds in developing a conception of international justice consonant with the domestic conception of justice and, ultimately, with the notion of universal human rights.

Chapter Three

Rawls and the Question of International Justice

Although the discussion in the previous chapter sought to establish that Rawls's theory of justice contains a central role for basic human rights, it has not yet been established that Rawls provides the kind of extension of justice as fairness to an international level that must be regarded as a corollary to the modern conception of human rights. Over the course of the next two chapters I intend to establish that Rawls's work does indeed allow for that extension, although I will argue that Rawls unnecessarily limits the range of that extension.

The purpose of the present chapter is to explore how the domestic theory of justice as fairness presented in A Theory of Justice might be expanded into the international domain and thus provide the framework of a theory of international justice that is both consistent with Rawls's overall treatment of justice and yet also develops some of those areas that remain unexplicated by Rawls. Doing so will bring out some of the conceptual difficulties and practical consequences of extending justice as fairness on an international scale. The next chapter will then carry the discussion forward into the context of Rawls's more recent thoughts on international justice and human rights.

To begin with, then, in section one I shall review what Rawls has to say about international justice in A Theory of Justice and then over the course of the chapter flesh out those rather sparse remarks into what I hope is a more revealing

discussion of international justice as fairness. In the second section, I draw attention to two fundamental problems in Rawls account of international justice: first, the priority of the domestic original position over the international original position; and second, the analogy he draws between individuals and states. In the third section, I examine Thomas Pogge's arguments concerning a Rawlsian global justice as they relate to the issue of diversity or social pluralism. This leads, in the fourth section, to a discussion of the principle of self-determination and how certain difficulties with this principle problematize the law of nations scheme endorsed by Rawls. In section five, I consider the possibility of extending Rawls's two principles of justice to a global scale and some criticisms that might be raised against this move.

3.1 Rawls's Account of International Justice

In A Theory of Justice, Rawls divides the problem of social justice into three stages: that concerning the justice of domestic institutions; that concerning individuals; and that concerning international justice and the conduct of states (1971: 377). In the first two stages, the primary subject of justice is essentially the basic structure of domestic society, that is, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. In the previous chapter I discussed the principles of justice in light of which the basic structure of society can be evaluated are specified by means of Rawls's hypothetical social contract and rational choice procedure.

According to Rawls, once the principles of justice as they apply to the basic structure of domestic society and to individuals have been derived, one may extend the interpretation of the original position and "think of the parties as representatives of different nations" choosing together the fundamental principles to adjudicate conflicting claims among states (1971: 378). Those parties to the international original position are, as were those to the domestic original position, represented as rational (choosing among principles by reference to the interests of their nations as defined by the principles of justice already acknowledged), symmetrically and equally, and as deciding for appropriate reasons; the parties know nothing about the particular circumstances of their own society, its power and strength in comparison with other societies, nor do they know their place in their own society. However, Rawls suggests that the parties do know that nation-states are the historical reality of the day and that nation-states, like individuals in society, will have conflicts of interest (1971: 108ff, 378). "This original position," writes Rawls (1971: 378), "is fair between nations; it nullifies the contingencies and biases of historical fate." I will argue in the sections which follow that the international original position offered by Rawls does not in fact nullify certain significant historical contingencies and biases, and that his theory is thus flawed.

As Rawls's aim here is an account of international justice, the nations so represented need to choose principles to order their interactions and to adjudicate any conflicting claims between parties. Before the principles of justice that would be chosen under this model can be indicated, however, it is first necessary to briefly describe the formal constraints of right that would apply to the choice procedure of the parties. The first constraint on the parties is that any set of

possible principles of international justice must be narrowed such that their derivation is consistent with the institutional and individual principles of justice already chosen in the domestic context of justice as fairness. Just as the individual and social institutional principles of the domestic context together had to form a coherent conception of justice as fairness, so too are international principles to conform to the previously established conception of justice.

The second constraint is based upon one of the conditions of the rationality of the parties. According to the condition of strict compliance, the principles finally acknowledged will constitute the basis for an ideal theory of international justice. In Rawls's words, "the parties can rely on each other to understand and act in accordance with whatever principles are finally agreed to. Once principles are acknowledged the parties can depend on one another to conform to them" (1971: 145). This constraint allows for the parties to concentrate on selecting those principles of reciprocal advantage for well-ordered nations that will become the foundation for the basic institutions of a well-ordered society of nations.

Given these two constraints, the parties can now consider the principles to be chosen with respect to the matter of international relations. In Rawls's opinion, the "familiar principles" of international law, or what he refers to as the law of nations, would be chosen under this scenario (1971: 378). The first principle of international justice to be chosen is apparent given the conception of the parties as free and equal. This is the basic principle of equality: "Independent peoples organized as states have certain fundamental equal rights" (1971: 378). This principle analogizes the status of individuals as free and equal to that of states, and is the consequence of the transfer of moral status of

individuals to nation-states based upon the characterization of the parties to the international original position as representatives of states. Rawls remarks that the principle of equality between nations, that is, the idea that the fundamental rights and obligations of all nations are the same, is a long-standing principle of international law, indeed is the "basic principle of the law of nations" (1971: 378).[37] The principle of equality seems required, of course, by the very structure of the original position and the constraints outlined above, since it is fundamental to establishing reciprocal relationships for mutual advantage and cooperation. Rawls's point here is that international law would not retain its legitimacy and force if nations were not treated equally under it.

The second principle to be chosen is that of self-determination, that is, "the right of a people to settle its own affairs without the intervention of foreign powers" (1971: 378). This principle means that each nation's conception of the good, being protected by the principle of equality, is deemed legitimate and of equal worth. Because the particularities of specific conceptions of the good are unknown behind the veil of ignorance, the parties could not reasonably agree to a principle which would allow ranking of differing conceptions, thereby putting their own nation's conception of the good in jeopardy. Any other principle permitting one nation's predominance over or interference in the internal affairs of another state, due solely to differing conceptions of the good, could not be allowed and would violate the principle of equality. Rawls claims that the principle of self-determination thus carries with it a right to non-intervention and a right to self-defense, with the latter right implying principles of just war (jus ad bellum and jus in bello). Rawls's brevity on the connection between self-determination and non-intervention leaves much to be desired, since he seems not

to recognize that the right to be free from foreign interference can operate so as to preclude humanitarian intervention or even investigation into the so-called internal affairs of a sovereign state in the event of unjust violence or abuses of human rights on the part of that state.[38] Rawls would reply, of course, that his comments on self-determination are given with the assumption that more-or-less just states are in view under an ideal theory of justice as fairness and strict compliance. I return to this matter below.

The third principle acknowledged by the parties in the original position is the basic principle of obligation, traditionally known as the principle of pacta sunt servanda ("treaties are to be observed"), which means that states must carry out their treaty obligations in good faith and without exception (1971: 378). This principle is needed if the international order is to be given a reciprocal structure. It can be viewed as encompassing the individual analog of fairness, combined with the duty of mutual respect, already acknowledged at the domestic level. Consequently, nations must acknowledge and take responsibility for their international claims and actions. The principle of obligation thereby establishes the contours of reciprocity in international relations.

According to Rawls, then, these three principles (and their corollaries) taken together form a foundation for erecting a basic structure of international justice. These principles are intended to represent the final stage of a coherent theory of justice as fairness when aligned with the previously derived principles of individuals and domestic social institutions. Although the discussion of international justice provided by Rawls in A Theory of Justice is clearly minimalist (two pages out of a book of nearly 600 pages) in comparison to his treatment of justice as fairness at the domestic level, Rawls nevertheless indicates

an expectation that his domestic theory can be extended such as to cover international affairs. Rawls himself admits, however, that A Theory of Justice "does not pursue these larger matters" (1989: 252). In the sections that follow I discuss a number of problematic assumptions contained in Rawls's theory of international justice and propose several changes to his theory that would, I think, result in a fuller conception of international justice which nevertheless retains its Rawlsian character. [39] In the next section, I address some of the difficulties presented by Rawls's account of the international original position.

3.2 The International Original Position

Rawls characterizes the international original position as follows:

> Let us assume that we have already derived the principles of justice as these apply to societies as units and to the basic structure. Imagine also that the various principles of natural duty and of obligation that apply to individuals have been adopted. . . . Now at this point one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states. . . . Once again the contracting parties, in this case representatives of states, are allowed only enough knowledge to make a rational choice to protect their interests but not so much that the more fortunate among them can take advantage of their special situation. . . .

> Justice between states is determined by the principles that would be chosen in the original position so interpreted. (1971: 377-78)

As was mentioned above, this original position is considered fair by Rawls such that it "nullifies the contingencies and biases of historical fate" (1971: 378). The point in ideal theory of nullifying the effects of specific historical contingencies is to ensure that the parties to the original position will not exploit such contingencies to their own advantage when it comes to the choice of principles of international justice. The question that I will examine here, however, is whether the original position and the veil of ignorance limitations portrayed by Rawls do meet that desired purpose.

Thomas Pogge takes the position that Rawls does not, at least in A Theory of Justice, distinguish between two possible readings of his interpretation on how the contractarian device is to apply at the international level (1989: 242ff.). On one possible reading, R_1, the parties to the international original position represent persons from the different societies; on another possible reading, R_2, the parties to the original position represent states. In both cases, of course, the international original position is utilized only after the principles of justice have been chosen at the domestic level.

It seems clear, however, that Rawls intends the parties to the international original position to no longer be mutually disinterested persons. Rather, given Rawls's insistence that the international original position only comes into play subsequent to the establishment of domestic "societies as units" at an earlier stage, it is certain that the participants are literally, in Rawls's words, "representatives of different nations" and "representatives of states" (1971: 378).

Consequently, the parties are to be understood in Rawls's account as representatives of nation-states, and not of persons, in an initial situation where they are to choose principles for structuring the relations between states.

Pogge's claim that two possible readings of Rawls's description of the international original position can be found in A Theory of Justice thus appears unfounded. It does nevertheless point to what I think are the two fundamental flaws of that very description: first, the priority of the domestic choice situation over the international choice situation and, second, the analogy between individuals and states. More specifically, I am concerned that each of these features in Rawls's theory undermines the attempt to establish a genuinely fair choice situation from which principles of international justice can be derived in ideal theory.

The problem with Rawls's prioritization of the domestic over the international choice situation is that it negates the ethical advantages gained through the utilization of the veil of ignorance. Rawls concedes that the parties to the international original position "know nothing about the particular circumstances of their own society, its power and strength in comparison with other nations" (1971: 378). However, the parties do know a most important fact, namely, that the societies of the participants are nation-states and the parties are to serve as representatives of those states. This is problematic because the idea and existence of the nation-state is a uniquely modern, historically contingent factor that ideally ought not to have an influence on the selection of principles of international justice. In other words, Rawls assumes without justification that international justice is concerned only with relationships between states and not relationships between persons who reside in various societies.

This problem is exacerbated by Rawls's presupposition that the domestic principles of justice apply to societies that are "self-contained national communit[ies]" or "more or less self-sufficient association[s] of persons" (1971: 457, 8). While Rawls insists that the priority of the domestic over the international choice situations is intended to guarantee that the parties to the international original position are states that have already adopted domestic principles of justice, there is no similar guarantee that the parties will be willing to extend the same principles to others when it comes to dealing with one another solely as sovereign states. In setting up the international original position as he does, Rawls unnecessarily burdens it with the type of contingent historical elements missing from the domestic original position. If domestic societies are conceived as more or less self-contained or self-sufficient states, what motivation might they have for agreeing to principles of justice that would govern international relations? Even an inter-state system in which each state is committed to ensuring justice within its own borders might fall short of an international society based on equal rights and liberties for all persons, wherever those persons might happen to reside at any given time. In Rawls's description of the international original position, in which the parties are states, the right to political equality, fair equality of opportunity, and the difference principle extend up to but not necessarily beyond the national level.

The problem of prioritizing the domestic over the international is further reflected in the analogy Rawls draws between individuals and states. In particular, Rawls analogizes the interests, equality, and autonomy of persons with the interests, equality, and sovereignty of states (1971: 378). In this way he apparently derives a convenient device for shifting the identities of the parties to

the original position. In the domestic original position, the participants are individual persons; while in the international original position, the participants are representatives of states. In both cases the parties are conceived of as "free and equal" and having similar interests. There are, however, significant differences between the two types of participants which I believe would have a negative impact on the principles of justice that would ultimately be chosen. Moreover, it is not clear to me just how the participants can move from their status as individuals to that of state representatives unless Rawls incorporates several unnecessary assumptions into his theory.

In the domestic choice situation, of course, the aim is to select those principles that will guarantee individuals an equal or equitable share of those social primary goods necessary in a just and well-ordered society. The principles of justice adopted are therefore those that are in the best interest of individuals, within a situation in which the constraints of having a morality are enforced. As a result, the domestic original position is said to represent fair conditions among free and equal moral persons, that is, persons who possess the capacity to exercise their moral powers with respect to how a just society ought to be organized.

In the international choice situation described by Rawls the aim and method of ideal theory appears to take a backseat to the dictates of a realist view of international politics. No longer are the participants moral persons, rather they are fully formed nation-states, or the "representatives" of those states. The problem here, I want to argue, is that this move changes the entire complexion of a Rawlsian ideal theory of justice. This is because Rawls overdetermines the characteristics of the original position: the question is not left open as to what

type of system of international justice will be adopted by the participants to the original position, since Rawls has already defined those participants as nation-states and has already indicated that international justice is relevant only insofar as it can "adjudicate conflicting claims among states" (1971: 378). Consequently, the interest that is to be taken into consideration by each contracting party when selecting the principles of international justice is the "national interest" of the state apparatus, which does not necessarily coincide with the interests of moral persons (1971: 379). To repeat the point bluntly, the representatives of states who function as parties to the international original position are there to "protect their [nation's] interests" (1971: 378). It is little wonder then that Rawls observes that "there would be no surprises" among the principles of international justice adopted in such a choice situation, since the principles would be the "familiar ones" of the traditional law of nations (1971: 378). Yet it is not at all clear to me that, if the participants were moral persons such as those conceived in Rawls's domestic theory of justice, they would in fact adopt such all-too-familiar principles.

I would argue that the concept of international justice differs from that of domestic justice insofar as it refers to a set of (moral and political) principles that transcend the narrow interests defined by a nation-state's historically-contingent borders. It is from this perspective that Rawls's account of international justice succumbs to the present day dictates of realism in international politics. And yet an ideal theory of international justice should be concerned not so much with what is but with what ought to be, not so much with adopting "familiar" rules of political realism but with articulating principles with which to evaluate those existing rules and suggest goals for transforming them. An ideal theory of

international justice must be, in the end, about how the world ought to be organized. If that is the standard, then Rawls's theory aims too low.

3.3 Some Problems with Rawls's Theory of International Justice: Diversity and Self-Determination

In the argument that has been offered so far I have suggested that Rawls's description of the international original position is flawed because, first, Rawls prioritizes domestic justice above international justice and, second, he replaces the interests of persons with those of states in the choice situation and thereby assumes that the interests are analogous. More needs to be said, however, about how these features of the international original position result in principles of international justice that do not, in important respects, live up to the same rigorous standards of domestic justice proposed by Rawls. In this section I consider some of the principles of international justice that Rawls claims would be adopted by the parties to the international original position as modeled in A Theory of Justice, and show how these principles are deficient for purposes of constructing a robust theory of international justice.

Thomas Pogge's contention that Rawls does not clearly distinguish between two possible readings of his account of the international original position, while not necessarily accurate, can nevertheless prove useful as a starting point for our analysis. Pogge's criticisms of Rawls's views on international justice are grounded on Rawls's endorsement of the "familiar principles" of international law and the two possible readings on how the contractarian device is to be applied at the international level. On reading R_1, it

will be recalled, the global parties represent persons from the different societies; on reading R_2 they represent states. Pogge's argues that the endorsement of a conventional version of the law of nations and the two readings go against important Rawlsian commitments, specifically the need to focus on the basic structure of society as well as the moral conception of persons.

Pogge contends that the absence of a single world government is not the fundamental problem facing international justice. Instead, according to Pogge, the weakness of international law is due to the fact that states presently operate within a realist political system in which international relations are a modus vivendi, that is, states are concerned only to further their own interests and inter-state relations are carried out only on prudential grounds. In such a system, relatively weak international institutions are the result of governmental practices based on prudential, rather than moral, reasons informed by the current distribution of power. As a result, finding a moral reason to support some part of this international order--for instance, international human rights agreements--is very difficult, since such agreements can be seen as just another step in prudential behavior.

Given an intergovernmental modus vivendi, assurance and stability problems in international relations are acute. In a modus vivendi, even though prudential equilibrium is necessary--all parties must have a reason to participate on the going terms--the terms of such equilibrium are not. The competition over the balance of power and over the terms of the modus vivendi is unrestrained and unlimited. Despite the fact that a modus vivendi is a very malleable arrangement, perhaps preventing an all-out war in the long run (the malleability of the terms accommodates changes in the power and situation of the parties), it is precisely

this malleability which fosters short-term instability and detachment from higher-order moral values. For instance, the prudentially-determined survival of a nation's own values, as well as ensuring that a decline in power and a deterioration in the terms do not occur, takes precedence over the short-term instantiation of higher-order moral values. Seen through the lens of political realism, ethical constraints upon the pursuit of power in the present might well be viewed as signaling defeat in the future and the long-term eradication of one's own values. Thus, no party's values are adequately reflected in their external conduct, their decisions about compliance, or the terms of the modus vivendi.

In a modus vivendi, effective mechanisms of adjudication and enforcement become impossible. Each party fears that it will be dominated by those who dislike its way of life and domestic institutions. Thus, those mechanisms will be dependent upon the strongest governments' temporary bargain and not the rule of law. Furthermore, international treaties will not be honored when the benefit of noncompliance is considerable; international treaties are perceived as reflecting self-interested bargaining, with no higher ethical standing. And parties assume others to be ready to reinterpret treaties or abrogate them as well when it is in their benefit to do so. Finally, an intergovernmental modus vivendi is unsatisfactory on at least three related counts: First, such a framework is insensitive to the fate of others in the poorest or weakest societies. A party's bargaining power is a function of the distribution of military and economic strength; a concern for deprived "foreigners" and for universal human needs is perceived as putting a nation's own bargaining position in jeopardy. Second, an intergovernmental modus vivendi embodies little concern for the treatment of persons within their own societies. Within this system, a party's interest in

controlling its own population outweighs its interest in those abroad. Third, a party in the modus vivendi framework is relatively unconcerned about the treatment of persons at the hands of allied governments or governments that are operating within its "sphere of influence." A basic feature of the modus vivendi framework is that each superpower has "special claims" to those regions which are more essential economically or strategically to its security than to that of the next superpower. It is not uncommon for changes of government, political systems, and economies in that sphere of influence to occur without significant interference (Pogge 1989: 224-27).

Using the terms of Pogge's analysis, it can be argued that Rawls's description of the international original position is deficient insofar as it leads him to endorse the "familiar principles" of the law of nations, principles that are burdened with the realist presumptions of a modus vivendi system. An international system based on such principles is better characterized not in terms of global justice, but in terms of global instability and power struggles, the pursuit of narrow self-interests, and indifference towards the interests of persons who happen to reside outside of one's own borders. As Pogge emphasizes, these are principles grounded on prudential rather than moral reasons, a situation that is hardly fitting for an ideal theory of justice.

Pogge argues that the principles of international law assumed by Rawls are inadequate for dealing with contemporary issues of distributive justice; even an intergovernmental system in which each state is committed to ensuring justice within its borders (as Rawls wants) will degenerate into a modus vivendi if based only upon such principles. In R_2, in which the parties to the original position are representatives of states, the right to political equality, fair equality of

opportunity, and the difference principle extend up to but not beyond the national level. Since in R_2 the global background justice is assessed by how it tends to affect the domestic justice of states, especially the least just, the reading still allows for indefinite international inequalities. Those international inequalities, plus the fact that the Rawlsian principles of justice need not be fulfilled at the global level, translate into enormous inequalities among the members of different communities, in regard to political rights, opportunities, and socioeconomic means. In R_1, in which the parties are representing persons, the principles chosen make the position of the least advantaged individual globally the touchstone of international justice (the parties do not know the place of their society among others, nor do they know their place in their own society). However, in Rawls's model, the domestic choice situation takes precedence over the selection of principles in the international choice situation and Pogge contends that, given this precedence, even the criterion that would be chosen in R_1 cannot be fulfilled.

According to Pogge, the priority of the domestic choice situation assumes that the favored model of a just national basic structure can be developed without paying attention to its international environment, in other words, that principles of domestic justice can simply be "complemented" with inter-national rules preventing global injustice. And yet, the fact of a plurality of nations and the ramifications of their actions collectively cannot be accommodated by merely adding rules. Moreover, if an international scheme is to endure, urges Pogge, it must engender in national populations moral allegiance to and compliance with the ground rules of that scheme. This will partly depend on the domestic institutional organization of societies, which means that <u>from the start</u> reflection on (and models for) national institutions is to be conducted with an eye on

considerations of the stability and functioning of the global basic structure, that is, together with the preferred ideal of a global basic structure. Pogge writes:

> Since national and global basic structures strongly affect each other's stability and are closely interrelated in their effects upon individual lives, we should think about our basic social institutions in general and from a global point of view, thereby aiming for an integrated solution, a just and stable institutional scheme preserving a distribution of basic rights, opportunities, and index goods that is fair both globally and within each nation. Such an institutional scheme, if constructed along Rawlsian lines at all, would be developed through a single unified original position global in scope. (1989: 256)

Such a global original position affords those reflecting upon the two principles of domestic justice the constrained standpoint of persons who are both insiders and outsiders of different national societies. The global original position thus subjects the institution of the modern nation state in its present form to moral examination.[40] In contrast to the approach adopted by Rawls, Pogge holds that while the institutions of an "isolated" state might be justified by reference to its least advantaged members (even by the communal life they protect for all its members), a system of sovereign states requires a global examination and justification. In a world of vast interdependence one cannot decide whether competitive markets, private property of the means of production, and so on are to be governed by the domestic criterion of the initial choice situation or the global criterion of the international choice situation, because it is impossible to

maintain the sharp distinction between national and international institutions that both R_1 and R_2 maintain.

The point made by Pogge makes explicit one of the concerns I have suggested about Rawls's remarks on international justice, namely, that they are not attuned to the increasingly globalized character of world society. International relations are coming more and more to resemble domestic society in respects relevant to the justification of principles of social justice; thus, such principles ought to apply globally. Yet, as I mentioned previously, Rawls assumes that states are more-or-less "self-sufficient" or "self-contained." The self-sufficiency thesis assumes that the nations of the world interact only in marginal ways. The familiar principles of international law presuppose that, at least in ideal theory, each society's external behavior is controlled by its domestic principles of justice; agreement on principles for the law of nations is made only to provide states with security about other states' behavior. But what if the world as a whole fits the description of a scheme of cooperation under the circumstances of justice?

It is indisputable I think that the contemporary world fits the description of a global scheme of cooperation: there is interdependent economic (as well as political, social, and cultural) activity that produces substantial aggregate benefits, and a pattern in which international and transnational institutions (multinational corporations, international and transnational trade and investment, property rights over national territories and their resources) distribute those benefits and also burdens. However, as Charles Beitz recognizes, "it is easier to demonstrate that a pattern of global interdependence exists and that it yields substantial aggregate benefits, than to say with certainty how those benefits are

distributed under existing institutions and practices or what burdens those institutions and practices impose on participants" (1979b: 145). Nevertheless, some general observations are possible.

Global interdependence, as it now functions in a modus vivendi framework, widens the gap between rich and poor countries, generates political inequality and inequality of opportunities among the members of different countries and, domestically, widens the gap between the upper and the lower income classes. These considerations lead Beitz to conclude that, in a world where state boundaries do not constitute the limits of social cooperation, Rawls's confinement of principles of distributive justice to the domestic sphere has the effect of taxing poor countries and poor classes therein. In characterizing the principles of international justice as the familiar rules of the law of nations, Rawls sacrifices strong consideration of the distributive aspect (of substantive goods) of international justice to the notion of simple conformity to the common or established rules of international affairs. This is a serious omission given the necessity of having both principles of justice as fairness in place in Rawls's domestic conception. The two principles, when given domestic preference, might then justify wealthy nations in denying aid to the poor if that aid can be used domestically to promote a more just regime. And yet, if the wealth of a "more just" regime has come about with the "cooperation" of a poorer regime, principles of domestic justice will be genuinely just only if they are consistent with principles of global justice, which must be considered from the start and not regarded as a mere afterthought. Beitz therefore claims that, because of our international interdependence, the difference principle ought to hold globally and

that a resource redistribution principle would have to apply to the uneven and morally arbitrary distribution of the earth's natural resources (1979b: 137-43).[41]

It might be argued, however, that the types of global interdependence evidenced primarily by the transactions of the present world system are not a sufficient foundation upon which to build a Rawlsian model of international justice. In particular, the steadily growing recognition of cultural diversity and the distinctiveness of many people's identities has often led to sentiments that run counter to a sense of global or even national solidarity. Considerations of social cooperation at the domestic level are problematic enough as it is given the now well-entrenched fact of social pluralism.

One way to approach these matters is through a discussion of the notion of self-determination, which Rawls suggests is one of the familiar principles chosen by the parties to the international original position. Yet Rawls has little to say about self-determination, other than he understands it to mean "the right of a people to settle its own affairs without the intervention of foreign powers" (1971: 378). What does it really mean though, when Rawls invokes the right of "a people" to "settle its own affairs"? Such a claim could imply a democratic determination of public policy by the equally free members (i.e., persons as citizens) of a political community, or it could refer to the policies pursued by a state ("a people") without recourse to democratic and public decision-making procedures. While the latter situation might conflict with the requirements of Rawls's version of domestic justice, it is less certain that it would conflict with Rawls's version of international justice.

A further problem arises when Rawls analogizes the "equal rights of citizens" with the "equal rights" of states (1971: 378). Surely it would be wrong

to "intervene" in the affairs of a person who, possessing basic rights and liberties, exercises those same rights and liberties in pursuit of his or her vision of the good, as long as that pursuit does not negate the equal rights and liberties of others.[42] Can the same be said of a state? Rawls seems to be claiming that the members of a political community should be able to freely choose the framework and policies constituting their community, without outside interference. But if a state, in pursuing its "national interest," violates the "equal rights" of some of its own citizens, should it be free from "the intervention of foreign powers" as Rawls suggests? Can the state be regarded as so insular when it comes to issues of justice? I do not think a satisfactory answer can be given on the basis of Rawls's model which--while attempting to analogize the interests and rights of states and persons--elevates the interests of states over that of persons in the case of international justice. The fact of the matter is that in the realist law of nations model endorsed by Rawls, states and persons are not analogous, since the state reigns supreme. Consequently, it will be worthwhile to say something further about the subject of self-determination in order to illuminate some of the tensions contained in Rawls's treatment of international justice.

3.4 Self-Determination in a Post-Colonial World: More Trouble for Rawls?

The principle of national self-determination has a significant genealogy in the political thought and practice of the Enlightenment. One can argue that intimations of this idea emerged in the political writings of Marsilius of Padua, where he made the distinction between the universitas civium (the people) and

the pars principans (the ruler) in his theory of the autonomous state, with the legitimacy of the ruler resting on the sovereignty of the people.[43] This idea was later taken up by Machiavelli in his considerations on the most appropriate and stable form of government, which Machiavelli believed to be a type of civic republicanism legitimated by popular support and sovereignty. The famous revolutions of the eighteenth-century, however, charged into new political terrain in overturning the divine rights of monarchical sovereignty and replacing it with the sovereign will of the people. Both the American and French Revolutions ushered in radical political rearrangements based on the participation of the people who determined through their "will" the form of government and political institutions by which they would be governed.

The stirring opening of The Declaration of Independence set a new precedent by which self-determination attained its "inalienable" status as a principle or right:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. -- We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these rights are Life, Liberty, and the pursuit of Happiness. -- That to secure these rights, Governments are instituted among Men, deriving their just powers from

the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and institute new Government. . . .

The implications of this document, conjoined with Enlightenment political thought concerning civil society, government and rights, are still struggled over, appealed to and claimed as legitimate bases for altering political associations that do not fulfill the political, economic, social and cultural aspirations of a people. As the Preamble of the Constitution declared, "We the People" have the right and responsibility to determine the appropriate form of popular rule. The affirmation of popular sovereignty and freedom from external domination established the consequential value of political decisions that are subject to and decided by the inhabitants of a specific territory: "The value of national self-government is the value of entrusting the general political power over a group and its members to the group" (Margalit and Raz, 1990: 444).

Just as self-determination is a key element to the US Constitution, it is also central to the United Nations Charter, which can be considered the founding instrument of the modern doctrine of self-determination. It is possible to read in the Charter's opening phrase "We the Peoples of the United Nations" the same justification of popular sovereignty as the legitimate basis of state or government authority. This phrase underscores the importance placed on the UN's role in fostering self-determination, human rights, and peace between peoples as developed in Articles 1 and 55. Article 1.2 states that the members of the UN are "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," while Article 55 declares that

"with a view to the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms. . . ." The language of the Charter presents a significant evolution of the political ideals developed during the Enlightenment, by directly linking self-determination with universal human rights and fundamental freedoms, but also, and more importantly, recognizing that there is an intrinsic connection between those rights and freedoms and creating and sustaining the necessary conditions for both domestic well-being, stability and peace of peoples, and for global stability and peaceful relations between peoples.

While self-determination has therefore been linked to the realization of human rights, particularly by decolonization movements after the Second World War, it has also been regarded as conceptually and normatively problematic, since it is a right that has been codified in international law by established states.[44] Rupert Emerson, in his book Self-Determination Revisited in the Era of Decolonization, reveals the aporia contained in the principle of self-determination: "My right to self-determination against those who oppress me is obviously unimpeachable, but your claim to exercise such a right against me is wholly inadmissible" (1964: 61). Emerson's acerbic insight into this paradox of self-determination exemplifies the still dangerous tensions that exist between claims for self-determination and the legal sanctity of an existing territorial arrangement as embodied in a sovereign state. Political and legal thinkers who have addressed the notion of self-determination generally assume, then, that

existing state arrangements serve as the ultimate precedents by which claims to self-determination are to be evaluated.

The process of decolonization after the Second World War was instrumental in establishing the contemporary political and legal right that a people have to freedom from external or foreign control over their political institutions, affairs, and everyday lives. This right to national self-determination was articulated in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples, which states that:

> 1. The subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (UN, 1994: 56)

Several paragraphs later (Para. 6), however, the Declaration asserts that "Any attempt at the partial or total disruption of the national unity and the territorial integrity of the country is incompatible with the purposes and principles of the Charter of the United Nations." This reflects the conviction that "a people's" right to self-determination is conceived within the framework of the modern sovereign state, whose integrity and unity are fundamental.[45] This approach has led to many injustices in polyethnic states where governmental power is controlled and exercised by one group of people while other groups are

subjugated or marginalized. In such situations human rights are filtered through the apparatus of a state power defined by a dominant group. Human rights then become dependent on the vicissitudes of a domestic legal-political system, giving rise to normative confusion when pleas for outside intervention are raised in the event of domestic abuses. This situation underscores some of the vulnerability of Rawls's notion of international justice, which is subordinated to the statist principles of the conventional law of nations.

We have seen that the principle of self-determination leads to the principle of non-intervention, both of which ultimately derive from and protect the principle of state sovereignty. A classic definition of sovereignty states that "there is a final and absolute political authority in the political community," which takes precedence over any other possible type of authority elsewhere (Hinsley, 1963: 26). The principles of self-determination and non-intervention are, at bottom, intended to protect all of those matters viewed as coming under the purview of the domestic jurisdiction of states. We have also seen, however, that a paradox resides in the current inter-state system: on the one hand, the principles of sovereignty, self-determination, and non-intervention are regarded as necessary to constrain the "external" power and actions of states, and thereby produce international peace and stability; on the other hand, the principles also restrict the progression of international peace and stability by placing the "internal" power and actions of states off-limits to outside "meddling."[46] However, the domestic and foreign affairs of states are not so nicely separated and when internal crises result that threaten regional or global peace and stability (or simply one particular power's "national interests"), political contortions are often needed to justify responses such as "humanitarian" intervention. Indeed,

the gradual influence of the idea of human rights in international relations in recent years has increased the legitimacy of intervention into the internal affairs of other states and, consequently, has challenged the conventional notion of sovereign statehood and the supremacy of state interests.[47]

The tension between national self-determination and the identities of those persons living within a state's territory has generated conceptual confusion between what is "a people" and "the state," and thus made the adjudication of rights and duties around self-determination ambiguous and difficult. As Hurst Hannum remarks, "Perhaps no other contemporary norm of international law has been vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were first enunciated by President Woodrow Wilson and others at Versailles" (1990: 27). While self-determination has been held up as a fundamental right, the troubling question of "What does self-determination mean?" still persists.[48] Answering this question is particularly challenging when the history of implementing the right to self-determination shows that it consistently clashes with the bias towards state sovereignty that has settled into international political-legal practice. The conceptual confusion between the state as "a legal and political organization with the power to require obedience and loyalty from its citizens," and the people "as a community . . . whose members are bound together by a sense of solidarity, a common culture, a national consciousness" has only contributed to contradictory and divergent interpretations of the meaning of the right to self-determination and to the moral and legal evaluation of claims (Seton-Watson, 1977: 1).

The controversies surrounding the ambiguity of the principle of self-determination are therefore of special concern in what can be called the era of late twentieth-century ethnic nationalism. Since the breakup of the Soviet Union, new life has been given to a diverse spectrum of ethnic aspirations for nation and state building around the world. Polyethnic tensions across Africa, Asia, and the Middle East have generated numerous conflicts fueled by aspirations for self-determination and freedom from what are considered oppressive regimes. These regimes are often controlled by an ethnic group which has unfairly employed the institutions and apparatuses of the state for capturing power, control, and resources to the detriment of other ethnic groups. Civil war, genocide, ethnic cleansing, violent suppression of minority-rights movements, characterize conditions in the former Yugoslavia, Rwanda, East Timor, Kosovo, Burma, Chechnya, Armenia and Azerbaijan, and Somalia, to name only a few. The forceful resurgence of ethnonational aspirations is the contemporary stage where the drama of self-determination is once again being played out, especially where the right to self-determination clashes with the rights of state sovereignty and the internationally recognized moratorium against secession.

Within the contemporary inter-state system and the structure of international law, discussions concerning international justice generally make reference to the state as the political and legal agent and representative of the citizens of the state. As James Crawford argues, "[r]eferences to the State, the basic unit of international law, involve a reference to the social fact of a territorial community of persons with a certain political organization, in other words, a reference to a collectivity. In this sense, international law rules that confer rights on States confer collective rights" (1988: 55). But interpretations

of international law have also established a rule that since states are the political and legal agents of a community of people and collective rights are first conferred on the state, then the government's interests and rights stand first even if the government's actions diverge from the popular interests or demands of the citizens. Thus, the tensions unique to the concept of self-determination are especially apparent between what has come to be delineated as the external and internal dimensions of self-determination. While the external dimension defines the right of "a people" to be free from "outside" interference, thereby demarcating certain aspects of relations between peoples or relations between states, the internal dimension implies the right of "a people" to assert its will over and, if need be, against the government that supposedly represents its interests. The conventional law of nations, as well as Rawls's account of international justice, is prepared to recognize only external self-determination within the modern context of sovereign states. Yet contemporary world events have increasingly focused on issues of internal self-determination, particularly in the case of minority groups or Indigenous peoples within existing but contested territorial arrangements. In each case, however, the right of self-determination is invoked on behalf of "a people."

One of the most pressing contemporary problems, then, is that the right of a people to self-determination lacks a precise definition of what constitutes "a people," especially in our contemporary polyethnic (or multicultural) societies. For many political and legal theorists the operative assumption has been that "the people" shared a common political identity. This assumption is found in the interpretation of Articles 1 and 55 of the UN Charter by the German jurist Hans Kelsen. Kelsen (1951: 51-53) leaned towards interpreting the term "peoples" as

simply referring to the state. Kelsen and others contributed to equating a political-legal symmetry between the state and the people, where the two terms were understood as being synonymous and interchangeable. In many regards, this interpretation can be understood as an interpolation of the Enlightenment political principle of the popular sovereignty of citizens as the ground of state legitimacy and authority. From this perspective, it is plausible to argue that the people are coterminous with the state. This argument supports the conventional law of nations approach to international affairs adopted by Rawls in A Theory of Justice.

Yet is the identification of a nation-state with "a people" either an accurate reflection of today's polyethnic societies or a viable political, philosophical, and legal ideal? Consider, for example, that the political reality in many, especially postcolonial, societies is that "a people" is grounded on an exclusivist sense of community that has led to ethnically-based definitions of sovereignty. Ethnic sovereignty is then linked to a contiguous political ideology that is understood in terms of some type of ethnic nationalism, which usually identifies the "members of an ethnically defined national grouping" as sharing common "physical characteristics, culture, religion, language, and . . . ancestry" (Kupchan, 1995: 4). Yet if the right to internal self-determination is reduced to exclusivist ethnic definitions of sovereignty, it might not be possible for external self-determination to plausibly succeed within the established international system since that system is threatened by a state's domestic instability.[49] The fact of pluralism thus challenges the simplistic picture of international society endorsed by Rawls. In the post-colonial and pluralist world, self-determination does not simply buttress the territorial borders of established autonomous states

against outside interference; instead, it can be the very means to challenge statehood.[50]

Thomas Pogge again provides a useful position for approaching these issue. Pogge attempts to sketch "another way for a shared institutional scheme to emerge and be sustained even while its participants have divergent interests and values." In this alternative scheme, the "central idea is to seek institutions that are based not upon free bargaining informed by the changeable distribution of power but upon some values that are genuinely shared" (1989: 227). Pogge refers to such shared values as "ultimate" in the sense that they are to be embodied in the institutions regulating the public, political interactions among participants. Since those interactions are for Pogge interactions among persons, he contends that one need not fear that the exchanges between nations (or cultures) might be well-ordered while their domestic exchanges might not.

Pogge asserts that the predicament in international relations is not that there is no, or too little, value overlap among populations. The problem is that shared values generally play no role in the standing global institutions, given the modus vivendi framework and its assurance problem. Unfortunately, Pogge says little about those presumed overlappingly shared values. Like Rawls, however, Pogge points out that ultimately what is being sought is an overlapping (not strict) consensus upon "public" (not all-pervasive or comprehensive) values, that is, upon those values that have to do with others and with others as a matter of justice. For Pogge, the prerequisite of the embodiment of shared values into "institutional fixed points" that stand above prudential bargaining (where everything is negotiable) is the moral acceptance on the part of all societies of the "continued existence of one another and of the values central to their domestic

social contracts" (1989: 228). This prerequisite is what Pogge calls the moral acceptance of international pluralism.

Pogge, following Rawls's own example, compares international pluralism within the modus vivendi framework to the relations between the plural Christian faiths after the Reformation. Each side long sought to reunify the Church on its own terms, sought to prevail over the other, until a fragile bargain was struck (cuius regio eius religio, "each lord may force his religion upon his subjects without outside interference"). This bargain was gradually transformed into a shared value commitment of religious toleration with deference to the individual's freedom of conscience. "The decisive condition for an analogous transformation in our current world," writes Pogge, is widespread acceptance of international pluralism, "the idea that knowledgeable and intelligent persons of good will may reasonably favor different forms of (national) social organization" (1989: 230).

Several questions come to mind about Pogge's claim. What does "an analogous transformation" really mean here--a shared value commitment, at the global level, to toleration of national/cultural diversity with the hope that it engenders more toleration, as toleration of individual and group pluralism, within each society? Might it be possible that widespread acceptance of international pluralism can be at odds with an interest in the protection of equal individual freedom and human rights? Does national or cultural pluralism always stand for the idea that persons of good will are collectively determining their fates, while leaving room for minority dissent and individual self-determination? Is national or cultural autonomy reducible to conformity of a society's main institutions with appropriate principles of justice?

According to Pogge, wanting one's own political ideal to prevail only contributes to our modus vivendi predicament, that is, lack of assurance on the part of others that one is not seeking to destroy their domestic institutions and, thus, an analogous desire to prevail on the part of others as well. International acceptance of international pluralism is a step towards solving this assurance problem: it allows value clusters "with their coordinated national forms of regime" to be morally accepted and protected against extinction; it makes possible for every party, once they know that their existence and that of their constitutions is no longer at issue, to focus on the shared global scheme and order their preferences concerning that scheme according to how well it reflects their own values, not simply their survival. As Pogge recognizes, this is a realist argument: it is for the sake of one's own values that one should accept a scheme reflecting a core of overlapping values and thus that one should accept a modification of one's values in the direction of greater mutual tolerance.

Pogge remarks that the international acceptance of international pluralism is not tantamount to agnosticism with respect to the justice of national institutions; it is equivalent to the acceptance of disagreements as reasonable disagreements. In a reasonable disagreement, the other cannot beforehand be assumed "different" or "deluded" and one cannot assume that one stands to learn nothing from the variety of national regimes and ways of life. Still, the examples of reasonable disagreements at the global level that Pogge offers--whether the means of production should be owned by national governments, private owners, workers; whether democracy is best achieved through a single party or a multiparty system; whether civil and political or social and economic rights are more important in the reform of institutions--are not all the disagreements there

are. What should be done about regimes that do not accept any democratic form, where the bulk of the population is economically deprived, where human rights are violated? Does a society whose constitution codifies that only certain classes--religiously or racially defined for example--are to have full rights still count as a society to be respected because of the centrality to them of the values of their social contracts? Can we be sure that such social contracts have much to do with widely, deeply, reasonably held values?

The general point to take from all of this is that the current inter-state system does not live up to rigorous standards of global justice. The criticisms being made here, however, are not to be understood as a recommendation that states be abolished (yet neither do I foreclose that possibility). Rather, I am arguing that the core of the problem is that state interests and domestic justice are too quickly given priority over global interests and global justice, defined in terms of everyone in the world. This can be seen not only in current inter-state practice but also in Rawls's account of international justice, which considers international justice as a kind of afterthought to domestic justice and thereby replicates the realist view of international relations. While Rawls considers international justice to be justice among states, I think that international justice ought to be at least equally about justice among persons, irrespective of what historically-contingent state a person happens to be a member of at present.

A further point I am trying to make, then, is that a theory of international justice cannot simply represent or model what kind of international society currently exists; it ought to say something significant about what kind of international society might exist, by contesting existing principles and presenting alternatives. Although I think Rawls fails, in A Theory of Justice, to take this

further step, the question remains open as to whether his fundamental account of justice can be globally extended in some other way. Is it possible to strike a different balance than he does between domestic justice and global justice? In particular, is it possible to offer an account of international justice without it having to follow upon a prior account of domestic justice? In the following section I will argue that it is, but only if we take the primary subject of international justice to be persons, not states.

3.5 Reconfiguring Rawlsian International Justice

The discussion carried out thus far of Rawls and international justice has been critical of the view articulated in A Theory of Justice. The criticisms advanced have, however, sought to evaluate Rawls's description of international justice from the point of view of Rawls's own theory of domestic justice, especially the centrality accorded there to the moral status of persons and their basic rights and liberties. What I want to do now is consider in more detail the need and process of working toward a theory of international justice structured by Rawls's two principles of justice as fairness.

There is some question, though, of whether and how successfully Rawls's two principles of justice can be globally extended. Charles Beitz, following Brian Barry (1973) and Thomas Scanlon (1973), argues that the principles can be extended as long as the model of the hypothetical social contract is altered somewhat. First, national boundaries, not being coextensive with the scope of global cooperation, have no fundamental moral significance and therefore do not mark the limits of the obligations of justice. Second, then, it cannot be assumed

that the parties to the original position know that they belong to a national community and are choosing principles for a nation-state; the veil of ignorance applies to matters of nationality and the principles of justice must be chosen to apply globally. If Rawls's arguments for the two principles are correct, "there is no reason to think that the content of the principles would change as a result of enlarging the scope of the original position," writes Beitz. "In particular, if the difference principle . . . wo: ld be chosen in the domestic original position, it would be chosen in the global original position as well" (1979b: 151). In Beitz's model there is no reason to assume that membership in the least-advantaged group will be coextensive with that of any particular state. Thus, the parties in the international original position are treated as persons and not states or representative of states.

If BeitzÕs argument is correct, that is, if the notion of a scheme of global cooperation and a conception of justice given that scheme of cooperation are sufficient to justify Rawlsian justice, then his conclusion could be considered radical. Rawlsian principles of international justice would guarantee to every person in the world the same set of rights, irrespective of nationality and culture, irrespective of whether they are citizens or outsiders, as well as the means to make those rights worthy. The universality of human rights would thus be grounded on considerations of Rawlsian international justice.

Like Beitz, Thomas Pogge's concern is to specify a model of international justice that is the well-suited for the purpose of guaranteeing human rights to all persons. As I mentioned previously, Pogge presents a theory of "global justice" that is informed by, yet different from Rawls's idea of international justice as presented in A Theory of Justice. Pogge claims that, according to his theory:

> the globalized first principle might be viewed as requiring a thin set of basic rights and liberties (analogous to the Universal Declaration of Human Rights . . .), which each national society could, in light of its national conception of domestic justice, "inflate" and specify into its own bill of rights. . . . Similarly, while the global second principle would constrain how societies may arrange their economies, these constraints would be less stringent than Rawls's requirement [in A Theory of Justice] that each society must satisfy the difference principle internally. (1989: 272)

As the above quotation makes clear, Pogge's emphasis on the moral salience of and the international responsibility for the global basic structure amounts to a defense and development of the Universal Declaration of Human Rights in its most cosmopolitan reading, specifically, as stated in Article 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

However, a number of pressing questions are as yet unanswered in our discussion of Rawlsian global justice: Can the description of the original position remain the same at both the domestic and global level? Is the assumption that persons are free and equal globally reasonable or can it be made reasonable? Are the ideals of a community of humankind and cosmopolitanism reasonable among and within a framework of nation-states? These questions are significant because it is my intention to defend the applicability and workability of Rawls's criterion as regards the global basic structure and its participants.

Pogge partly addresses the questions raised above while responding to several objections put forward against the ideal of a Rawlsian world order. Those objections assert that there are special factors on the global plane that make it inappropriate to apply Rawls's criterion to the global structure.

One common objection asserts that the global system is so marginally well-ordered in Rawls's sense that one cannot apply to it a criterion appropriate only to the "rich, North Atlantic democracies." Pogge contends that Rawls's notion of a well-ordered society is not descriptive but normative. This means that when the parties are said to be choosing a criterion for a well-ordered society, the criterion is supposed to harmonize with, to be satisfiable in, and to guide toward an ideal of society that, in Rawls's words, "it seems one would, on due reflection, wish to live in and want to shape our interests and characters" (1974b: 634). It does not mean that the criterion is only applicable to actual well-ordered societies, for there are (probably) no such societies. In this sense, it is misguided to maintain that a Rawlsian criterion of global justice must change in response to different non-well-ordered global conditions. The task is to create on both the global and the domestic levels the economic, political, and legal institutions that one would, on due reflection, think should exist in a just world.

A second, more powerful objection is one that is based on the fact of cultural diversity. The ideal of a Rawlsian global scheme, the objection goes, may cohere with "our" traditions and considered judgments but it is inappropriate due to the existing intercultural diversity of traditions and moral judgments. Rawlsian institutional reform at the global level might well require the supplantation or at the least the reorganization of cultures in the name of our own values.

I think that in order to respond to this objection it is first necessary to present the Rawlsian conception of global justice under the appropriate rationales. Pogge holds that Rawls's reluctance to globalize his conception of justice affects only one aspect of such globalization, namely, it reflects the belief that the domestic institutional organization and the assessment of the justice of such organization should perhaps be left to the members of communities whose cultures are different. Yet such an alternative is not available with respect to the global structure. How the global structure should be reformed and assessed cannot be evaded because of the unavoidability of global interaction, nor can it be adequately dealt with except through a conception of background justice. Rawls's criterion when globalized is not a neutral criterion equally congenial to every value and every culture, and thus to every particular form of domestic institutional organization. But then again, there are no neutral criteria of justice. As Rawls himself recognizes, the idea of institutional arrangements under which all values and judgments would flourish is an impossibility. Any global scheme can be opposed on the grounds that it is inhospitable to some other way of life. The question then, though Pogge does not clearly state it, is whether there is a better alternative than a conception of global justice that takes into account the fact of global interdependence, the importance of global background justice, and the ideal of moral persons as free and equal.

Another way of responding to the second objection is to contend that a "degrees" approach to the legitimation of Rawlsian justice within different communities might be appropriate. Thus, as Pogge points out, many of the protestations against pursuing "our" ideals of justice in the international arena come from advantaged members of our own culture and communities and, one

may add, the advantaged members of most communities. Similar protestations generally do not come from those actually living in hunger or oppression. This is not to deny that intercultural diversity in moral judgments may be great; it is simply to point out that one does not know how great it is. Any government, taken as the representative of "a people," likely will be violating rather than expressing the different moral judgments of its own various communities, when it engag ·s in the detention and torture of political prisoners or the denial of civil and political liberties.

Moreover, Pogge points out, communities endorsing different political judgments and different criteria of justice about a more just world might still agree on the Rawlsian conception as the "first stretch" on the road to global institutional reorganization. According to Pogge, this possibility is confirmed by the fact that some Third World proposals for global institutional reforms could arguably be favored by Rawlsian principles. Ironically, such proposals have been resisted by the West on the grounds of diversity. But resisting reforms demanded by justice as we ourselves understand it, on the ground that others do not really or fully share our convictions, is to take a position which acquiesces to the preservation of existing advantages. Minimally then, the globalization of Rawls's conception must be the benchmark in the assessment of government policies (foreign and domestic yet having a global impact).

A further response to the objection based on diversity is to argue that the proposal of Rawlsian global justice under appropriate rationales will be followed by consensus. Despite the great intercultural diversity of considered judgments on justice (because of the diversity of histories and traditions), Pogge argues that what counts at the global level, as at the domestic level, is convergence upon the

Rawlsian criterion itself. Such a convergence need not require a particular derivation of or rationale for the criterion. What the objector has to show is more than diversity of considered judgments; she has to show that agreement on and convergence around the criterion of global justice is impossible. In addition, the proposal of global justice can appeal to reflective equilibrium. Rawls's conception of justice when globalized is, I think, among the best proposals in the light of which an international cross-cultural moral dialogue on justice can be initiated. The idea of dialogue implies that one deals with objections and counterproposals from others as they arise; it also implies self-criticism, as the dialogue itself broadens the vision of its participants and requires them to accommodate others and the relevant facts, making their political convictions less parochial. The dialogue on a substantive moral issue of common concern will require others, perhaps nonliberal disputants, to work out their conceptions of justice and clearly expound the grounds of their disagreement. It is possible of course that disagreement will persist, that a global overlapping consensus on Rawlsian global justice will not be reached. However, as Pogge notes, the "fact of disagreement is no reason not to act in the light of whatever (factual and) moral beliefs we now think are best supported. Our considered judgments support a conception of justice whose scope is universal, even though its present appeal is not" (1989: 270). The point to take from this is that traditions, public institutions, and considered judgments have no ultimate moral sanctity just because they exist; rather, their understanding is open to criticism and to change.

In Pogge's view a final, and probably the most important, response to be made is that his globalized version of Rawls's conception of justice offers a good

deal of flexibility for incorporating cultural diversity. Unlike the two readings (R_1 and R_2) suggested in A Theory of Justice, the global parties in Pogge's theory are not constrained by any prior (Rawlsian) criterion of domestic justice. The global parties can in a single global session decide how much room to leave for differences in national conceptions of justice and in domestic institutional arrangements. For instance, the globalized first principle of justice may be viewed as requiring the "thin" set of rights and liberties embodied in the Universal Declaration of Human Rights, which each national society can then "inflate" in its own bill of rights in light of its domestic conception of justice. And the globalized second principle of justice, though constraining how societies may arrange their economies so as to not affect the globally worst share of primary goods, may still allow choices among more-or-less egalitarian forms of domestic organization. As Pogge concludes:

> The resulting global institutional ideal would then allow each society a good deal of choice as regards its internal practices (and moral principles), so long as such choices are supported by most of its citizens and are consistent with the basic rights of all human beings, citizens as well as outsiders. . . . What matters is that by balancing the liberty interest in collective [domestic] autonomy against other liberty interests, [the globalized conception] goes beyond R_1 and R_2 in the liberal quest to allow for "opposing religious, philosophical, and moral convictions." (1989: 272-73)

Clearly, then, Pogge amends not just the scope but also the content of Rawls's conception of justice as fairness; in the remainder of this chapter I will briefly discuss several ways that Pogge does so. One of Pogge's strategy for amending Rawls's principles of justice consists in "specifying the first principle so that it forbids radical social and economic inequalities (avoidably involving extreme poverty)" (1989: 138). In other words, he incorporates into the principle rights to a "minimum" of social and economic benefits. Let me briefly expound Pogge's justification of this amendment.

We have seen (in Chapter Two) that in Rawls's special conception of justice lexical priority is defended; the maximin criterion consists of two maximin criteria governing, respectively, those aspects of the basic structure that define and secure the equal liberties of citizenship, and those that establish or engender social and economic inequalities. Each scheme is to receive two scores based, again respectively, on the worst position it generates in terms of rights and liberties and on the worst socioeconomic position. Weights are assigned to these scores to make possible the ranking of alternative schemes; in the special conception first score differentials always override second score differentials. Rawls's rationale for prioritizing the satisfaction of the first principle over the second is "that the interests of liberty . . . become stronger as the conditions for the exercise of the equal freedoms are more fully realized. Beyond some point it becomes and then remains irrational . . . to acknowledge a lesser liberty for the sake of greater material means and amenities of office" (1971: 542).

Underlying Rawls's lexical priority is his distinction between liberty and its worth. The goods under the two principles make different contributions, according to Rawls, to the same supreme value of liberty. The goods under the

first principle spell out effective legal freedom or simply "liberty," while the goods under the second principle (plus effective legal freedom) spell out the worth of this liberty. The question of compensating for a lesser than equal liberty does not arise; that of compensating for a lesser worth of liberty does since, according to Rawls, the capacity of the least fortunate would be even less were they not to accept inequalities whenever the difference principle is satisfied. The usefulness of liberty is specified in terms of an index of primary goods regulated by the second principle. According to the two principles, then, the basic structure is to be arranged so as to maximize the worth to the least advantaged of the equal basic liberties.

Pogge's criticisms of Rawls rely on a clarification of the maximin idea and on the fact that favorable conditions need not obtain, or even if they do obtain, need not entail the satisfaction of socioeconomic needs. The criterion of justice, Pogge explains, requires basic structures to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This presupposes that the parties have a preeminent interest in the worth of freedom, in being in the best possible socioeconomic position to enjoy, exercise, and take advantage of liberty. This means that in non-ideal conditions, when the difference principle is not satisfied, the parties need assurance that a narrow interpretation of the first principle will not end up by deferring the fulfillment of basic needs for the sake of establishing legally effective rights and liberties.

Indeed, the same might be the case even under favorable conditions, for "favorable conditions" are somewhat vaguely portrayed by Rawls as those social conditions that allow an effective establishment of rights and liberties--supposedly, conditions advanced enough so as to render feasible economic

institutions fulfilling urgent needs. Yet feasibility hardly entails existence, as it is patent in many Western countries today. Pogge concludes that Rawls's refusal to include rights to a socioeconomic minimum in the first principle since "in view of the difference principle a fraction of index goods can already be regarded as such minimum," does not distinguish between design (the ideal) and implementation. Thus, Pogge suggests the need to include among the rights and liberties protecting the freedom and integrity of the person "rights to a socioeconomic position that is sufficient to meet the basic social and economic needs of any normal human participant in the relevant social system" (1989: 147).

Pogge's amendment of the second principle of justice is also interesting, especially his comments on self-respect and the implications of self-respect vis-à-vis the difference principle. If according to Rawls self-respect is too important to be left to an index goods calculus and equality of opportunity is essential to this self-respect, then Rawls's distinction concerning the facts about individuals to which institutional inequalities may be related needs revision. For example, a democratic-equality interpretation of the second principle allows inequalities of opportunity arising from natural contingencies (talent) to be governed by the difference principle, whereas it disallows those arising from social contingencies (class) through the opportunity principle. Pogge demonstrates that the natural/social distinction is problematic, since so-called natural contingencies have a considerable social component. Talent-induced inequalities, for instance, cannot simply be explained by reference to the natural distribution of talents and the prevailing institutional scheme (merely allowing talent to play a role in determining shares). That distribution itself is influenced by "how valuable the various natural talents are considered to be in the relevant social system . . . [a

consideration that] will itself be determined by the prevailing institutional scheme" (1989: 164). Race-and-gender-induced inequalities, for instance, though related to "natural" contingencies in Rawls's sense, have more in common with class-induced inequalities than Rawls seems to recognize.

Pogge's amendment of Rawls's second principle thus turns out to look something like this: Inequalities in index goods are governed by the difference principle, subject to the condition that there must be formal equality of opportunity and rough equality of actual opportunity (e.g., access to a roughly equivalent education with equivalence understood in terms of cost). Everyone should have such access. The constraint upon inequalities of opportunity arising from social contingencies is extended to those related to any other (natural) contingency.

Pogge's criticisms of Rawls's position on international justice are helpful in allowing us to recognize the deficiencies of that position, and also offer us some means of improving upon those deficiencies. It might be argued, however, that a revised cosmopolitan conception of Rawlsian international justice such as that which I have advocated here (along with Pogge and Beitz)--understood as a global scheme in which basic universal human rights can be fully realized--requires domestic liberal democracy of a Rawlsian kind. By this I mean that there exists an equal and quite demanding set of rights, liberties, and opportunities for all citizens; those rights and liberties take priority over claims of the general good and of perfectionist values; and also that there are measures ensuring both citizens as well as outsiders the all-purpose means so that those rights and liberties are effectively realized. If it is the case that the effective realization of universal human rights requires a liberal democratic organization

of society, is it possible to articulate a scheme of international justice that allows for even minimal differences in national conceptions of domestic justice? A question that remains to be examined further, then, is whether the conception of international justice presented here is compatible with the existence of different social and political cultures that are not liberal democracies. It is to this question that I turn.

Chapter Four

Rawls, the Law of Peoples, and Human Rights

Human rights are a notably contested topic in late twentieth-century political philosophy. Whether or not one regards universal human rights as desirable or possible, Rawls's recent attempt to combine an account of human rights with his theory of justice as fairness is a challenging intervention into the debate. Considering the arguments of the previous chapter, however, one might be led to wonder if Rawls has anything to offer of real worth for human rights theory and practice. Any doubts on this matter will have to be settled by closer examination of what Rawls has to say specifically about human rights within the context of social justice at both the domestic and international levels. Thus, this chapter will analyze Rawls's essay "The Law of Peoples."

In the first section I discuss Rawls's proposed argument for a "law of peoples" and argue that his conception of human rights is flawed. In the second section I critically examine Rawls's argument in light of the foregoing discussion of international justice, focusing on the problems that arise from his distinction between liberal and hierarchical societies and their respective interests and public cultures. In section three, I contend that the manner in which Rawls constructs the choice procedure for the law of peoples leads him to draw mistaken conclusions about the types of human rights required by liberal and hierarchical peoples. In concluding, I discuss how a revised Rawlsian theory of international

justice, in which the global is no longer subordinated to the domestic, can provide a suitable basis for addressing human rights. Against Rawls, I argue that, from the point of view of a more cosmopolitan ideal of social justice, universal human rights require the liberal democratic organization of domestic society.

4.1 Rawls's Argument in "The Law of Peoples"

In his recent article "The Law of Peoples," Rawls has attempted to respond to criticisms of his previous remarks (or lack thereof) on international justice. More specifically, he has reacted against the possibility that his two principles of justice might serve to evaluate the systems of cooperation of cosmopolitan individuals, that is, individuals that in choosing a criterion of domestic justice must both, and at the same time, be insiders and outsiders to their community because, in an interdependent world, it is impossible to sharply distinguish between national and international basic institutions.

Rawls states that his proposed law of peoples is "a political conception of right and justice that applies to the principles and norms of international law and practice" (1993: 42). International law is the existing, positive, legal order understood by Rawls according to the law of nations perspective. The law of peoples is the family of political concepts and principles specifying the content of a liberal conception of justice worked up to apply to and evaluate international law (1993: 50-51). Rawls's idea is to pair liberal ideas of justice, similar to but more general than those of justice as fairness, with the law and the political practices of the international society of peoples, and see whether the latter can be legitimated. In so doing, Rawls's aim is twofold: First, he wants to give an

account of the role of human rights and of the form that toleration of nonliberal societies must take from the point of view of liberalism extended to the law of peoples. Second, he wants to prove that his liberal law of peoples is acceptable across the board, to both "well-ordered" liberal and "well-ordered" nonliberal peoples; he wants to prove, in other words, that a society need not be liberal in order to respect human rights.

Rawls identifies a political conception of justice as having the following three features (1993: 220 n.2):

> (1) it is framed to apply to basic political, economic, and social institutions; in the case of domestic society, to its basic structure, in the present case to the law and practices of the society of political peoples; (2) it is presented independently of any particular comprehensive religious, philosophical, or moral doctrine, and though it may be derived from or related to several such doctrines, it is not worked out in that way;
> (3) its content is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a liberal society.

For Rawls, extending liberal ideas of political justice to yield a law of peoples has nothing to do with the positing of universal first principles, but rather with the notion of the social contract and its constructivism. As in the case of the principles of justice for the basic structure of liberal domestic society, the principles of the law of peoples--the principles of justice for the society of societies--must be constructed by way of a reasonable procedure in which rational parties would adopt and assent to those principles. Rawls states that the choice

procedure is modified to tackle "the issue at hand," which here is "the distinct structure of the social framework . . . the distinctive nature and purpose of the elements of society, and of the [international] society of peoples" (1993: 47). Thus, the principles chosen must be endorsed on due reflection by the agents to whom they are supposed to apply, in this case "peoples." Rawls explains that he uses the term "peoples" to refer to "persons and their dependents seen as a corporate body and as org. nized by their political institutions, which establish the powers of government" (1993: 221, n. 5). Peoples are thus understood to refer to nation-states rather than individuals, which is in keeping with Rawls's use of nation-states as the representing parties in the international original position presented in A Theory of Justice.

Given that perfect isolation is a thing of the past, Rawls notes, every society must have conceptions of how it is related to other societies and how it must conduct itself with respect to them; every society must have principles and ideals that guide its policies toward other peoples. The question for a liberal society is how a conception similar to justice as fairness can be extended to cover that liberal society's relations with both liberal and nonliberal societies and to yield a law of peoples that is "reasonable." For in the absence of that extension the liberal conception of justice would be historicist, applying only to similar, liberal societies. Rawls suggests that the way to proceed, then, is to defend a constructivist liberal doctrine that is universal in reach, in the sense of giving principles for the most comprehensive of subjects, i.e., the political society of peoples. Its authority rests on the principles of practical reason adjusted to apply to the subject at hand, and on the fact that it can be endorsed on due reflection by those to whom the principles apply.

Rawls argues that liberal ideas of justice contain three important elements: (1) a list of basic rights, liberties, and opportunities; (2) a priority for those freedoms, especially with respect to claims of the general good and of perfectionist values in general; and (3) measures ensuring all citizens all-purpose means so that those freedoms are effective. However, Rawls excludes from the more general liberal ideas of justice upon which the law of peoples is going to be constructed the strong egalitarian features of ju. tice as fairness--the principles of the fair value of the political liberties and of fair equality of opportunity, and the difference principle. Those features, he tells us without further explanation, are simply not needed for a law of peoples (1993: 51-52).

The way that Rawls proposes to extend these liberal ideas of justice, with the requisite degree of generality, to yield the law of peoples is sui generis and has two stages, each possessing two steps. The first stage is that of ideal or strict compliance theory, and the second stage is that of nonideal or noncompliance theory.

The first step in the first stage of ideal theory is to prove that the original position is a device of representation for the case of different and well-ordered liberal peoples, that is, when it is reused to extend the liberal conception of justice to the law of democratic societies. This amounts to showing that, similar to the account of international justice given in A Theory of Justice, representatives of liberal societies in the original position adopt a law of peoples whose content turns out to be almost identical to the standing principles of international law.

The second step in the first stage of ideal theory is to specify the requirements of "well-orderedness" for nonliberal or hierarchical societies. This

consists of demonstrating that the original position is also a device of representation when reused to adopt a law of peoples among hierarchical peoples, and showing that representatives of hierarchical peoples in the original position would adopt the same law of peoples as that adopted by liberal peoples.

In the case of a single liberal society, the original position with its veil of ignorance is a device of representation because it models what free and equal citizens of a well-ordered liberal society regard as fair conditions and acceptable restrictions under which parties, as representatives of citizens, must choose the terms of domestic cooperation for the basic structure. Given the veil, representatives are represented symmetrically and equally, as rational, and as deciding for appropriate reasons among alternative principles.

In the case of different liberal societies, when the original position is reused to extend the liberal conception of justice to the law of democratic peoples, it is also a device of representation because it models what citizens of different democratic societies would regard as fair conditions under which parties are to choose the terms of cooperation among peoples. Rawls reiterates here that the parties to the original position are "representatives of societies" or peoples; thus, the terms of cooperation regulate not a single domestic structure but the law and practices of nation-states.

Rawls adds that three conditions are essential to setting up the original position: (1) the representatives of liberal societies are symmetrically and equally situated; (2) the representatives are to choose among principles for the law of peoples by reference to the interests of their democratic societies; and (3) the representatives do not know certain details (such as the size and population of their territories, the relative strength of the people they represent, the amount

of their natural resources and their level of development). Given these conditions, citizens of different liberal democratic societies would agree that the original position models fair conditions under which representatives of societies are to specify a law of liberal peoples (1993: 53).

Rawls claims, then, that the following "familiar principles" of a law of peoples will result from the extension of a liberal conception of justice to democratic societies (1993: 55):

1. Peoples (as organized by their governments) are free and independent and their freedom and independence is to be respected by other peoples.
2. Peoples are equal and parties to their own agreement.
3. Peoples have the right of self-defense but no right of war.
4. Peoples are to observe the duty of nonintervention.
5. Peoples are to observe treaties and undertakings.
6. Peoples are to observe certain specified restrictions on the conduct of way (assumed to be in self-defense).
7. Peoples are to honor human rights.

Except for the addition of the new principle to honor human rights these are, of course, the same familiar principles proposed by Rawls in A Theory of Justice. Since this law of peoples for liberal peoples "will also allow for various forms of cooperative associations among peoples" and "cooperative arrangements" such as trade, Rawls thinks that the parties ought to come up with "standards of fairness" and provisions "of assistance" ensuring "that in all reasonably developed liberal societies people's basic needs are met" (1993: 56).

By "basic needs" Rawls understands the economic and institutional means necessary for individuals "to take advantage" of the rights, liberties, and opportunities of their society (1993: 223, n. 15).

Extending the law of peoples to well-ordered hierarchical societies involves proving that a second session of the original position--in which representatives of hierarchical peoples are equally situated, rational, and deciding for appropriate reasons--actually models what hierarchical peoples consider to be fair conditions under which peoples are to choose a law of peoples. (It is interesting to note that there are no first sessions of the original position in the case of hierarchical societies. If first sessions were to be held, what principles of justice would the parties choose? Would we have any further need to then speak of hierarchical societies?) This extension also involves proving that in such a second original position the same law of peoples--the same standing principles of international law--as that adopted by liberal peoples would be adopted by hierarchical peoples. An important corollary to the law of peoples, then, is that nonliberal societies are also to honor human rights.

The question that will be the concern for the remainder of this chapter is whether nonliberal, hierarchical societies can in fact honor human rights. I will argue that they can only if one adopts a relativistic conception of human rights which grants "different" rights to "different" cultures. I think that Rawls ends up adopting this conception in order to make his law of peoples work, and as a result his theory of social justice as a whole suffers. If human rights are "different" depending on the social context, are they even recognizable as human, i.e., universal rights?

Before establishing this, however, it is necessary for Rawls to specify a "hierarchical society," and determine when it is well-ordered. According to Rawls, a hierarchical society is one not characterized by the separation of church and state; its political institutions specify a consultation hierarchy; and its basic social institutions satisfy a conception of justice that expresses a conception of the common good (1993: 52). If it turns out that societies which are religious in nature, whose political institutions specify a hierarchy of estates or castes, and whose social (including the legal) systems satisfy a common good conception of justice are also peaceful and non-expansionist, then their hierarchy is just, their legal and political systems legitimate; in short, those societies are well-ordered. This well-orderedness, Rawls suggests, ensures the human rights of their citizens. He contends that those societies will therefore have no problem in agreeing to a liberal law of peoples, one of whose main principles is respect for human rights.

A hierarchical society is peaceful and non-expansionist if its religious doctrine, though comprehensive and influential in governmental policy, does not seek to undermine the civic order of and liberties within other societies. Its system of law is legitimate if it imposes moral duties on all persons within its territory, guided by a "common good" conception of justice; if it takes impartially into account the fundamental interests of all members of society; and if judges and administrators sincerely believe and publicly defend that the law is indeed guided by such a common good conception. Another way of further spelling out this last requirement is to say that the political institutions of a well-ordered hierarchical society constitute a reasonable and just consultation hierarchy:

> They include a family of representatives bodies, or other assemblies, whose task is to look after the important interests of all elements of society. Although in hierarchical societies persons are not regarded as free and equal citizens, as they are in liberal societies, they are seen as responsible members of society who can recognize their moral duties and obligations and play their part in social life. With a consultation hierarchy there is an opportunity for different voic :s to be heard, not, to be sure, in a way allowed by democratic institutions, but appropriately in view of the religious and philosophical values of the society in question. Thus, individuals do not have the right of free speech as in a liberal society; but as members of associations and corporate bodies they have the right at some point in the process of consultation to express political dissent. (1993: 62; my emphasis)

Rawls asserts that if all of this is the case, a hierarchical society's common good conception of justice secures for all persons certain "minimum" rights. These are rights to means of subsistence and security; to liberty as freedom from slavery, serfdom, and forced occupation; to formal equality as in "similar cases must be treated similarly"; and to some personal property (1993: 62). If those rights are violated, it cannot be claimed that the legal system imposes moral duties on all persons, or takes impartially into account fundamental, essential interests. If those rights are violated it cannot be claimed that the consultation hierarchy is reasonable. A well-ordered hierarchical society, Rawls concludes, respects what he calls "basic human rights" (1993: 63).

Confronted with the problem that in hierarchical societies a state religion or comprehensive doctrine might not admit full and equal liberty of conscience and thought for all, Rawls strikes a compromise in his response. He notes that it is essential to the well-orderedness of hierarchical societies that other religions are not actually persecuted or denied practice, and that the society allows for the right to emigration. Doctrines that deny full and equal freedom of conscience are not reasonable, but, Rawls adds cunningly, they are not unreasonable either. Allowing "a measure" of liberty of conscience, though not fully and not equally, lies "between the fully reasonable and the unreasonable, which denies it entirely" (1993: 63; 225, n. 28). Thus, Rawls circumvents the problem of whether a state religion to which certain privileges attach, and which allows a "measure" of liberty of thought, might end up affecting the fullness and equality of other rights. Of course, given the "minimum" rights Rawls recognizes as being suitable for persons living in hierarchical societies, it's doubtful that he would acknowledge there is a possible problem here.

At any rate, the conditions of well-orderedness specified by Rawls (i.e., non-expansionism, the legitimacy of the legal system and reasonableness of the hierarchy, and the honoring of human rights) are presented, on the one hand, as the necessary conditions for membership in good standing in a reasonable society of peoples and, on the other hand, as the proof that nonliberal societies can be members in good standing in terms of their own conceptions of justice.

In order to confirm that an agreement on the part of hierarchical societies on a law of peoples protective of human rights is possible, Rawls argues further that the original position is a device of representation for hierarchical peoples among themselves. Although domestically the conceptions of justice in these

societies are not "political," nor can they be said to be constructed or justified in a manner consistent with Rawls's political constructivism, it is not unreasonable for these societies (members of different hierarchical societies) to insist that their representatives be rational and equal in making claims against other societies at the second step of the extension. Members of those societies would thus agree that the original position models fair conditions when their representatives: (1) care for the good of their own societies, understood in accordance with their own conceptions; (2) have equality in making claims vis-à-vis other representatives; and (3) care for the benefits of peace, trade, and assistance (1993: 64). Also in this case the standards of fairness for trade and other "cooperative arrangements" focus on how well a society can meet its basic needs, understood in terms of that particular society's cluster of minimum rights and liberties.

If this is the case, Rawls continues, representatives of hierarchical societies will agree to the same law of peoples as liberal societies inter se, and hierarchical peoples will honor the law of peoples for the same reasons liberal peoples do. Rawls explains that this is because the law of peoples as derived allows each people to pursue their interests and their conceptions of justice, within certain limits. Thus the limits of the law of peoples apparently coincide with those that hierarchical societies impose upon themselves in terms of their own common good conceptions of justice.

Several conditions are essential to the agreement proposed by Rawls. The first is that the original position at the second level of the law of peoples does not incorporate a "liberal," political conception of the person as free and equal. The second is that the law of peoples is not worked out through an all-inclusive global original position representing all persons "regardless of their society and culture"

(1993: 65-66). Without these conditions, Rawls worries that articulating a law of peoples would be "much more troublesome" (1993: 66). My concern here, however, is that universal human rights are premised on the ideal that individuals are free and equal, regardless of what society they happen to be born into, and that the point of human rights is to protect this freedom and equality from the type of discriminatory treatment characteristic of Rawls's hierarchical societies. To whom is this ideal troublesome? To Western philosophers theorizing in the comfort and safety of their offices? To power elites reaping the privileges of their positions of authority and control at the top of hierarchical societies based on inequality? To those marginalized and rendered voiceless or invisible by those very hierarchies? Perhaps if it were individual persons represented in a global original position, rather than the representatives of a hierarchical state, the parties would find agreement on such "liberal" principles to be not so troublesome after all.

In light of his account of the law of peoples, that is, his account of the "political conception of justice applying to and evaluating international law and practices," Rawls sums up his rather peculiar conception of human rights.

Rawls contends that human rights are different from rights in political liberalism. Human rights "do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example, that human beings are moral persons and have equal worth, or that they have certain particular moral and intellectual powers that entitle them to rights" (1993: 68; my emphasis). Neither do human rights require the "liberal idea that persons are first citizens, and as such free and equal members of society who hold those basic rights as the rights of citizens" (1993: 69; my emphasis). Apparently, human

rights require only the contingent fact that one is a "member" of some society or other; thus, one's moral obligations and interests will be different depending on the society one happens to be a member of. Because these obligations and interests are variable in Rawls's view, human rights need not be the same for all persons everywhere. A member of a hierarchical society need not be considered a person possessing identifiable moral powers, and can be denied equal worth on the basis of what class of membership they happen to be born into. Oddly, the arbitrary circumstances of historical and geographical fate are to allowed to determine in Rawls's law of peoples whether a person is treated equally or unequally. While Rawls's position may be an accurate description of certain empirical situations in which people are in fact treated unequally and rendered powerless within their societies, his concession to "political realism" (1993: 59) seems a far cry from the theory of justice as a moral as well as political conception.

Rawls argues that the above requirements are to be observed because human rights must work as the "minimum standards" of well-ordered institutions for all peoples who belong in good standing to a just political society of peoples. A just political society of peoples must consider hierarchical societies to be "members in good standing." And the minimum rights recognized in those hierarchical societies must, Rawls argues, be referred to as human rights in the same way that the more robust set of rights in liberal societies are referred to as human rights (1993: 69).

Rawls explains that the nonliberal conception of the person in other traditions might regard persons as "responsible" members of society, acting in accordance with their "moral duties"; as first and foremost members of estates,

associations, and corporations, whose rights arise from this prior membership. These are referred to as enabling rights, that is, rights enabling persons to perform duties in the groups to which they belong. That rights are understood to hold for persons only as members of estates and corporations, and not as individual citizens, "does not matter" according to Rawls (1993: 70). What is important is that these so-called "basic human rights" can be protected (through the imposition of moral rights and duties on p. rsons as members of differentiated groups) in a hierarchical society, without appealing to a comprehensive or political liberalism.

Rawls concludes that human rights are a "special class" of rights with a "special role" in a reasonable law of peoples; in his view, they are distinct from constitutional rights and the rights of democratic citizenship (1993: 70ff.). To support this conclusion, Rawls offers a limited interpretation of the Universal Declaration of Human Rights. According to his interpretation, human rights "proper" are only those contained in Articles 3 and 5 of the UDHR, i.e., the rights to life, liberty and security, and rights against torture and degrading treatment or punishment (1993: 227-28, n. 46). As we have seen, however, Rawls understands the right to liberty and security to apply differently in liberal and hierarchical societies; in hierarchical societies, liberty and security are minimally conceived as "freedom from slavery, serfdom, and forced occupations" (1993: 62). The other human rights recognized by Rawls are those described by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid. The remaining 28 articles of the UDHR, and apparently the economic, social, and

cultural rights set out in the International Conventions of 1966, fall outside the realm of human rights "proper."

Article 1 of the UDHR, which states that "All human beings are born free and equal in dignity and rights" is dismissed by Rawls as merely expressing "liberal aspirations" (1993: 228, n. 46). This move is telling, however, because Rawls's interpretation ignores that Article 1 is the very basis for all of the interdependent rights contained in the UDHR and the Conventions. The principle of equality or non-discrimination, which holds all persons to be free and equal, is recognized as the foundational concept in legislation, judicial interpretation, and other instruments concerning fundamental human rights.[51] According to these sources, the purpose of human rights is to universally respect, protect, and promote the freedom and equality of all persons. Rawls's account of human rights is unable to meet these recognized standards since it allows for the possibility of unfair inequality as the result of historically contingent injustices and disadvantages, rather than from choices made by individual persons as members of society whose partiality has been suitably constrained.[52]

4.2 The Law of Peoples: Some (Further) Problems of International Justice

The description of international justice offered by Rawls in "The Law of Peoples" is one in which "peoples" cooperate and interact only in peripheral ways. As in A Theory of Justice, the (more or less) self-sufficiency and self-containment of

the national community and the domestic scheme are asserted without much argument. Unlike A Theory of Justice, however, "The Law of Peoples" has dropped the idea that every domestic scheme of cooperation can be regulated by a Rawlsian criterion of domestic justice, and has added to the "familiar principles of international law" the principle of respect for human rights. Rawls's world of human rights implementation and protection is one in which the domestic community bears the utmost responsibility. The international political society of peoples is there merely to set some minimum standards for domestic institutions so that "certain" yet differing human rights are protected.

From the outset, Rawls affirms that the political conception of justice among peoples, i.e., the law of peoples, applies to inter-national (literally) law and practices; and he describes inter-national practices as cooperative associations and cooperative arrangements, such as trade between peoples. Extending political-liberal ideas of justice to yield a liberal law of peoples acceptable to liberal and nonliberal peoples, Rawls explains, depends on having a second original position modeling peoples, that is, nations, as free and equal. For Rawls, this is needed because the structure of the international social framework is different from the domestic basic structure, and because such representation embodies fair conditions according to peoples as corporate bodies organized by their institutions and governments, endorsing the principles there arising.

Rawls's assertions admit of two different readings, one less charitable than the other. The less charitable reading holds that Rawls simply ignores the types

of arguments I raised in the previous chapter. If the boundaries of cooperation and cooperative schemes do not coincide with nation-state boundaries; if institutions such as corporations, trade, investment, or credit do not distinguish between "national" and "international" cooperation; and if the global flow of information, resources, capital, and persons now interlock citizens and foreigners, then a second original position as Rawls envisages it, and the principles of international justice derived from that original position, are unjustified.

The more charitable reading, which I will examine here, suggests that Rawls is not so much denying the fact of interdependence as claiming that global distributional and political-power matters take second place vis-à-vis a more urgent project aimed at strengthening the legitimacy of international law as it now stands, and where domestic obstacles to compliance with that law and to human rights protection take center stage.

On this second reading, it can be argued that Rawls's project in "The Law of Peoples" is one of legitimation, that is, presenting a political conception of justice for the case of the political of societies that can help provide a shared public basis for the justification of international law and practice on the part of each "people" (nation-state). Because that political conception is said to articulate liberal democratic ideals and values and is said to be capable of gaining the support of nonliberal peoples, it can also allegedly provide international law and practice with a common value-based, rather than a modus vivendi-based, foundation.[53] Rawls describes his project as one intended to deny that standing international law and the principle of respect for human rights are ethnocentric,

reflecting and imposing Western values (1993: 69-70). If it can be shown that standing in a relation of freedom and equality with all other societies, and accepting a criterion of legitimacy in the eyes of their own people are reasonable conditions for any given society, he argues, then the law of peoples can be claimed to be "universal." Central to this argument is the notion that, although the criterion of legitimacy is international, because it belongs to the law of peoples, it can be accepted by nonliberal societies in terms of their own conceptions of justice (1993: 79ff.).

However, Rawls's attempt at strengthening the acceptance of and compliance with international law and respect for human rights contains several problematic assumptions. First, his theory would seem to imply that what lies at the root of disrespect for human rights is a lack of conviction on the part of populations that the principle of human rights and their domestic conceptions of the good do in fact cohere. Second, it would seem to imply that the major distinction to be drawn among nations in the world today is that between, on the one hand, liberal and nonliberal political cultures that are capable in principle and through moral argument of supporting human rights and, on the other hand, nonliberal cultures that completely disregard the principles of international law. Indeed, Rawls's prototypes of non-compliant states in "The Law of Peoples" are those whose comprehensive doctrines are expansionist and recognize no state boundaries (like the Hapsburgs in the 16th and 17th centuries), and those whose "religious and philosophical traditions" support oppressive governments, corrupt

elites, the subjection of women, and unsustainable environmental practices (1993: 72ff., 77).

It seems to me, however, that Rawls's diagnosis would be belied by Rawls himself, were he to take his own arguments to their final consequences. Moreover, his account does not easily agree with other descriptions of the world as manifesting more consensus than he admits, both in the literature on international law and popular movements supporting human rights. Let me briefly take up these issues.

As Rawls implies, it certainly matters whether or not populations have a moral allegiance to the principle of respect for human rights. Moral allegiance ensures compliance with this principle in its self-regarding and other-regarding dimensions, that is, domestically and in the interactions with other populations. Yet, is it true that the principle of human rights ultimately lacks legitimacy because of a lack of moral allegiance on the part of populations, that is, because populations still have to be persuaded that the fundamental interests ensured by their conceptions of justice coincide with those ensured by the principle of respect for human rights?

Rawls himself contradicts this estimation when giving us the principles that ought to guide the behavior, under the law of peoples, of liberal and nonliberal well-ordered societies towards "outlaw regimes" and societies under "unfavorable conditions." Regarding those societies that are either expansionist or do not recognize any conception of domestic right and justice at all, Rawls asserts that well-ordered societies must, either separately or within the United

Nations, denounce their institutions, deny them military, economic, and any other assistance, and exclude them from mutually beneficial cooperation. Yet regarding societies under unfavorable conditions (which Rawls reduces to the unreasonability of their political cultures), well-ordered societies must assist them in attaining those conditions that make possible a well-ordered society, and ultimately in attaining conditions ensuring the fulfillment of their basic needs and respect for human rights.

Now, it is clear that many expansionist and tyrannical regimes are neither denounced nor denied military and economic assistance. And it is also clear that many societies under unfavorable conditions are not in fact granted the resources, technology, and human know-how that make a well-ordered society possible, although they may be granted some moral outrage against the unreasonability of their manners. How can we explain these discrepancies?

One possible explanation is that a well-ordered society does not actually exist in the world today; this is to say that no society is presently and effectively regulated by its own conception of justice, both in the sense that the population generally accepts and complies with such a conception, and in the sense that the basic domestic institutions satisfy its requirements. [54] Rawls seems to point in this direction, but only in passing. He notes that actual democracies like the United States, unlike well-ordered democracies, can intervene in and undermine less secure and well-established democracies like those of Allende in Chile, Arbenz in Guatemala, or Mossadegh in Iran (1993: 59). But what would "well-ordered" really mean here? That the institutions of foreign policy, and foreign

conduct in general, must satisfy the domestic conception of justice? If that is the case, why do they not?

Rawls appeals to the example of domestic oligarchic governments carrying out "covert operations" in other countries without the knowledge and the consent of the public. Thus, by Rawls's own passing avowal, it cannot be simply claimed that the institution of foreign policy does not satisfy the domestic conception because the population are unpersuaded that it must be brought into line with the domestic conception's values. Rather, it might be the case that the institution of foreign policy excludes the domestic conception's (and population's) values because it is in the hands of oligarchic interests and oligarchic governments. In other words, individual persons do not have a say in the matter of whether and how domestic and international conceptions of justice are to coincide, because their "interests" at the international level are controlled by the representatives of states who are "in bad faith . . . claiming to speak on behalf of the community" (Nagel, 1995: 106). And those representatives may have brutal reasons for claiming that the principle of respect for universal human rights does not cohere with their "peoples" traditional values.

Another possible explanation of why tyrannical regimes are not ostracized and regimes under unfavorable conditions are not substantially assisted is that the political society of peoples is not well-ordered; "peoples" do not generally accept the law of peoples, and international law and practices do not satisfy the requirements of the law of peoples. However, this second explanation reduces to the first, because Rawls's well-ordered society of peoples is no more than the

society of well-ordered peoples: each society complies with the law of peoples because it is well-ordered. But if there are no well-ordered societies in the world today, Rawls's discussion on noncompliance regarding those societies that refuse to acknowledge a reasonable law of peoples cannot be restricted to the ideal, strict compliance behavior of well-ordered liberal and nonliberal societies towards non-well-ordered regimes. And if there is any suspicion that there are no well-ordered societies in the world today because the institutions of foreign policy and practices are generally in the hands of domestic elites, then arguments aimed at the moral persuasion of populations must be combined with arguments on institutional reform so that each society can go from the "real" to the "ideal" (denying military and economic assistance to tyrannical regimes, and so forth).

It is likely, though, that the non-well-orderedness of the political society of peoples amounts to more than the non-well-orderedness of each society. It might be that international law and practices do not satisfy the requirements of Rawls's law of peoples because alliances of oligarchic interests and oligarchic governments discourage or make futile attempts at the well-orderedness of other-regarding institutions on the part of some societies. These alliances are usually made not just for security, survival, or other such worthy ends, but also for power and profit; and they would not be so profitable were they not so easy to make because of the fact of economic and power-political interdependence that Rawls seems to consider secondary.

In addition to the concerns raised above, I think that Rawls's partition of the world among reasonable liberal and nonliberal political cultures--thus able

to support human rights--and unreasonable ones--thus unable to support them--is unsound and not born out by the human rights literature and practice.

In his arguments regarding populations under unfavorable conditions, and after pointing out that they must be granted resources, technology, and human know-how so that their needs and rights are met, Rawls adds:

> I shall not attempt to discuss here how this might be done, as the problem of giving economic and technological aid so that it makes a sustained contribution is highly complicated and varies from country to country. Moreover the problem [in societies under unfavorable conditions] is often not the lack of natural resources. Many societies with unfavorable conditions don't lack for resources. Well-ordered societies can get on with very little; their wealth lies elsewhere: in their political and cultural traditions, in their human capital and knowledge, and in their capacity for political and economic organization. Rather, the problem is commonly the nature of the public political culture and the religious and philosophical traditions that underlie its institutions. (1993: 76-77)

This way of speaking about public political cultures and principles as though they were self-originating is a step backwards even from the arguments of A Theory of Justice. Most of the literature dealing with the attitudes of peoples toward international law, and human rights in particular, recognizes that the public cultures of societies are shaped by a confluence of economic, political,

and ideological forces that originate from many sources beyond a state's territorial borders.[55] Clearly, there are differences of degree in the extent of observance of rights, and differences in the types of rights being observed among countries. Scholars disagree about what factors would explain these differences; some emphasize the level of economic development and the type of economy; others, the economic-political ideology; others still emphasize the effects of competing political traditions and the alliances forged with domestic and foreign powers. Despite these differences, two points can be made. First, analyses of political tradition and culture, insofar as they are considered to have a bearing on the protection of human dignity, do not separate them from economic and political factors. Second, economic and political factors are not regarded in the literature as exclusively endogenous, that is, originating and influenced merely by internal domestic culture.

Thus, Rawls' notion of domestic public cultures characterized as "unreasonable" traditions might be criticized as another version of those narrow ideological discourses which blame the recurrence of violence, human rights abuses, and social instability on supposedly intractable (therefore hopeless) defects of "national character." Are violence, human rights abuses, and social instability merely the necessary burdens of a "self-contained," "closed" society whose domestic political culture inherently fails the test of reasonableness?

This is not to deny that there are political cultures more reasonable than others; it is simply to add that the reasonability and unreasonability of political cultures are related to historical material conditions, some or perhaps even many

of which are extra-domestic. Moreover, if Rawls's abstract conception of political culture seems to be refuted by much human rights literature and practice, so too does his portrayal of "peoples" interests. I return to this last point in the next section.

4.3 Rawls's Law of Peoples and the Fate of Human Rights

Rawls's treatment of human rights included in his law of peoples has several unfortunate consequences. First, it rationalizes different rights standards among liberal and nonliberal peoples and among members of nonliberal peoples themselves. Second, it seriously compromises the range and interdependency of the rights codified in the Universal Declaration of Human Rights. Third, it also misconstrues the purpose of contemporary human rights law. In this section I want to expand briefly on these criticisms.

Rawls's principle of respect for human rights as part of a just law of peoples can be interpreted in two different ways, both of them problematic:

> (1) The human rights that nonliberal peoples recognize--e.g., the rights to subsistence and personal security, to liberty as freedom from slavery, serfdom, and forced occupation, to some formal equality as in "similar cases must be treated similarly," and to "certain" liberties of conscience, thought, and association--are the human rights that liberal peoples

recognize; that set of rights is the same for both nonliberal and liberal societies and it is a narrow set.

(2) The human rights mentioned above are nonliberal peoples' human rights; that a law of peoples accommodating both liberal and nonliberal peoples settles upon them is a reflection of liberal societies' toleration of nonliberal societies.

As for the first interpretation, it is patently false that liberal parties in the second session adopt the same law of peoples for the same reasons (Rawls 1993: 60, 67) as nonliberal parties in their second session. Recall that according to Rawls's scenario the first stage of the original position involves two steps or sessions, the first for liberal peoples and the second for nonliberal or hierarchical peoples. In the second session, representatives of each "peoples" (nation-states), bound by the "interests" of their respective societies, choose principles for the law of peoples by reference to how these principles accord with the principles of domestic justice already chosen; as Rawls makes clear, the law of peoples only draws some "outer boundaries" to domestic justice. Because Rawls divides the original position into two stages, giving priority to the domestic choice situation, he is necessarily committed to the distribution of different contents and scopes of freedom and equality.

In liberal democratic societies, claims of the general good and other perfectionist values do not take priority over the freedoms and interests of individual citizens. In democratic societies, at least in principle, the "interest"

of the society is the interests of its individual citizens in accord with the principles of domestic justice. The law of liberal peoples, and the principle of human rights in particular, must ensure, not undermine, a very demanding set of individual rights, liberties, opportunities, and socioeconomic means. But there is some doubt that Rawls's liberal law of peoples can ensure that set. Rawls understands by "basic needs" those that must be met if citizens are to be in a position to take advantage of the rights, liberties, and opportunities of their society. One can assume that the set of rights, liberties, and opportunities is sufficiently similar and wide in all liberal democratic societies, but it need not be. If standards of fairness for cooperative arrangements that focus on how well "peoples" or societies satisfy their basic needs do allow for indefinite inter-peoples inequalities, however, those standards, unlike the difference principle that Rawls summarily excludes from the law of peoples, might end up widening the gap among different societies' shares of means and sets of rights.

The "interests" of hierarchical societies, as typified by Rawls, are not the demanding interests of citizens, much less those of equal citizens. How does Rawls's theory determine the interests of hierarchical societies given that inequality? To which perspectives or claims does it pay attention, and which does it ignore? For all that Rawls says, common good conceptions of justice in hierarchical societies guarantee only a very minimum set of rights to all members, but also a wider set of rights to some members. The law of hierarchical peoples is therefore a different law than that of liberal peoples; the law of

hierarchical peoples ensures only a narrow set of rights, and fewer means to make those rights worthy, than does the law of liberal peoples.

Contrary to Rawls, I think it unlikely that liberal societies made up of individuals matching Rawls's political conception of persons--and thus concerned about preserving the worth of a demanding set of rights, liberties, and opportunities--would agree to standards of fairness that allow for indefinite inequalities among peoples by focusing only on domestic well-being and disregarding the extra-domestic components of that well-being. The difference principle, were it not to be excluded by Rawls from the "more general ideas of liberal justice" suited for the law of peoples, would, by focusing on inter-personal inequalities across national boundaries, provide a more rigorous check on those inter-peoples inequalities. The same can be said about the principles of fair equality of opportunity and the fair value of political liberties; but those too are excluded by Rawls.

In addition, doubts can be raised about the case of hierarchical societies. Why would they allow for indefinite inter-peoples inequalities that threaten even the narrow set of rights (and means) they recognize? Why would they not want to guard themselves against contingencies--such as a huge population, environmental hardship, or lack of relative strength--through measures more definite than those barely meeting their own basic needs? Why would they allow contingent national borders (often arbitrarily determined by the colonial powers) to "justify" enormous inter-personal inequalities at the global economic level, even if they apparently do not care domestically about basic equality? Liberal

and nonliberal peoples alike might care about inter-peoples inequalities, even if they do not care in the same way about domestic equality.

Thus, in contrast to the first interpretation of Rawls's account of the principle of respect for human rights, I would argue that liberal peoples, concerned about preserving the widest and most worthy possible set of individual rights, liberties, opportunities, and means, would not accept as the content of international measures of protection the narrower set of rights and means ascribed to nonliberal peoples. Though it is plausible, as Rawls says, that both liberal and nonliberal peoples care about imposing limits on internal sovereignty, I think it likely that liberal peoples would demand stronger rather than weaker limits.

Turning to the second interpretation, Rawls might be saying that liberal peoples agree to the same law of peoples, to the same principle and content of international human rights as nonliberal peoples, simply because the reasoning of liberal parties in the second session tries to accommodate the existence of nonliberal societies. When liberal parties accept a second session of the original position without representing "peoples" as free and equal across all societies, and accept the limits on internal sovereignty based on hierarchical peoples' own conceptions of the good, they are demonstrating that accommodation through a commitment to toleration.

However, the second session thus understood commits liberal peoples to a lowest common denominator understanding of human rights, in contravention of the spirit of the UDHR that human rights are standards of achievement for all peoples and nations, and not of legitimation of any given scheme of domestic

justice. The second session description of rights destroys the range and interdependency of international human rights across the board. It might be that such a lowest common denominator understanding is only intended to regulate liberal peoples' behavior towards nonliberal peoples and not necessarily the behavior of liberal peoples among themselves, but I do not think this would be the case in light of our discussion above of the first interpretation.

Liberal democratic societies, Rawls states, must tolerate nonliberal societies, organized by comprehensive doctrines but meeting certain conditions of well-orderedness, in the same way that liberal citizens must respect citizens with other comprehensive views, provided they are pursued in accordance with domestic justice. The constructivist account which holds that the original position procedure is to represent "peoples" symmetrically and equally situated, so that the liberal conception does not impose on other societies, is thought by Rawls to be the best manner of showing such "liberal" toleration since it asks of other societies only what they can reasonably grant (1993: 67, 79). But leaving aside for the moment the simplistic parallel between toleration of individual pluralism and of pluralism of conceptions of the good at the level of the state, liberal societies, or rather the citizens of liberal societies, must also be responsive to the fundamental needs and interests of all other persons qua persons, and this equally. This is simply a feature of liberal persons that cannot be waived. It is not clear to me why, when a liberal political conception of justice is extended to the law of peoples, the essential question becomes for Rawls "What form does the

toleration of nonliberal societies take in this case?" (1993: 42-43), as opposed to "What form do liberty, equality, and solidarity take in this case?"

However, Rawls wants to prove that distinguishing two stages in justice as fairness--the first focusing on liberal domestic institutions and individuals, and the second focusing on the political relations between "peoples"--not only agrees with the reflective public opinion of all peoples as "corporate bodies," but also that such a distinction does not totally commit liberal democratic "peoples" to overlook or disregard the liberty and equality that I am concerned with here. In other words, such a distinction is in Rawls's opinion the best manner to balance liberal toleration towards independence and self-determination of peoples and liberal universalism regarding the liberty interests of individuals.

The powers of sovereignty, Rawls explains, are a part of the law of peoples and not of domestic justice or domestic jurisdiction. Among those powers are how a state is to treat its own citizens, and among the principles of the law of peoples are the minimum standards of such treatment, that is, the principle of respect for human rights. Human rights are ensured through the criteria of "well-orderedness" of the law of peoples that the well-ordered hierarchical societies can respect. On this view, we must tolerate only those societies. And the smaller measure of freedom and equality of their members that those societies respect is all liberals can "reasonably" ask for.

Consider again the criteria of hierarchical well-orderedness that the society of liberal societies accepts and hierarchical regimes can respect. Rawls claims that the social and legal systems are legitimate and the hierarchy is just

because the rights those systems and the hierarchy recognize enable all human beings therein to be dutiful members of their societies and dutiful members of their assigned station. To be sure, hierarchical societies keep their members alive and protected against slavery, serfdom, torture, and other similar degrading treatments which would destroy the moral dutifulness of any person. Yet it seems unlikely that "moral dutifulness" defined in terms of a hierarchical well-orderedness is always or even ever in accord with the type of respect of human dignity recognized by the UDHR. Think, for example, of the predicament of traditionally "dutiful" women and other disempowered persons (religious and racial or ethnic minorities) in those contexts, and the consequences of Rawls's views with regard to their struggles for emancipation and full and equal human rights begins to look rather too tolerant.

Moreover, in agreeing to the representation of hierarchical peoples as pursuing the common interests of their societies, although subject to some limitations of the law of peoples, liberal peoples not only agree, as Rawls points out, to the denial of full and equal liberty of conscience and thought to the members of such societies. In societies where a state religion or a state comprehensive doctrine reigns, the members of the established religion or comprehensive doctrine enjoy certain privileges that translate into elitism and paternalism, and consequently the denial of the fullness and equality of almost all other liberties to the rest of the members, including the minimum liberties that Rawls grants them. Any advocacy of toleration towards pluralism of conceptions of justice at the level of the state must take note of these facts, especially if the

struggles of non-privileged members against the dominant domestic, common good conception are also pursued in accordance with standards of justice recognizable to liberal societies.

It is arguable that Rawls's notion of a society of liberal societies accommodating what the society of hierarchical societies "can reasonably grant" might say more about the interests and concerns of the power elite at the top of the hierarchy than about the ideals and values of their populations, at least of the oppressed therein. Because the criteria of well-orderedness of the law of peoples have been designed with a view to what hierarchical societies can reasonably accept in terms of their own common good interests (those criteria are to become "human rights" for them) and because, less ideally, the scope and content of state internal sovereignty are dependent on the practices and omissions of the international community, it is difficult to say whether hierarchical peoples enter the proposed agreement with a very different understanding of human rights, which must be tolerated, or whether they are destined to maintain that understanding. And even though Rawls claims that his law of peoples does not embody the "morality of states" view (i.e., the traditional law of nations) because it places the powers of internal and external sovereignty in the realm of the law of peoples itself, that is, in the hands of the community of communities (1993: 48ff., 221 n. 8), Rawls's notion of toleration among peoples and the design which guarantees that toleration come very close to the morality of states view. On this point, Rawls remains faithful to the position taken in A Theory of Justice.

I very much doubt, then, that the reflective liberal democratic individual and the disempowered members and groups of hierarchical societies would support Rawls's two sessions as described, that is, the very minimum criteria of well-orderedness of the second session. But even if those criteria were to be supported, that would only show, I think, that public opinion is still to be brought into equilibrium with better possible conceptions of justice among peoples.

One could still argue that despite the limitations I have pointed out, Rawls's project of an overlapping consensus of peoples on a law of peoples, which allows them to pursue their collective interests within limits, still leads to the moral affirmation of important rights; and thus, that this approach is better than a modus vivendi state of affairs. However, there still remain reasons for doubting the wisdom of a list of differing minimum rights as standards of international protection.

For instance, when it is claimed that for the purposes of foreign policy and action, the sixty or more rights recognized in the International Bill of Human Rights should be trimmed down to something more manageable, that "something more manageable" tends to reduce either to the set of rights with regard to which a particular government is "doing better" in comparison with a real or imagined opponent (e.g., economic rights in socialist countries, political rights in liberal democratic countries), or to a set of rights that reflects de facto rather than normative consensus.[56]

Furthermore, Rawls's list of basic rights is surprisingly "Western" in what it leaves out, despite his anti-ethnocentric aspirations: economic and social

rights, except the right to subsistence, have disappeared, as well as any reference to international solidarity and international institutional reform as necessary for the full realization of all rights (Article 28). Rawls fails to address the fact that in international debates since at least the 1970s "non-Western" (or "developing") societies have struggled for precisely those rights. Even Rawls's recent feminist gestures, such as his condemnation of the oppression of women due to the unreasonability of certain conceptions of the common good, agree little with First and Third World feminist literature emphasizing the indivisibility of rights and the inclusion of socio-economic rights as vital to the full spectrum of human rights.[57]

Assenting to de facto consensus as the starting point of international action--and Rawls's project seems to read, "let us start with only those rights that more easily could be respected by all and see where we can go from there"--implies paradoxically that international efforts should emphasize only those rights that are not widely and systematically violated. Any sound list of differing "minimum" rights would require such extensive empirical research regarding the mechanisms by which each repressive government is able to turn human life into that of a solitary, poor, nasty, and brutish shell, that we are much better off by defending all the rights of the UDHR (Donnelly, 1989: 41ff.). There is no reason to think that not recognizing the right to subsistence is the only means of keeping human beings from their food and shelter; and there is no reason to think that a de facto minimalism does not lead to a spiraling downwards in human well-being,

as opposed to a hopeful start. That Rawls appears to think this is a severe step backwards from the vision of social justice articulated in his earlier theory.

A final point. Rawls insists time and again that human rights are a "special class of rights," different from constitutional and citizens rights. This way of describing human rights coheres with Rawls's project concerning a law of peoples, but seems to confuse two different facts, namely, the international character of human rights law--the fact that human rights standards are international--and its true role and object of concern--the fact that human rights are rights of the individual, there to protect the inviolability of the individual from domestic and extra-domestic threats. International law theorists insist that human rights are individual rights and that their only "specialness" is that they are claimed when legal and political remedies are not working or have failed.[58] Far from being different from constitutional and citizens rights, human rights become redundant or "self-liquidating" precisely when constitutional and citizens rights are in place.

If the purpose of contemporary international human rights law is that of raising domestic standards of protection so that individual well-being is increased, I do not see how Rawls's project of a lowest common denominator "equilibrium" among differing domestic standards respects that purpose and its beneficiaries. And if human rights law can be expansively read as safeguarding the individual also against extra-domestic threats and in accordance with a very demanding set of rights that are appropriate for all persons everywhere, then I fail

to see how Rawls's law of peoples can improve upon that recognition and protection.

4.4 Rawls and Cosmopolitan Social Justice: Concluding Remarks

Charles Beitz argues that a social justice model of human rights accommodates the economic and social rights of the Universal Declaration, brings in issues of contribution regarding the fulfillment of rights claims (i.e., who should satisfy rights claims), and addresses matters of priority among rights "in the context of a theory drawing together the diverse moral considerations that (must) enter in the justification of general principles of social justice" (1979a: 60). Beitz's argument is aimed against some specific traits of natural rights theories, yet he does not emphasize other advantages of the social justice model, such as its ability to preserve the universality of human rights.

Beitz contends that because "the social justice model recognizes that some rights find their philosophical foundation in certain characteristics of human social cooperation, it can explain the basis of . . . those human rights which do not belong to persons as persons, but rather belong to persons because of the social relations in which they stand" (1979a: 58-59). Before I enter into the matter of human rights universality at the conclusion of this thesis, however, I want to comment on the justification of human rights within the social justice model. This is because I think that Beitz is wrong in asserting that economic and social rights find their foundation exclusively in human social cooperation,

whereas "personal" rights (and perhaps even civil and political rights) appeal to other bases. This brief commentary will set the tone for the discussion that follows.

One of the problems with Beitz's argument is that it tends to obscure the ideal dimension that the notion of social cooperation has in a theory of social justice such as that of the early Rawls, in terms of its importance to the justification of Rawlsian justice. For instance, in his account of Rawlsian global justice in Political Theory and International Relations, Beitz merely appeals to the empirical existence of global cooperation given the circumstances of justice yet neglects the ideal of cooperation among free and equal persons. In other words, Beitz appeals to the role of justice but neglects the interpretation of this role intimately connected to an ideal of social cooperation. I think that in Rawls's theory (and I refer here to his conception of social justice in A Theory of Justice), all rights--civil and political as well as economic and social (what Rawls refers to as means contributing to the worth of freedom)--are justified by appeal not only to their necessity and efficacy given societal cooperation under the circumstances of justice, but also by appeal to the notion of cooperation among free and equal persons, which is a normative ideal. (The question I raised in the previous chapter is whether Rawls's principles of international justice are able to vindicate this ideal). In overlooking this normative ideal Beitz unnecessarily fragments the justificatory bases of (human) rights. And Rawls ends up with the same result by dropping this ideal from his theory of justice.

I think it is necessary to underline that point because one of the usual contentions in human rights theory is this: If human rights are rights that all individuals have simply because they are human, why then are human rights also entitlements, that is, how come they refer to social structures, political ties, and so on? The answer to this query is not to argue that there are, in the UDHR, two different philosophical anthropologies (human beings as "natural" vs. human beings as "social") and two opposing views of human freedom and rights (negative and positive). Those remarks often imply that social and economic rights are different, less firm, and somehow second category rights. What ought to be argued is that there is one single normative ideal of the human being--as equally free--and that economic and social rights, as much as any other right, rely on it; and that ideal is to be realized, logically, in society. How else are we to understand the Preamble to the ICESCR, which states that the "ideal of free human beings enjoying freedom from fear and from want can only be achieved if conditions are created whereby everyone enjoys his economic, social, and cultural rights"? The idea conveyed by these documents is that all rights are instrumental in society in helping to secure equally free humanity.

Jack Donnelly has argued that the "humanity" which grounds human rights is both historically embedded and utopian, i.e., a moral ideal. To say that human rights derive from the inherent dignity of the human person is to say that human rights are needed for a life of dignity, a life worthy of a human person, a life of freedom and equality. Humanity's moral status, as free and equal, as possessing dignity, not only appeals to the "nature" of persons and their societies given

contemporary psychological, sociological, and moral facts. It is also a moral vision of humanity resting on an account of some of the requirements needed to realize that vision. Human rights include, then, the demand that basic legal, political, and economic institutions and practices help realize that moral vision precisely through the implementation of those rights.[59]

On this point Pogge's Rawlsian version of global justice is in agreement. In his theory, it will be recalled, Pogge wants to provide an answer to the question, What sort of international order makes possible the full realization of the human rights of the Universal Declaration given the fact of societal interdependence? His answer is more closely related to Kant's notion of cosmopolitan right than it is to Rawls's notion of a law of peoples. Whereas Rawls would accept a division of the world's peoples into those who are mere subjects with unequal rights and those who are equal citizens, Kant argued for the establishment of equal world citizenship for all persons. He wrote:

> Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of human rights and hence to perpetual peace. (1957: 23)

The Kantian response to the ideal of equal freedom, and to the fact that whenever people cooperate together so that their actions affect each other a threat of infringement of equal freedom usually arises, is to create an order of global justice that recognizes and protects the same and equal human rights for all, and the measures that guarantee the maximum worth or value of those rights. In other words, the response is the creation of or the working towards a global scheme that satisfies and harmonizes with Rawls's globalized principles of justice, chosen by individuals as free and equal and chosen for basic institutions in general.

For Pogge, Rawlsian principles of global justice are the principles that free and equal moral persons would agree upon when confronting a world in the circumstances of heavy interdependence and pluralism. As he well points out, the ideal of the human person as free and equal--or its equivalent, the ideal of well-ordered cooperation among citizens regarded as such persons--is no more nor less than that: an ideal, a normative conception that must be realized. It is as absurd to maintain that a criterion of justice is only applicable to better-ordered societies where better-off citizens abide (the West) as it is to maintain that human rights are only applicable there where they are (arguably) less needed. The task is then to create, not to presuppose, the institutions, and to implement the principles that will bring about such an ideal person and such ideal cooperation.

This discussion on the importance of normativity allows us to understand further advantages of the cosmopolitan social justice model. Those advantages

have to do with the plausible elaboration it provides of those theoretical and practical key points in the international human rights law that some theorists argue are underelaborated; for example, the elaboration of some of those global circumstances that have made human rights imperative; the elaboration of the conceptions of justice, freedom, and stability that are reflected in the full range of human rights; the elaboration of the links between the national and the international obligations required to create conditions that secure human rights. I will not enter into these further matter here. I am going to focus, instead, on the fact that the broadly Rawlsian social justice model attempts to preserve the universality of human rights standards, and some of the problems that follow from that attempt.

According to the prevailing human rights law, human rights are universal: all and the same human rights should be applicable to every human being and equally applicable. This point is essential beeause, as we have seen, Rawls's overlapping consensus of peoples on a "law of peoples" protective of differing minimum rights does not preserve universality. In Pogge's framework, it is Rawls's liberal democratic rights that he attempts to universalize. Assuming for the moment that a liberal democratic understanding of human rights is the best articulation of those rights, the question arises of how to go about universalizing them.

According to Pogge, there are at least three strategies to employ in universalizing human rights:

1) Proposing those rights to others under the Rawlsian rationales of the fact of pluralism, the fact of the global basic structure, the ideal of cooperation among free and equal persons, and the necessity of preserving background justice in the light of that ideal. An essential part of this proposal is taking positive steps towards refashioning global institutions in a liberal democratic way; the West bears a special responsibility here, due to its position of control and advantage within those institutions.

2) Adopting a degrees approach to the legitimation of liberal democratic rights in diverse cultures.

3) Insisting on the necessity of an overlapping consensus on the same rights along individualist lines, so that such consensus is capable of initiating global and domestic change and institutional reconstruction.

This strategy suggested by Pogge might appear trivial but it is not given present-day tendencies to seek agreement in light of the prudential convictions we happen to have, rather than in light of the convictions we could have by developing better moral and social theories and taking practical steps to realize them. The strategy is still too general, of course, yet it is well-taken.

Now, if the universalizing strategy is well-taken, the Rawlsian content that Pogge seeks to universalize might not be as proper, particularly if the criterion is to help develop and realize the contemporary human rights law. In other words, while Pogge can successfully show that Rawls's theory should move in a global direction, and that such a move can only help the universalization of human rights, can he show that Rawls's conception of justice and rights is the

best available to fully realize human rights? This is important because human rights law aspires to more than universality of rights standards. It aspires also to the universal realization of the free and equal human being, an ideal underlying economic and social as much as civil and political rights. If the same ideal of equal freedom underlies Rawls's rights, opportunities, and means in A Theory of Justice, one needs to push Rawls's criterion so that it coheres with the ideal of human rights on the global level. The question then is, does Rawls provide a theory of social justice that is capable of grounding universal human rights?

I believe that in his early theory of justice as fairness he does, and in my estimation there is much to be gained by thinking of human rights in a Rawlsian framework, that is, as requirements of domestic and international social justice and as standards specifying the legitimacy of institutional patterns. However, thinking of human rights in a Rawlsian framework gives us another reason for reconfiguring Rawls's theory of international justice so that the device of the original position is brought to bear immediately on the world at large.

One advantage of thinking of human rights in terms of Rawls's theory of justice as fairness is, I believe, the structural vision of the world of human rights protection that such a strategy both presupposes and encourages. That conception allows the human rights theorist and activist to develop an analysis of the legal system, the political constitution, the economic organization (or disorganization) of a society; the ways in which those institutions, taken as a "scheme" or whole, distribute human beings over different social positions that dramatically influence their life prospects and shape their expectations and activities; and the

ways those institutions often exclude, unduly burden, or clearly exploit the members of specific social and economic positions. A Rawlsian conception of the world of justice and human rights encourages a complex yet unified view of the dimensions of social reality.

A Rawlsian conception can also be inclusive, insofar as it recognizes that institutional patterns may interlock the members of different communities across the globe. As Pogge contends, the present international order is the modus vivendi framework brought about by inter-governmental prudential practice, informed by the changing distribution of power, whatever that may be. That framework cannot reflect the moral values of any nation-state's population and perhaps makes impossible any value-based global institution, such as effective mechanisms for the protection of human rights everywhere in the world. This predicament explains, for example, why the international community often disregards domestic human rights violations in powerless or strategically-allied populations, or initiates violations in "spheres of influence." Moreover, being a-moral, the present international order's ground rules are generally insensitive to international inequalities, which in turn reinforces the power-structures characteristic of the existing modus vivendi. Because those rules do not incorporate any egalitarian distributive component (as does Rawls's law of peoples which excludes the difference principle and fair equality of opportunity), members of different communities do not have equal chances to influence the trans-national and supra-national decisions that shape their lives, and thus do not have equal chances of obtaining health care, education, or work irrespective of

the society to which they belong. Because the international inequalities generated do not work to the benefit of the world's least advantaged groups and classes (on the contrary, they compound their position of disadvantage) the rights and liberties of those groups are nearly valueless; and this is leaving aside the sheer starvation and misery brought about and worth preventing in itself, not just in terms of worthy or effective liberty.[60]

The discussion throughout the last two chapters brings to our attention that one of the most important problems facing human rights today is that of the diversity of (domestic) frameworks of justice and of political cultures. I have argued that the absolute primacy of the domestic, or a focus on the domestic that disregards the extra-domestic, ought to be contested. This is not to say that the dimensions of diverse public cultures do not matter to human rights protection. It is to say that discussing issues of cultural diversity in isolation from basic structure (domestic and global) considerations may be too short-sighted. I think that a properly Rawlsian conception of justice and human rights would be concerned to question the separation between the creation of a domestic climate in which equal freedom can flourish and the creation of a global scheme in which such a domestic climate becomes possible.

However, the continually growing importance of globalization and trans-national dimensions of social justice calls for more finely-tuned analyses than those that stop at the negative human rights significance of the nation-state's borders. The nation-state is clearly still a very important actor within the global arena. Given this fact, are the most important human rights violations those

brought about by the standing modus vivendi framework? If so, what are the implications of a Rawlsian criterion of global justice regarding domestic society? How well does a Rawlsian global model fare with respect to the tension, and the necessary accommodation, between global justice--ensuring universal, equal rights--and cultural diversity?

At the end of Realizing Rawls, Pogge maintains that the single, global session of the original position allows the parties to decide how much room to leave for differences in national institutional organizations and in national conceptions of domestic justice (1989: 272). The parties know that the world divides up into national societies although they must accommodate this knowledge from the standpoint of free and equal moral persons seeking to optimize their shares of primary goods, rather than from the standpoint of states' representatives pursuing prudential interests (1989: 258). Thus, Pogge adds, choices as regards domestic practices must, first, be consistent with the basic rights of all (as embodied in the Universal Declaration or according to the rights and liberties enunciated by Rawls in A Theory of Justice), both citizens as well as outsiders; and, second, be supported by most of a society's citizens. Pogge identifies these requirements as a balancing of the liberty interest in collective autonomy against other (apparently universal and individual) liberty interests. According to Pogge, this balancing allows for differences in national conceptions of justice. But how does it do so? It seems clear that the criterion of global justice might allow for domestic variations in institutional features, but it is less

obvious that variations will be allowed in substantive conceptions of justice (or in interpretations of those conceptions).

A brief examination of Pogge's elaboration on domestic choice in his discussions of the political process might help to illuminate the problem. Pogge maintains that his globalized version of Rawls's conception of justice is more responsive to cultural diversity than are Rawls's own proposals for international justice (portrayed in chapter three as R_1 and R_2). This is supposedly because in Pogge's version the global parties are not constrained by any prior (Rawlsian) criterion of domestic justice, and because Pogge envisages the constitutional convention as relating not just to differences in national circumstances but also to diversity in national collective preferences.

In Pogge's opinion, Rawls has the tendency to think of the political process as an instance of imperfect procedural justice. Pogge contends, however, that insofar as outcomes of the domestic political process are underdetermined by an independent criterion (the global criterion), the political process contains an element of pure procedural justice; that element allows more of a social system's institutional features to be shaped in accordance with preferences in the political debate. In particular, the role reserved for direct democracy, choices between democratic single-party or multi-party systems, and choices between single-member or multi-member constituencies, can be left to the domestic debate.

While the criterion of global justice governs the ground rules of the global system as a whole, this is still compatible with different institutional

specifications of the criterion regarding practices whose authority is confined to particular regional or local divisions, for the equal political liberties can be compatible with those differences. Moreover, since the opportunity principle makes no specific requirements about what opportunities a scheme is to generate, but constrains only the distribution of such opportunities, and since, similarly, the difference principle requires only that inequalities optimize the relative position of the least advantaged, the choice of institutional features that affect opportunities and socioeconomic positions roughly equally can be left to the domestic political process. Pogge recognizes, though, that the domestic political process is also constrained. Thus, social policies must be just (the criterion excludes certain outcomes, like violations of the first principle of justice); the equal political liberties must be domestically respected; and the difference principle should be incorporated into domestic constitutions.

As far as international justice is concerned in A Theory of Justice, Rawls assumed a conception of social cooperation which is tied directly to the realist perspective of conventional international relations and the law of nations. Given this assumption, I must agree with Pogge that Rawls's account of international justice is severely hampered by its dependence on a background modus vivendi framework. The inequality and instability resulting from this framework are hardly conducive to the principles of justice endorsed by Rawls at the domestic level. As Pogge proposes, then, I believe that the choice situations of the original position ought to reflect an alternative conception of social cooperation in order to generate a more adequate theory of international justice. This would be

achieved, in part, by eliminating Rawls's stipulation that the original position may be extended into the international domain only after principles have been chosen for domestic purposes. Instead, the parties to the original position would immediately address the principles for the basic structure of global society, which includes at the same time domestic social systems and individuals. Under this interpretation, the majority of the elements found in Rawls's description of the original position still remain in place, such as the formal constraints of the concept of right (universality, generality, publicity, finality), the condition of mutual disinterestedness, and the conception of the parties as rational. However, what is most significantly different is that the parties to the original position are to be considered persons from different societies and not representatives of states. The parties can still be regarded as the citizens (not merely subjects) of states, but they would not possess knowledge of the particular features of the states in which they happen to reside. In other words the parties retain, from Rawls's original conception, their identities as free and equal moral persons in the world at large but a veil of ignorance precludes them from assuming the identity of states' (liberal or hierarchical) representatives.[61]

Adopting this position allows for a "more Rawlsian" characterization of the international original position. For instance, the parties do not know the particular circumstances of any society, nor do they know any society's political structure or economic situation. Moreover, the parties do not know the particular circumstances of the international community. Because Rawls would allow the international original position only after the principles have been chosen for the

domestic original position, in his model the parties must know that they are representatives of states whose interests are necessarily determined by an existing national context. This would seem to me to defeat the purpose of the veil of ignorance and the original position in choosing appropriately global principles of justice. As Rawls maintains, justice is the object of the basic structure of society; yet I suggest that the basic structure is that of an interdependent global society rather than that of a single more-or-less self-contained state. This is significant because the basic structure is conceived by Rawls as the system of institutions which distributes rights and liberties and determines the division of advantages of domestic cooperation. It is my argument that the basic structure is now to be understood as the system which distributes universal rights and liberties and determines the advantages of international social cooperation, which necessarily includes different societies.

It should also be noted that if the parties are persons, rather than representatives of states in a modus vivendi framework, then they would be more liable to adopt a moral rather than merely prudential understanding of their existence in the circumstances of justice, i.e., that conditions of moderate scarcity exist between them, that natural and other resources are not evenly distributed, and that the availability of those resources is affected by conflicting claims at the global level. This recognition is a factor absent from Rawls's model. As a result, the interests, equality, and autonomy of persons are given priority over the interests of states.

The model presented here suggests that although the parties recognize that a basic structure of some sort exists it remains open as to what its final form will be, although I do assume it would match up with a Rawlsian liberal, democratic society. It does not assume that the selected principles of international justice will be the "familiar" rules of the conventional law of nations, which necessarily differ from the principles of domestic justice described by Rawls. Thus, the parties understand that extended principles of justice are required to order these underdetermined social institutions for the mutual advantage of all, precluding the immediate imposition of a modus vivendi framework from a position external to that of the parties in the original position. The principles of domestic justice would coincide with the principles of international justice, meaning that the basic rights and liberties of people as national citizens would coincide with the basic rights and liberties of people as global subjects. Starting from a global rather than domestic choice situation therefore entails the following modifications of the Rawlsian principles of justice that can be derived and used to appraise the basic structure of international society:

(1) The first principle of equal liberty requires the distribution of the most extensive total system of universal rights and liberties from the start to all human beings in the global community.

(2) The second principle concerning equality of opportunity and social and economic inequalities applies from the start to the global, not just the domestic, community.

Rawls observed in his theory of domestic justice that, from the participant's point of view, it would not be reasonable to expect agreement on a principle of justice granting a greater than equal share in any division of the social primary goods; neither would it be reasonable to expect agreement on a principle distributing less than an equal share. The same can be said if one takes the original position, and thus the background ideal of social cooperation, to be immediately global rather than only domestic. The basic result of the modifications given above is, then, a view of cosmopolitan social justice in which all social primary goods--equal rights and liberties, fair equality of opportunities, the bases of self-respect and respect for others--are to be distributed equally and universally. This Rawlsian framework of principles of international justice would appear to embody the ideals that are essential to the achievement of universally substantive human rights, since such globalized principles are justified by appeal not only to their necessity and efficacy given international interdependence, but also by appeal to the normative ideal of inter-social cooperation among free and equal persons. As I argued in Chapter Two, if we understand Rawls's basic or fundamental rights to mean human rights, such rights depend both on the normative ideal of social cooperation among free and equal persons and on their realization in the socio-political institutions of the basic structure of (global) society. It is only if the ideal of free and equal social cooperation is as prescriptive at the global level as Rawls holds it to be at the

domestic level that a specifically Rawlsian conception of international justice can be obtained.

If that is the case, a Rawlsian theory of international justice appeals not only to a particular conception of moral persons but it also seeks to create the basic social conditions, institutions and practices through which human beings can actually realize themselves as free and equal. In other words, Rawlsian principles of global justice are those that free and equal moral persons would agree upon given the circumstances of an international original position. However, while such principles are ideals of well-ordered cooperation among persons they are clearly also more than that: they are ideals that must be realized in society if justice is to be had. The further task, then, is to construct the social institutions and implement the principles that will bring about the type of global social cooperation of moral persons that cosmopolitan justice requires.

Thus, I share with Rawls the tenet that a major cause of human rights violations is the lack of legitimacy of international standards within political cultures. However, I distance myself from Rawls's law of peoples approach in one important respect: it is the human rights of the international instruments that must be legitimized with respect to the interests of individual persons, and these universal human rights must take priority over those differing minimum rights ascribed by Rawls to different peoples. The main features of human rights in international law--the universality of human rights application to every human being; the universality of recognition on the part of states and state-actors; the inalienability of human rights, which protect interdependent interests--must

provide some fixed points to any inquiry into the cross-cultural substantiation of human rights. Since human rights standards and procedures need further development and substantive force, as even Rawls recognizes, it is true that cultural diversity also matters. Yet a strategy may be found sketched in the International Bill of Human Rights for the justification of human rights that is promising with respect tc their cultural and cross-cultural legitimation.

According to Article 1 of the UDHR, the proximate normative premise justifying universal rights is the principle that each human being as human being is entitled to freedom and to equal dignity. Persons are so entitled because human beings are due freedom and equal dignity as a matter of reciprocal moral recognition. Human rights are, then, "aspects of status--part of what is involved in being a member of the moral community" and include "forms of inviolability in the status of every member of the moral community" (Nagel, 1995: 85). However, the precise characteristics of human beings by virtue of which they owe each other moral recognition are left underelaborated, thus leaving them open to various cultural interpretations which may conflict among themselves, but without affront to the UDHR. This is important because the leeway of interpretation is nevertheless constrained by the human rights provisions contained in the UDHR as a whole.

According to the Preamble of the UDHR and the discussions of the Third Committee of the General Assembly in 1948, another justificatory premise helping to prescribe the system of human rights is a description of the Second World War and events such as the Holocaust, whose possible repetition make

mandatory a globally binding consensus on universally applicable human rights and on a program of implementation. Thus, it is not the commitment to freedom and equality on the basis of some grand assumption about God, Nature, or Human Nature that prescribes human rights, but rather the commitment to freedom and equality on the basis of political, sociological, and historical analyses of the circumstances confronting all societies of the world. Thus, the justificatory theory of the UDHR is neither theological nor metaphysical, but rather an exercise in situated moral-political rationality. Although the UDHR denies that human rights derive solely from human beings' legal and political status in society or from their citizenship in a state, it also rejects natural law doctrines holding that human rights derive ultimately from an essential "human nature." This position fits well with the one I outlined in Chapter Two concerning Rawls's theory of basic (human) rights. As I stated there, not every theory that claims that human rights are not derived wholly from persons' legal and political status need be a natural right doctrine in a strong, metaphysically excessive sense. While the moral interests and obligations representative of those protected by human rights do not suddenly come into existence only within a formal political unit (does one's interest in not being tortured come to an end if one is suddenly made homeless or stateless by, say, a natural disaster or an act of war?), they are only fully realized when respected and protected by a legitimate legal and political system.

My assertion is, then, that universal human rights are compatible with cultural pluralism with respect to justification, and that the UDHR precisely

constitutes a proposal for a global overlapping consensus on the same rights along the lines of the diversity of cultures. The normative premise in the UDHR could be fleshed out, of course, and supplemented with other normative principles that might vary with culture, provided they support the freedom and equal dignity of human beings, and the priority of that freedom and equality. The global overlapping consensus at work here is similar to that proposed by Rawls, but differs in that its subject matter is universal human rights (not principles for a basic structure) and its scale concerns international relations within world society (and not only domestic societies).

The core problem with Rawls's approach is that it leads to a lowest common denominator standard that trims the range, scope, and interdependence of human rights. This is a problem because one of the purposes of internationalized human rights norms is the protection of vulnerable individuals and groups from local mistreatment by cultural attitudes and practices entrenched in dogmatic comprehensive doctrines. Yet if local standards must prevail in a law of peoples, as Rawls suggests they must, what would be the point of social justice as conceived in Rawls's earlier work? What would be the point of striving to raise domestic standards that allow cruel, inhuman, and degrading treatment, if not that of at least maximizing the minimums in its most pedestrian sense, i.e., improving the lot of the worst off? Unfortunately, Rawls's human rights are not universal standards of achievement for all nations and cultures. They condone different rights among the members of different societies, and among the members of the same society.

I do not think that international standards are as vague in meaning and possible forms of implementation as Rawls apparently believes, unless of course one ignores the concrete history and institutionalization of rights and insists on "isolating" one culture from the next. Rawls's method of isolating cultures/countries in the procedure of the original position makes it easier and more likely to fragment human rights, to begin a process of separation and then dilution. However, appeal to cultural diversity need not lead to the kind of parochialism exhibited by Rawls's law of peoples, since not all (many? any?) cultures are locally confined, or inward-looking, or homogeneous.

Finally, I would suggest that accepting the basis of human rights to be the freedom and equal dignity of all persons would require the eventual transformation of a hierarchical state into a democratic, secular one. This is because, in accepting the equality of all persons, human rights and a human rights-based constitution and not a comprehensive religious or moral doctrine must become the law of the land. One cannot arrive at a constitution based on the liberties of equal citizenship by starting with a doctrine that clearly denies this basis. Such a transformation is desirable from the point of view of social justice since a neutral (liberal democratic) state does not violate the religious rights of anybody (although it probably "violates" the unreasonable demands of some that the state be organized according to their comprehensive doctrine). The most effective way to guarantee the human rights of all persons is through a series of constitutions whose bases are liberties of the person, legal liberties, liberty of conscience, and political liberties, and these equally without discrimination. A

state organized on such a basis has ceased to be a hierarchical state (although perhaps what survives of religion in public life are rhetorical formulae of the kind found in the United States, such as "In God we trust" and so on). Such a state is actually more responsive to the fact of social pluralism, since it provides for the freedom of all persons to hold diverse religious and moral beliefs, grants each person an equal liberty of thought and conscience, and accords "to each individual some substantial space of personal independence, immune from coercion by the will of others" (Nagel, 1995: 94).

I am aware, of course, that such a transformation is not easily achieved in the practical realm. A reformed hierarchical society that proclaims the legal and political equality of all persons is in fact a hierarchical society proclaiming its self-dissolution, and with it the disappearance of the legal, political, and economic advantages for those at the top of the hierarchy or consultation elite. Yet in my opinion the preservation of a hierarchical society does not cohere with universal human rights, an opinion I think would be shared by at least the early Rawls.

In A Theory of Justice we can find a typical liberal democratic argument for the separation of religion and state (and law); the notion of a confessional state is rejected and the notion of state neutrality affirmed. Incidentally, one rejects the notion of a confessional state not only because the contents of most religious obligations to have the state organized according to comprehensive religious doctrine are discriminatory against others' different goods and rights; but also because leaving in the hands of the state any sort of possibility of appealing to religion in order to justify public policy is leaving in those hands too much leeway and power.

In A Theory of Justice the principle of equal liberty, the first principle of justice for institutions, is chosen under conditions of fairness and impartiality. That principle and very prominently the liberties of the person, equal liberty of conscience and freedom of thought, and equal political rights (what Rawls calls the liberties of equal citizenship) are to be incorporated into and protected by the constitution. Rawls points out that the argument for the first principle in general can be given by considering the argument for freedom of conscience (1971: 205ff.).

In the original position, even though the parties do not know what specific religious and moral views they hold and they do not know how their views will fare in their society, they know that they have moral and religious obligations which they want to keep themselves free to honor. The parties then choose principles that guarantee the integrity of those obligations: they choose principles to regulate their liberties as citizens with a view, among others, to preserving those obligations, and the principle of equal liberty of conscience (and equal liberty in general) is the only one that can possibly be acknowledged.

As Rawls explains, the plausibility of the argument hinges on reflecting on "what to take one's religious and moral convictions seriously" means. To take one's convictions seriously means one does not gamble with them, for example, by choosing an unequal principle and hoping that one's religion will be in the majority. To take religious and moral convictions seriously also means that one cannot reasonably expect others to acquiesce in an inferior liberty of conscience or to accept an inferior liberty as the interpreter of their religious duties. The veil of ignorance ensures that I take other's convictions seriously when and on the same reasoning that I take seriously my own.

If the principle of equal liberty of conscience is the only one that can be acknowledged, the constitution must ensure a regime guaranteeing equal freedom of thought and belief and of religious practice. This means that the state cannot favor a particular religion or morality, and cannot impose any disability on the grounds of a particular religious affiliation. In particular, apostasy is not recognized as a legal offense, nor is atheism. The notion of an omnipresent "laicist" state is also denied. Thus, the neutrality or the secularism of the state--the fact that the state is merely to be understood as the association of equal citizens, that in justifying its coercive decisions it can only appeal to the protection of equal liberty (primary goods), that the protection of equal liberty limits the sorts of reasons the state can invoke--does not imply that religious and moral commitments are not important to people. It implies that those commitments cannot be the state's business.

I know of no better way to argue for equal freedom of conscience and state neutrality than to maintain that the protection of <u>all</u> individuals and their interests must be ensured by placing restrictions on the type of reasons that the state can invoke in justifying coercion. That the state can only invoke political, secular reasons, i.e., the protection of equal liberty (equal human rights) itself, is something that a reasonable person and reasonable members of culture can accept, where reasonability is understood in the light of a wide reflective equilibrium and members are understood to refer to <u>persons</u>, and not "peoples" (nation-states). What else, then, but state and legal neutrality can be demanded by the principles of equality and nondiscrimination embedded in human rights instruments such as Article 2 of the UDHR: "Everyone is entitled to all the rights

and freedoms of this Declaration without distinctions of any kind"? This vocabulary of universal human rights, which recognizes the same rights for all persons equally is, in the end, superior to that of Rawls's law of peoples.

Conclusion

We can conclude with a brief survey of the arguments discussed in this thesis. Overall, I have been concerned to show that the theory of international justice and human rights elaborated by John Rawls, while based on his domestic account of justice as fairness, fails to carry forward the normative significance of the domestic account into the international arena and thus cannot adequately support a genuinely universal human rights project. Although Rawls's theory of justice can, I think, be utilized to contribute to a theory of universal human rights, this contribution must depend on a greater commitment to extending the priority and principles of justice to all persons and not only to those already living in established liberal democracies.

Chapter One presented an introduction to the moral and political concerns of social contract theory and served to state the focus of this study. First, the essential contours of contractarianism were set out. Then the important elements of rights and freedom were shown as central to contractarianism, establishing the further connection between social justice and the existence of basic rights and freedoms. Next, the emergence of the modern discourse of universal human rights was discussed along with various aspects of that discourse in relation to the social contract tradition.

With this basic groundwork thus set out, the thesis moved to consider Rawls's role in the social contract tradition and the intersection of his work with the issues of international justice and human rights.

Chapter Two was concerned with the fundamental theses and ideas that form the core of Rawls's moral and political theory of justice as fairness. This included accounts of the original position, the veil of ignorance, the thin theory of the good, the formal constraints, the principles of justice, and the sense of justice. In the course of investigating the place of rights within Rawls's theory, it was shown that Rawls places a priority on the social primary goods of basic rights and liberties. It was argued that Rawls's views on the rights and liberties in A Theory of Justice can be understood in terms of basic human rights which are to be recognized for all persons. I then explored the influence of social pluralism on Rawls's later political conception of justice as fairness and addressed some communitarian criticisms of Rawls's theory.

In Chapter Three, the arguments Rawls provides for his description of international justice were examined. Essentially, Rawls contends that an extension of justice as fairness from the domestic to the international level results in a picture of international justice that is identical to the traditional law of nations framework. I argued that Rawls's description contains two fundamental problems that lead to an unnecessarily weak account of international justice, namely, the priority he assigns to the domestic original position over the international original position, and the analogy he draws between individuals and states. I also discussed the principle of self-determination and how certain

difficulties with this principle problematize the law of nations scheme endorsed by Rawls. Finally, I examined the possibility of extending Rawls's two principles of justice to a global scale by eliminating the priority Rawls gives to the domestic original position.

Chapter Four built on the analysis of the third chapter through a discussion of Rawls's most recent, and most comprehensive, attempt to account for human rights through the extension of justice as fairness into an international "law of peoples." In the case of the law of peoples, it was shown that Rawls's distinction between liberal and hierarchical societies leads him to propose a concept of human rights that provides for different sets of rights with respect to each type of society. I then argued that the more limited set of rights ascribed to persons in hierarchical societies undermines the universality of human rights and allows for the possibility of unfair inequality between persons in the same societies as well as between different societies. The chapter concluded with an appeal to a more cosmopolitan ideal of social justice informed by Rawlsian ideal theory, according to which all persons are regarded as free and equal in worth and dignity, and are considered to possess equally certain fundamental human rights. Consequently, I believe that this latter approach would better represent a conception of global justice committed to universally promoting and protecting human equality and dignity than would the approach taken in Rawls's law of peoples.

Notes

[1] Shute and Hurley (1993: 3).

[2] For a discussion of the contrast between Rawls's theory and earlier contract theories, see Rapaport (1977).

[3] The difference between first-order and second-order theories is discussed in Mackie (1977: 15-20).

[4] For an argument that morality is right-based, see Mackie (1984). For further right-based theories see Gewirth (1978), and Dworkin (1978).

[5] Kupperman (1983) offers an argument that morality is goal-based.

[6] Rawls (1971: 112-17) discusses this distinction.

[7] For a discussion of the state of nature theory, see the first two chapters of Nozick (1974).

[8] There are a number of interesting discussions of the idea of natural rights. See, for example, MacDonald (1984); Pennock and Chapman (1981); and Freeden (1991).

[9] See Nozick (1974: 5). Nozick constructs the second type of justification.

[10] See Hamilton and Cairns (1961: 50-53). The laws of the city inform Socrates that if he chooses to remain in the city even though he could leave, then he enters into a covenant to abide by the law.

[11] See the Republic at 359 in Hamilton and Cairns (1961).

[12] Hume (1961) raises this objection to contract theory.

[13] For a discussion of side constraints, see Nozick (1974: 30-42).

[14] Such thinkers as Hume, Bentham, and Marx criticized the idea of natural rights. They argued that "rights" can make sense only if they are regarded as the result of political legislation, sovereign rule, and positive law. Positivist legal theory, for instance, came to view rights as presuppositions of domestic and international law rather than as imprescriptible natural rights. Criticisms of natural-rights theory tend to focus on the claim that such rights are "self-evident," pointing to the epistemological difficulty of determining norms that are deduced in some way from an objective, independent moral reality. Another criticism commonly leveled at natural-rights theory is that it presupposes a more or less static human "essence" as the foundation for such rights. However, it is not certain that natural rights must be read in such a strong metaphysical sense. Moreover, the critic of natural rights faces the difficult problem of explaining the obvious moral deficiencies of many existing legal systems and of the rights generated by those systems, without having recourse to any source of justification other than already established political authority and the systematic injustices possibly embodied

therein. Our examination of Rawls will inquire into the possibility of conceiving fundamental human rights as terms of agreement that rational actors would choose in the original position. From this perspective, natural rights might be seen as arising by virtue of the human ability to exercise rational choice, such that certain social practices are included within the notion of natural or human rights, including the rule of law (although such rights are not simply reducible to legal rights as such). For a concise discussion of the influence of natural rights theory on contemporary human rights doctrines see Donnelly (1982).

[15] The range of rights that are to be recognized is, of course, one of the more contentious issues in human rights debates.

[16] The Universal Declaration and other human rights documents can be consulted in Steiner and Alston (1996: 1156).

[17] Recent years have seen claims made for a "third generation" of human rights, namely, those of peace, solidarity, and development, as well as rights to a clean and healthy environment. See the useful discussion of how the ideas of positive and negative freedoms intersect with the contract tradition in Habermas (1994).

[18] See Henkin (1981: 24-25), and Henkin (1981: 259).

[19] This point is not mentioned by Henkin but by Lindholm (1992). It is an important one, actually appearing in the Preamble of the UDHR. There we read that "disregard and contempt for human dignity and rights have resulted in barbarous acts that have outraged the conscience of humankind," and that the rule of law has become necessary against "tyranny and oppression." This, of course, leaves open the character and theorization of prospective "tyranny and oppression."

[20] See Nelson (1989) and (1990). Nelson unabashedly asserts that human rights are nothing more than a "wicked" and "genocidal" imposition of foreign values (1990: 347-48).

[21] I should clarify, however, that this thesis is not intended to be an examination of theories of cultural pluralism and universalism per se, and it will therefore engage with the issues surrounding these theories only insofar as they arise in my treatment of Rawls's work in relation to his accounts of international justice and human rights. In other words, my purpose here is not to offer a theory or justification of human rights in response to the universalism/relativism debate but, for the most part, to assume the principles contained in the major instruments of international human rights law as my starting point and then examine how well Rawls's remarks on international justice and human rights satisfy those principles.

[22] Kymlicka is addressing the special case of minority cultures, on the verge of extinction as cultures, within liberal-democratic multinational states.

[23] Nozick (1974: 184-86) looks into the nature of the question of how the benefits of social cooperation are to be distributed.

[24] See also Rawls (1977: 159-60).

[25] For a very different approach to the characterization of basic human goods, see Finnis (1980).

[26] While I will not pursue the thought here, it is worth noting that the ideas and institutions "found" in the public political culture of contemporary democratic societies are there to be drawn upon only because of the influence of classical comprehensive liberalism in helping to create that very culture over time. Thus Rawls might be accused of developing his "freestanding" political conception of justice from the very source he is seeking to distance himself from. At any rate, it seems to me that Rawls's political conception of justice maintains a strong continuity with his earlier conception of justice as fairness.

[27] Nagel (1991: 163, n. 49) has more recently dropped the argument of epistemological restraint, while still holding to its conclusion.

[28] Rawls (1996: 5) also includes a version of the first principle in Political Liberalism which reads: "Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value."

[29] These correspond to the "highest-order interests" discussed earlier.

[30] Incidentally, Rawls rejects Dworkin's characterization of justice as fairness as right-based for being a too narrow definition of his theory. Rawls explains that he prefers to regard his theory as "working up into idealized conceptions certain fundamental intuitive ideas such as those of the person as free and equal" rather than, apparently, building upon the notion of natural rights. Again, however, I'm not certain how a "fundamental intuitive idea" such as that of a "person as free and equal" differs from the idea of the natural right of equal concern and respect, which might also be regarded as a "fundamental intuitive idea" for those in a liberal-democratic society. See Rawls (1985: 236, n. 19).

[31] Sumner (1987: 159) raises this question.

[32] Cited in Barber (1984: 4).

[33] I borrow this phrase from Jürgen Habermas (1975), who discusses the way social orders are legitimated and the "crises" that threaten legitimation when incompatible "organizational principles" confront one another.

[34] See, for instance, Avineri and de-Shalit (1992).

[35] Bobbio (1996: 6) observes: "The evident plurality of religious and moral perceptions is a historical fact. . . . It is precisely this pluralism which constitutes the most powerful argument in favour of some of the most significant human rights, such as religious freedom and freedom of thought in general."

[36] Gerald Gaus (1996: 201) provides a nice description of the role of individual rights that meshes well with the account I have offered: "A system of [publicly] justified rights thus allows people to live together in peace and coordinate their activities while honoring their commitment to publicly justify themselves, despite

the fact that they regularly, if not typically, disagree on the merits or justice of particular actions. . . . A liberal regime, in which individuals live together honoring their commitment to public justification in the face of pervasive moral disagreement, must be a regime of rights. A regime of justified rights copes with the fact of moral disagreement by decentralizing and dispersing moral authority." A publicly justified scheme of basic individual rights thus allows us to negotiate through conflicting comprehensive doctrines, without succumbing to the tyranny of the moral dogmatism that would result if a single comprehensive doctrine were elevated above all others.

[37] The "law of nations" referred to by Rawls is the traditional name for international law, and is defined as the body of legal rules commonly considered binding on states in their relations with one another, while contemporary international law is defined more broadly to encompass the relations not only between states but also between states and persons and between persons and persons. See August (1995: 2). James Brierly (1963) is Rawls's one and only cited authority for international law and relations (Rawls claims that Brierly's book "is all that we need" for the discussion of international justice).

[38] See Wicclair (1980).

[39] Rawls does comment (1971: 8) that the "conditions for the law of nations may require different principles arrived at in a somewhat different way" than those put forward in his own discussion.

[40] Pogge (1994) reiterates this point in his critical essay on Rawls's recent discussion of human rights.

[41] Cf. Nardin (1983: 268): "International justice has come to be identified with reforms aimed at securing a more equal distribution of wealth rather than with conduct according to the common rules of international society."

[42] I use "intervene" here somewhat loosely and in a strong sense, since people clearly cannot live together in society without interfering to some degree with each other's lives.

[43] See Previté-Orton (1928).

[44] See Hannum (1993).

[45] See also the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970): "Nothing in the foregoing paragraphs [asserting the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. . . ."

[46] On the conventional dichotomization of international relations-domestic politics, that is, on how the international and the national are viewed as oppositions in international relations theory and practice, see Walker and Ashley (1990).

[47] See Greenwood (1994). Greenwood points out that another interesting development is the increasing role of non-state actors, such as NGOs, in devising new methods of "intervention" and promoting the view that it is no longer the state which can claim sole responsibility for "the common good."

[48] It is not my intention to offer an answer to this question, which would be beyond the scope and purpose of this chapter.

[49] See Horowitz (1997). Consider the difficulties presented by the events in Eastern Europe and especially the former Yugoslavia since 1989. As the Soviet Bloc disintegrated, the principle of self-determination appeared as an effective mechanism to justify the autonomy and freedom of the states recognized by the established inter-state system. Yet this same system was thrown into turmoil as the principle of self-determination was invoked by ever-smaller groups of "peoples" existing across, within, or beyond recognized territorial borders. As the drive toward self-determination became more local, the principle became always more exclusive. On whose behalf were "outsiders" supposed to intervene? A nice discussion of these matters is presented in Frost (1996), chapter 7. For an argument that international justice, contra Rawls, requires intervention (given certain legitimate criteria) see Harff (1995).

[50] An extensive discussion of these and related issues is found in Kymlicka (1995).

[51] See Steiner and Alston (1996: 256 ff.), and Brownlie (1992: 567 ff.). On the interdependence of human rights see Sen (1994).

[52] Rawls's interpretation of human rights has, to my mind, a disturbing resonance with the US racial segregation policy dictating "separate but equal" treatment for black and white Americans, or the attempts to define apartheid as a "separate development" policy necessitated by the "fact" that different "races" (peoples?) have different interests, obligations, and standards of well-being. Such policies were of course nothing more that thinly disguised attempts to justify historically entrenched prejudice and discrimination, and to maintain the privileges held by those in power.

[53] This might be characterized in terms of Rawls's idea of an overlapping consensus, applied to the case of a society of peoples, though he himself does not put it that way.

[54] For the notion of well-orderedness, see Rawls (1980: 521ff.).

[55] On these distinctions see, among others, Cassese (1988); Macpherson (1985); and Donnelly (1989).

[56] See Donnelly (1989: 28-47).

[57] See the essays in Peters and Wolper (1995).

[58] As Henkin (1981) explains, because international law is made by states assuming legal obligations, states party to international human rights agreements can be seen in two different roles: as legislators, making law, and as obligors,

having obligations to ensure the human rights of their inhabitants. International law focuses on the state's obligations; but under that law, once it is in effect, the rights are rights of the individual. It is true that there are controversies in the literature as to whether the individual has human rights in international law--whether rights (and obligations) there work only among states, or also between an individual and her state. But there are no disagreements that the individual has human rights, under international law, against his or her domestic society.

[59] This argument is advanced by Donnelly (1989: 16-19). As he puts it, human rights say in effect "treat human beings as free and equal and you'll get free and equal human beings," and then add "here is how you (partly) treat human beings as free and equal" (enumeration of the list of human rights, and the command to implement them in social life).

[60] See Pogge (1994), passim.

[61] Moellendorf (1996) argues for a similar conception of the original position with respect to Rawls's later account of international justice. See also Scanlon (1973: 1066-67).

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